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Generation Mixtape: A User's Guide to Online Copyright

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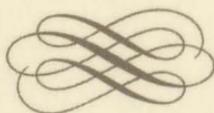
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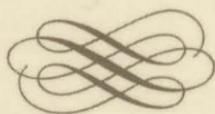
LEGAL BACKGROUNDER NO. 2



GENERATION MIXTAPE

A User's Guide to Online Copyright

*Matthew D. Catania
Gaetano G. Marretta*



PROGRAM IN LAW & JOURNALISM
AT NEW YORK LAW SCHOOL



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In conjunction with the Program in Law and Journalism at New York Law School, Tribeca Square Press publishes a monograph series, *Legal Backgrounders*, to provide those who regularly report on law and the legal profession, including print and broadcast reporters, editorial writers, bloggers, and editors, with concise, objective, timely, and readable information on legal topics currently in the news. Monographs in this series are not intended to advocate legal or policy positions but to describe and summarize the state of the law. An electronic version of each *Legal Backgrounder*, including links to sources, will be available on the Tribeca Square Press website shortly after publication of the print edition. For more information, see <http://www.tribecasquarepress.com>.

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I. INTRODUCTION

The Musician

Gregg Gillis loves music. He considers himself to be both a consumer and creator of pop-music. In 2009, his most recent album, *Feed The Animals*, received rave reviews from *Time Magazine*,¹ *Rolling Stone*,² and *Blender*.³ In 2010 he headlined several well-known music festivals.⁴ And although this attention might be considered a good thing in the eyes of Gillis and his fans, there is a problem looming large. Gregg Gillis has potentially violated over three hundred copyrights.⁵

Gillis performs under the stage name Girl Talk. His primary instrument is a laptop with an extensive library of popular music from over the past 40 years. While you've probably never heard of Gregg Gillis, you have heard bits and pieces of the music he plays. That is because Gillis creates his music by intertwining pieces of popular and easily recognizable pop-songs. Gillis takes snippets of these songs and manipulates, remixes, and weaves them together to make danceable, musical collages known as mixtapes.

Since the beginning of this practice, the mixtape has been fraught with illegality.⁶ In the music industry, mixtapes often include previously released music from another composer, to which the mixtaper has added his own flavor. Emerging out of the disc jockey (DJ) underground scene of the 1970s and 1980s, mixtapes filled an unmet need: music consumers have loved the mixes played in clubs and at parties, but lacked a way to capture the uniqueness and energy of a live DJ performance. Mixtapes provided a solution, even though a clearly illegal one. Although record labels typically allowed these DJs to use copyrighted songs in public settings, they did not permit DJs to record those performances and sell the recordings for personal profit or gain.

Gillis is not alone. Other musical genres and popular media employ varying degrees of mixtaping. The practice of mixtaping cuts across numerous musical genres and includes a wide array of media. The hip-hop genre was one of the first to experience the mixtape phenomenon.⁷ An unsigned artist might release several mixtapes using copies of other artists' beats to generate buzz and interest from record labels, while a signed artist might release a mixtape containing original and borrowed material to promote a future studio album. In fact, there are entire blogs devoted to mixtapes by unknown artists. Essentially these are compilations produced by individuals looking to showcase their own talents by adopting and building upon what another artist has done before.

In the context of the music industry, mixtapes are quickly becoming more diverse and difficult to define.⁸

The difficulty largely has to do with rapidly changing technology. The advent of CDs made reproduction much more affordable and more efficient. Moreover, the recent proliferation of the Internet has exposed the art of mixtaping to an even wider audience through the use of MP3s, "on demand" music streams, and file sharing technology.

The Graphic Artist

Shepard Fairey is a mixtaper specializing in graphic design who merchandises his creations through his company, Obey Giant Inc.⁹ Obey Giant, Inc. has a long history of unapologetically appropriating others' works for its merchandise without attribution.¹⁰ Its "Obey" logo is based on a photo of Andre the Giant that was later altered by Fairey to avoid a publicity rights lawsuit from Titan Sport, which owns the rights to the wrestler's likeness. Fairey's roots are in graffiti art, but his current output rarely shows any personal artistic touches, leading detractors to speculate that his artwork is mainly created via Photoshop or Illustrator.¹¹ Some of his artwork is still created the old fashioned way with spray-paint and stencils.¹²

Critics are concerned "that Fairey is not just appropriating, but also copyrighting images that exist in our common history."¹³ By inserting his logos and banners onto political art, it is feared that he is eroding the social and historical contexts of these images without adding meaningful commentary to it. Artist and archivist Lincoln Cushing "recently got Fairey to pay retroactive royalties

on a t-shirt with Cuban artwork appropriated without credit.” Despite Fairey’s constant use of others’ images without credit, Obey Giant is very litigious toward people who use its work as reference. Fairey threatened to sue Frank Orr for trademark infringement for selling prints that parodied Fairey’s “Obey” trademark (itself an unauthorized derivative work) and called Orr a “parasite.”¹⁴

In 2008, Fairey created a series of iconic and heavily-merchandized portraits of President Barack Obama that boosted Obama’s presidential campaign and Fairey’s renown.¹⁵ The series of campaign images was developed (to an unknown degree) using computer imaging software.¹⁶ Fairey’s initial portrait and later versions featuring different text were developed (to an unknown degree) using computer imaging software. This portrait was based upon a photograph of Obama taken by Associated Press photographer Mannie Garca in 2006.¹⁷ The Associated Press alleges that Fairey violated its copyright in this photograph because he did not obtain a license to base his work on it.¹⁸ In 2009, Fairey preemptively sought to have his Obama portraits be declared non-infringing before the Associated Press could sue him for copyright infringement.¹⁹ The Associated Press counterclaimed that Fairey willfully infringed its copyright. The suit was later settled.²⁰

The Movie Critic

Mike Stoklasa is one of the new breed of movie critics. Instead of merely using words to review movies, these modern reviewers post video reviews with snippets of the films themselves spliced in. Stoklasa has reviewed a vari-

ety of films, ranging from *Star Trek: Generations* to *Baby’s Day Out*, on his Red Letter Media website.²¹

One aspect of Stoklasa’s reviews that makes them stand out from others in this emerging field is his willingness to dissect whole movies in exacting detail rather than providing mere overviews. He became an internet sensation by posting a seventy-minute critique of *Star Wars: Episode I – The Phantom Menace*, which he followed up with 90-minute reviews of the two successive prequels.²² These reviews incorporate large chunks of the films, including many crucial scenes, and often juxtapose them against sequences from the original *Star Wars* trilogy and behind the scenes footage.

