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## The Transformative Tribute: How Mash-Up Music Constitutes Fair Use of Copyrights

Vera Golosker

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# The Transformative Tribute: How Mash-Up Music Constitutes Fair Use of Copyrights

by  
VERA GOLOSKER\*

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## I. Introduction

Technological advances in accessibility of digital information have fundamentally changed both the creation and consumption of entertainment.<sup>1</sup> In music, sampling, altering, and layering parts of others' copyright protected songs has manifested a genre of "mash-up"<sup>2</sup> popular in its own right. The practice of digital sampling is enthusiastically consumed and engaged in by listeners themselves in an interactive trend of transformation. The popularity of such use, exemplified by artists such as Greg Gillis, also known as Girl Talk, has complex copyright implications in the face of law that has yet to adapt to the technological advances and modern notions of originality.<sup>3</sup>

As music executives consider their next legal move, courts face an evolving challenge: striking the balance between encouraging a new artistic frontier and honoring the copyright, production efforts and originality of the artist sampled.<sup>4</sup> While several copyright infringement suits have challenged artists' sampling,<sup>5</sup> Gillis, who used 372 unlicensed samples in his 2010 album *All Day*,<sup>6</sup> and is touring the country, has yet to be sued by an artist or record company.<sup>7</sup> Girl Talk's popularity may itself be the deterrent; as he "performs" his mixes of samples to sold out audiences, the result is not only profit for Gillis, but widespread exposure for the original artists as well. While the desire to avoid setting negative precedent in favor of fair use<sup>8</sup> is

1. See Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI & TECH 261, 301 (2009).

2. See *id.* at 303–04 (defines "mash-up" music). See also Zachary Lazar, *The 373-Hit Wonder*, N.Y. TIMES MAGAZINE (Jan 6, 2011), available at <http://www.nytimes.com/2011/01/09/magazine/09GirlTalk-t.html> (defining mash-up music as "chunks of other people's songs combined into new ones.").

3. Ashtar, *supra* note 1, at 303–304.

4. See Jeffrey Omari, *Mix and Mash: The Digital Sampling of Music Has Stretched the Meaning of Fair Use*, 33 L. A. LAWYER 35, 36 (2010).

5. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 795 (6th Cir. 2005); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571–572 (1994).

6. GIRL TALK, *ALL DAY* (Illegal Art 2010), available at <http://illegal-art.net/allday/>.

7. Luiz Augusto Buff, *Mash-Ups & Fair Use: Girl Talk*, MUSIC BUS. J., Berklee College of Music, Dec. 2010, at 13.

8. See 17 U.S.C. §107 (Deering 1976).

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one disincentive to bring suit,<sup>9</sup> the idea that this type of sampling should be permitted—if not encouraged<sup>10</sup>—is also at play.

Transformativeness is a result of changing, isolating, and layering segments of songs in a way that evokes a distinct message or sentiment, and has creative value beyond that of its original sampled parts. This Note will consider whether transformative sampling—absent a licensing agreement or musician permission—constitutes copyright infringement or protected fair use. Using Gillis' album as a model, this Note will discuss the potential reactions of the legal and entertainment industries, and put forward an approach that is both fair and embraces the modern realities of the way art is both consumed and created.

This Note will argue that Gillis' *All Day* album does not infringe on the copyright or artistic integrity of the sampled artists, but rather constitutes fair use because the result is mutually beneficial, an artistic contribution that is simultaneously a tribute to the original musicians and a parody of the notion of artistic innovation. If embraced with creativity, this form of expression can be profitable for both artists, as it tellingly taps into current trends of consumption.

After a background on the transformative sampling phenomenon in music as well as technological and cultural developments in the industry, this Note will address the precedent on copyright infringement and fair use. Assessing and adding to the diverging commentary on the subject, this Note will analyze the specific nature of the use and consider how the external factors, such as the ease of obtaining licenses, should influence our interpretation of fairness.

Finally, this Note will propose an approach to the recent emergence of sampling for the music industry that incorporates a modern concept of creativity but does not disregard the originality that inspires artists to reinterpret in the first place.

## II. Background

### A. Transformative Digital Sampling and Mash-Up

Classical composers such as Mozart, Tchaikovsky, Bach, and Beethoven transparently borrowed from earlier compositions to create their works in the name of furthering musical progress.<sup>11</sup> By

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9. See Buff, *supra* note 7, at 13.

10. *Id.*

11. See Lauren Fontein Brandes, *From Mozart to Hip Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 94 (2007)

reusing melodies and rhythms, composers considered the process a valuable form of composition, allowing listeners to see reinvention of popular songs in adaptation to changing styles in music.<sup>12</sup> In the 1800s, composers borrowed from various genres including folk, exotic and regional music to audiences' delight.<sup>13</sup> In fact, such use was considered a sign of innovation instead of a lack thereof.<sup>14</sup> Sampling today can be seen as comparable to past practices, using parts of others' work as a form of commentary, tribute, and contribution to a distinct musical aesthetic.<sup>15</sup>

