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Smashing the Copyright Act to Make Room for the Mashup Artist: How a Four-Tiered Matrix Better Accommodates Evolving Technology and Needs of the Entertainment Industry

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Smashing the Copyright Act to Make Room for the Mashup Artist: How a Four-Tiered Matrix Better Accommodates Evolving Technology and Needs of the Entertainment Industry

by
CAROLINE KINSEY*

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In truth, literature, in science and in art, there are, and can be, few, if any, things which in an abstract sense are strictly new and original throughout. Every book in literature, science, and art borrows, and must necessarily borrow, and use much which was well known and used before.

-Joseph Story

I. Introduction

With the rise of online blogging, social networking platforms, and video-sharing sites such as YouTube and Yahoo Video, it is now

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1. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436).

possible for one individual to rival the span of entire media empires from one's basement computer. Commonly known as the Web 2.0 phenomenon, the combination of these technological advancements with video platforms that encourage users to "engage, create, and share content online"² has fundamentally transformed the music industry. No longer are fans passive listeners, but instead, with the click of a mouse and access to the Internet, they become "publisher[s], TV network[s], radio station[s], movie studio[s], record label[s], and newspaper[s], all wrapped into one."³

This article evaluates the current liability of Mashup Artists, those whom are, for purposes of this article, "individuals who develop video or audio works comprised of two or more segments of pre-existing copyrighted material for personal use, distribution on the Internet, or profit."⁴ As the Mashup Artist's creation is often neither entirely the product of his own creativity, nor distributed online with the original copyright holder's permission, he may automatically be deemed a copyright infringer when publishing his work. Thus, he is only able to seek refuge under the fair use doctrine,⁵ a four-factor analysis described by critics as "a risky proposition"⁶ and "an impediment to . . . profitable return on digital, remixed creative labor."

In recognizing that moral rights⁷ concerns are outweighed by the overwhelming need to develop new methods to better accommodate the evolving needs of the Mashup Artist and ensure protection to the original copyright holder in this digital age, copyright theorists have established several alternative methods to fair use. To satisfy the intricate balance between sampling and stealing without inhibiting the First Amendment goals and historical aims of copyright law, these theorists suggest measures such as establishing a compulsory licensing

2. Edward Lee, *Developing Copyright Practices for User-Generated Content*, 13 J. INTERNET L. 1, 1 (2009).

3. *Id.* at 13.

4. I refer to the works created by Mashup Artists as either "Mashup" or "Mashups."

5. 17 U.S.C. § 107 (2006).

6. Michael Katz, *Recycling Copyright: Survival and Growth in the Remix Age*, Univ. S.F. From the Selected Works of Michael Katz (Oct. 2008) http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=michael_katz ("The distinction between fair use and infringement isn't easily defined, as the Copyright Office puts it.").

7. Although not recognized within the Copyright Act, an Artist's "moral rights" generally consist of the right to "create a work, to display the work to the public in whatever form he or she chooses, to withhold the creation from the public, and to demand respect for his or her personality as the creator of a work." Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artist, Authors and Creators*, 53 HARV. L. REV. 554, 578 (1940).

system, relaxing market economic structure, or using a sound recording collective. Theorists also recommend reverting to contract law principles and allowing individual recording labels or production studios to develop their own regulations should a Mashup Artist wish to use their copyrighted works in his creation.

The purpose of this article is to advocate for the restructuring of current copyright law to impose heightened requirements on social and video-sharing networks and include a four-tiered matrix exclusively designed to assess copyright issues relating to Mashups. Not only is this matrix consistent with the constitutionally mandated policy goal of the Copyright Act to promote “the [p]rogress of [s]cience and useful [a]rts,”⁸ but it also eliminates the arbitrariness inherent in the current fair use doctrine, and provides Mashup Artists with a level of clarity in how they may properly use copyrighted works in their creation.

In making this recommendation, this article begins by elaborating on the definition of “Mashup,” explaining the expanding role of the Mashup Artist, and elaborating on the current conflict between copyright holders and Mashup Artists. The article next examines the fair use doctrine as it pertains to Mashups and summarizes why the protection it affords Mashup Artists is insufficient and fails to recognize the overwhelming public value Mashups impose on society. The article then identifies alternative solutions proposed by copyright theorists and evaluates the strengths and weaknesses of each recommended mechanism. It concludes by encouraging the United States Copyright Office to impose heightened requirements on social and video-sharing online networks and expand the Copyright Act to include a four-tiered matrix that outlines the various requirements a Mashup Artist must follow in order for his work to be immune from infringement claims. Each tier of the matrix reflects a series of factors particular to the created Mashup, including the location where it may be found and whether it serves a commercial purpose. Based on where a Mashup Artist’s creation falls, he may have no responsibilities to the original copyright holder or may be forced to pay a set fee that corresponds with the length and type of each copyrighted work incorporated. In promoting this matrix as the ideal mechanism to combat arbitrariness within the fair use doctrine, this article elaborates on its strengths, refutes criticisms surrounding its recommendation, and emphasizes how this mechanism is superior to suggested alternatives.

8. U.S. CONST. art. I, § 8, cl. 8.

II. Defining the Mashup and its Role in the Entertainment Industry

A. The Mashup

Absent from most dictionaries, the term “Mashup” has multiple meanings depending on the context in which it is used. It may refer to “a musical or audiovisual work that consists entirely of parts of other songs or videos”⁹ or “an offspring of sampling that mixes together two or more records to create a new song.”¹⁰

As the definition of Mashup varies in form, so does the Mashup itself, as it is incredibly flexible and its possibilities are endless. For example, a Mashup may be developed for a commercial or non-commercial purpose, displayed privately on a home computer or publicly through world-wide video-sharing sites such as Youtube and Yahoo Video, and include two or two-hundred-thousand copyrighted works at one or one-hundred minutes apiece, lasting thirty seconds or thirty days in length. Because the Mashup lacks consistency in its definition, it also may pertain to sculptures, paintings, video, audio or audio-visual works. It also could include any combination of these art forms.

For the purposes of this article, the Mashup is “any video or audio work comprised of two or more segments of pre-existing copyrighted material.” This article explicitly excludes tangible art forms from the definition for two main reasons. First, absent the computer’s ability to digitize visual artwork, it is frequently difficult, costly, and time consuming to accurately and objectively measure the amount of copyrighted material used in the creation of a painting, drawing or sculpture. Second, because digital technology empowers users from all backgrounds with all levels of ability to create music and videos that can be disseminated world-wide through the use of the internet in a cost-efficient, instantaneous manner, audio and video mashups presently impose a greater threat to the original copyright holder’s rights than visual art. This definition does not restrict future scholars from expanding it to encompass visual artwork, but only mandates that, for the purpose of this article, Mashups solely include video and audio works.