The Red Letter Media reviews, however, are not merely Internet versions on the television movie reviews made popular by Roger Ebert. They are more akin to film school lectures. His reviews are long because he wants viewers to recognize all the many ways the subjects of his reviews fail on both narrative and filmmaking levels. Stoklasa employs editing techniques like split screens and pop-ups text on the movie footage to stress these points visually.²³ His commentary is also incisive about cinematic shortcomings.

While his reviews are worthwhile viewing for their in-depth analysis alone, they are also presented as surreal parodies. Stoklasa reviews every film in the character of Harry Plinkett, an apparent schizophrenic serial murderer.²⁴ The opening line to his first prequel review is “*Star Wars: The Phantom Menace* was the most disappointing thing since my son.... And while my son eventually hanged

himself in the bathroom of the gas station, the unfortunate reality of the *Star Wars* prequels is that they'll be around forever. They will never go away."²⁵ A subplot involving the interactions between Plinkett and actresses portraying kidnapped hookers runs through many of his reviews and provides continuity between them. Catherine Grant, senior lecturer in film studies at the University of Sussex, describes his *Episode I* review as "a compelling, well put together and useful audiovisual review of *The Phantom Menace* and an incredibly thorough parody of a review — it musters a very clever attack on a certain kind of dumbass fanboy style of film reviewing."²⁶ Although Stoklasa's reviews are entertaining and informative, his review of the second prequel ran afoul of the Digital Millennium Copyright Act (DMCA).

The Composition of Generation Mixtape

Gillis, Fairey, and Stoklasa are all members of what we call Generation Mixtape. Generation Mixtape is a misnomer. We are not using the term "generation" in the traditional sense. Membership in Generation Mixtape is not defined by arbitrary dates as are the more conventional chronological generational groups like the Baby Boomers and Generation X. Instead we are using the term generation to highlight a group of people who would otherwise be a random collection. There are a number of characteristics that define the members of this generation. Primarily, members of Generation Mixtape are also tuned into culture. They draw ideas and raw content from an eclectic variety of media ranging from comic

books to opera. Another core feature is the desire of its members to express themselves by building upon the work of others. Still another defining characteristic is that its members are savvy about the cutting edge of computer and Internet technology.²⁷ While previous generations also expanded upon popular culture, Generation Mixtape's embrace of technology brings this savvy to a whole new level.

Technology has democratized artistry for Generation Mixtape in two ways. First, software programs have made raw artistic talent unnecessary. Where previous generations had to nurture the skills of singers and painters to provide quality entertainment, Generation Mixtape can get the same results by learning keystrokes. Now mixtapers can cut and paste other's works into digital collages of unlimited variety. As the technology gets more sophisticated, the fruits of Generation Mixtape's tinkering grow more professional in quality. It is increasingly difficult (and some may say, unnecessary) to differentiate between works produced by amateurs from those of industry professionals. When mixtapers who already possess artistic talents master these new programs, the results can be extraordinary.

There is a computer program for almost any media format that may interest a mixtaper. Apple's Garage Band and Adobe's Audition allow users to deconstruct and edit sound files with studio-quality results.²⁸ Auto-Tune 5 alters the pitch of any audio to perfect the way it's heard in song. "Digital editing software and DVD-ripping technology permits [*sic*] anybody with filmmaking skill and the right

tools—say, Handbrake to rip discs, MPEG Streamclip to convert them to edit-able [*sic*] format, and iMovie or Final Cut to put the pieces together.”²⁹ Adobe Photoshop, Illustrator, and Corel Graphic Suite allow for similar manipulation of graphic media like digital scans of drawings and photographs. These are just a few examples of the tools mixtapers employ (and better versions are being developed as you read this).

Second, the global interconnectivity of the Internet has prompted democratization by making mixtaping a worldwide phenomenon. Mixtapes in previous generations were generally only shared among small circles of friends and family because it was difficult for these analog mixtapers to get distribution deals with industry titans. Now, the global pervasiveness of the Internet easily allows strangers scattered across the world to experience each other’s mixtapes. Mainstream distribution deals are almost irrelevant now that anybody in the world with an Internet connect has access to every mixtape imaginable. Mixtapes can go “viral” when word of mouth drives up audience exposure exponentially. Even mixtapes that do not attain international success can still find their niche among the innumerable fringe communities online.

A consequence of widespread sharing of mixtapes on the Internet is that it has made Generation Mixtape collaborative. Few mixtapers object to others’ remixing their mixtapes even further. If mixtapers continue to riff on a popular mixtape, it could start a repeating meme in the collective consciousness of the World Wide Web. An example of a mixtape meme is the LOLcats phenomenon:

users upload their own humorous captions to others’ photographs of cats.³⁰ Mixtapers can receive feedback just by posting their mixtapes on the Web. Much of the feedback is constructive criticism. This feedback engenders a sense of camaraderie among Generation Mixtape and encourages the propagation of mixtapes.

Music Mixes

Despite the recent explosion of mixtaping in various forms, the practice seems to have evolved from an earlier music practice known as sampling.³¹ Sampling involves imposing a portion of a previously recorded song into a new composition. Typically, the sample tends to be used as a beat in the background, or a recurring hook throughout the song. The original snippet can be left intact or altered to contain only an isolated instrument or voice.

A popular and well known example can be found in the first hip-hop single to hit number one on the Billboard Top 100, 1989’s “Ice Ice Baby” by Vanilla Ice.³² In that song, Vanilla Ice raps while the background samples the bassline of “Under Pressure” by Queen and David Bowie. While “Ice Ice Baby” is clearly a unique and original composition, it relies heavily upon Queen and Bowie’s riff, written years earlier. Therein lies the hard problem. Vanilla Ice did not create a new song that utilized another song which he created nor had permission to use. When artists like Queen and Bowie spend time and money to compose and record a piece of original music, they expect to receive credit for having created this music. No lawsuit was ever filed, but the artists are rumored to have settled

out-of-court.³³ Although much has changed since Vanilla Ice's era, the problem remains: mixtapers still sample and remix others' songs without obtaining permission.