Advancement in digital technology allowed artists to use prerecorded material and integrate it with original elements in creating a song.<sup>16</sup> Music sampling originated in the 1960s in Jamaica and was introduced in the United States in the 1970s, particularly with the height of rap music's popularity.<sup>17</sup> Jazz music in the mid-1900s also incorporated use of previous works combined with improvisation, creating a fresh familiarity.<sup>18</sup> Some popular mid-to-late-19th century artists, including The Beatles, admittedly borrowed from past material, and recognized that future musicians use them for inspiration in advancement of rock 'n' roll.<sup>19</sup> Sampling became a staple in hip hop, and the tradition of "mixing" prerecorded material became common as the digital revolution advanced to allow for more access to and interaction with existing music material.<sup>20</sup>

Eventually, the use of digital samples in producing one's own music infiltrated other genres, and remained prominent in hip-hop.<sup>21</sup> Artists such as N.W.A., the Beastie Boys, and Lil' Wayne used samples of other songs, such as the melody, largely as a backdrop upon which to layer their own elements, like original vocals.<sup>22</sup> The use of the samples included increasing or decreasing the speed or

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(identifying how the hip hop community recognized the impact of Grand Upright's bright-line rule against unauthorized sampling).

12. *Id.*

13. *Id.* at 101.

14. *Id.*

15. *Id.*

16. See Matthew G. Passmore, *A Brief Return to the Digital Sampling Debate*, 20 HASTINGS COMM. & ENT. L.J. 4, 833, 838-9 (1998) (explaining the introduction of the MIDI synthesizer that expanded possibilities for working with prerecorded material).

17. Omari, *supra* note 4, at 35.

18. Brandes, *supra* note 11, at 102.

19. *Id.*

20. Omari, *supra* note 4, at 35.

21. See *id.* at 39.

22. See *id.*

changing the tenor of parts of the original.<sup>23</sup> Often the sampled part of the song was isolated but remained unobstructed, a method which initially fell under the radar of industry executives, but not for long.<sup>24</sup> By the time Lil' Wayne was actively sampling, both executives and the sampled artists were aware of the phenomenon and concerned about the force with which it was changing creative standards of propriety in music.<sup>25</sup>

Once industry executives decided to take legal action to halt the practice of sampling, courts criticized the use of samples without permission.<sup>26</sup> The leading case on sampling was *Bridgeport Music, Inc. v. Dimension Films* in which the Sixth Circuit court held that the hip hop group N.W.A.'s use of a George Clinton song was in violation of copyright law.<sup>27</sup> Even though the portion N.W.A sampled and looped throughout their track "100 Miles and Runnin'" was only two seconds in length, the court ruled against them, reasoning that obtaining licensing rights would not stifle creativity.<sup>28</sup>

The Sixth Circuit recognized the industry's desperate need for a rule clarifying when digital sampling of copyrighted sound recording constituted infringement.<sup>29</sup> Their response was simple: no license, no sampling.<sup>30</sup> The court reasoned that regardless of the nature of the sample or how small the sample was relative to the entire work, unauthorized sampling was copyright infringement.<sup>31</sup> The *Bridgeport* decision continued a pattern of finding infringement in sampling, which began fourteen years before, in *Grand Upright Music Ltd. V. Warner Bros. Records, Inc.*<sup>32</sup> *Grand Upright* was the first case to hold that sampling without a license was copyright infringement.<sup>33</sup> The

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23. *Id.* at 38.

24. *Id.*

25. *Id.*

26. Brandes, *supra* note 11, at 119 (identifying how the hip hop community recognized the impact of Grand Upright's bright-line rule against unauthorized sampling).

27. *Bridgeport*, 410 F.3d at 796, 800 (holding that NWA's song "100 Miles and Runnin'" sampled and looped a two second chord of the George Clinton's "Get Off Your Ass and Jam" from the Funkadelic's in violation of copyright law, regardless of the length of the portion used. Bridgeport Music and Westbound Records owned the copyright, and sued Dimension Film, who distributed the motion picture "I Got The Hook Up" featuring the N.W.A. track).

28. *Id.*

29. *Id.* at 801. *See also* Omari, *supra* note 4, at 36.

30. *Id.* at 805. The court also noted that the decision did not preclude other fair use defenses.

31. Brandes, *supra* note 11, at 94.

32. *Id.* at 94-95.

33. *Id.* at 95.

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*Grand Upright* and *Bridgeport* decisions noticeably impacted rap music as incidents of sampling decreased, which arguably stunted creation of new works and creative progress in the genre.<sup>34</sup>

Use of copyrighted work in sampling was successfully challenged and greatly declined as the cost of defending against copyright infringement lawsuits or attaining rights to the samples became insurmountable.<sup>35</sup> However, as sampling has grown in prevalence due to technological advancements and ease of access, courts have struggled to resolve the “clash between a thriving art form and preexisting music.”<sup>36</sup>

Today, the art of transformative sampling has carved out a musical frontier of its own, bringing this legally scrutinized practice to the center-point of the genre’s creativity. Girl Talk is a modern phenomenon. Upon offering their album *All Day* for free on their website, the download traffic caused servers to crash. Instead of sampling aspects of songs that listeners may or may not attribute to the original artists, mash-up music transparently takes others’ songs and transforms them as the focal point of the art.<sup>37</sup> While the style amplifies the use of samples to a complete reliance,<sup>38</sup> Gillis, the arguable leader of the movement, who sampled 373 songs in his album *All Day*, remains free from any formal legal challenge.<sup>39</sup>

Other creative minds in the industry have not been so lucky, and were vehemently challenged, albeit unsuccessfully. One notable example is DJ Danger Mouse’s use of music from The Beatle’s *White Album* with Jay-Z’s *Black Album*.<sup>40</sup>

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34. *Id.* (“The Grand Upright decision had a tremendous impact on the rap music industry. It drastically reduced the incidence of sampling, impeding the creation of new works and the development of the rap music genre.”).