9. James De Los Reyes, *Examining Copyright Exemptions for Web Mashups in the International Context: Applying American Constitutional Considerations as Guidepost for the Trips Three-Step Test*, 38 HASTINGS CONST. L.Q. 473, 476 (2011).

10. Jeffrey Omari, *The Digital Sampling of Music Has Stretched the Meaning of the Fair Use Doctrine*, L.A. LAWYER, Sept. 2010 at 35, 38.

B. How Mashups Conflict with Copyright Holder Concerns

The United States Constitution grants Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.” In conjunction with this authority, Congress, via section 106 of the 1976 Copyright Act (hereinafter, “Copyright Act”),¹¹ established six exclusive rights authors would automatically retain in their original, copyrighted works. Included in these rights are the rights to: (1) “reproduce the copyrighted work in copies,”¹² (2) “distribute copies . . . of the copyrighted work to the public . . .,”¹³ (3) “. . . perform the copyrighted work publicly,”¹⁴ (4) and “prepare derivative works based upon the copyrighted work.”¹⁵ It is the fourth exclusive right mentioned, the right to prepare derivative works, where the majority of contention lies between the Mashup Artist and the original author or copyright holder.

Included within section 101 of the Copyright Act,¹⁶ the term ‘derivative work’ is defined as “a work based upon one or more preexisting works, such as a . . . musical arrangement . . . motion picture version, sound recording . . . or any other form in which a work may be recast . . .”¹⁷ The overwhelming concern asserted by copyright holders is that the Mashup Artist’s use of their copyrighted material without seeking advance permission to do so infringes upon their exclusive right under section 106 to create a derivative work from that copyrighted material. This theory is predicated upon the belief that Mashups are included within the definition of a derivative work, and as such, when someone other than the original copyright holder creates a Mashup, he has automatically infringed on the copyright holder’s exclusive rights and must be held liable for this infringement.¹⁸

Courts are not easily persuaded by this argument, however, and although they neglect to provide Mashup Artists with guidance as to the “quantum of similarity . . . necessary to become liable for

11. 17 U.S.C. § 106 (2006).

12. *Id.* at § 106(1).

13. *Id.* at § 106(3).

14. *Id.* at § 106(4).

15. *Id.* at § 106 (2).

16. 17 U.S.C. § 101 (2006).

17. *Id.*

18. Omari, *supra* note 10, at 35.

infringement,”¹⁹ they seldom find a Mashup Artist liable to the original copyright holder solely on the basis that the Mashup may be viewed as derivative, despite the fact that even “a very small amount of expression [taken] from a copyrighted work”²⁰ may result in copyright infringement under the derivative works right. Instead, even if the copyright holder argues the Mashup is a derivative work, a Mashup Artist’s use of the copyrighted material may be considered ‘fair’ under 17 U.S.C. § 107, so long as it has a transformative, creative purpose and adequately satisfies the four factors established within the fair use doctrine.²¹

III. The Fair Use Doctrine

A. Elements of Fair Use

With rapid growth in the technology utilized by Mashup Artists in developing their creations, and an increase in the amount of individuals beginning to combine copyrighted materials to create ‘new’ works,²² concerns surrounding compliance with copyright laws have become increasingly pervasive, as Mashup Artists use copyrighted material in a manner often not intended by the original rights-holders. As a result of this unauthorized and unintended use, should the Mashup Artist become threatened with an infringement claim his only recourse is to seek refuge under the fair use doctrine,²³ a mechanism defined by the United States Supreme Court as “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.”²⁴

Although designed to ensure the use of copyrighted materials by those who have not received permission from the original copyright holder is fair, the fair use doctrine—in practice and pertaining to Mashups—is anything but. It is filled with multiple uncertainties

19. Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1220 (1997).

20. *Id.*

21. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J. L. & ARTS 467, 494 (2008).

22. Andrew S. Long, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of the Transformative Video*, 60 OKLA. L. REV. 317 (2007) (“In 2004, over fifty-three million people, accounting for forty-four percent of Internet users, uploaded user created data or videos onto the Internet.”).

23. 17 U.S.C. § 107 (2006).

24. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (quoting HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944)) (internal quotation marks omitted).

resulting from the user's ability to easily combine multiple copyrighted works for international dissemination in the manner of his choosing while incurring little, if any, financial expense during the creative process.

Included within section 107 of the Copyright Act, the fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which [the] law is designed to foster."²⁵ To determine whether a Mashup Artist's appropriation of the copyrighted material in his creation is fair, courts must consider four factors.²⁶ Each factor is individually assessed and evaluated with flexibility and discretion.

The first factor requires courts to evaluate "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes."²⁷ The rationale behind this factor is to determine if the newly created Mashup threatens the market value of the original copyrighted material. It also assesses the extent to which the Mashup transforms the original work into something innovative and unique. Transformativeness, generally defined by the fair use doctrine as including "something new, with a further purpose or different character, altering the first with new expression, meaning, or message," is imperative in examining the liability of Mashup Artists under this factor, as "the more transformative the new work, the less [significance the other three factors will have, even if they] . . . weigh against a finding of fair use."²⁸ In looking to whether a work is transformative, courts often ask whether the Mashup could serve as a supplement to or replacement for the original copyrighted work.

In determining whether Mashup Artists are likely to prevail under this first factor, courts will consider the distribution of their work, i.e., whether the Mashup is purely for personal use, disseminated via online video-sharing networks, or developed solely for a commercial purpose. Courts will also review the message the Mashup presents, looking to whether it is identical to that of the original copyright holders, or whether it aggregates those copyrighted works to create a new art form with an entirely original message.

25. *Steward v. Abend*, 495 U.S. 207, 236 (1990) (internal quotation marks and citation omitted).

26. 17 U.S.C. § 107 (2006) ("the factors to be considered shall include . . .").

27. *Id.* at § 107(1).

28. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

The problem with this factor of fair use, as it pertains to Mashups, is that it is purely subjective and difficult for judges to determine the degree to which a message may be altered so that it no longer violates the copyright holder's rights to the original work. With the broad definition of transformativeness, the likelihood for arbitrariness is rampant, since every Mashup Artist is likely to believe his or her work is "something new," and judges are presented with little guidance in determining the amount of change a copyrighted work must undergo before it may be deemed new. Further, this factor lacks uniformity, as two separate Mashups that appear to transform the original works in a like fashion may receive different treatment. Moreover, because Mashups are often published via online video-sharing networks, it is difficult for a court to determine the commercial value of a Mashup. This is especially so if the Mashup Artist does not directly profit from his work, as the majority of these file-sharing networks generate profits from advertising based on the success and popularity of the published Mashup.