Some examples of mixtaping are far more apparent than others. In the context of music, mixtapes range from unauthorized collections of a single artist's entire catalog to compilations of multiple artists' latest hits.³⁴ Non-musical audio, such as the rant of Cornell's Professor Mark Talbert against snoring students, can even be turned into a song via auto-tuning and sampling.³⁵ In addition to sampling other artists' tracks, mixtaping can be as simple as looping a three-second clip from another popular song or as full-bodied as a mash-up. A mash-up combines two songs in their entirety to create a different mood or juxtapose two seemingly opposite traits. An example of a mash-up is Girl Talk's combining samples from fourteen different songs to create "Smash Your Head."³⁶

The advent of new advanced creative technology of the twenty-first century has brought sampling to an even wider audience.³⁷ Currently, the most frequent and mainstream uses of mixtapes occur within the rap genre.³⁸ Hip-hop has also fully embraced the role mixtapes play in generating consumer buzz and interest.³⁹ Moreover, an increasing number of new rock bands, such as Minus the Bear and The Postal Service, have opened their catalogues up to Generation Mixtape by encouraging their fans to deconstruct their songs and create remixes of the original tracks. Encouraging fans to mixtape has not caught on, however, with the majority of established mainstream musicians.

Graphic Mixes

High resolution scanners and digital cameras have brought art created in the real world into cyberspace. Mixtapers can manipulate others' uploaded images more easily than traditional artists can make physical collages. Software programs like Photoshop give mixtapers the capability to alter images so subtly that viewers wouldn't notice they've been doctored or to exaggerate them to the point of surrealism. Re-colored comic book artwork and photos of different celebrities composited together are sophisticated examples of mixtaped graphics. Mixtaping graphics can also be as simple as adding new captions to existing images, as shown by the variety of LOLcats images.

The website Photobucket offers users a rudimentary version of image-editing technology and allows them to display galleries of modified images.⁴⁰ DeviantART is purely a hosting website like the YouTube where users can post image galleries for other users to view and critique.⁴¹ Although much of the images posted to deviantART are original, a sizeable amount is copyrighted photographs and artwork that have been digitally manipulated.

Video Mixes

The term mash-up can apply not just to musical mixtapes but to mixtapes of audiovisual media as well. Video mash-ups combine footage and audio from a variety of sources, including video game sequences. For example, professional film critic Matt Zoller Seitz spliced expository scenes from seventeen movies into a short film called

The Explanation, which leaves viewers utterly confused over what's being discussed.⁴²

Beyond video mash-ups, mixtapers of video also produce more scholarly work. Such videos are sometimes called video essays. For example, Professor Eric Braden compiled a series of clips from Disney cartoons into *A Fair(y) Use Tale* as a way to explain copyright law.⁴³ Many of these video essays represent a revolution in how critics can present their reviews of television and cinema to viewers. Seitz explains that while critics can review without clips, the ability to include clips improves the audience's understanding of the reviewer's points. Remove the clips, "and you're left with the critic saying, 'Well, I can't show you exactly what I mean, so I'll describe it as best I can and hope you believe me.'" ⁴⁴

Hosting websites like YouTube make it easy for mixtapers to spread and riff on each others' works. For instance, mixtapers have added new subtitles to the four minute meltdown sequence in 2004's *Downfall (Der Untergang)* so that Hitler appears to be outraged at a variety of mundane frustrations such as the new version of Windows and the Australian Olympic team.⁴⁵ This relatively simple mixtape has gone viral with different mixtapers adding their own subtitles to voice their displeasure over current events while ridiculing Hitler's competency as a leader. The earliest version of this meme dates back to August 2006 and raged against a demo version of Microsoft's Flight Simulator X computer game.⁴⁶ Oliver Hirschbiegel, the film's director, is flattered by the videos and finds them oddly appropriate for deconstructing the image of the

mad dictator. Constantin Films, the movie's production company, finds them distasteful and has used YouTube's Content ID filtering system to have them automatically removed from that site.⁴⁷ Some of these videos have managed to avoid this purge.⁴⁸

The Internet Effect

The growth of the Internet has played a substantial role in the spread and exposure of mixtaping.⁴⁹ Websites like YouTube, Daily Motion, MySpace, deviantART, Photobucket, and Vimeo allow users to upload self-created content. Such sites rely substantially upon amateur artists, many of whom engage in the practice of mixtaping.⁵⁰ The Internet is an ideal venue for them because it can mimic and reproduce multimedia that would otherwise need separate venues such as art galleries and concert halls.

The Internet acts as a giant forum where mixtapers can disseminate these creative endeavors among fans and each other. The Internet also provides a handy platform for exposure of art forms that exist outside the mainstream. Brian Burton is an American DJ who performs under the name DangerMouse. For years, he had been trying to generate a following in America but was unable to make a name for himself in the lukewarm New York DJ Scene. He moved to England in 2001 in search of a recording contract. After sending numerous demo CDs to multiple companies, he was ultimately signed by Lex Records.⁵¹ Burton's first release was *Ghetto Pop Life*, a 2003 collaboration with Jemini, who rapped over Burton's work on the turntables. The debut was well received

by English critics, but DangerMouse was still unable to break through to mainstream audiences.

In the meantime, DangerMouse began working on a mixtaping project during his free time. The project was a remixing of The Beatles' *White Album* and Jay-Z's *Black Album*. Originally the project was intended solely for his circle of friends, but soon after several tracks began popping up on the Internet.⁵² These songs generated so much interest that Burton was spurred to formally release *The Grey Album*.

The album quickly became extremely popular over the Internet because of the surrounding publicity from several blogs offering the album for download.⁵³ *The Grey Album* also came to the attention of numerous music critics in both the U.K. and the U.S. It received extremely positive reviews in *The New Yorker*⁵⁴ and was named the best album of 2004 by *Entertainment Weekly*.⁵⁵ At the peak of its popularity, more than 100,000 copies of the album were downloaded in a single day.⁵⁶ The viral spread of *The Grey Album* is a classic example of the Internet's power to popularize mixtapes.

Why mix?

Why would anyone create and distribute mixtapes if doing so can expose the artist to liability under the current copyright system? Motivations vary. Some individuals do it simply as a form of expression, a way of showcasing their abilities to create something meaningful. These individuals see mixing as more than just simple copy and paste creation. In a filmed interview, DangerMouse explained his motivation for creating *The Grey Album*:

A lot of people just assume I took some Beatles and, you know, threw some Jay-Z on top of it or mixed it up or looped it around, but it's really a deconstruction. It's not an easy thing to do. I was obsessed with the whole project, that's all I was trying to do, see if I could do this. Once I got into it, I didn't think about anything but finishing it. I stuck to those two because I thought it would be more challenging and more fun and more of a statement to what you could do with sample alone. It is an art form. It is music. You can do different things, it doesn't have to be just what some people call stealing. It can be a lot more than that.⁵⁷

Many artists share his passion. For this new wave of musicians, monetary gain does not enter their minds. They do it because they can and because they want others to experience it. In fact, artists like DangerMouse, Girl Talk, and Lil Wayne have all offered their mixtape albums for free online.⁵⁸ But just because the albums are not being sold, these artists do not stand to gain only reputation; A successful mixtape can lead to a career.