35. Ashtar, *supra* note 1, at 267–268. Explaining an example of the flux of sampling trends:

The experience of pioneering hip hop group Public Enemy is instructive. In the pre-Grand Upright days, the group made collages of thousands of sounds, but was then forced to abandon its “whole style” as it became impractical to attain numerous rights. Markie’s next album—All Samples Cleared!—was released two years later, in an era of reduced sampling and stifled creativity.

36. Omari, *supra* note 4, at 36.

37. *See Lazar, supra* note 2.

38. *Id.*

39. *Id.*

40. *See Omari, supra* note 4, at 36.

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Although the recording industry was well aware of the potential pitfalls of digital sampling, it was officially put on notice in 2004 when DJ Danger Mouse had an idea for what he termed an “art project.” The resulting *Grey Album* was simultaneously a commercial success and a nightmare for the recording industry.<sup>41</sup>

While the unauthorized use sparked the protest of the Beatle’s White Album copyright holder, EMI, the poignant twist in the story was that the *Grey Album* was never released commercially, and therefore Danger Mouse successfully met the challenge.<sup>42</sup> This concept of immense success without a commercial release could signify some of the new forms of consumption of entertainment due to the extremely quick progression of changes in technology and taste.

### **B. Emergence of DJ Popularity and User Generated Content**

Another element of this type of music is accessibility to listeners, who can participate in creating their own mixes with the advent of affordable technology<sup>43</sup> and inspiration from predecessors. This accessibility of participation also forms expectations of freedom in consumption. DJ Danger Mouse presents a perfect example. His album was an “art project,” which can be contrasted with an attempt to use the music for monetary gain.<sup>44</sup> Danger Mouse claimed the album’s popularity “wasn’t supposed to happen . . . I just sent out a few tracks [and] now online stores are selling it and people are downloading it all over the place.”<sup>45</sup> The line between consumer and creator has blurred; listeners feel empowered to remix works themselves, which poses artistic possibilities not contemplated by earlier notions of copyright.

### **C. Copyright and Licensing Overview**

Copyright law generally contains two sets of rights for most songs: musical composition—the words and music of a song—and the actual sound recording.<sup>46</sup> In 1971, in order to thwart the rise of pirating,<sup>47</sup> Congress amended the Copyright Act to include Section 114(b), expanding the rights of original artists to create derivative

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. See Brandes, *supra* note 11, at 104.

works from their sound recordings.<sup>48</sup> Sound recording copyright holders only have the exclusive right to prepare derivative works in which “the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered.”<sup>49</sup> However, copyright infringement will only result if the use is substantially similar to the original work,<sup>50</sup> leaving some room for transformative sampling in the realm of the fair use doctrine.

While the Sixth Circuit has created a bright-line rule requiring licenses to sample, its ruling does not preclude making fair use of songs, even absent rightsholders’ permission.<sup>51</sup> If Gillis’ use of music constitutes fair use, he can skirt the licensing issue entirely. It seems ironic that artists, such as N.W.A. and Lil’ Wayne, who only sample minimally, are held to legal repercussions, while Gillis, who relies on sampling entirely, receives support instead of summons.

The alternative seems to lack practicality. Gillis estimates it would cost millions of dollars and countless hours of negotiating if he was required to obtain permission to use of the 373 samples on his latest album.<sup>52</sup> However, it is interesting to note that if the use is truly mutually beneficial, as discussed in detail later, one can argue that artists would be happy to permit the use. So far, musicians have yet to challenge the sampling, and some even encourage Gillis by promoting his album on their websites.<sup>53</sup> The lack of any legal challenge to Gillis,<sup>54</sup> despite the sheer enormity of his sampling may be due to the potential benefits to artists and attitude towards encouraging emergence of new creative fronts. But further, the absence of legal challenge seems to imply a fear of setting negative precedent favoring fair use.<sup>55</sup>

#### D. Fair Use Doctrine

When a copyright owner can show that a defendant used the owner’s copyrighted sound recording or composition without permission, the defendant may respond with the affirmative defense

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48. *Id.*

49. 17 U.S.C. § 114(b) (2006).

50. *See Brandes, supra* note 11.

51. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799 (6th Cir. 2005).

52. *Lazar, supra* note 2.

53. *See id.* (citing an example of a sampled artist The Toadies promoting *All Day* on their album, discussed later).