Under the second factor, the fair use doctrine requires courts to evaluate "the nature of the copyrighted work."²⁹ The purpose of this element is to assess the originality of the copyrighted work used within the Mashup and delve into whether it is an "original creative expression,"³⁰ or a mere "recitation of factual information," since mere facts alone are not eligible for protection under the Copyright Act,³¹ and may be reproduced by the Mashup Artist in his creation. As such, stronger protection under this factor is most often given to fictional and highly creative works as opposed to mere ideas, facts, formulas or processes.³² Under this prong, the court will also examine whether the original copyright holder has previously exercised his right to publish the copyrighted work. This element is particularly important, as the original author traditionally retains a significant interest in "controlling the circumstances of the first public revelation of his work"³³ and his right, if he so chooses, not to publish at all.³⁴

The preeminent concern with this factor is that it is outdated. Although at the time the fair use doctrine was adopted it may have

29. 17 U.S.C. § 107(2) (2006).

30. *Campbell*, 510 U.S. at 586.

31. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

32. Jon M. Garon, *Fair Use Documentaries* GALLAGHER, CALLAHAN, & GARTRELL (Dec. 2009), http://www.gcglaw.com/resources/entertainment/fair_use.html.

33. *Harper & Row*, 471 U.S. at 552-55.

34. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1118 (1990).

been easy to determine the particular ‘nature’ of a copyrighted work, or whether it had been published, due to the technological advances surrounding the Web 2.0 phenomenon, present-day determination of whether a work has been published is not as easily made. Today, publication may include a video posted once on a family member’s Facebook wall, a Mashup Artist’s private Myspace page, or a song played for family and friends outside at a local park.

The third factor requires courts to examine “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”³⁵ This factor, like the first, considers the purpose and character of the copyrighted material, but does so in a different manner. Emphasis is placed upon the substantive elements of the copyrighted work and the significance of the material taken from the copyrighted work, instead of on the ultimate purpose behind the copyrighted creation. In determining whether a fair use violation has occurred under this element, the court must balance the quantity of the copyrighted material appropriated by the Mashup Artist with the “significance of the material taken from the copyrighted work.”³⁶ Quantity is not necessarily commensurate with duration under this factor; a Mashup Artist’s use of an entire copyrighted work may not oppose a finding of fair use, while the copying of a mere several seconds may.³⁷

This factor does not provide adequate protection to Mashup Artists, as it fails to impose a uniform way for judges to determine the substantiality of a particular excerpt from a copyrighted work. As audio-visual works often impose multiple messages at one time that may be interpreted differently by each listener or viewer, it is impossible for courts to apply this factor to Mashups in a uniform fashion. The author of the copyrighted material may identify one particular clip or series of chords as the substantial part of the copyrighted work, while the consumer or Mashup Artist may render that excerpt as mere surplus. Judges are often not musical composers or television producers, and should not be forced to determine something as subjective as identifying whether a particular section of copyrighted material may be deemed significant to the copyrighted work as a whole, particularly when the creative expression of the Mashup Artist is at stake. Because of judicial discrepancy as to what may classify as a ‘substantial’ portion of a copyrighted work, this third

35. 17 U.S.C. § 107(3) (2006).

36. Long, *supra* note 22, at 332.

37. *Id.*

factor eliminates all elements of predictability within the fair use doctrine, and leaves the Mashup Artist with no indication as to the amount or type of appropriation that would constitute infringement.

The final factor has been described by the United States Supreme Court as “undoubtedly the single most important element of fair use”³⁸ and requires courts to evaluate the effect the Mashup has “upon the potential market for or value of the copyrighted work” as a whole.³⁹ In determining if this element has been met, courts look to whether the Mashup usurps the market’s need for or serves as a substitute to the copyrighted material.⁴⁰ In rendering this decision, the court evaluates not only the harm the Mashup imposes on the copyrighted material, but also the harm that may be imposed on any derivative works the copyright holder may produce at a later date.⁴¹ Mashups that serve as a mere replacements for copyrighted material frequently fail under this element, as their creation often involves little creativity, and the Mashup Artist’s role becomes that of pirate instead of creator. The justification for examining the Mashup’s effect on the market is to ensure that the traditional aims of copyright law are not ignored and that future artistry and creativity is not stifled.⁴² To promote through the creation of new and innovative works, courts apply this fourth factor to prevent copyright holders from barring innovation, particularly on the basis of competition. Copyright holders are unlikely to succeed in initiating an claim against a Mashup Artist’s creation solely on the basis that the Mashup may negatively affect the market value of the copyrighted material.⁴³ This element does not, however, give the copyright holder the exclusive right to control all purchasing decisions made by the consumer.

Although this fourth factor seldom weighs against Mashup Artists due to the fact that the majority of Mashups are unlikely to be proven as “market substitutes” for the original copyrighted material,⁴⁴ the wide array of judgments issued nationwide evidence that there is no

38. *Harper & Row*, 471 U.S. at 566.

39. 17 U.S.C. § 107(4) (2006).

40. *Harper & Row*, 471 U.S. at 568 (citing *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 451 (1984)).

41. Long, *supra* note 22, at 333.

42. *Id.* (citing *Harper & Row*, 471 U.S. at 567-69).

43. *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523–24 (9th Cir. 1992).

44. Michael Allyn Pote, *Mashed-Up in Between: The Delicate Balance of Artists’ Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 690 (2010).

single way this factor may be analyzed.⁴⁵ This judicial discrepancy is due largely in part to the fact that the fourth factor is stated in such a broad manner that it fails to inform courts as to whether emphasis should be placed on the present or future market, and the amount of attention that must be given to imaginary derivative works not yet developed by the copyright holder.

The following two decisions rendered by the United States Court of Claims and the Second Circuit provide an accurate example of these contradictory viewpoints expressed by courts in assessing this fourth factor. In *Williams & Wilkins Co. v. United States*, the United States Court of Claims determined it would be wrong to “measure the detriment to [the copyright holder] by loss of presumed royalty income” from a non-existent future market,⁴⁶ limiting the scope of this fourth prong solely to the impact the appropriated work had on the current market. Expressing a dramatically opposing viewpoint, the Second Circuit, in *Iowa State University Research Foundation, Inc. v. American Broadcasting*,⁴⁷ evaluated the fourth factor in terms of whether a future market and not-yet-developed derivative work would suffer harm as a result of the appropriated work. In making this evaluation, the court neglected to evaluate whether the copyright holder had any intention to exercise his section 106⁴⁸ right to create a derivative work from the copyrighted material.