The Grey Album was a reputation builder. Before the Internet frenzy surrounding *The Grey Album*, DangerMouse was relatively unknown. But since catching the eyes of critics and artists alike, DangerMouse's reputation in the music community has grown by leaps and bounds. By 2005, he had been enlisted as a producer for the latest Gorillaz album, *Demon Days*. His meteoric rise would not have happened without mixtaping.

Reputation building is a similar rationale behind Sandy Collora's 2006 fan film, *Batman: Dead End*.⁵⁹ This short film features Batman and the Joker encountering Aliens and Predators. This video was an online sensation thanks to its high production values and the famous comic book and film characters involved. Although all the cinematic elements except the soundtrack were newly created for this short, it still violates a number of copyrights because Collora didn't obtain the rights to use any of those characters. The short ends with the disclaimer, "This film is not for sale or resale. It is strictly for the promotional use of the filmmakers." Had Collora tried to sell this video, he would have been sued by DC Comics (owner of Batman and the Joker) and 20th Century Fox (owner of Aliens and Predators). This noncommercial project has brought Collora acclaim in the fan film community, but it has not translated into a mainstream career as it did for DangerMouse.

Mixtaping is an excellent way for mixtapers to refine their creative and technical skills because it allows them to experiment with new software. Some mixtapes even began as assignments for budding art and film school students. Mixtapers can post their compositions to sites like deviantART and YouTube and get instant feedback from users around the globe. This constructive criticism can help mixtapers build portfolios to get jobs such as film editors, graphic designers, and sound engineers.

There is also the potential for mixtapers to earn extra money from their passion. Mixtapers with personal websites can get advertising revenue by drawing viewers there with popular mixtapes. YouTube will make a mixtaper a

partner in revenue sharing if he gets enough views on his page of uploads.⁶⁰ Websites like Zazzle, Etsy, and deviantART offer the ability to sell mixtaped graphics on a variety of goods including prints, magnets, and t-shirts.⁶¹ Shepard Fairey has shown there is a market for mixtaped art. Mixtapers can get paying gigs to perform remixes and mash-ups at clubs. Because making money off others' work is a surefire way to invite a lawsuit, Generation Mixtape tends to downplay this fringe benefit.

The Problem

Until relatively recently, the type of manipulation that mixtaping entails was virtually impossible without large and expensive tools, such as mixers and multiple-track recording equipment. Modern computer technology has enabled people to slice and dissect music, movies, and pictures using commonplace everyday devices like laptops. This explosion and wide dissemination of technology has enabled an entire generation of consumers to go beyond simply consuming pop culture. Instead, users can now digest and create new and unique pieces of pop culture. Although artists have borrowed from other works throughout history, this borrowing has become more far more pervasive.

The problem with mixtaping is that it often violates the rights others have in the underlying works from which mixtapes are made. Owners of creative works are granted control over them by the federal Copyright Act. To use the work legally, mixtapers need to seek permission or get a license to use copyrighted works. Because mixtapers are more concerned with what they can patch together than

with legal formalities, few seek permission from copyright holders. They are thus copyright infringers, and their mixtapes are consequently illegal. Unfortunately, even if they want to stand on a legal foundation, mixtapers frequently lack the resources or know-how to obtain a license.

Rights holders are not required to grant licenses or permission to those seeking to repurpose their works. Rights holders can sue mixtapers for infringing their exclusive and legally enforceable copyrights. There are exceptions to the general rule under the doctrine of “fair use.”⁶² Mixtapers, however, cannot unilaterally declare that their mixtapes are fair use. Such an assertion would hold no water with copyright owners who feel their work has been plagiarized. The conflict over fair use is the central conflict for Generation Mixtape:

Often those who act substantially as copyright owners tend to be of the mindset that there is no such exception as fair use and that all uses of a copyrighted work should be subject to licenses or fines. Those who predominantly act as consumers or users of copyrighted material tend to think that any use is fair use or that at least that each use is fair enough.⁶³

This is why judicial decisions are sought to objectively decide whether a mixtape does or does not violate another’s copyright. Absent a legal decision, many mixtapes exist in a liminal space between copyright infringement and fair use, the intellectual property equivalent of Schrödinger’s cat.⁶⁴

In a time of cruder technology, copyright’s rigidity may not have mattered. Analog mixtapes of clearly infe-

rior quality and very insular distribution seldom ran afoul of rights holders. But today trends in modern technology have introduced a creative circle in which the consumer can also become the equal of the creator. Millions of amateurs now composite new works using materials that they did not create themselves and do not have the rights to use. The technological features that allow Generation Mixtape to flourish also make it a rival of the entertainment industry.

Approximately one quarter of Internet traffic worldwide involves the theft of intellectual property, which is estimated to cost “the U.S. economy more than \$100 billion every year, and results in the loss of thousands of American jobs.”⁶⁵ Between 2002 and 2004, “the number of suspects referred to the United States attorneys with an intellectual property claims increased twenty six percent.”⁶⁶ It is unknown how many of those directly related to mixtapers, but it is clear that copyright holders continue to enforce their copyrights across the digital landscape. Even so, there are relatively few cases that deal directly with mixtaping. One explanation for the dearth of lawsuits directly related to Internet mixtaping is that mixtapers tend to be amateurs without the financial resources to make a full lawsuit cost effective for rights holders. It is more economical to scare mixtapers into stopping their infringing activities by sending cease and desist letters or filing DMCA “takedown notices” against them.⁶⁷

Each copyright lawsuit is fact specific, so it is difficult to articulate a concise and consistent rule on mixtaping

and fair use. We provide cases to explain how courts evaluate a variety of analogous mixtaping scenarios. These cases may come from different federal court jurisdictions, but we have selected cases whose precedents have been influential across most jurisdictions.⁶⁸ We focus on the context of musical mixtaping because it provides the most clear and easily identifiable example of the practice. Many cases discussed involve mixtaping independent of the Internet. These principles are still analogous to modern mixtaping. There is no black letter law, so these principles may apply differently for mixtaping across different media. While this monograph focuses on copyright, we also explain briefly how mixtapers infringe on trademarks and rights of personal publicity and privacy. We also provide advice on how mixtapers can obtain licenses. It is vital to examine these precedents so that mixtapers can decrease the risk of being found liable for violating rights and rights holders can see the boundaries the law places on enforcing their rights. The conflict between the artistic expression of mixtapers and the enforcement of copyright law is the crux of this monograph.