54. *Id.*

55. 17 U.S.C. §107 (*Deering* 2011).

of fair use. Even if the copyright owner can prove infringement by the defendant, the infringement will be excused if the use is deemed fair.<sup>56</sup>

The Supreme Court dictated the fair use defense in *Campbell v. Acuff-Rose Music, Inc.*,<sup>57</sup> holding that 2 Live Crew's use of Roy Orbison's rock ballad, "Oh Pretty Woman," in their song "Pretty Woman" was a commercial parody that could be fair use within the meaning of the doctrine.<sup>58</sup>

The defense of fair use permits non-copyright holders to use a protected work for purposes such as, but not limited to, "criticism, comment, news reporting, teaching, scholarship or research,"<sup>59</sup> as well as symbolism and aesthetic declaration.<sup>60</sup> Pursuant to section 107(1) of the Copyright Act, the Court considers four factors, weighing the first with special emphasis:<sup>61</sup>

- (1) The purpose and character of the use . . .
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.<sup>62</sup>

In *Campbell*, despite 2 Live Crew's potential action of "taking the heart of the original and making it the heart of the new work," the Court upheld the expansion of the copyright statute application to consider the defense of fair use,<sup>63</sup> noting the unreasonable presumption by the Court of Appeals that the potential market harm outweighed the benefit.

The decision has a rational basis when considering its overall purpose of forwarding and protecting artistic endeavors. The fair use doctrine "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>64</sup> An analysis of whether Girl Talk's artistic

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56. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 573 (1994).

57. *Id.*

58. *Id.*

59. Omari, *supra* note 4, at 38.

60. Ashtar, *supra* note 1, at 300.

61. *Id.* at 295.

62. *Id.*

63. *Campbell*, 510 U.S. at 589.

64. Omari, *supra* note 4, at 38.

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output qualifies as a type of creativity society should foster should consider the purpose and character of the use.

### III. Analysis: Application of Fair Use

#### A. Purpose and Character of the Use

##### 1. *Transformative Nature Resulting in Unique Expression*

As *Campbell* demonstrated, a transformative style is not a necessity for a finding of fair use.<sup>65</sup> Allowing this type of sampling furthers the spirit of the doctrine, and ultimately, the goal of copyright: to promote art.<sup>66</sup> The “breathing space” of fair use increases the more transformative nature of the work.<sup>67</sup>

The court, in analyzing what is transformation versus mere duplication,<sup>68</sup> looks at whether the use adds something new to the original work, demonstrating a separate or further purpose, and by changing the original, contributes new expression or meaning.<sup>69</sup> The transformation of the original work into a new creation is distinct from mere duplication of the original, and constitutes fair use.<sup>70</sup>

In *Girl Talk*'s case, the *All Day*<sup>71</sup> album's transformative elements include isolating parts of songs and layering them together in “sonic collages.”<sup>72</sup> The use is arguably reminiscent of a symphony, where the tracks sampled are like instruments, combined together in unexpected ways to elicit a particular emotional response, which in Gillis' method is often pure joy and nostalgia.<sup>73</sup> The sampling is transformative because Gillis combines different genres, tempos, and styles of music meticulously and seamlessly, resulting in a whole creatively distinct from just the sum of its popular parts.

##### 2. *The Use as a Tribute to the Original Artists*

As Gillis reaches worldwide fame, an artist's inclusion in the mix is a form of a pop-music tribute, deeming the original valuable in

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*; see also Ashtar, *supra* note 1, at 293.

69. Omari, *supra* note 4, at 38.

70. *Id.*

71. GIRL TALK, *supra* note 6.

72. Omari, *supra* note 4, at 39.

73. Lazar, *supra* note 2 (“The mash-ups sound ironic to the ironically inclined and like pure joy to the joyfully inclined, and for both camps they're fun to dance to.”).

defining the emotional fabric of a time, and elevating that value through current consumption via Gillis' catchy commentary.

While fully embracing the integrity of the songs sampled,<sup>74</sup> Gillis' end result is a form of expression distinct from its sources.<sup>75</sup> Knowledgeable about the concept of fair use, he describes his work as "something brand new, something that transcends their source material altogether."<sup>76</sup> According to Gillis, his "recontextualization" of the original work by presenting it to distinct audiences in a drastically different form makes his albums go beyond mere use of the original work,<sup>77</sup> in a genre and time interplay that is a tribute to popular music itself.

Some legal scholars argue that current copyright law disproportionately favors rights holders, and that the fair use defense, nicknamed "copyleft"<sup>78</sup> should be expanded to include transformativeness.<sup>79</sup> As seen with the decline of sampling in rap music,<sup>80</sup> the court's decisions can serve as a deterrent to create when costly infringement suits sided against sampling.<sup>81</sup> Some argue that by barring sampling, the decisions stifled creation of new works and innovation in the hip hop genre, which aesthetically relies on samples in practice and spirit.<sup>82</sup>

The rulings finding infringement thereby contradicted the very purpose of copyright law, "to promote the progress of arts and science."<sup>83</sup> By instead recognizing the benefit of transformation of the original work involved in sampling, copyright law could function to encourage creativity, instead of curtailing it. However, some see a stance in favor of fair use to unfairly benefit those who effectively steal others' work, as opposed to the artist who labored with production of something truly original.