Because of the disparity amongst the judicial system in evaluating this element of fair use, it is inherently biased against Mashup creators, as courts retain discretion to review the market effects that an already developed Mashup may impose upon a derivative work not even in existence. This comparison may be made even when the original copyright holder has failed to demonstrate intent to create a derivative work. Not only does this factor allow courts to consider hypothetical derivative works in assessing the liability of a Mashup Artist, but it also enables these courts to create hypothetical markets composed of non-existent consumers and imaginary technologies, all of which automatically give the original copyright holder the upper hand in the fair use debate.

45. Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 265, 290 (2007).

46. 487 F.2d 1345, 1357 n.19 (Ct. Cl. 1973).

47. 621 F.2d 57, 62 (2d Cir. 1980).

48. 17 U.S.C. § 106 (2006).

B. Problems With the Fair Use Doctrine as Applied to Mashups

With the emergence of social and video sharing-networks, the fair use doctrine inadequately addresses concerns of Mashup Artists as it treats Mashup Artists like enterprise-level pirates,⁴⁹ is concerned with protecting the commercial function of a work rather than securing a composition's social value,⁵⁰ requires Mashup Artists to pay to defend their work should it be challenged with an infringement claim—even if their creation is non-commercial,⁵¹ and prevents Mashup Artists from making a living, as they are rarely able to sell their creations without inviting threats of infringement from copyright holders.⁵² In addition to this myriad of concerns, the fair use doctrine is outdated, ambiguous, and disregards the legitimate social and political functions Mashups serve in today's society.

The fair use doctrine is outdated in that it fails to adequately address the disconnect between “what current copyright law protects and how people [presently] create” with the aid of modern technology.⁵³ No longer are consumers passive listeners; with the emergence of the Web 2.0 phenomenon, users have started “taking control of technology and making culture instead of consuming it.”⁵⁴ Modern day users crave innovation, communication and mass networking, and strive to develop new ways to connect and obtain control of technological advancements.⁵⁵ In neglecting to impose a provision specifically tailored to address this modern-day technology, the fair use doctrine leaves the user's interest in creation unprotected and directly contravenes copyright's intended purpose of “encourag[ing] and reward[ing] the development of creative works for the betterment of society.”⁵⁶

The fair use doctrine is ambiguous, as it neglects to provide Mashup Artists with clear standards as to what may and may not be considered ‘fair’ use under the Copyright Act.⁵⁷ As fair use is

49. Katz, *supra* note 6, at 38.

50. Debra Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 954 (2009).

51. Katz, *supra* note 6, at 26.

52. See *Grand Upright Music v. Warner Bros. Records*, 780 F.Supp. 182 (S.D.N.Y. 1991)(finding all unauthorized sampling legally suspect and susceptible to infringement allegations).

53. Halbert, *supra* note 50, at 921.

54. *Id.* at 923.

55. Mark Dominiak, *‘Millennials’ Defying the Old Models; Younger Online Consumers Leaning More Toward User-Generated Content*, TELEVISION WK., May 7, 2007 at 68.

56. Katz, *supra* note 6, at 2.

57. See generally, Halbert, *supra* note 50.

analyzed in a case-by-case manner, the Mashup Artist is neither provided with information outlining the amount of work he may appropriate, nor given a description of the specific elements of the copyrighted work he may appropriate before he is automatically deemed an infringer. This lack of uniformity is likely to stifle innovation, as Mashup Artists may be less likely to create if they are uncertain as to whether they will be charged with infringement upon publication of their work. As user-generated creative works begin to increase in popularity, the Copyright Act must adapt to provide the Mashup Artist with a broader and more consistent level of protection.

The fair use doctrine disregards the legitimate social and political functions Mashups serve in today's society. Although viewed by the majority of the entertainment industry as inherently destructive, Mashups can and often do serve productive, socially desirable purposes consistent with the Copyright Act, as they unite viewers throughout the world, invite user commentary, welcome criticism, and aid in the development of positive self-expression and self-definition.⁵⁸ Additionally, Mashups enhance First Amendment values by fostering a safe outlet where society may "adopt, modify, reject [and] question" copyrighted creations.⁵⁹

IV. Alternative Solutions to Fair Use

Due to the aforementioned flaws with the fair use doctrine as applied to Mashups and the Web 2.0 phenomenon, a new mechanism must be constructed to better balance the Mashup Artist's right to create with the copyright owner's interest in profiting from his work. In struggling to develop a system that achieves uniformity and eliminates uncertainty within the Mashup community, copyright theorists such as William W. Fisher, Brian Pearl, Pamela Samuelson, Abigail De Kosnik, and Michael W. Carroll have proposed several alternative systems for compensating copyright holders when Mashup Artists use their copyrighted material in creating a new work. These alternative systems are not exhaustive, but merely demonstrate the wide range of recommendations made by copyright scholars to restructure fair use. While these solutions may prove meritorious in providing proper justice to either the Mashup Artist, consumer or

58. Jane C. Ginsburg, *User-Generated Content Sites and Section 512 of the U.S. Copyright Act* in COPYRIGHT ENFORCEMENT AND THE INTERNET 183, 184 (2010), available at http://sr.nellco.org/cgi/viewcontent.cgi?article=1084&context=columbia_pllt (last visited Nov. 12, 2012).

59. Rebecca Tushnet, *Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters*, 6 J. L. & POL'Y. INFO. SOC'Y. 1, 2 (2010).

copyright holder, none of the following proposals adequately address the concerns of all three, and each recommendation leaves many important questions and concerns unanswered.

In his book, “Promises to Keep: Technology, Law and the Future of Entertainment,”⁶⁰ William W. Fisher, III outlines three alternative solutions to better address the technological advances that have developed as a result of the Web 2.0 phenomenon. Fisher’s primary scheme, which he describes as designed “explicitly . . . to protect creators, as a class, against injury,”⁶¹ recommends transforming the entire copyright system into an administrative system resembling that of an involuntary license. Under this theory, if a copyright owner wanted to be compensated when a Mashup Artist used any quantity of his copyrighted material, he would register his copyright with the United States Copyright Office in advance and pay a designated fee for the registration.⁶² Once the material was registered, the copyright holder would receive a “unique file name, which . . . would be used to track . . . distribution, consumption and modification”⁶³ of the copyrighted material. The government would then compensate the copyright holder through taxes imposed on everyday entertainment and electronic items such as MP3 players, cable boxes, and personal computers after determining the “frequency with which each song and film was listened to or watched.”⁶⁴ The amount of compensation a copyright holder would receive from tax money would be commensurate with the rates in which the public interacted with the registered work.⁶⁵

The main criticism of this proposal is that it would have a negative impact on copyright holders and the consumer at large. Copyright holders may not have the funds to register their works with the Copyright Office, and those who are unable to do so are barred from subsequently seeking compensation from the government when another appropriates their work. Additionally, Fisher’s proposal harms the public at large, as all consumers will be forced to pay a designated tax on entertainment-related products. By imposing a fixed tax for all, Fisher rewards those who rapidly consume copyrighted materials, since they are not required to pay a tax equal

60. WILLIAM W. FISHER, III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 9, 199-258 (2004).

61. *Id.* at 249.

