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# For the Times, They Are A-Changin': Mashup Movement Seeks to Reform Copyright Law and Pushes Society to Embrace New Forms of Art

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For the Times, They Are A-Changin':  
Mashup movement seeks to reform copyright law and  
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Once upon a time, jazz was trash and rock 'n' roll was just noise pollution. Picasso was not talented and expressionism was just a big mess on the wall. In 1921, Ulysses by James Joyce was banned in the United States by the New York Society for Suppression of Vice for being obscene and Allen Ginsberg faced an obscenity trial for his beat poetry in 1957. Many times new forms of art are not appreciated and, in fact, are oftentimes hated by the masses when the movements begin, but as art is ever-evolving, so must be our laws to protect it and those that create it. Today, we have many advantages that were not available to artists in the past. The ease of access to information, digital copies of songs and remixing programs have paved the way for mashup culture. But, as with most artistic movements that shape history, with the good comes the bad. Are these mashup artists infringing upon the copyrighted works of other artists? If so, should we require mashup artists to obtain permission and pay licensing fees, punish offenders, forbid the practice OR should we begin a legal revolution?

#### I. DEFINING "ART" IN AN EVER-CHANGING ECONOMY AND SOCIETY

In his 1980 book, *Cosmos*, noted astronomer and science writer Carl Sagan wrote "[i]f you wish to make an apple pie from scratch, you must first invent the universe," which is to say that there is no such thing as "from scratch" as all the ingredients already exist.<sup>1</sup> Nothing can really be created. The most we can hope for is to find a new and exciting way to combine various existing ingredients.<sup>2</sup> While music is very different from physics, the basic premise is the same. The sounds, notes, arrangements and scales are all there already. We can only hope to rearrange

them to create something new. This is all art is: constant rearrangements and recreations. Peter Jaszi of American University Washington College of Law explains “[m]ashups, remixes, subs, and online parodies are new and refreshing online phenomena, but they partake of an ancient tradition: the recycling of old culture to make new. In spite of our romantic clichés about the anguished lone creator, the entire history of cultural production from Aeschylus through Shakespeare to *Clueless* has shown that all creators stand, as Isaac Newton (and so many others) put it, ‘on the shoulders of giants.’”<sup>3</sup> Michelangelo painted the Sistine Chapel recreating the image of God giving life to Adam from the Book of Genesis.<sup>4</sup> Ansel Adams took photographs of nature and existing structures.<sup>5</sup> Vivaldi composed *The Four Seasons* to mirror the seasons in sound. Greg Gillis of Girl Talk combines previously recorded songs – often quite famous and popular at some point in history – to create a brand new piece of art: the mashup.<sup>6</sup> All art imitates something of the artist’s choosing. Are there limits on what may inspire an artist and what types of tools they may use to create that art?

Art is inspiration come to life...but how do we define art? Furthermore, where does one attain inspiration? Should an artist be made to account for his or her inspiration? Merriam-Webster’s Dictionary defines “art” as “the quality, production, expression, or realm, according to aesthetic principles, of what is beautiful, appealing, or of more than ordinary significance.”<sup>7</sup> Black’s Law Dictionary defines “art” much more simply: “creative expression, or the product of creative expression.”<sup>8</sup> Such broad definitions can encompass many things, and what may be “art” to you, may not be “art” to someone else. Despite varying opinions, all art should be respected. Most artists would state quite simply that they wish to inspire those who see, hear or witness their art in any form.

## II. HISTORY OF THE MASHUP MOVEMENT

In the simplest terms, a musical mashup is a combination of at least two songs, mixing the instrumental track from one song and the vocal track from the other.<sup>9</sup> The ideal end result is a brand new musical work. Although there is currently no legal definition for a mashup, Black's Law Dictionary defines "sampling" as "the process of taking a small portion of a sound recording and digitally manipulating it as part of a new recording."<sup>10</sup> We can assume that laws that apply to sampling would also apply to mashups since those who create mashups use the same techniques as those who sample.<sup>11</sup> There are two types of musical mashups: regressive and reflexive.<sup>12</sup> A regressive mashup refers to musical mashups which often juxtapose at least two very different songs (different genre, different beat, etc.).<sup>13</sup> A reflexive mashup refers to non-musical mashups most often relating to the combination of web based programs.<sup>14</sup> A good example of this is an online program that can provide the user with both a map and information regarding local businesses.<sup>15</sup>

Federal copyright law provides protection to creators of original works of authorship.<sup>16</sup> This includes musical compositions – the songwriting and the recorded track itself. Section 106 of the Copyright Act of 1976 specifically gives the copyright owner the exclusive right to reproduce the work and prepare derivative works based on the original work, among other rights.<sup>17</sup> If an individual does not secure permission and/or pay the appropriate licensing fees, he or she may be violating the copyright law by infringing on the rights of the copyright owner. These rules are strict and an infringement can be very costly. As society changes, so must its laws. Traditionally, the law is the last to catch up. Remixes and samples have been in existence, and quite popular, beginning in the 1960s and 1970s. The ever rising popularity of the rap and hip hop genres has made this practice quite common. A mashup – a new work comprised

entirely of pre-recorded musical compositions (samples) - is essentially the same, only bigger. Due to its rising popularity, our lawmakers must question the practicality of strict copyright enforcement. Is it practical?

In the 1991 landmark case, *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, the Southern District of New York made the first sweeping rules regarding sampling.<sup>18</sup> The judgment changed the music industry by requiring all music sampling be approved by the copyright owners to avoid lawsuit.<sup>19</sup> The first line of this opinion, as written by Judge Duffy, is “Thou shalt not steal.”<sup>20</sup> That paints a fairly clear picture about where this opinion is headed. In this case, rapper Biz Markie used an unlicensed ten-second sample from an old Gilbert O’Sullivan song called *Alone Again (Naturally)* on his album *I Need a Haircut*.<sup>21</sup> The song had been submitted to O’Sullivan by Markie’s attorney, however they did not wait to acquire the appropriate permission before they released Markie’s album.<sup>22</sup> Warner Bros. insisted that unauthorized sampling was extremely prevalent in the hip hop music industry (as well as other areas of the music industry) and as such should be accepted.<sup>23</sup> As Judge Duffy wrote, “the defendants...would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused.”<sup>24</sup> The court determined that O’Sullivan was the rightful owner of the copyrights partly based on letters sent by Markie’s counsel to O’Sullivan requesting permission to use the sample.<sup>25</sup> That action alone suggested that Markie’s counsel was well aware of their obligation to secure consent (and pay the appropriate licensing fee), however they neglected to secure such consent before releasing the album.<sup>26</sup> The court found against Warner Bros. and Biz Markie, ignoring their attempt to use an “everybody else is doing it” defense.<sup>27</sup> Judge Duffy wrote “it is clear that the defendants knew that they were violating the plaintiff’s rights as well as the rights of others... This callous disregard for the law

and for the rights of others requires not only the preliminary injunction sought by the plaintiff but also sterner measures.”<sup>28</sup> Judge Duffy referred this case to the US Attorney’s office for criminal prosecution for intentional copyright infringement.<sup>29</sup> The lesson to be learned here is that asking for permission from a copyright owner is tantamount to admitting one’s actions require permission, rendering them knowing and willful.<sup>30</sup> The relevant legal issue here is whether or not mashup artists are guilty of copyright infringement when they compose new musical works using previously recorded and copyrighted musical material *without obtaining the permission of the copyright owner*. Perhaps neglecting to ask is actually the proper course of action.