II: MIXTAPES AND COPYRIGHT

Exclusive Rights and Derivative Works

Unlike mixtaping, copyright is not a novel concept. In fact, the origins of American copyright law lie in 1787 when the United States Constitution was drafted.⁶⁹ The

underlying purpose of copyright law is to encourage creativity. Essentially, our copyright scheme assumes that artists will be more willing to create when they know their work will be protected from infringement.

Once a work is protected by copyright, certain exclusive rights flow to the copyright holder. The Copyright Act provides six separate and exclusive rights to copyright holders: (1) to reproduce the copyrighted work in copies; (2) to prepare derivative works based on the original material; (3) to distribute copies of their work; (4) to perform their work publicly; (5) to display their work publicly; and (6) to perform their work publicly by means of a digital audio transmission.⁷⁰ Artists can contractually transfer all or some of these rights to other parties. The studios and companies that collectively constitute the entertainment industry are the parties that tend to amass the copyrights that most interest Generation Mixtape.

The most common issue that arises in the context of mixtaping is the exclusive right to prepare derivative works. By definition, a mixtape is a derivative work. A derivative work “is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”⁷¹ Mixtapes are considered derivative works since they owe their existence to earlier works. Moreover, a derivative work also constitutes “a work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an origi-

nal work of authorship.” This is relevant because many mixtapers consider their efforts to be commentaries on of the underlying works.

Some mixtapes, such as mash-ups, may be more specifically defined as compilations. Compilations are “formed by the collection and assembling of pre-existing materials ... that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” Because compilations are bound by the same guidelines as derivative works, we will use ‘derivative work’ to broadly encompass both compilations and mixtapes that are not compilations.⁷²

Unless authorized by the copyright holder, derivative works are automatically presumed to be infringements. Mixtapers have the burden of proving that even though unlicensed, the mixtape does not violate the rights of the copyright holder. This is known as the “fair use” defense. (In the next chapter we discuss successful and unsuccessful attempts to use the fair use defense.) If a court accepts a mixtaper’s fair use defense, he will not be liable for copyright infringement. In fact, mixtapers who succeed in a fair use defense can even claim copyright over their mixtapes.

The creator of a derivative work can claim copyright over only the material that was not present in the material it was based upon.⁷³ For example, when Lil Wayne uses the entire backing track from another artist’s song the beat is the same, the flow is the same, and the atmosphere is the same. The only elements that have changed are the words and the performer. Therefore, Lil Wayne can only copyright his new lyrics and the sound record-

ing of him performing them. He cannot claim ownership of the copyright in the backing track even if he obtained permission from the rights holder to use it.

Originality

Courts must decide on a case by case basis whether each unauthorized derivative work contains enough originality to be exempt from liability or instead constitutes a theft of another’s intellectual property. Under the most recent revision of the Copyright Act, copyright protection is available for “original works of authorship fixed in any tangible medium of expression.”⁷⁴ An immediate issue is the curious absence of a unified and clear definition of originality.

What we do know is that the courts apply a very low standard to the requirement that a creation be original. The new work does not have to be something completely new to obtain copyright protection; it merely needs to be “a distinguishable creation” from other works.⁷⁵ But having low standards of originality does not mean that there are none: “[Slavish] copying involving no artistic skill whatsoever does not qualify.”⁷⁶ The changes mixtapers make to other works must be more than superficial or trivial and must demonstrate some creative effort. For example, tweaking the audio of an episode of *True Blood* so that all the characters are renamed Oswaldo would not be significantly original. This hypothetical change is inconsequential to the creative expression contained within the episode, so this mixtape lacks enough originality to obtain its own copyright.

A work that is nearly identical to another work, however, may still be deemed original if the author of the second work can show that he created it independently of exposure to the earlier work.⁷⁷ Access to another work is one of the necessary elements of a successful copyright infringement claim. In the absence of access to a copyrighted work, no infringement can occur because the defendant could not have intentionally or subconsciously copied that work. For instance, two photographers who take a picture of the sunset from the same hill simultaneously would produce two original photographs even if they're virtually identical. A third photographer who takes the picture of the sunrise on the same hill at a later date would also produce an original photograph providing that he had not seen the earlier photographs of the same subject. If that photographer sought to replicate the sunrise photograph of another, however, the recreation of the earlier sunrise photograph would be an unoriginal infringement. Independent creation can rarely be asserted by mixtapers, since mixtapes are dependent on their authors' having access to earlier works as raw materials.

Because there is no statutory definition of originality, judges have to evaluate each mixtape on its own merits. The Copyright Act does not specify whether originality should be judged by the standards of average audiences or experts. Judging originality is especially problematic in the case of musical mixtapes because there is almost infinite variety in how music can be remixed. Altering elements such as rhythm, tonal pitch, and volume dynamics can make a common song unrecognizable.⁷⁸ That mix-

tape may sound wholly original to average listeners, whereas connoisseurs and musicologists may be able to discern the underlying songs that were spliced together. This issue becomes more complicated when several remixed recordings are spliced together. Courts have developed tests for originality based on interpretations from laymen and experts alike. Either way, it's never certain whether a mixtape will always be "a distinguishable creation" apart from its underlying components. There is no universal standard for mixtapes, but courts often defer to expert testimony in music cases.

Whether mash-ups are copyrightable is murky since mixtapers usually aren't adding any of their own content to the overlaid songs and clips. Can they get a copyright in the hybridized works since the component parts were never combined before? Or is there no originality for just grafting others' songs together?

The answer depends on the manner in which the components of a mash-up are put together. For example, suppose a mixtaper inserted a country and western song in-between a string sonata and a blues song. While those individual compositions might not have previously been combined in that order, both ordinary audiences and experts could tell that they are three distinct pieces strung together. That mash-up would not be sufficiently original because the components have not been altered in any way that distinguishes them from their original forms. It does not show much creativity on the part of the mixtaper. If these songs were remixed before being linked, this mixtape would have a higher degree of originality. If the songs

were overlaid, that would also enhance the originality level. Essentially, the more creativity a mixtaper uses to distinguish his output from the source material, the more likely that mixtape will be considered original.