62. *Id.* at 203-06.

63. *Id.*

64. *Id.*

65. *Id.* at 223-34.

to their amount of consumption, and punishes those who seldom interact with copyrighted material, since they will be required to pay the same amount in taxes as the avid consumer. Moreover, Fisher's proposal may cause a decline in the market for electronic goods, since his tax can only be imposed on products that have not yet been purchased, and users may delay in replacing an old computer solely on the basis of the excessive entertainment tax.

In his 2009 UCLA Law Review proposal, "Girl Talk, Fair Use and Three Hundred Twenty-Two Reasons for Copyright Reform,"⁶⁶ Brian Pearl advocates for imposing a compulsory licensing scheme coupled with a royalty-based system. Under this mechanism, the Mashup Artist would be obligated to compensate the copyright holder based on the percentage of revenue generated by the Mashup creation.⁶⁷ If the Mashup Artist either uses multiple copyrighted materials in one Mashup or creates a CD consisting of several tracks comprised of multiple materials, he would be required to divide the royalty fees paid to each copyright holder in proportion to the length of the samples used on each track.⁶⁸

Although on its face, this method appears to be ideal, since Mashup Artists who do not generate income from their works would not be forced to pay anything for the use of the copyrighted material, Pearl's proposal fails to adequately address the copyright holder's concerns under section 106 of the Copyright Act,⁶⁹ as it grants Mashup Artists free-range to create an alleged 'non-profit derivative work' and publish that work on the Internet for millions of people to observe without having to compensate the copyright holder for its use.⁷⁰

Throughout the course of her career, Pamela Samuelson, a nationally recognized pioneer in the realms of digital copyright law,

66. Brian Pearl, *Girl Talk, Fair Use and Three Hundred Twenty-Two Reasons for Copyright Reform*, N.Y.U. INTELL. PROP. & ENTMT'L L. LEDGER 19 (2009) available at: <http://jipel.law.nyu.2009/12/girl-talk-fair-use-and-three-hundred-reasons-for-copyright-reform/>.

67. *Id.* at 26-27.

68. *Id.* at 27-28.

69. 17 U.S.C. § 106 (2006).

70. *See also*, *Viacom Int'l. Inc. v. YouTube, Inc.*, 718 F.Supp.2d 514 (S.D. N.Y. 2010), 540 F.Supp.2d 461 (S.D.N.Y. 2008) (Although this matter centered upon direct copies being made of Viacom's copyrighted content, Viacom distributed cease-and-desist letters to Mashup Artists who published their not-for-profit works on YouTube's video-sharing network.).

cyber law, and information policy,⁷¹ and distinguished legal Professor at the University of California, Berkeley, has written extensively on modifying the 1976 Copyright Act to provide for a greater understanding amongst the American people of the limitations imposed by Copyright Law, particularly in the area of digital downloads and technology.⁷² Although each of Samuelson's proposals differs in structure, her overarching theme remains the same: the United States Copyright Office must refine its statutory damages provision to ensure that due process considerations are adequately accommodated, and to prevent those charged with secondary liability in infringing the copyrighted material from being assessed a penalty grossly disproportionate to their actual offense.⁷³ Under section 504(c) of the 1976 Copyright Act,⁷⁴ when a copyright holder has filed an infringement claim against someone who appropriated his work without authorization to do so, he may elect to recover an award of statutory damage in a sum of no less than \$750.⁷⁵ Where the alleged infringer bears the burden of proof and must demonstrate he was unaware his actions were infringing, the court may "reduce the award of statutory damages to a sum of not less than \$200" should he prevail on his argument.⁷⁶ As such, even if the court finds the alleged infringer lacked reason to believe he committed infringement, he is still subject to a \$200 minimum fine, unless an employment exception under sections (2)(i) and 2(ii) applies.⁷⁷

In arguing for a less arbitrary statutory damages provision, Samuelson recommends courts look to the type of infringement that occurred when awarding copyright statutory damages. For matters of "innocent" infringement, where the alleged infringer did not believe his actions constituted infringement, the defendant's work was not for profit, and the copyright holder suffered minimal damage, Samuelson suggests courts automatically award the minimum amount of

71. UNIVERSITY OF CALIFORNIA, BERKELEY, <http://people.ischool.berkeley.edu/~pam/> (last visited May 2, 2011).

72. Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, UNIVERSITY OF CALIFORNIA, BERKELEY <http://people.ischool.berkeley.edu/~pam/papers/Preliminary%20Thoughts%20utah.pdf> (last visited May 2, 2011).

73. *Id.* at 15.

74. 17 U.S.C. § 504(c) (2006).

75. 17 U.S.C. § 504(c)(1) (2006).

76. 17 U.S.C. § 504(c)(2) (2006).

77. *See* 17 U.S.C. § 504(c)(2)(i) (2006) and 17 U.S.C. § 504(c)(2)(ii) (2006) (carving out circumstances where the court may remit statutory damages; examples include employees of nonprofit educational institutions and public broadcasting entities).

statutory damages.⁷⁸ For what she describes as “ordinary infringement,”⁷⁹ Samuelson urges courts to award statutory damages in an amount commensurate with the amount of damages the original copyright holder would have been awarded if he made no election to seek statutory damages.⁸⁰ In determining the amount of damages under this type of infringement, Samuelson advises courts to ensure actual damages are as accurately approximated as possible to prevent infringers from being charged with overly-excessive damages disproportionate to the amount of copyright material appropriated.⁸¹

While the obvious benefit of Samuelson’s proposal is that it would prevent infringers, such as Mashup Artists, from being excessively penalized when they do not significantly profit from use of the copyrighted material, it does so at the cost of automatically deeming a Mashup Artist an infringer, and neglecting to carve out a “safe harbor” mechanism in which one may appropriate another’s work without being deemed in violation of the Copyright Act. Under Samuelson’s proposal, Mashup Artists are no more protected than they would be under the fair use doctrine, since infringement may occur “when the [Mashup Artist] did not know his conduct was infringing”⁸² and a Mashup Artist, even one who creates for non-commercial purposes, would be subject to compensating the copyright holder a minimum of “\$200.”⁸³ This proposal also decreases the likelihood of the judicial system establishing a level of consistency amongst other factually similar cases, as she has failed to demonstrate a precise measurement for courts to use when calculating damages. As Mashups often neglect to serve as replacements of or substitutes for the copyrighted material, it will become increasingly difficult for the majority of copyright holders to give a near exact estimate of the damages suffered, and courts will be forced penalize Mashup Artists on a copyright holder’s mere conjecture of lost profits.