The entire hip hop industry was forced to change as a result of this case. Hip hop music is based quite heavily upon combinations of different samples from different sources. All samples must be cleared to avoid infringement. The fees, in many cases, became prohibitively expensive.<sup>31</sup> Due to the expense, the practice of interpolation became widespread in the industry (albeit begrudgingly).<sup>32</sup> Interpolation refers to the practice of rerecording the piece of work the artist wishes to sample and subsequently paying only the songwriter for his or her copyright license.<sup>33</sup> Since the original recorded work is not used, there is no need to secure permission from the artist and/or the record company.<sup>34</sup>

In the 2004 case of *Bridgeport Music, Inc. v. Dimension Films*, the U.S. Court of Appeals for the Sixth Circuit ruled quite simply that any unlicensed sampling of a master, no matter how small and unrecognizable, amounts to copyright infringement.<sup>35</sup> This particular case revolved around sampling done by rap artists N.W.A. of Parliament-Funkadelic’s song “Get Off Your Ass and Jam.”<sup>36</sup> The court held the copyright was infringed even though only a few notes were duplicated.<sup>37</sup> The court explained there is no *de minimis* defense to unauthorized sampling (though this may weigh in favor of a “fair use” defense, discussed below).<sup>38</sup> The court held that

the owner of a sound recording copyright held the exclusive right to duplicate this work – no matter how small the sampled section, effectively eliminating any de minimis defense.<sup>39</sup> The court specifically stated, though, that other infringement defenses in sampling cases are not precluded by this decision.<sup>40</sup> The court plainly stated, “[g]et a license or do not sample. We do not see this as stifling creativity in any significant way.”<sup>41</sup> Girl Talk might disagree with that statement.

Clearing title and obtaining permission to use a sample can be a very difficult action for many artists to complete. The copyright owner is not compelled to grant a license to anyone who wishes to use a copyrighted track.<sup>42</sup> After the new track is complete, the artist must provide the copyright owner of the underlying track with a copy of the completed work – so the work must be complete before permission can be secured.<sup>43</sup> Once the owner hears how the sample is used, he or she will determine how much should be charged for use of the sample, or if he or she will permit the user use the sample at all.<sup>44</sup> There is no compulsory license for samples. Record companies (the owners of the copyrights more often than not) typically charge around 3¢ to 8¢ per copy as a royalty and will often request an advance.<sup>45</sup> Publishers often request a percentage of the copyright on the new work, songwriting royalties and publishing income.<sup>46</sup> As explained by Donald S. Passman in *All You Need to Know About the Music Business*, “if you’ve lifted an entire meoldy line, or their track is the bed of your song, they might take 50% or more; for less significant uses, the range is 10% to 30%.”<sup>47</sup> Now, as if that isn’t bad enough, what happens when more than one sample is used in one song as with mashups? Since the copyright owner sets the price *after* the new work is completed, each publisher, sensing they have the user’s back up against the wall, may have a different obscene price. If the various copyright owners each name their price, and together they equal more than 100%, the user must come up with the

difference.<sup>48</sup> The publisher can also place limits on how the samples may be used and secure co-administration agreements with users – meaning they can prevent a user from issuing a license as their permission must be obtained and they must be paid.<sup>49</sup> Is it any wonder mashup artists do not seek permission for their works?

### III. WHO IS GIRL TALK?

Girl Talk is the stage name for 31-year-old Gregg Gillis, a former biomedical engineer from Pittsburgh, Pennsylvania.<sup>50</sup> Gillis is a mashup artist. To date, he has released five albums all comprised entirely of mashups of pre-recorded songs.<sup>51</sup> His songs are often comprised of at least a dozen unauthorized samples from other artists' previously recorded works. What makes Gillis so amazing in the entertainment law world is that he has never been sued for his use of unauthorized and unlicensed samples. The New York Times Magazine has referred to Gillis's work as "a lawsuit waiting to happen."<sup>52</sup> In an industry that seems fairly litigious to an observer, this is simply amazing. While his albums are available online, Apple has refused to carry his albums on iTunes and CD distributors will not sell his albums in stores.<sup>53</sup> Gillis does not play an instrument. He does not sing. He simply mixes the works of other artists. Upon hearing one of his mixes, I believe most people in the music industry would agree that this type of work requires talent and work, regardless of any feelings related to copyright infringement. Gillis maintains that his mashup creations are hard work, estimating that each minute of his albums took him about a day to create.<sup>54</sup> Imagine the instrumental of *Foreplay* by Boston laid underneath the vocals of *Pimpin' Around the World* by Ludacris, mixed with *Bittersweet Symphony* by The Verve and *Tennessee* by Arrested Development. It all comes together in a seamless mix. Gillis creates these combinations repeatedly. It takes time, patience, talent and, probably most importantly, passion, to entwine Guns N' Roses, Eminem, Beyonce, Mary J. Blige, Elton John,



The Who, a-Ha and Biggie Smalls all in one seemingly perfect piece of music. In an interview with Dan DeLuca of The Philadelphia Inquirer Gillis said, “[i]t’s always fun for me to hear people say, ‘Wow, that’s great party music.’ But I still want to make music that’s challenging to a certain degree on a compositional level. If you take a step back, it’s a 71-minute piece of music that’s linear with no repetition, really. Structurally, it’s kind of out there. I want to try out a lot of things, but still be accessible to someone who’s 50 or someone who’s 15.”<sup>55</sup>

Talented or not, why has Gillis remained free from lawsuits? Congressman Michael Doyle of Pennsylvania has hailed Gillis as a “local guy made good”, and he asked his colleagues to open their minds and try to embrace what he termed a new form of art.<sup>56</sup> Congressman Doyle suggested Congress consider mashups to be transformative art that “expands the consumer’s experience and doesn’t compete with what an artist has made available on iTunes or at the CD Store.”<sup>57</sup> As explained by Joe Mullin in his article “Why the Music Industry Isn’t Suing Mashup Star ‘Girl Talk’”, Gillis has not been sued “probably because he’s the most unappealing defendant imaginable. Gillis would be a ready-made hero for copyright reformers; if he were sued, he’d have some of the best copyright lawyers in the country knocking on his door asking to take his case for free. At the Electronic Frontier Foundation, probably the most well-funded public interest group working in the copyright space, lawyers have made it clear for years that they’re positively eager to litigate a case over music sampling, which they believe is a clear-cut case of fair use.”<sup>58</sup> Big music is scared. If they attempt to sue Gillis and lose, it could open the floodgates for more artists to create mashups. According to general deterrence theory, fear of legal repercussions and punishment may be the only impediments to the commission of illicit behaviors.<sup>59</sup> If that fear is removed, there is nothing to entice people to behave.<sup>60</sup> Everyone fancies themselves somewhat creative, and deep down, many people have a desire to be famous.