Fixation and Registration

Until 1978, federal copyright protection was available only to works that had been officially registered with the federal Copyright Office. If an unregistered work was infringed, the creator could receive protection only under a particular state's copyright law. But a change to the law in 1978 removed the registration requirement. Now federal copyright protection is automatic upon fixation of every original work.

Fixation is a prerequisite to copyright protection.⁷⁹ A work is "fixed" whenever it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."⁸⁰ A work is copyrighted as soon as it becomes fixed in a tangible form.⁸¹ Some examples of tangible forms are paintings, books, sound recordings, and digital files. There is no copyright protection for a work that exists only as an idea in someone's mind. Copyright is available only when such an idea is expressed in a relatively permanent medium.

The elimination of the registration requirement is a potential speed bump for mixtapers. While the Copyright Office's records can be searched for all works that have been formally registered, there is no database of all fixed works, making it difficult for mixtapers to identify the

owners of unregistered works. While most mainstream works are still registered, amateur and fringe works might not be.

Although registration is now optional, registering a copyright confers additional protection to the copyright owner. As a result, it is riskier for mixtapers to incorporate registered works. By registering the copyright within five years of creation, the copyright holder obtains the legal presumption that he owns a valid copyright in the work.⁸² (The rights holder's ownership of a copyright could be found to be invalid at trial, for example, if the copyright registration was found to contain fraudulent misstatements of fact.) At a trial, a mixtaper facing a registered copyright is more likely to be declared a copyright infringer. Holders of registered copyrights may also be awarded statutory damages and attorneys' fees in addition to other damages.⁸³

Mixtapers can also register their mixtapes as derivative works.⁸⁴ To do so, they must identify all the prior works that are incorporated into the mixtape and include a description of the original content added.⁸⁵ The Register of Copyrights has discretion to refuse an application for registration if he does not believe the mixtape meets the criteria for being copyrightable.⁸⁶ If registration is rejected, the mixtaper will be informed of the reasons for rejection in writing.⁸⁷ Knowingly including false information on an application for mixtape registration is a criminal offense that can result in a \$2,500 fine.⁸⁸

Few mixtapers opt to register their mixtapes. One reason may be that they might not realize that registration

is an option.⁸⁹ Mixtapers might also refrain from registering because they do not want to prevent other mixtapers from using their work. The criminal sanctions against filing false registration applications may also frighten mixtapers who are uncertain about how to file. If a mixtaper does obtain a valid copyright registration in his mixtape it will weigh in his favor in potential infringement suits. In a dispute involving a registered work and a registered derivative work, the Register of Copyright may be called to give expert testimony on why the mixtape was copyrightable.⁹⁰

Copyright Duration

The date of fixation is important because it determines the length of the copyright. Works fixed before 1978 have different copyright terms than later works. When a copyright expires, the work enters the public domain so that anyone can legally use it. By checking the fixation dates of the works that they wish to manipulate, mixtapers can determine whether they first need to obtain clearance. All copyrights expire at the end of the calendar year in which their duration terminates.⁹¹

The copyrights for all works created before 1923 are now expired.⁹² Because of amendments that have extended copyright duration, works created between 1923 and 1963 may be protected for a total of 95 years.⁹³ This means that the earliest copyrights from this period will expire in 2018. Works from this period may already be in the public domain, however, if they lacked a notice of copyright or their copyrights were not renewed.⁹⁴ For example, the movie *It's a Wonderful Life*, released in 1946, is now in

the public domain for lack of renewal. The need for copyright renewals was abolished for works created after 1964.⁹⁵ Works created in 1964 will begin expiring in 2023.

All works created from 1978 onward are protected for the life of the author plus 70 years. For joint works, the 70-year limit is added after the death of the last surviving co-author. As long as mixtapers know the author's date of death, they can easily determine when a work will become part of the public domain. So under this scheme, the earliest date is 2048.⁹⁶ For anonymous works, pseudonymous works, and works made for hire, the author's date of death is irrelevant: "the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from its creation, whichever expires first."⁹⁷ Notice of copyright is now optional for works created after 1978, but the presence of a copyright notice will defeat claims by mixtapers that they had no knowledge the work they used was copyrighted.⁹⁸

Mixtapers still confused about when a work's copyright will expire should consult the Public Domain Sherpa.⁹⁹ One of its many useful features is the copyright term calculator.¹⁰⁰ From users' answers to a series of questions about a particular work, this tool calculates when a work will enter the public domain. This site also contains many links for finding a variety of media in the public domain.

The Public Domain

Though it is not a physical location, the public domain is an excellent resource for mixtapers. Public domain is the term used to describe the collective pool of intellectual

properties that have no copyright restrictions. It is filled with items that cannot be copyrighted such as ideas and facts as well as works whose copyrights have expired.¹⁰¹ All copyrighted works will eventually make their way into the public domain; once the copyright lapses, it cannot be restored. That is why anybody can make a new version of *The Legend of Sleepy Hollow* in any medium without needing permission from Washington Irving's estate.

A major concern for mixtapers of music is that there are very few sound recordings in the public domain to sample. Sound recordings were not protected by copyright until 1972,¹⁰² when they were granted a copyright term of 95 years. Before 1972, sound recordings were not considered copyrightable material but were protected under a variety of state laws, which provided protection terms that were indefinitely longer than those set by the Copyright Act. Now that they are encompassed by copyright, the earliest date that a sound recording will fall into the public domain is 2067.¹⁰³

Using items from the public domain removes many of the legal frustrations that can plague mixtapers. There is no need to get a license for public domain material, nor can anyone be sued for remixing anything in the public domain. Therefore mixtapes based only on public domain works are much more likely to be copyrightable as derivative works than mixtapes based on works that are still copyrighted. The mixtaper, however, cannot claim copyright over any portion of the mixtape that comes from the public domain. The public domain, unfortunately, is not much use to mixtapers who want to use

only the latest content. No new works will enter the public domain until 2018, and those additions will be works created in 1923.

A significant set of problems can arise from works created after 1922 but prior to 1978. Under the earlier system, copyright was based on the date of publication instead of the life of an author. This rule applied to derivative works as well. Each derivative work has its own copyright term distinct from the term granted to the original work. Works published before 1964 required that the copyright owner renew the copyright of the original and any derivative works. It is possible that the original and its derivative works will not all be available in the public domain at the same time, especially if necessary renewals have not been filed.