Copyright scholar and Assistant Professor at the University of California, Berkeley, Abigail De Kosnik, identifies a two-fold

78. Pamela Samuelson et al., *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 501 (2009).

79. Samuelson defines “ordinary infringers” as those who “knew they were infringing or were reckless about infringing, but as to whom other indicia of egregious conduct are not present.” Ordinary infringers may include those who use copyrighted material in a commercial manner. *Id.* at 503.

80. *Id.* at 503.

81. *Id.*

82. *Id.*

83. *Id.* at 449 n. 35.

approach in altering copyright law to accommodate for the increasing impact re-mix culture imposes on present day society, particularly in the area of fan-fiction. Although fan-fiction on its face may bear little relation to a Mashup, the circumstances surrounding a fan-fiction writer are similar to that of the Mashup Artist, as the fan-fiction writer appropriates characters or a plot from a copyrighted work, transforms them as he sees fit and submits his work for publication, either in stores or via the Internet.⁸⁴ De Kosnik's analysis first suggests re-mix artists should be required to compensate copyright owners for use of their material before they are able to share their new work with others via online publication.⁸⁵ Second, De Kosnik notes fans have compensated the re-mix artist for his work. Once the re-mix artist has been compensated, De Kosnik suggests that he share a percentage of these profits with the original copyright holder.⁸⁶ The percentage of shared profits would most likely be commensurate with the percentage of the copyright material appropriated in the remix.⁸⁷

The primary concern with De Kosnik's two-step analysis is that it ignores imperative questions that must be addressed. Must all Mashup Artists strive to receive a profit for their work? What if fans refuse to compensate the Mashup Artist for his creation and he does not profit; would he still be forced to pay the copyright holder for use of the copyrighted material? Should the source where the Mashup Artist posts his work be responsible for compensating him should fans not take to his creation? Would doing so require video and file-sharing networks to screen Mashup creations in order to determine if they may prove profitable before the network may accept the Mashup for online publication? Would Mashup Artists no longer strive to create works if they are no longer able to work anonymously or under a pseudonym?

In his 2007 North Carolina Law Review article entitled, "Fixing Fair Use,"⁸⁸ American University Washington College of Law Professor Michael W. Carroll introduces three different ways to alter copyright law and eliminate the uncertainty inherent in the fair use

84. Tushnet, *supra* note 59, at 3-4; *See also*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

85. Abigail De Kosnik, *Should Fan Fiction Be Free?* 4 J. SOC'Y CINEMA & MEDIA STUD. 118, 120-21 (2009) (comparing digital appropriation with fan-fiction and recommending compensating these artists in order to properly reimburse copyright holders for use of their original works).

86. *Id.* at 121-23.

87. *Id.*

88. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007).

doctrine. In his main proposal, Carroll recommends that Congress alter the Copyright Act to permit development of a Fair Use Board (hereinafter, “Board”) within the United States Copyright Office. This three-judge administrative body would retain the exclusive right to authorize the use of a copyrighted work in a creation, such as a Mashup, without requiring the Mashup Artist compensate the copyright owner for the specific use.⁸⁹ Under this proposal, the Mashup Artist would petition the Board for permission to use a particular copyrighted work prior to creating the Mashup.⁹⁰ In filing his petition, the Mashup Artist would be required to notify the copyright holder that a petition had been made and summarize his request to use the particular work. The copyright holder would then receive an opportunity to respond to the petition on the grounds of his choosing, or file for a declaratory judgment, but the Board would retain the sole discretion in determining whether a work may be appropriated.⁹¹ Once a decision regarding the petition has been made, the petitioner would be free from all liability for the proposed use, but the copyright holder may challenge other artist’s similar uses of the copyrighted material, as the Board’s ruling would be non-precedential.⁹² Each Board decision would be appealable and subject to administrative and judicial review.

There are three main concerns surrounding Carroll’s theory, all of which prejudice the Mashup Artist in a significant way. First, Carroll’s recommendation could be incredibly time-consuming for both the Mashup Artist and the copyright holder, as the Board’s final decision is appealable and both parties are given several opportunities to file motions outlining their arguments. By the time a verdict has been rendered in the Mashup Artist’s favor, he may no longer be interested in using the work, as its social value may have depreciated since the filing of his petition.

Second, because the copyright holder is likely to have more of a disposable income than the Mashup Artist, particularly in circumstances where the copyright is held by a major corporation, the Mashup Artist will likely be forced to obtain legal counsel in order to successfully prevail against the copyright holder’s legal team. Assuming the Board initially renders a decision in the Mashup Artist’s favor and the copyright holder exercises his right to appeal,

89. *Id.* at 1090.

90. *Id.*

91. *Id.* at 1091.

92. *Id.*

the Mashup Artist may have expended several thousand dollars in obtaining legal advice for the opportunity to use one minute of copyrighted material before the matter is settled.

Third, Carroll's theory fails to distinguish the casual Mashup Artist, an individual who creates his work merely for personal satisfaction, from the commercial Mashup Artist, an individual who may use the copyrighted material to create compact disks for worldwide sale and distribution. Both types of Mashup Artist would be required to file a petition with the Board requesting permission to use the copyrighted material. Both would likely obtain legal counsel to assist them in presenting their arguments and both would be subject to thousands of dollars in legal fees should they need assistance in preparing their claim.

V. Proposal for Reform

In order to best promote uniformity amongst Mashup cases and adequately balance concerns of the Mashup Artist, consumer and copyright holder, this article outlines a two-step proposal of what must occur. First, Congress must impose strict requirements that social and video-sharing networks (hereinafter, "network(s)") must follow before they may broadcast a user's creation. Second, Congress must alter the Copyright Act to include a four-tiered matrix specifically designed to address those who develop video or audio works comprised of two or more segments of pre-existing copyrighted material for personal use, distribution on the Internet, or profit.