Gillis has taught us that all you need is a laptop, a few relatively cheap computer programs, a fierce work ethic and an unflappable ear for music. What would stop everyone from trying to make a living by creating new songs based on previously recorded and copyrighted works? To understand why these suits have not been filed, first we must understand the appropriate portions of copyright law as it applies to musical mashups.

#### IV. COPYRIGHT LAW AS IT APPLIES TO MASHUPS

The Copyright Act of 1976 provides, in relevant part, that the owner of a copyright holds exclusive, yet assignable, rights to reproduce the copyrighted work in copies or “phonorecords,” a term still relevant in the industry, but basically dead to the rest of us.<sup>61</sup> Section 101 of the Copyright Act defines a “phonorecord” as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed.”<sup>62</sup> This is very important language since we are dealing with digital copies of songs. Congress obviously anticipated changes in technology. Copyright protects “original works of authorship.”<sup>63</sup> The copyright owner retains exclusive rights to (i) reproduce the work, (ii) distribute copies of the work, (iii) perform the work publicly, (iv) make a derivative work and (v) display the work publicly.<sup>64</sup> Copyright protection takes effect from the moment the work is fixed in fixed, tangible medium.<sup>65</sup> The copyright becomes the property of the “author” who created the work, but with musical works, this copyright usually becomes the property of the producers, songwriters and, ultimately, the record label as they will own the master original recordings of the song. These special arrangements are made through lengthy and specific contract provisions. Notice to the public is necessary, but presumably given in the case of musical works (i.e., the copyright symbol (©) included on albums). The purpose of copyright law is to promote the progress of the arts by giving the creators of that art exclusive license to his

or her work for a limited duration of time.<sup>66</sup> The rationale here is quite simple: many would not go to the trouble of creating if anyone could use his or her creation for free.<sup>67</sup> The copyright gives the artist an exclusive monopoly, and the artist has no mandatory obligation to share his copyrighted work with anyone.<sup>68</sup>

As previously stated, the copyright owner retains the exclusive right to “derivative works.” if the song is a new version of a public domain work or a new version of a copyrighted work produced with the consent of the copyright owner, the new version is regarded as a derivative work and is copyrightable as such. Many new recordings that use licensed samples of an earlier copyrighted recording meet the requirements for this derivative copyright status. If an original recording is rearranged, remixed or otherwise altered in so substantially creative a manner as to constitute “authorship” it is worthy of derivative copyright status. As explained quite simply by Donald S. Passman in All You Need to Know About the Music Business:

A derivative work is a creation based on another work. In the music industry, an example is a parody lyric set to a well-known song (what Weird Al Yankovic does). The original melody is a copyrighted original work, and once you add parody lyrics, it constitutes a new, separate work. This new work is called a *derivative work* because it’s “derived” from the original. This concept is even easier to see in the motion picture area. Any film made from a novel is a derivative work (the novel is the original work). The Broadway musical *Rent* is a derivative work based on the opera *La Bohème*.<sup>69</sup>

This is the best explanation I have seen while conducting research. Based on this simple explanation, we can infer that mashups can be considered a derivative work. If so considered, the copyright owner would retain exclusive rights to create such derivative work and any person seeking to make such work must retain the permission of the copyright owner.<sup>70</sup>

As with most other laws, there are exceptions. These exceptions are called compulsory licenses. If the use falls under one of the compulsory license use categories, a license must be

issued by the copyright owner for a fee.<sup>71</sup> A copyright owner must issue a compulsory license to anyone who wants to use the work in a phonorecord for a specific payment established by law.<sup>72</sup> The owner is required to issue the license if (1) the song is a non-dramatic musical work; and (2) it has been previously recorded; and (3) the previous recording has been distributed publicly in phonorecords; and (4) the new recording does not change the basic melody or fundamental character of the song; and (5) the new recording is only used in phonorecords.<sup>73</sup> Based on these specific requirements, Girl Talk would not qualify for a compulsory license because his creations violate condition (4) above – he changes the fundamental character of the song, but more on that later.

Section 501 of the Copyright Act provides that anyone who violates any of the exclusive rights belonging to the copyright owner specified under Section 106 is guilty of copyright infringement.<sup>74</sup> To prove infringement, the copyright owner must first prove that he actually owns the copyright and that the defendant copied the work or violated Section 106 of the Copyright Act.<sup>75</sup> There are several defenses to a claim of copyright infringement.

#### V. FAIR USE DEFENSE AND ANALYSIS

Gillis has claimed that the so-called “fair use” doctrine protects him from an infringement claim. Section 107 of the Copyright Act specifies that the fair use of a copyrighted work, including such use by reproduction in copies for purposes such as criticism, comment, news reporting, teaching, scholarship or research, is not an infringement.<sup>76</sup> On its face, the fair use doctrine hardly seems to be helpful to Gillis since he is not creating parody, critique or using the music samples for educational purposes, however, this list of acceptable uses is not exhaustive.<sup>77</sup> A use that would otherwise constitute an infringement is allowed by fair use to advance some important social end – in this case, fostering creativity.<sup>78</sup> Section 107 further provides a four

factor test to determine if a work meets the fair use standard.<sup>79</sup> The factors to be considered include (i) the purpose and character of the use and whether such use is of a commercial nature or nonprofit educational nature; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or value of the copyrighted work.<sup>80</sup> These factors must be determined on a case by case basis and are provided as a guide to help the courts determine infringement.<sup>81</sup> These factors are not absolute.<sup>82</sup>

A. The Purpose and Character of the Use.

As the Second Circuit provided in *MCA, Inc. v. Wilson*, an artist's stated reason for using a copyrighted work in his or her creation is usually the best evidence of his or her reasoning.<sup>83</sup> In the case of Girl Talk, and other mashup artists, we can recognize an obvious commercial nature of the works because the songs are recorded on albums and subsequently sold (although Gillis has made his albums available for download at a price of the buyer's choosing, or, in the case of his last album, *All Day*, for free) but arguments can also be made for the artistic integrity of the works.<sup>84</sup>

When the courts consider the purpose and character of the work, both the commerciality and the transformativeness of the new work are analyzed.<sup>85</sup> In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court determined the most important factor to consider is the transformativeness of the new work.<sup>86</sup> Does the "infringing" work supersede or substitute the original or is it adding something new, and in so doing, create a new work? By combining multiple previously recorded songs, Gillis is creating a new work.