Such complexities were at issue in a case of analog mixtaping. Doubleday & Co. published and registered General Dwight D. Eisenhower's *Crusade in Europe* in 1948.¹⁰⁴ Doubleday licensed the exclusive right to produce a television series based on the book to Twentieth Century Fox Film Corporation. The result was a 26-episode series also named *Crusade in Europe*, featuring narration derived from the book over war footage that premiered in 1949.¹⁰⁵ Doubleday renewed its copyright in the book in 1975, but Fox allowed the television series to enter the public domain by letting its renewal lapse in 1977. Fox reacquired the right to sell the television series on videotape in 1988.

In 1995, Dastar Corporation created a videotape set entitled *World War II Campaigns in Europe* that it edited from the original televised version of *Crusade in Europe*:

Dastar's *Campaigns* series is slightly more than half as long as the original *Crusade* television series. Dastar substituted a new opening sequence, credit page, and final closing for those of the *Crusade* television series; inserted new chapter-title sequences and narrated chapter introductions; moved the "recap" in the *Crusade* television series to the beginning and retitled it as a "pre-view"; and removed references to and images of the book.¹⁰⁶

Each tape of *World War II Campaigns in Europe* was as much a remix as any video a modern day mixtaper would upload. Dastar did not acknowledge that its video series was based on either the *Crusade in Europe* book or television series.¹⁰⁷ It sold this video series at prices that substantially undercut sales of Fox's video series. Fox sued Dastar in 1998 on both copyright and trademark grounds.

The claim against Dastar was that, although the television series was in the public domain, it had infringed the copyright in the book upon which the series was based. Because the book that the public domain movie was based upon still had a valid copyright, Dastar had infringed the copyright in that underlying work. "Dastar admitted to copying without authorization substantial portions of *Crusade in Europe* to create *Campaigns in Europe*."¹⁰⁸ The court sided with Twentieth Century Fox in finding that Dastar was a copyright infringer.

This case shows that it is important for mixtapers to identify the elements of a work that are public domain

and separate them from those elements that are copyrighted. Derivative works based on public domain works may also remain in copyright even if the underlying work is public domain. For example, mixtapers are free to do whatever they want with the original silent version of *Nosferatu*. Because it was made in 1922, it is in the public domain in both the United States and its home country, Germany.¹⁰⁹ Mixtapers, however, cannot use the musical score and intertitles from the 2005 restored version of the film because they were newly created for this edition and currently embody unexpired copyrights.¹¹⁰ Mixtapers also can't freely use the *Nosferatu* remake because this 1979 derivative work is still copyrighted in the U.S. and Germany.¹¹¹

Character Copyrights

Mixtapers frequently incorporate fictional characters that they do not own in graphic and video mixtapes. Fictional characters are also copyrightable subject matter as long as they are delineated sufficiently to be considered original.¹¹² The characters must be distinctive: those with multi-faceted personalities, unique dialogue, and vivid physical appearances are most likely to be copyrightable. At the opposite end of the spectrum, stock characters that are essentially background character or stereotypes cannot be copyrighted.

The copyright in a unique character exists separate from the copyright in the works that feature the character. For example, Disney owns the copyright to every episode of the cartoon series *Duck Tales*, which stars

Scrooge McDuck. But the copyright in Scrooge McDuck is independent of *Duck Tales*; a mixtaper who put Uncle Scrooge in a video or graphic without using portions of *Duck Tales* would still infringe Disney's copyright in that character. The copyright in a character lasts as long as the copyright in a work in which the character first appeared. Since the character first appeared in 1947, Disney will be able to enforce its copyright in Scrooge McDuck until 2042.¹¹³

Copyright holders own the exclusive right to derivative works based on their characters. Mixtapers must therefore also license the right to use copyrighted characters. For example, Honda once commissioned a commercial for its Honda del Sol convertible that evoked James Bond.¹¹⁴ Metro-Goldwyn-Mayer sued Honda for violating its copyright in the James Bond character and films. Honda countered that the concept of James Bond can't be copyrighted and that the character has appeared in books and three movies not produced by MGM. "To the extent that copyright law only protects original *expression*, not *ideas*, [MGM's] argument is that the James Bond character as developed in the sixteen films is the copyrighted work at issue, not the James Bond character generally."¹¹⁵ The court agreed that MGM's film version of James Bond was sufficiently delineated to be copyrighted.

Honda contended that its commercial was meant to emulate the genre of spy thrillers as a whole rather than James Bond specifically.¹¹⁶ MGM asserted that the commercial was substantially similar to its James Bond film franchise because both feature "a high-thrill chase of the

ultra-cool British charmer and his beautiful and alarming sidekick by a grotesque villain in which the hero escapes through wit aided by high-tech gadgetry."¹¹⁷ The court found that the commercial infringed on five protected elements and six sequences from the James Bond film series. Rather than being transformative, the commercial copied the total concept and feel of James Bond to such an extent that viewers might mistake it for a scene in one of his movies. The court found that MGM was harmed by this commercial because it cost the studio millions in potential licensing deals and diluted the long-term value of its copyright in James Bond.¹¹⁸ MGM was granted an injunction to prevent the commercial from being aired on television again.

Some mixtapers may endeavor to strike a balance between copyright holders' rights and their own creativity by not directly duplicating protected content. For example, industrious mixtapers could film a Wonder Woman movie without using any excerpts from any of the comic books, television shows, or cartoons she has appeared in. They could even write a script for this fan film that was not based on any of the many stories featuring her. The only similarities would be that the Wonder Woman in the mixtaper's film acts and looks the way that Wonder Woman is traditionally presented. The lawsuit over the Honda commercial shows that this type of mixtaping could still get mixtapers into hot water. Because DC Comics owns the rights to Wonder Woman as she appears in a variety of licensed media, this fan film would likely constitute an infringement even if it did not directly

incorporate any of those pre-existing works involving Wonder Woman.

To avoid liability, the mixtaper must find a unique way to express each character rather than producing a work that emulates the total concept and feel of the protected character. (Achieving this could be very difficult for a character like Wonder Woman because she has gone through a plethora of official iterations since 1941.)¹¹⁹ The boundaries of character infringement are very ill-defined and fact specific. The issue here is that the rights holders want mixtapers to avoid using their characters in ways that audiences would mistake for an authorized use.