A. Regulating the Internet

Congress must establish a series of requirements that social and video-sharing websites must meet before they are permitted to accept a user's creation for publication. Due to the lax regulation of the Internet, litigation of infringement claims has become rampant in present-day society, as those who wish to upload works consisting of copyrighted material are able to do so with ease and at virtually little to no cost. While websites such as YouTube require those who upload work onto their networks (hereinafter, "up-loaders") to establish an online user account before they may publish a work, up-loaders are not required to submit any personal information aside from postal code, gender and date of birth, and there is nothing preventing them from establishing their online accounts with

inaccurate information.⁹³ Further, up-loaders are not asked specific questions about the work they intend to publish, and are merely required to check “I accept” under a series of statements informing them that their account will be deleted if material they do not personally own is uploaded.⁹⁴ Because these networks neglect to record personal information from the up-loader and fail to obtain specific details about the work being uploaded, they become a virtual un-regulated breeding ground for copyright violators; anyone can post anything without a likelihood of facing liability, as it is often time-consuming and difficult for copyright owners to browse databases searching for violations.

To assist in bringing these networks back to their main purpose of providing society with an outlet to share their *own* creations, but still presenting an arena where works such as Mashups may be shared worldwide, Congress should require that all video-sharing networks make a more detailed assessment of the user and the type of work created before allowing for publication. Under this system, when establishing a user account, the up-loader must submit personal information similar to that required if he were making an online purchase. His name, address, telephone number, and credit card number would all be required and privately maintained by the social or video-sharing network. This information would not be available to the public, and the up-loader would be permitted to establish the username or pseudonym of his choice under which his creations would be published.

Aside from the up-loader’s personal information, the network would also be required to gather data particularly related to the content being uploaded. After an up-loader accurately submits his personal information with the network, he would be directed to a second series of questions where he would be asked if his work uses material created by another. If it does use such material, the up-loader would be required to submit the name and creator of the material being appropriated along with the amount (in minutes) of each appropriated work. If an up-loader submits false information under the first set of questions, he would not be directed to the second set. If he submits false information on the second set of

93. *Create a New Google Account*, GOOGLE, <http://accounts.google.com/SignUp?service=youtube> (last visited May 2, 2012).

94. *Copyright Tips*, GOOGLE, http://www.youtube.com/t/howto_copyright (last visited May 2, 2011). (YouTube tells users before they create an account, “Uploading materials that you do not own is a copyright violation and against the law. If you upload material you do not own, your account will be deleted.”).

questions and states his work does not contain material appropriated by another when it actually does, his credit card would automatically be charged \$200, half of which would go to the artist(s) whose work is appropriated, while the other half is paid to the particular network.

These requirements would enable the network to compile a database of works uploaded so that they would be able to compensate the copyright owner directly from the up-loader's account commensurate with the fees established under the four-tiered matrix described in section B of this proposal.

Although critics may urge that imposing such strict requirements on the up-loader may prevent users from uploading information onto video-sharing networks, in theory it does the exact opposite. Presently, all video-sharing networks do not allow one to post the copyrighted work of another; anyone who uploads another's copyrighted material will automatically lose their account, and their creation, once identified by network representatives, will be removed.⁹⁵ Under the proposed regulation, the amount of works permissibly uploaded to these sharing networks would dramatically increase, as users would be able to upload copyrighted and non-copyrighted information without the fear of having their account and posting removed, or facing thousands of dollars in litigation costs. This theory is also consistent with the fundamental aim of copyright law to further progress, as all creators will be able to use video-sharing networks specifically tailored to their individual creations.

Further, imposing regulations on these social networks does not remove a Mashup Artist's right to remain anonymous in publication, as viewers of the uploaded content do not receive any information about its creator other than the information which the artist wishes to display. Additionally, this restriction does not inhibit creation or punish those who do not choose to upload material copyrighted by another, as users who upload works that are entirely theirs will not be required to pay an uploading fee.

B. Imposition of a Four-Tiered Matrix

In order to determine the amount of compensation copyright holders are entitled to receive for unauthorized use of their copyrighted materials in Mashups, Congress must create a scheme that acknowledges the numerous types of Mashup creations and provides a uniform method to adequately and evenly compensate copyright holders.

95. *Id.*

The only way for copyright law to achieve this delicate balance is for Congress to create a four-tiered matrix within the Copyright Act that will particularly pertain to Mashups as defined in section II(A) of this article. The matrix would be structured in the shape of a pyramid, and each of the four tiers would be separated based on the type and location of infringement. Based on the type and location of infringement that has occurred, a Mashup Artist may not be required to compensate the original holder for use of the copyrighted material, or he may be forced to share a percentage of his profits proportionate to the amount earned or quantity of work appropriated.

The first tier is designed specifically to protect the “Casual-Masher;” an individual who creates a work for his own pleasure using two or more copyrighted materials, does not publish his creation on the Internet or on any other social-video sharing platform, and receives no profit from his compilation. This Masher may share his works with friends or even display it in a large setting, such as a lecture or banquet hall, but neither he nor anyone else may publish or profit from the creation. If a Mashup Artist’s work falls within this tier, the original copyright holder automatically would be barred from seeking damages and alleging infringement.

For example, Jim, a “Casual Masher,” creates a six-minute Mashup of scenes from various Walt Disney and Pixar films that he shows to his family and friends at a local coffee shop. Jim does not get paid for this work, and he has not posted it online. Under the first tier of the matrix, Jim’s use of the copyrighted material would automatically be presumed “fair.” As such, Jim is automatically protected from all liability and is not required to compensate either Disney or Pixar for his use of the copyrighted materials.

The second and third tiers of the matrix resemble the mechanical licensing requirement established in section 115 of the 1976 Copyright Act,⁹⁶ as they require the Mashup Artist compensate the copyright holder based on the amount of work appropriated.

Dedicated to the “Low-Scale-Masher,” the second tier of the proposal applies to the individual who creates a work for his own pleasure using two or more copyrighted materials, publishes that work on social or video sharing platforms that are privately funded and do not contain advertisements, and receives no profit from his

96. 17 U.S.C. § 115 (2006) (Establishing a compulsory license for those who make and distribute physical and digital phonorecords. Users must compensate the copyright holder at a current rate of 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever is greater.).

compilation. Under this tier, a “Low-Scale-Masher” who falls within the above definition must compensate the copyright holder in a sum proportionate to the amount of copyrighted work appropriated at a rate of three cents per minute. This charge will be made directly to or taken from the credit card or bank account the Mashup Artist listed when he developed his user account with the online network. This modest cost addresses the needs of both the Mashup Artist and the copyright holder, as the Mashup Artist will be able to publish his work at little cost, and the copyright holder, even if he does not suffer detriment, will be compensated for the use of his creation. Personal homepages would automatically fall within this tier.