As Nimmer has explained "[I]n determining whether given conduct constitutes copyright infringement, the courts have long recognized that certain acts of copying are defensible as fair

use. It has been said that the affirmative defense of fair use ‘permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’<sup>87</sup> The goals of copyright law are to protect and promote creation, not stifle it. This works in furtherance of that goal. By protecting a transformative work, innovation in art is encouraged. Courts generally will place greater weight on the transformative nature of a work if it is sufficiently transformative and less weight on the other factors.<sup>88</sup>

Courts also consider the commerciality of the new work when determining the purpose and character of the use. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the court explained that this particular analysis is two-fold. The court must consider both the defendant’s purpose (i.e., commentary, parody, educational use, etc.) *and* whether the defendant achieves a commercial gain through the exploitation of the copyright owner’s work without compensating the owner.<sup>89</sup> *Harper* specifically focused on a newspaper publishing an important excerpt of the yet to be published (at that time) memoirs of President Ford.<sup>90</sup> This excerpt referenced the Watergate scandal, and in so doing, affected the market for the book itself.<sup>91</sup> Mashups do not affect the market for the copyrighted songs used because the artists generally use songs that are already famous in their own right.<sup>92</sup> This step of analysis will be discussed in more depth below in Section D. In *Campbell*, the court explained that the commercial nature of the use is not conclusive regarding fair use as it was only one factor, and transformativeness carries more weight.<sup>93</sup>

#### B. The Nature of the Work.

The second factor to be analyzed is the nature of the work and the value of the materials used.<sup>94</sup> As Nimmer has explained, the more creative license taken by the owner of the

underlying copyrighted work, the higher the level of the protection becomes available to the owner.<sup>95</sup> For example, fiction and nonfiction books are entitled to different levels of protection.<sup>96</sup> Facts cannot be offered the same amount of protection under this test because there is little creative input involved. Fiction, on the other hand, requires extensive creative process and is subsequently entitled to more protection.<sup>97</sup> In general, the more expressive and creative a work is, the less this factor favors fair use. Since musical compositions are highly expressive and creative, this factor would weigh against fair use for mashups.

C. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole.

The amount of the copyrighted work used in these mashups varies song to song. The use varies from something as small as one word to as much as two versus used in one mashup. In general, substantial verbatim copying may be admitted as fair use if the artist's purpose is to criticize or parody the original, underlying work.<sup>98</sup> Without critique or parody as a net, the artist can be exposed to a rebuttable presumption of unfair use.<sup>99</sup> Although there is technically no de minimis defense, if the use is so small and trivial, that will weigh in favor of fair use.<sup>100</sup> The main reason for the success of a mashup artist is the fact that the songs are recognizable – even a small part. Success depends on the listener's ability to identify the songs that comprise the whole. Pieces are chosen for artistic reasons, but what makes artists like Gillis so exceptional is that they are able to combine vocals and instrumentals that most of us would never think to combine. I would never think to dub Nate Dogg vocals over a Supertramp instrumental, but Gillis does, and that is what makes him an incredible artist.

When determining substantial similarity, the courts rely on a two part test of both extrinsic and intrinsic similarity.<sup>101</sup> Extrinsic similarity involves the analytical dissection of a

work and comparison of songs through expert testimony, but since a mashup artist will be using the actual recording of the original work, this test is not helpful.<sup>102</sup> There are clearly extrinsic similarities. The test for intrinsic similarity, however, can be very helpful. When determining intrinsic similarity, the courts will subjectively determine whether an ordinary, reasonable individual would find the total concept and feel of the works to be substantially similar.<sup>103</sup> Based on the total concept and feel, a reasonable person could easily determine that a mashup is very different from the original – that is really the whole point. If we could not identify the original underlying works in the new work, how would we know that those melodies were not originally recorded together? This would weigh in favor of fair use.

D. The Effect of the Use upon the Potential Market.

The last factor to consider is the effect of the use upon the potential market for or value of the copyrighted work. This is the strongest evidence in favor of a fair use defense. These mashups do not compete with the original song, but rather likely engage a new audience in a musical experience they may not have had otherwise. As David Tough argued in *The Mashup Mindset: Will Pop Eat Itself?*, mashups actually increase the market for the underlying songs because new audiences are exposed to songs they may not have heard previously, and, as a result, they become more likely to purchase the original underlying work.<sup>104</sup> When an individual hears a mashup, he or she may easily be reminded of a song he or she has always liked but have possibly forgotten. If that song is purchased, that is now money in the owner's pocket. It can amount to free advertising for the copyright holders of the underlying works. It is *not* competing; it is exposing. As explained by mashup artists Super Mash Bros., “[W]e always try and use clips that the average person would easily recognize; that is really important to us. We try and only use samples that are, or have been significantly popular. Once we find the clips that



we like, we analyze which will go together best in terms of the keys of the two tracks and how far apart they are in bpm. Normally, we don't like to stretch samples too far from their initial tempo/key. We really find all of our samples by raiding the iTunes' of just about everyone we know.”<sup>105</sup>

## VI. CONTEMPORARY ALTERNATIVES TO COPYRIGHT

### A. Creative Commons – “Some Rights Reserved”

Creative Commons (hereafter, “CC”) is a non-profit organization founded in 2001 by Lawrence Lessig, Harvard Law professor and copyright reform advocate of near-legendary status.<sup>106</sup> Copyright has always been an “all-or-nothing proposition.”<sup>107</sup> The owner of the copyright asserts “all rights reserved” while in possession of the copyright, before it passes to the public domain.<sup>108</sup> The founders of CC realized the necessity for other options besides the polar opposites of the public domain and a copyright in which all rights were reserved by the owner.<sup>109</sup> They developed a middle ground they termed “some rights reserved” that values both intellectual properties while increasing the suitable uses of those protected properties.<sup>110</sup> All licenses offered by CC require attribution to the original author (easily achieved by a simple liner note), but the other rights permitted or protected vary.<sup>111</sup> License types include:

- (1) Attribution License, identified by “CC BY” notation. This license allows users to distribute, remix and build upon the owner's work, even commercially, provided proper credit for the original creation is given to the owner. This is the most accommodating of licenses offered by CC. CC recommends this license for maximum distribution and use of the licensed works.<sup>112</sup>
- (2) Attribution Share-Alike License, identified by “CC BY-SA” notation. The attribution share-alike license allows users to remix and build upon the owner's

works for commercial and non-commercial purposes, provided the user gives proper credit to the owner for the work under the same terms as the license he or she received. This type of license is very similar to the so-called “copyleft” licensing scheme, which we will discuss in the next section. All derivative works based on the owner’s licensed work will carry an identical license, so all derivative works will permit both commercial and non-commercial uses. This license is currently used by Wikipedia.<sup>113</sup>

- (3) Attribution, No Derivatives License, identified by “CC BY-ND” notation. This license allows for commercial and non-commercial distribution, provided no changes are made and the proper credit is given to the owner.<sup>114</sup>
- (4) Attribution, Non-Commercial License, identified by “CC BY-NC” notation. This license allows users to remix and build upon the licensed work for non-commercial uses only. The user must provide proper credit to the owner, but the user does not have to use an identical license for any derivative works he or she might create.<sup>115</sup>
- (5) Attribution, Non-Commercial, Share Alike License, identified by “CC BY-NC-SA” notation. This license allows users to remix and build upon the licensed work in a non-commercial fashion provided the user provides proper credit to the owner and any new creations must be licensed under identical terms.<sup>116</sup>
- (6) Attribution, Non-Commercial, No Derivatives License, identified by “CC BY-NC-ND” notation. This is the most restrictive CC license. This license only allows users to download the protected work and share with others provided

proper credit is given to the owner, however, the user may not change the work in any fashion and he or she may not use the work commercially.<sup>117</sup>

As provided above, the individual who seeks to obtain a CC license for an original work can choose the level of protection he or she believes he or she needs, and, in addition, the individual seeking to use this work will be easily able to identify if the work is available to be used to suit his or her purposes. CC provides these licenses free of charge to the public to make works available to others as legal sharing.<sup>118</sup> The main function CC seeks to serve is to foster creativity and a sharing environment by replacing individual negotiations with specific rights between the owner and the licensee.<sup>119</sup> Individuals share their works that could be strictly copyrighted by obtaining a CC license which enables those individuals to reserve certain rights and provide certain freedoms to those who wish to use the work.<sup>120</sup> This is essentially a private copyright system whereby the individual determines what protections they need and what freedoms they wish to grant others. Lessig has explained “if you’re a photographer and don’t mind if others collect [reproduce] your work, but don’t want *Time* magazine to take your work without permission, then CC would give you a license to signal this.”<sup>121</sup> The majority of these licenses permit free derivatives – like mashups – although about half of those licenses require that the derivative be freely released too.<sup>122</sup> Gillis would meet this requirement as he released his most recent album as a free download and his previous albums were released for download at a price of the consumers choosing. About two-thirds of CC licenses authorize noncommercial distribution but restrict commercial use.<sup>123</sup> They have created a registry of copyright owners, and by simplifying the identification of the owner, the system can run more smoothly by easily identifying exactly who needs to grant the relevant permissions.<sup>124</sup>

The CC system makes vast changes to current copyright law through the voluntary actions of license holders.<sup>125</sup> First, every CC license authorizes noncommercial distribution at the very least.<sup>126</sup> Lessig argues that this works to deregulate amateur ingenuity.<sup>127</sup> Second, CC licenses simplify the identification process for those wishing to identify the owner of the license.<sup>128</sup> Third, CC enables those unfamiliar with the copyright system to use the CC system with ease.<sup>129</sup> Lastly, by authorizing noncommercial use, CC has effectively decriminalized the copying.<sup>130</sup> Lessig has explained that CC is not an “ultimate solution” but rather a step in the right direction with regards to copyright reform and building a better copyrighting system.<sup>131</sup> The CC system has gained support from many individuals and companies that use the licenses and support the movement. These licenses are used by Google, Flickr, Wikipedia and even Whitehouse.gov.<sup>132</sup>

#### B. Copyleft

The General Public License, commonly referred to as a “copyleft” license, is similar to the Attribution, Share Alike License under the CC licensing scheme, discussed above. The work will not fall into the public domain, but copyleft will allow the owner to enforce some restrictions.<sup>133</sup> The most important restriction imposed provides that copyleft derived works may be created as long as they are released under a similar copyleft scheme.<sup>134</sup> The user is given to distribute modified copies of a work, but that user is required to ensure new users will have the same liberties with that modified work.<sup>135</sup> In simpler terms, “copyleft is a general method for making a program (or other work) free and requiring all modified and extended versions of the program to be free as well.”<sup>136</sup> All derivative works based on a work released under copyleft must also be distributed under the same license terms. Under the copyleft scheme, an owner can give every individual who receives a copy of the work permission to modify and distribute the

work provided the modified work is bound by the same licensing agreement.<sup>137</sup> Copyleft does not offer as many options as CC, but the push towards copyright reform is clear. The majority of these licenses are currently used for computer software to ensure the software remains free.<sup>138</sup>

The types of licenses offered are as follows:

- (1) “Freedom 0” which provides the user with the freedom to use the work;
- (2) “Freedom 1” which provides the user with the freedom to study the work;
- (3) “Freedom 2” which provides the user with the freedom to copy and share the work with others; and
- (4) “Freedom 3” which provides the user with the freedom to modify the work and distribute the derivative works.

Copyleft is a fairly simple concept, but it is not currently widespread. The restriction imposed by copyleft, requiring all derivative works to be distributed under a copyleft license as well, is an extremely important provision as it prevents the protected material from being “co-opted” into later copyrighted products. The copyleft “makes it free and guarantees it remains free.”<sup>139</sup>