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74. Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug 6, 2008, <http://www.nytimes.com/2008/08/07/arts/music/07girl.html> (quoting Gillis saying, "[t]his project has always been about embracing pop.").

75. Lazar, *supra* note 2 ("[Gillis'] sound collages are radically different from their sources, far more than the sum of their parts.").

76. Omari, *supra* note 4, at 36.

77. *Id.*

78. Levine, *supra* note 74.

79. Ashtar, *supra* note 1, at 271.

80. See Brandes, *supra* note 11, at 94 (discussing the decisions in *Bridgeport v. Dimension Films*, and *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*).

81. *Id.*

82. *Id.*

83. *Id.* at 95.

### 3. *Arguments Against Fair Character of the Use*

While many agree that Gillis' character of the use is transformative enough to warrant a fair use defense if a legal challenge was ever raised,<sup>84</sup> some legal scholars disagree.<sup>85</sup> Lucille M. Ponte argues that the law should encourage the creator having more control over the work,<sup>86</sup> and the moral rights resulting from his originality should govern over technological advances.<sup>87</sup> Barry Slotnick, head of the intellectual property litigation group at the law firm Loeb & Loeb argues that fair use allows commentary, not recreation of exiting copyrighted material.<sup>88</sup> "What you can't do is substitute someone else's creativity for your own," he said.<sup>89</sup> Both arguments against fair use focus on the protection of originality in art, which in itself is a debatable concept, as discussed next.

### 4. *The Use as a Parody of Originality*

Interestingly, Gillis' entire symphony of songs can be seen as a parody of the idea of true originality in creativity, calling into question the idea that any form of art can be completely unique.<sup>90</sup> The fact that sampling has been part of musical composition from the time it was first recorded, albeit in sheet music form,<sup>91</sup> suggests that using another's work has been historically seen as a gateway, not a detriment to originality.<sup>92</sup> As Marcel Proust eloquently stated: "The real act of discovery is not in finding new lands, but in seeing with new eyes."<sup>93</sup> Scholars have confronted the scarcity of true originality, especially in art, which involves combining one's thoughts with others to create a more ingenious result, and many contend that such artistic tendencies do not necessarily preclude creativity.<sup>94</sup>

The subjective nature of what qualifies as art is a cultural and legal issue. While some may argue that mash-up is largely, if not

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84. See *infra* Section III.

85. Levine, *supra* note 74.

86. Lucille M. Ponte, *Preserving Creativity from Endless Digital Exploitation: Has the Time Come for the New Concept of Copyright Dilution*, 15 B.U. J. SCI. & TECH. L. 34, 38–39 (2009).

87. *Id.*

88. Levine, *supra* note 74.

89. *Id.*

90. See Brandes, *supra* note 11, at 94.

91. *Id.*

92. *Id.*

93. See Ashtar, *supra* note 1, at 263.

94. See Jeremy Scott Sykes, *Copyright—The De Minimis Defense in Copyright Infringement Actions Involving Music Sampling*, 36 U. MEM. L. REV. 749, 772 (2006).

wholly, unoriginal, the consensus seems to be that the work qualifies as fair use because of the sophistication of its transformation.<sup>95</sup> That said, the current state of the entertainment industry shows that artists' costs of production remain high, their sales are unencouraging, and their work is being used at a profit for the transformer with no licensing agreement nor permission from the artist. Consequently, an analysis of commerciality of Gillis' work is necessary.

#### **B. Commerciality of the Use**

The commerciality of *Girl Talk* is intriguing and non-traditional, as his albums are available online either for free<sup>96</sup> or with a suggested donation of five dollars through the aptly titled *Illegal Art* website. At the same time, Gillis clearly benefits monetarily as he tours the country playing in front of sold out audiences,<sup>97</sup> making the case for commerciality clear to some. Gillis, clearly aware of the issue of commerciality at play, declined to state how many listeners downloaded copies of his albums, or how much, if anything, they pay.<sup>98</sup> However, he has stated that his income from the music has allowed him to quit his day job as a biomedical engineer.<sup>99</sup>

Further, Gillis might argue that the popularity of his music does not necessarily implicate recognition or fame for him personally,<sup>100</sup> and that the original musicians themselves are the ones truly promoted. Indeed, fans who scrambled for tickets to Gillis' infamous concert parties do not recognize him as he poses as a fan and questions them about availability of tickets.<sup>101</sup>

On his last tour, Gillis kept a travel diary. He interviewed fans on camera, people who waited for hours in the cold to get into his show, but when he started asking questions, it was clear they didn't recognize him. Gillis, incognito without trying to be, asked some fans where he could find some tickets to his own performance. They marveled at his cluelessness. "Do you know how hard it is to get those?" they asked.

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95. *Id.* at 763; *see also* Ashtar, *supra* note 1, at 301; Lazar, *supra* note 2.

96. *GIRL TALK*, *supra* note 6.

97. Lazar, *supra* note 2.

98. Levine, *supra* note 74.

99. *Id.*

100. Lazar, *supra* note 2.

101. *Id.*

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“There’s a chance I’m going to the after-party, and no one’s going to recognize me,” he told me.<sup>102</sup>

Regardless of whether Gillis is personally recognizable, the commerciality of his work is clear, with actual profits from touring as well as potential for profit as a legend in the field.<sup>103</sup> However, if the financial benefit can be extended to the original artists as well, this commerciality can be seen as mutually beneficial.