The third tier is relatively similar to the second, only it pertains to the “Mid-Scale-Masher,” one who creates a work for his own pleasure using two or more copyrighted materials, publishes that work on social or video sharing platforms that are funded by consumers or advertisements or a combination of both, and receives no profit from his compilation. A “Mid-Scale-Masher” who meets these requirements would be required to compensate the copyright holder in a sum proportionate to the amount of copyrighted work appropriated at a rate of six cents per minute. Like the charges made to the “Low-Scale-Masher’s” user account, the fees a “Mid-Scale-Masher” must pay would be directly charged to or taken from the account on file with the video-sharing network. Networks that would automatically fall in this tier would include YouTube, Blip.tv, and Yahoo Video. All video-sharing networks that offer both a fee and no-fee version for viewers would also be included within this tier.

Putting the second and third tiers into practice with assistance from the hypothetical created in tier one, imagine Jim decides to post his Disney/Pixar Mashup on the Internet and that two of the six minutes consist of Disney footage, while the remaining four minutes are copyrighted by Pixar. Depending on where Jim chooses to publish his work, he may be responsible for paying Disney and Pixar either 6 and 8 cents respectively, (if he publishes the work on his personal homepage), or 12 and 16 cents respectively (if he wishes to post the work on YouTube), for use of the copyrighted material. Either way, the Mashup Artist is not likely to be deterred by the low cost in publishing his work, the consumer is able to view his creation, and the copyright holder is able to receive compensation.

The final tier pertains directly to the “High-Scale-Masher,” one who directly profits financially from his work. There are two types of Mashup Artists that fall within this category. The first type of Mashup Artist is known as the “One-Track-Masher,” who creates a

single Mashup that he sells for profit. Throughout his career, he may create hundreds of Mashups, but the “One-Track-Masher” sells each Mashup separately as a single track. Under this fourth tier, if a “One-Track-Masher” receives funds for the sale of his Mashup, he would be required to compensate each copyright holder at a rate of two percent of the gross profits received. This two percent restriction could legitimately require the Mashup Artist to relinquish all profits if he were to use more than fifty works in his creation. However, it is the superior alternative to requiring him to pay based on the proportion of copyrighted materials appropriated, since the Mashup Artist will only have to compensate the copyright holder if his work profits. The second type of “High-Scale-Masher” is the “Multiple-Masher,” an artist such as DJ Girl Talk,⁹⁷ who creates several different Mashups, separates these Mashups into individual tracks, and compiles them onto one compact disk or record, which he sells for profit. Each of DJ Girl Talk’s albums contains samples from over hundreds of copyrighted materials.⁹⁸ Instead of requiring the “Multiple-Masher” to distribute two percent of his profits to over a hundred different copyright holders, he would be required to compensate the copyright holder in proportion to the length of copyrighted material used at a fixed rate of ten cents per minute per copy sold. If DJ Girl Talk uses twenty minutes of a copyrighted song in his album and sells 200 copies of the album, he would be required to compensate the copyright holder \$400.⁹⁹

The difference in regulation between the “Multiple-Masher” and “One-Track-Masher” serves as recognition of the various Mashing methods available, and ensures that Mashup Artists are not grossly financially burdened in a manner disproportionate to the amount of copyrighted material appropriated.

Overall, this four-tiered Matrix is an ideal and uniform means of regulating Mashups, as it adequately addresses the needs of the Mashup Artist, consumer, and copyright holder in an un-biased and predictable manner without inhibiting the First Amendment goals and historical aims of copyright law.¹⁰⁰ It satisfies the concerns within the Mashup community, as it provides clear guidelines as to the amount of compensation a Mashup Artist must furnish to copyright

97. Pearl, *supra* note 66.

98. *Id.*

99. 10 cents per minute x 20 minutes of copyrighted material = \$2 must be paid to the copyright holder per album; \$2 per album x 200 albums sold = \$400 must be paid to the copyright holder.

100. Halbert, *supra* note 50, at 953 (2009).

holders in creating his work, and it eliminates the uncertainty prevalent within today's Mashup community.¹⁰¹ It is also malleable, and alters in form to recognize the various types of Mashups that may be created and the various locations where they may be published. Further, it eliminates the fair use doctrine's present bias in favor of commercial interests¹⁰² and makes copyright law more amenable to technological advancements without ignoring the needs and rights of copyright holders. It also recognizes the needs of consumers in a manner unlike any other proposal, as it allows for online publication of all works- not just those original to the up-loader, without imposing a mandatory or blanket tax. Finally, it is an ideal proposal for copyright holders, as they are able to receive guaranteed compensation for the published use of their copyrighted material, even when the Mashup Artist does not profit from his creation.

Critics of this proposal may urge that a statutory licensing scheme like that reflected within the proposed Matrix would be impractical, as the majority of Mashup Artists create works for non-commercial purposes and would be forced to either cease creating works or go into debt in order to pursue their interest in developing Mashups. This concern is outweighed by the first tier of the Matrix, which grants the "Casual Masher" full discretion to use the copyrighted work as he deems fit, so long as his creation is not published and he does not profit from its creation. Further, the small fees Mashup Artists will have to pay to use copyrighted material in a manner outlined in tiers two and three of the Matrix are not significant enough to deter the increase of Mashup creations.

Another criticism of the proposal is that current Mashups located on the Internet would not be subject to this Matrix, while future works would be. This is certainly not the case, as the proposed scheme would require that every video-sharing network entirely wipe their online database and only accept works once they have reformatted their user account registration process consistent with section V(A) of this proposal. This way, every up-loader has completed the necessary registration process, and is aware of their obligations to compensate copyright holders should their work include material that is not their own. Although wiping entire databases may prove time-consuming and costly to video-sharing networks, these networks have historically skirted around liability as secondary infringers, solely on the basis that they did not post the

101. *Id.* at 954.

102. *Id.*

infringing material or have a belief that a particular posting contained infringing material. It is certainly time they take responsibility and facilitate compliance with copyright laws.

VI. Conclusion

In order for copyright law to remain prevalent in today's primarily digital world, it must be altered to foster, not inhibit creativity. Mashup Artists and their creations are different from those who commit acts of pure digital piracy, yet current copyright law under the fair use doctrine fails to treat them as such. In order to balance the inherent conflict between free speech, creativity, and the law, Congress must adapt the Copyright Act and bridge the gap between what the law protects and how people create.¹⁰³ The only way to bridge this gap and accommodate the creator, consumer, and copyright holder is to impose heightened requirements on social and video-sharing networks and develop a matrix specifically tailored to assess all matters pertaining to this new way of creating. The twenty-first century is moving forward with or without copyright law. 'It is only fair that copyright follow suit.

103. *Id.*

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