### C. The Public Domain.

Creative works that are not protected by copyright law are said to be in the “public domain.”<sup>140</sup> If a work is in the public domain, it is not protected by intellectual property laws (copyright, trademark, or patent), which means it can be used free without permission.<sup>141</sup> If a work is in the public domain, anyone can use it for free.<sup>142</sup> Most works enter the public domain because of the works are just old, like the works of William Shakespeare or Robert Frost. Any work published in the United States before 1923 or works published before 1964 for which copyrights were not renewed, as renewal was a requirement for works published before 1978,

fall into the public domain<sup>143</sup>. Some works fell into the public domain because they were published without a copyright notice, which was necessary for works published in the United States before March 1, 1989.<sup>144</sup> This is no longer a requirement to obtain copyright protection. Some works are in the public domain because the artist wishes to give them to the public without seeking any copyright protection.<sup>145</sup> The last type of work to be in the public domain are those works that are just not covered by copyright law.<sup>146</sup> Copyright law does not protect the titles of books or movies, nor does it protect short but recognizable phrases.<sup>147</sup> Copyright protection also does not cover facts, ideas, or theories.<sup>148</sup> Facts are not covered simply because they are not “original works of authorship” as required by Section 107 of the Copyright Act.<sup>149</sup> If ideas and theories are not fixed in tangible form, copyright law will not protect them.<sup>150</sup> Only the *expression* of the idea or theory is protected.<sup>151</sup> As provided by the Stanford University Copyright Overview (NOLO), “[y]ou can always use the underlying idea or theme—such as communicating with aliens for the improvement of the world—but you cannot copy the unique manner in which the author expresses the idea. This unique expression may include literary devices such as dialogue, characters, and subplots.”<sup>152</sup> Genres are also not protected under copyright.<sup>153</sup> For example, *CBS Broadcasting, Inc. v. ABC, Inc.*, the creators of *Survivor* claimed they had created a new genre of television entitled to protection – reality-competition.<sup>154</sup> The court held that a genre on its own was not protectable, and the show in dispute, *Celebrity*, had not copied a substantial amount of details of *Survivor*, so it had not committed an infringement.<sup>155</sup> While most creative works are entitled to copyright protection, an artist must be aware if his or her creation may fall into the public domain.

## VII. PROPOSED REFORM

Current copyright law is absolutely too stringent. It stifles creativity and one of defined purposes of copyright is to foster creativity.<sup>156</sup> Historically, copyright was an “opt-in” system of protection and regulation.<sup>157</sup> The protections of copyright were only available if an artist registered his or her work for copyright protection.<sup>158</sup> If the appropriate steps were not taken, the work was automatically in the public domain.<sup>159</sup> Occasionally this system would result in individuals losing rights they wished to protect, which led to massive copyright changes in 1976.<sup>160</sup> Seeking to make the system simpler, Congress reversed the rules creating an “opt-out” system of regulation instead.<sup>161</sup> The Copyright Act of 1976 provided an extension to the term of the copyright beyond the term originally codified (28 years plus a possible 28 year extension). Section 302 of the Copyright Act of 1976 extended the life of the copyright protection to a term of the life of the owner plus an additional fifty years after the death of the author.<sup>162</sup> In 1998, the Copyright Term Extension Act modified this to the duration of the author’s life plus an additional seventy-five years.<sup>163</sup> Now, copyright protection is automatically provided for all those creative works that are fixed in tangible form and the maximum term for such copyright is provided.<sup>164</sup> As this forceful system seems to stifle creativity, perhaps a shorter initial term for copyright protection could be instituted. The owner would automatically be granted a reasonable term of years after registering the work and would be required to renew the copyright for another reasonable term of years or the work would fall into the public domain.

This system of adjusting the length of the copyright terms would complement the CC system wonderfully. If the owner can choose exactly what type of licensing the work requires and how much protection it needs, he or she can also choose the length of the protection. This system could work very well provided all users were aware of their rights and restrictions. A universal database could provide valuable information. The U.S. Copyright Office does

maintain a database, but as with other government based online databases, limited information is provided, the search process is long and relevant information is not always provided. If a user were to search “Neil Diamond,” he or she would find a copyright has been registered for *Elijah’s Song*, but it does not explain if this is a songwriting copyright or a recording copyright.<sup>165</sup> Information is not provided regarding the individuals who must be contacted to obtain permission to use this song. The duration of the copyright is not provided. An individual would not know who to contact to obtain permission based on the current database offered. We need an easier system of cataloging so an average user can find the appropriate person or entity from whom he or she must secure permission. Many might just throw up their hands and say “why bother?” because they do not know where to begin. A trip to a music production blog or forum like kvradio.com, earslutz.com or analogindustries.com will make perfectly clear that many musicians and producers do not know the first thing about copyright law, what is permitted and what is restricted. If the system is more user-friendly, more licenses could be purchased and more derivative works could be created, thusly benefitting both the owners and the users.

Copyright law is incredibly complicated, and, worse yet – it purports to regulate *everyone*. As stated by Professor John Tehranian, “[o]n any given day, for example, even the most law-abiding American engages in thousands of actions that likely constitute infringement.”<sup>166</sup> Professor Tehranian goes on to explain that an ordinary day full of commonplace activities, similar to sending e-mail messages, could result in over \$4 billion in “potential damages” every year if the copyright holders were to attempt to enforce their copyrights.<sup>167</sup> How can this be? Since current copyright law is so unclear and infringements are determined on a case-by-case basis, individuals cannot be expected to understand if they are infringing a valid copyright. If copyright law was not so difficult to understand, individuals like



Gillis would have a better idea if they were infringing a copyright when creating their art. Gillis insists that he is protected by the fair use standard, but it can be very difficult for an average person to follow. Not everyone out there is an attorney with extensive copyright experience. If an artist wishes to secure permission to use a song in a mashup, how does he or she know where to begin? Who grants that permission? I would have assumed that right belonged to a music star...until I took Entertainment Law. Now I know that the copyrights to songs often lie with the songwriter (songwriting copyright) and the record company and/or producer (masters). We need to make this system easier for an average individual to understand. As explained by Fred von Lohmann in the Berkeley Technology Law Journal, the fear of legal consequences experienced by individual artists and consumers has resulted in a downward trend for creativity and innovation that has previously provided new tools for consumers and businesses.<sup>168</sup>

Copyright law cannot regulate each and every use; that is simply absurd, but if the terms of copyright were easier to understand and easier for an individual to follow, it might become a lot easier to enforce. Many individuals would not know if they were infringing a copyright unless they asked a lawyer educated in these matters, and not everyone has the money to do such a thing. Since something like fair use is currently determined on a case-by-case basis, it is difficult to give emerging artists a guiding hand. We can make inferences based on previous cases, but that is by no means a guarantee for a particular outcome. Perhaps we can tell an individual what would definitely constitute copyright infringement, but we could not give a precise answer regarding fair use – just similar case law. Congress could possibly lay out a more definitive list of what is protectable and what is not. Copyright law has been purposely broad so as to cover any and all art and emerging technologies, but maybe lists should begin forming.

If Congress were to adopt something like the Creative Commons license structure and allow artists to choose the level of appropriate protection and also maintain a simple, user-friendly, comprehensive database, many could benefit – owners and users alike. Since the Creative Commons licensing structure provides an array of licenses, every individual could secure as much protection as he or she deems necessary (as much as current copyright law delivers) or much less if they wish to share works with others.