### C. Effect on Market and the Copyrighted Work

#### 1. *Potential for Mutual Benefit: Nostalgia and Recontextualization*

The feeling of nostalgia while listening to Gillis’ work is an undeniably cathartic part of the experience, as he takes the listener on a musical journey that reaches into the listener’s CD cases and memories at once.<sup>104</sup> The aspect of nostalgia is brilliantly timed for the market because new technological innovation and an overload of material makes listeners anxious for a simpler time, yet excited for something new. *Girl Talk* provides listeners with both. That feeling of remembering a forgotten favorite song, and excitement of an old favorite being included in the mash-up is recurring in waves for the listener as the symphony continues. That form of celebration or tribute to the original can attract that listener back to the original track.

As *Girl Talk* gains worldwide popularity, one could argue that being featured is a privilege, especially as listeners who would not have exposure to the original work now enthusiastically consume it as translated through Gillis’ perspective. In contrast to previous cases of sampling, such as *Bridgeport*, where a two-second sample was barely recognizable and could not be linked to the original,<sup>105</sup> Gillis’ use of samples is the focal point of the creativity. The fact that someone else’s originality is being played with is transparent, thus transforming the use from a taking to a tribute. His use of the songs can be considered not only acceptance of their value, but also adding commerciality and attractiveness to the original.

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102. *Id.*

103. *Id.*

104. *Id.*

105. See Brandes, *supra* note 11, at 97 (“[T]he district court found that ‘no reasonable jury, even one familiar with the works of George Clinton . . .’ would recognize the source of the sample without having been told of its source.”).

2. *Use is Attractive to Current Consumers, Meeting their High Expectations*

Industry and recording executives are understandably puzzled by the habits and expectations of modern listeners towards consumption of entertainment. The availability of technology allows a demand for freedom and flexibility, which has, in turn, shaped consumers' expectations. The prominence of Pandora, YouTube, digital and satellite radio, music blogs, and iTunes podcasts creates a listener's expectation of, if not reliance on, personalized, available, and abundant content. The technology that allows us to have these needs met can create an arguably spoiled nature of consumption, but if embraced, can be aligned with notions of profitability and fairness.

One way in which *Girl Talk* fits in with the needs of consumers today is the form of the music—a long, transitioning hour long track<sup>106</sup> that allows the listener to plug in and enjoy the musical journey uninterrupted. The freedom from worry about creating a playlist or wondering which song will come on next while hosting company is undeniably appealing. Further, even the shortest of attention spans are satisfied, as the song is constantly changing and only short (often the “best” or most recognizable) portions of songs are included. These quick transitions take the pressure off of the consumer-as-DJ if one sampled song does not meet someone's approval. Listeners also have the choice to download Gillis' album in broken up individual tracks if they so choose.<sup>107</sup> Clearly, Gillis has a good business model given the time and state of the industry, which does not preclude the return of popularity of original, less dense, self-sufficient in genre style of music as priorities evolve and change. But for now, the experience is wholly intuitive of the needs of sophisticated consumers and should be embraced in the process of legal and economic innovation in the industry. The intuitive success of Gillis' creation may also explain the lack of legal challenge: Artists do not want to go against a genre gaining popularity, nor do they necessarily disapprove of Gillis' actions. By embracing new forms of consumption, and encouraging innovation in the industry regarding this issue, artists can gain popularity and credibility themselves.

Also in line with modern consumers' sometimes difficult to understand expectations and tastes towards entertainment consumption is the all-at-once presence of songs of various moods,

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106. GIRL TALK, *supra* note 6 (play time for the track is 1:11:05.).

107. *Id.*

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genres and times in pop history.<sup>108</sup> A mixture that seems over-packed and disjointed to some, to others is a musical gift of a nostalgic experience that is sensitive towards our high expectations of ease of consumption, and quality of music that is at once something old and something new.<sup>109</sup> The experience of recognizing elements of the deeply layered songs reinforces a feeling of connectedness with the emotional sentiment of a generation, or a moment or period in time.<sup>110</sup>

The value of nostalgic, somewhat cathartic entertainment is neither new nor unique to music. One can look at other elements of popular culture for confirmation of the success in integrating others' original works or ideas. Shows such as South Park and Family Guy can be seen as remixes of original characters and story lines of other films and forms of entertainment. The use transcends the original as a parody, and elevates the piece as a stirring up of former experiences that have permanently shaped the composition as an audience. This enormously attractive model makes sense in the sporadic surge of innovation, as consumers embrace it in form, but in substance hold on to familiar facets of a somewhat simpler time.

#### IV. Proposal

##### A. Ensure that Fair Use Definitions Catch Up with Modern Concept of Originality and Art: Artistic Recontextualization Constitutes Fair Use

Digital sampling did not even exist when the Copyright Act was enacted,<sup>111</sup> and in interpreting the statute broadly, the Court has favored the exclusive claims of sound recording copyright holders over the recording.<sup>112</sup> The policy benefits of maintaining the original artists' exclusive rights<sup>113</sup> and encouraging the continued creation of novel work are clear and commonsensical.