#### VIII. CONCLUSION

Based on the fair use analysis presented above, I believe the mashups created by Gillis should be considered protected fair use. The songs he creates are sufficiently transformative, with a different concept and feel than the original underlying songs, and the market for the original songs will likely not be affected. His work also fosters creativity among emerging artists. This simple analysis may be exactly the reason the record companies have not filed suit against Gillis. As stated by Anthony diIonno, quoting Peter Friedman “[a]s it turns out, some people believe that because of some previous landmark sampling cases that went in the original copyright holders’ favor, the music industry does not want to sue Girl Talk and lose, because of the new precedent that might be set after such an outcome. Says Peter Friedman, law professor at the University of Detroit, ‘I would advise [an artist] not to sue Girl Talk; Gillis’s argument that he has transformed the copyrighted materials sufficiently that his work constitutes non-infringing fair use is just too good. I’d go after someone I am more likely to beat...’”<sup>169</sup> I could not agree more. If the court places more weight on the transformative nature of the new work and the market effect as it has done in the past, the case for fair use seems clear cut.

Despite the solid argument for fair use, changes must be made to copyright law in general to foster an open and sharing creative environment. Nobody knows where or when inspiration

may strike. We are inspired by what we see and hear every day. As stated at the beginning, nothing is “from scratch.” There is no such thing as pure creation as all creativity is inspired by something else, based on something else or perhaps built with pieces of other inspiring works. Congress must loosen its stranglehold on copyright law and loosen the reins. If changes are not made, the effect on creativity and innovation could be widespread and everlasting. If Congress sincerely seeks to encourage creativity and innovation, artists of all types must be permitted to create freely. The interests of copyright owners must be balanced delicately against every artists’ right to create. As explained by Pan C. Lee, Daniel S. Park, Allen W. Wang and Jennifer M. Urban of the University of California Berkeley School of Law, in *Introduction to the Copyright Reform Act*, “[c]opyright law must, even in the face of rapid technological change, strike a balance between rewarding authors with temporary control over their creations and securing the public’s access to creative works, which comprise our cultural heritage, our history and the foundation on which new works are created.”<sup>170</sup>

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<sup>1</sup> Carl Sagan, *Cosmos* 218 (1980).

<sup>2</sup> *Id.*

<sup>3</sup> Online video: Remix Culture: Fair Use Is Your Friend (American University School of Communication, Center for Social Media, 2012) <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>

<sup>4</sup> Art Through Time: A Global View Annenberg Foundation 2011.  
<http://www.learner.org/courses/globalart/work/78/index.html>

<sup>5</sup> William Turnage, *Ansel Adams Biography* (Oxford University Press 1992), <http://www.anseladams.com/ansel-adams-information/ansel-adams-biography/>

<sup>6</sup> Zachary Lazar, *The 373 Hit Wonder*, *The New York Times Magazine*, January 6, 2011, at 40.

<sup>7</sup> Merriam-Webster (2012).

<sup>8</sup> Black's Law Dictionary 126 (9<sup>th</sup> ed. 2009).

<sup>9</sup> David Tough, *The Mashup Mindset: Will Pop Eat Itself?* In George Plasketes, *Play It Again: Cover Songs in Popular Music* 205 (Ashgate Publishing Company 2010).

<sup>10</sup> Black's Law Dictionary 1458 (9<sup>th</sup> ed. 2009).

<sup>11</sup> Tough, *supra* note 9, at 207-208.

<sup>12</sup> Eduardo Navas, *Regressive and Reflexive Mashups in Sampling Culture* (2009) *reprinted in* *Mashup Cultures* 157 (Stefan Sonvilla-Weiss ed., SpringerWeinNewYork May 2010).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 17 U.S.C. 102

<sup>17</sup> 17 U.S.C. 106

<sup>18</sup> *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Kembrew McLeod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity* (Doubleday, 2005).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6<sup>th</sup> Cir. 2005).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Donald S. Passman, *All You Need to Know About the Music Business* 319 (7<sup>th</sup> ed., 2009).

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<sup>43</sup> *Id.*  
<sup>44</sup> *Id.*  
<sup>45</sup> *Id.*  
<sup>46</sup> *Id.*  
<sup>47</sup> *Id.*  
<sup>48</sup> *Id.* at 319-320.  
<sup>49</sup> *Id.*  
<sup>50</sup> Cam Lindsay, *The Trouble with Girl Talk* (Exclaim!, November 2008).  
[http://exclaim.ca/Interviews/FromTheMagazine/trouble\\_with\\_girl\\_talk](http://exclaim.ca/Interviews/FromTheMagazine/trouble_with_girl_talk)  
<sup>51</sup> Ryan Dombal, *Girl Talk Dishes on New LP* (Pitchfork, October 26, 2010). <http://pitchfork.com/news/40515-girl-talk-dishes-on-new-lp/>  
<sup>52</sup> Rob Walker, *Mashup Model* (New York Times Magazine, July 20, 2008).  
[http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?\\_r=0](http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?_r=0)  
<sup>53</sup> Joe Mullin, *Why the Music Industry Isn't Suing Mashup Star "Girl Talk"* (November 16, 2010).  
<http://paidcontent.org/2010/11/17/419-why-the-music-industry-isnt-suing-mashup-star-girl-talk/>  
<sup>54</sup> Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, The New York Times (August 6, 2008).  
<sup>55</sup> Dan Deluca, *Girl Talk is a Master of Musical Mixes* (March 1, 2011) <http://www.ecollegetimes.com/music/girl-talk-is-a-master-of-musical-mixes-1.2501506>  
<sup>56</sup> Lawrence Lessig, *Remix: Making Art and Commerce Thrive in a Hybrid Economy*, 11( 2008).  
<sup>57</sup> *Id.* at 11-12.  
<sup>58</sup> Joe Mullin, *Why the Music Industry Isn't Suing Mashup Star "Girl Talk"* (November 16, 2010).  
<http://paidcontent.org/2010/11/17/419-why-the-music-industry-isnt-suing-mashup-star-girl-talk/>  
<sup>59</sup> Larry J. Siegel, *Criminology* 120-121 (11<sup>th</sup> ed. Wadsworth, Cengage Learning) (2012).  
<sup>60</sup> *Id.*  
<sup>61</sup> 17 U.S.C. 106  
<sup>62</sup> 17 U.S.C. 101  
<sup>63</sup> 17 U.S.C. 102  
<sup>64</sup> 17 U.S.C. 106  
<sup>65</sup> Passman at 206.  
<sup>66</sup> *Id.* at 207.  
<sup>67</sup> *Id.*  
<sup>68</sup> *Id.*  
<sup>69</sup> *Id.*  
<sup>70</sup> *Id.* at 206  
<sup>71</sup> 17 U.S.C. 115  
<sup>72</sup> *Id.*  
<sup>73</sup> Passman at 209.  
<sup>74</sup> 17 U.S.C. 501  
<sup>75</sup> Three Boys Music Corp. v. Bolton, 212 F.3d 477; 2000 U.S. App. LEXIS 9163 (9<sup>th</sup> Cir. 2000).  
<sup>76</sup> 17 U.S.C. 107  
<sup>77</sup> *Id.*  
<sup>78</sup> Lessig at 267.  
<sup>79</sup> 17 U.S.C. 107  
<sup>80</sup> *Id.*  
<sup>81</sup> Measuring Fair Use: The Four Factors, Stanford University Libraries (2010).  
[http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter9/9-b.html](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-b.html)  
<sup>82</sup> 4 Nimmer on Copyright § 13.05[5][b].  
<sup>83</sup> *MCA, Inc. v. Wilson*, 677 F.2d 180, 184 (2d. Cir. 1981).  
<sup>84</sup> Matthew Newton, *Girl Talk*, SPIN 42 (October 2008).  
<sup>85</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 u.s. 569. 578-586 (1994).  
<sup>86</sup> *Id.* at 569.

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<sup>87</sup> 4 Nimmer on Copyright § 13.05 quoting *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980).

<sup>88</sup> 4 Nimmer on Copyright § 13.05[5][b].

<sup>89</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, 47 U.S. 539, 562 (1985).

<sup>90</sup> *Id.* at 452.

<sup>91</sup> *Id.* The court explained that most people would be interested in that piece of history specifically, and as such, the market for the book would be affected greatly if many of those people were only interested in the Watergate scandal.

<sup>92</sup> Interview with Super Mash Bros., What the Mashup (August 3, 2009) <http://www.whatthemashup.com/interviews/super-mash-bros/>

<sup>93</sup> Campbell at 583-585.

<sup>94</sup> *Folsom v. Marsh*, 9 f. Cas. 342, 48 (C.C.D. Mass 1841).

<sup>95</sup> 4 Nimmer on Copyright § 13.05[A][2][a].

<sup>96</sup> *Steward v. Abend*, 495 U.S. 207, 237-238 (1990).

<sup>97</sup> 4 Nimmer on Copyright § 13.05[A][2][a].

<sup>98</sup> *Abilene Music, Inc. v. Sony Music Entertainment, Inc.*, 320 F. Supp. 2d 84, 93 (S.D.N.Y. 2003).

<sup>99</sup> *Campbell* at 587.

<sup>100</sup> *Fisher v. Dees*, 794 F.2d 432, 434 (9<sup>th</sup> Cr. 1997).

<sup>101</sup> *Sid & Marty Krofft Television Productions v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).

<sup>102</sup> *Id.*

<sup>103</sup> *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970).

<sup>104</sup> Tough, *supra* note 9, at 209.

<sup>105</sup> *Id.*

<sup>106</sup> <http://creativecommons.org/about>

<sup>107</sup> Educause Learning Initiative (March 2007). <http://net.educause.edu/ir/library/pdf/ELI7023.pdf>

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> <http://creativecommons.org/licenses>

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> <http://creativecommons.org/about>

<sup>119</sup> Lessig at 277.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 278.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 278-279.

<sup>129</sup> *Id.* at 279.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> <http://creativecommons.org/who-uses-cc>

<sup>133</sup> *What is Copyleft?* <http://www.gnu.org/copyleft>

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<sup>134</sup> *Mashup Cultures* 246 (Stefan Sonvilla-Weiss ed., SpringerWeinNewYork May 2010).  
<sup>135</sup> *What is Copyleft?* <http://www.gnu.org/copyleft>  
<sup>136</sup> *Id.*  
<sup>137</sup> *Id.*  
<sup>138</sup> [www.copyleftsolutions.com](http://www.copyleftsolutions.com)  
<sup>139</sup> Free Software Foundation <http://www.gnu.org/licenses/license-list.html#GPLCompatibleLicenses>  
<sup>140</sup> Passman at 304.  
<sup>141</sup> Copyright and Fair Use; The Public Domain, Stanford University Libraries (2010).  
<sup>142</sup> *Id.*  
<sup>143</sup> *Id.*  
<sup>144</sup> *Id.*  
<sup>145</sup> *Id.*  
<sup>146</sup> Copyright and Fair Use: The Public Domain – Welcome to the Public Domain, Stanford University Libraries (2010).  
<sup>147</sup> *Id.*  
<sup>148</sup> *Id.*  
<sup>149</sup> 17 U.S.C. 107  
<sup>150</sup> *Id.*  
<sup>151</sup> Copyright and Fair Use: The Public Domain – Welcome to the Public Domain, Stanford University Libraries (2010).  
<sup>152</sup> *Id.*  
<sup>153</sup> *Id.*  
<sup>154</sup> CBS Broadcasting, Inc. v. ABC, Inc., 2003 U.S. Dist. LEXIS 20258 (S.D. N.Y. 2003)  
<sup>155</sup> *Id.*  
<sup>156</sup> U.S. Const., Art I, § 8, cl. 8.  
<sup>157</sup> Lessig at 263  
<sup>158</sup> *Id.*  
<sup>159</sup> *Id.*  
<sup>160</sup> *Id.*  
<sup>161</sup> *Id.*  
<sup>162</sup> 17 U.S.C. 302  
<sup>163</sup> 112 Stat. 28  
<sup>164</sup> *Id.*  
<sup>165</sup> <http://www.copyright.gov/records/> link to:  
<http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=3&ti=1,3&Search%5FArg=Neil%20Diamond&Search%5FCode=TALL&CNT=25&PID=HkvYLax-FCQBQtIh4KaquHieAXH&SEQ=20121204154116&SID=1>  
<sup>166</sup> John Tehranian, *Infringement Nation; Copyright Reform and the Law/Norm Gap*, 2007 Utah L. Rev. 537, 543 (2007).  
<sup>167</sup> *Id.* at 543-548.  
<sup>168</sup> Fred von Lohmann, *Fair Use as Innovation Policy*, 23 Berkeley Tech. L.J. 829, 863 (2008).  
<sup>169</sup> Anthony dilonno, *Why Hasn't Girl Talk Been Sued?*, Copyright, Commerce & Culture (April 24, 2010).  
<http://copyrightcommerceandculture.com/2010/04/24/why-hasn%E2%80%99t-girl-talk-been-sued/>  
<sup>170</sup> Pan C. Lee, Daniel S. Park, Allen W. Wang and Jennifer M. Urban, *Introduction to the Copyright Reform Act*, 4 <http://www.publicknowledge.org/cra/> (prepared for Public Knowledge, February 13, 2010).