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108. See Lazar, *supra* note 2. (Providing a great verbalization of the style and appeal of Girl Talk, the experience of both creating and consuming their music, and the odd legal waiting game as the industry decides how to respond to the phenomenon).

109. *Id.*

110. *Id.* (“The mash-ups sound ironic to the ironically inclined and like pure joy to the joyfully inclined, and for both camps they’re fun to dance to. These are not just a collection of other people’s hooks; Girl Talk has created a new kind of hook that encompasses 50 years of the revolving trends of pop music. Sometimes cynicism is a hook, sometimes the hook is humor, angst, irony, aggression, sex or sincerity. Girl Talk’s music asserts all these things at once.”).

111. Brandes, *supra* note 11, at 98 (2007).

112. *Id.*; see also Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005); Omari, *supra* note 4, at 35.

113. Brandes, *supra* note 11, at 98.

However, the justification for favoring originality does not preclude a fair use defense of transformative sampling. In fact, an interpretation in favor of fair use is consistent with promotion of creativity and illustrates the power of reinterpretation. The idea that obtaining a license does not create a barrier to samplers is no longer sustainable as the sheer volume of symphony-like layered songs expands and user-generated mixes boom.<sup>114</sup> If licensing costs or procedural difficulty declined, the expectation to obtain permission would be less burdensome on creativity. The practical realities of licensing, and the legal developments of the scheme, should play a role in any analysis of fairness.

In order to strike an appropriate balance between maintaining the rights of the original musician and promoting new forms of innovation through sampling,<sup>115</sup> the court should interpret fair use in favor of transformative recontextualization, as demonstrated by Gillis as *Girl Talk*. If the benefits of allowing such use without licensing requirements outweigh the harm to the sampled artist or to future original production, the use should be permitted.<sup>116</sup> Here, the benefit of Gillis' work transcends the value of the mash-up itself by promoting the original artist and creativity in music. Not only is *All Day* in line with modern consumption and appreciation of nostalgia, it also illuminates the possibilities of recontextualization and encourages every listener to transform what they hear into their own perspective.

#### **B. Call for Embracing the Evolving Standards and Being Creative with Profitability**

The ambiguity and slow adaptive pace of the law to confront changes in creativity have not stopped artists from taking the task of freeing music into their own hands, shining light on the potential for profitability and creativity in cooperation. Taking transformation to yet another level, *Girl Talk* and artist Beto Metralha share their mixes with one another with permission to remix further,<sup>117</sup> sidestepping notions of ownership that can stifle artists' movement into the digital age. Such mutually beneficial models can increase popularity for both artists, each attracting their own audience yet exposing them to the work of their colleague.

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114. See *infra* Part II, A.

115. Brandes, *supra* note 11, at 113.

116. *Id.*

117. Omari, *supra* note 4, at 41.

Brett Gaylor, director of *Rip!: A Remix Manifesto*, a documentary about remixing and copyright,<sup>118</sup> encourages others to make remixes of the film through an open source video platform, Kaltura.<sup>119</sup> Through an Attribution-Non Commercial 3.0 Unported license, viewers are encouraged to share and adapt the work, as long as they attribute it and do not use it for commercial purposes.<sup>120</sup> These models are also in line with the modern appreciation of sharing as a gateway to further creativity. Artists expand upon one another's visions in a continuum, transcending the material utilized or the strained solitude of the artistic process.

Another example of an artist embracing sharing for transformation purposes yet maintaining creative identity is Jay-Z's release of an a cappella version of his Black Album.<sup>121</sup> Jay-Z made this release accessible, encouraging remixes and mash ups of his work.<sup>122</sup> Given the massive popularity of mash up music, the release can only be beneficial for Jay-Z, who can remain in the fabric of popular sound, practically rereleasing his work for public consumption with no cost to him. He can attract new audiences, sparking their curiosity in purchasing his work. Further, the use can help him in maintaining his celebrity status that can boost the profitability of his endorsement deals or enable him to tour successfully if he so desires. Since these are the means by which musicians remain profitable today, these results could exceed mere licensing profits.

Elements of artists embracing as opposed to fighting this type of use are already visible. Artists such as the Toadies, sampled on *All Day*, put a link of Gillis' album on their website,<sup>123</sup> proud to be featured on the artists' mix that blasts the ears of millions.<sup>124</sup> Such enthusiasm can earn respect among fans as demonstrating freedom and forward thinking, encourage further use by other mash-up artists, and explain the lack of legal action taken against Gillis.<sup>125</sup> As with other transformational trends, whether in fashion, film, or music, the consumers and industry themselves wait and see whether to love a

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118. See *RIP: A REMIX MANIFESTO* (National Film Board of Canada 2008), available at <http://films.nfb.ca/rip-a-remix-manifesto> (last visited Feb. 10, 2012).

119. See KALTURA, <http://corp.kaltura.com> (last visited Feb. 10, 2012).

120. See CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc-sa/3.0>.

121. Omari, *supra* note 4, at 35.

122. *Id.* at 38.

123. See TOADIES, <http://thetoadies.com/> (last visited Jan. 24, 2011).

124. Lazar, *supra* note 2.

125. *Id.*

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new movement or hate it, and are gauging reactions before picking a side. However, the law remains vague regarding such sampling, and scholars are putting forth various solutions to balance the interests.

In *Digital Sampling of Music and Copyrights: Is it Infringement, Fair Use, or Should We Just Flip a Coin?*, Christopher Collie and Eric Gorman suggest a profit-sharing scheme that distributes some of the sampler's profits to the original artist based on the seconds of use.<sup>126</sup> While this solution would clarify the ambiguity of lawfulness of digital sampling, the rule would be too rigid. Since artists like Gillis isolate parts of songs and layer the samples, and others remix the mash-up creations further, calculating how many seconds of the original were used is difficult. Also, the original artist can benefit in other ways besides receiving a legislated cut of the profits, and maintaining an argument of fair use for mash-ups.

Beyond results that can seem far removed, difficult to quantify, or still lacking fairness in compensation, other strategies that can integrate direct profits for the original artists being sampled are worth consideration. While Girl Talk tours the country, selling out shows,<sup>127</sup> artists could join them on tour, bringing in live performances on top of remixed material for another level of transformation that brings the process full circle.

Additionally, this note suggests that mash-up masters such as Girl Talk include links to purchase the original tracks on their website, allowing for a streamlined process of obtaining the original song he is paying tribute to, and falling in line with our admittedly high expectations for instant accessibility in entertainment consumption. This would necessitate cooperation from iTunes or the individual artist, but would serve to facilitate the process toward mutual benefits for original artists.

The listener stands to benefit from a fair use finding as well. Some consumers are still willing to pay a fair price to obtain high quality music files that will not risk their computer and realize the realities of high production costs. But, even if some have an unreasonable expectation of free music, those downloading tend to nevertheless hold music in high regard and may not have the intent to steal. Therefore, a fair use scheme with access to the original work

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126. Christopher Collie & Eric Gorman, *Digital Sampling of Music and Copyrights: Is it Infringement, Fair Use, or Should We Just Flip a Coin?*, BOST. COLL. INTELLECTUAL PROP. & TECH. FORUM, Dec. 2011, available at <http://bciprf.org/wp-content/uploads/2011/12/Gorman-Collie-IPTF.pdf>.

127. Lazar, *supra* note 2.

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would cover both bases, offering free compilations for those concerned about spending, and encouraging those hungry for more quality and a self-contained style of music to purchase an original track or album.

Also, consumers are willing to pay occasional premiums in other ways, such as a concert ticket or merchandise. While traditionally tickets may be valued for the quality of the live performance, in the case of a Girl Talk concert, audiences often pay to see Gillis merely press a button and party, or so it would seem.<sup>128</sup> But, the performance aspect is the universal appeal of enjoyment of the music and interaction with its consumption. Gillis can reveal his pre-created symphony of songs and simultaneously party with the crowd, celebrating quality of life that pop music so often illuminates.<sup>129</sup>

## V. Conclusion

In light of cultural and technological advancements, courts should interpret copyright law to allow for new forms of entertainment. Favoring creativity instead of focusing on originality can encourage a freedom to expand upon art, putting the tools to do so at the fingertips of the innovatively inclined.

Girl Talk provides an example of a new creative art-form that takes sampling to a level of a celebratory tribute, creative transformation, and poignant parody of what constitutes art in today's nostalgic yet forward thinking market. An undesirable result of fair use interpretation would contradict the purpose of copyright law: a stifling of music, culture and creativity. Instead, the law should demonstrate flexibility and adaptation to an industry ripe with innovation technologically and artistically.

Furthering of artistic endeavors that can incorporate a mutually beneficial monetary and moral result requires an enthusiastic embrace of the realities of modern consumption and expectations. While methods for commercially rewarding results may seem backhanded, untraditional and unreliable at first, further innovation can make the benefits obliterate doubt and resistance. Strategies such as linking listeners to purchase original tracks, or incorporating live performances at mash-up shows can enable artists to profit from the popularity of the new musical movement.

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128. Lazar, *supra* note 2 (“All this excitement is focused on a performer whose instrument is a laptop.”).

129. *Id.* (“The mash-ups sound ironic to the ironically inclined and like pure joy to the joyfully inclined, and for both camps they’re fun to dance to.”).

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As musicians part with rigid notions of ownership of their work, the industry faces challenges of realities in costs of production that are immense, but not insurmountable. With cooperation and a fresh outlook on the modern methods of consumption, the industry could come out benefitting with new artistic contributions and possibility for profit that have also been unforeseen.

Therefore, this note proposes that the defense of fair use to copyright infringement lawsuits for transformative digital sampling be upheld. Since mash-up artists present a love and appreciation for original music, as opposed to an opportunistic chance to make a profit, ideas for mutual benefit of the sampled artists would be subject to rational consideration. The benefit of being included in a groundbreaking tribute of pop music engaged in by Girl Talk alone can be sufficient to warrant approval and encouragement from industry leaders. We can interpret the use as facilitating continued appreciation for both originality and untraditional innovation in accordance with copyright goals and intuitively providing a kind of consumption our culture currently craves.