Another difficulty for mixtapers is that copyrighted characters may also be trademarked. Trademarks are words, symbols, images, or phrases used to identify the products of a particular rights holder in commerce.¹²⁰ Therefore mixtapers who use others' characters may be sued for both copyright and trademark infringement. Trademarks can last indefinitely if renewed each decade and are governed by both state and federal laws.¹²¹ Because the trademark in a character could technically last long after the copyright in the character has expired, rights holders sometimes try to enforce trademark rights in characters that have entered the public domain. For example, even though the character of Zorro is in the public domain, Zorro Productions Inc. is still adamant about enforcing its Zorro trademarks even where it may be overstepping those rights.¹²² Courts, however, have held that it is invalid to assert trademark claims as

substitutes for copyright claims in characters that have already entered the public domain.¹²³ Therefore trademarks cannot be enforced if the only motive is to prevent others from using public domain characters.

Mixtapers need to be aware that there are still restrictions on how they can use public domain characters. Even though *The Wonderful Wizard of Oz* is a public domain book, Warner Brothers Entertainment owns the copyrights to how its characters were depicted in the 1939 film adaptation.¹²⁴ This means that mixtapers cannot use aspects of the characters created for the movie, such as Dorothy's ruby slippers or the film's design of the Tin Woodsman, without a license. They also cannot use versions of those characters that appear in illustrations of later editions of the book that are still subject to copyright. Mixtapers can, however, freely use versions of those characters that appeared in L. Frank Baum's text and W. W. Denslow's illustrations from the original book.¹²⁵ Other interpretations of the characters made before 1923 are also fair game. Like all works in the public domain, mixtapers must filter out later additions to those works that are still under copyright.

Multiple Rights Holders

In the multimedia age, mixtapers should note that distinct elements of a single work may be owned by different copyright holders. For example, mixtapers should know that two separate copyrights exist for every recording of a song.¹²⁶ First, the musical composition of the work is protected by a copyright. This consists

primarily of the lyrics and musical score. The composition is usually fixed in sheet music. Second, the sound recording itself is protected. This copyright protects the actual recording of musicians performing the musical composition. The reason behind having separate copyrights is that there can be different sound recordings of a single musical composition. Artists are free to rerecord songs they've previously performed, and those new versions are entitled to separate copyright protection as derivative works.

The six basic constituents of copyrights may also be split apart and sold to different people or companies. For example, the right to make derivative works may be held by one party, and the right to reproduce the work by another. Mixtapers risk being sued by multiple parties for remixing a single work. The number would likely increase when several different works are mashed together as in a Girl Talk song.

In 2007, the video for Samwell's song "What What (In the Butt)" went viral via YouTube.¹²⁷ In 2008, the *South Park* episode "Canada on Strike" parodied Internet celebrity and the Writers' Guild Strike by having the character Butters star in a recreation of the "What What (In the Butt)" video.¹²⁸ The show's creators got permission from Samwell to use his song. They did not, however, get permission from Brownmark Films, the producers of Samwell's music video, to replicate the music video. In November 2010, Brownmark Films sued *South Park* and Viacom for willfully infringing its copyright in the music video for "What What (In the Butt)."¹²⁹

Copyright Infringement Lawsuits

A claim of copyright infringement can arise whenever a mixtaper has violated any one of the copyright owner's exclusive rights.¹³⁰ The rights holder must show that the mixtaper used the protected material without permission. Unless there is a contract, rights holders will have little difficulty proving that they did not grant authorization to use their work. Copyright infringement suits hinge on ownership, access, and similarity.

To establish a claim of infringement, the copyright holder must first prove ownership of a valid copyright.¹³¹ This element tends to be fairly simple to prove, especially if the rights holder (or plaintiff) has registered the copyright. Second, the rights holder must show that the mixtaper (or defendant) had access to the copyrighted work, since without access there could be no way of using the work.¹³² Evidence of access does not need to be conclusive. It suffices if there is a strong likelihood that the mixtaper had heard the original before making the mixtape. Evidence of access could be shown by files of the original song on the mixtaper's computer. Courts are not lenient with mixtapers who sample since "sampling is never accidental.... When you sample a sound recording you know you are taking another's work product."¹³³ Therefore, the true focus to any infringement claim will be whether the infringing work is substantially similar to the original work.

All copyright infringement cases are tried in the federal court system regardless of whether the copyright in question has been formally registered or not.¹³⁴ Such lawsuits are subject to statutes of limitation, which limit the time

during which rights holders can bring infringement claims. If the statute of limitations has expired, the rights holder is typically barred from suing for infringement. The statute of limitations for infringement suits is three years from when the claim arose.¹³⁵ Criminal cases must be filed by prosecutors within five years of the original violation of law.

There is no “rolling statute of limitations.” This rule “bars recovery on any claim for damages that accrued more than three years before commencement of suit.”¹³⁶ The statute of limitations begins to run from the date that the infringing work is fixed or when the copyright holder first became aware of the infringement. This rule encourages rights holders to sue infringers promptly. In 1987, Sutton Roley believed that the new film *Sister, Sister* infringed on a screenplay he had written earlier, but he did not file a lawsuit to enforce the copyright in his screenplay until 1991.¹³⁷ He believed he was within the statute of limitations because *Sister, Sister* was broadcast on television in 1988. Because the movie was made in 1987, the statute of limitations had already expired for Roley’s claim. Therefore he could not proceed on any infringements after the original act of infringement.

Rights holders can sometimes get around the rule against a rolling statute of limitations by showing they could not reasonably have known that any infringement had occurred until after the three-year time limit passed.¹³⁸ If it is shown that the rights holder knew of the infringement early but did not sue until after the statute of limitations had expired, the rights holder cannot prevail on claims relating to the underlying act of infringement.

Penalties for Mixtapers

The Copyright Act provides for certain civil remedies to enforce a copyright. Rights holders may be awarded monetary damages in the form of lost income or loss of potential income.¹³⁹ Plaintiffs may seek actual damages based on mixtaper profits from the infringement. Actual damages are often difficult to calculate, and this remedy is not an option if the infringing mixtaper made no profits. Plaintiffs may alternatively seek statutory damages. Statutory damages ordinarily range from \$750 to \$30,000 for each instance of infringement. If the rights holder can prove that the mixtaper intentionally infringed the copyright, the damages are increased to a maximum of \$150,000. If the mixtaper can show that he was unaware he infringed any copyrights, the courts can reduce the statutory damages to as little as \$200.00. The winning party in the lawsuit may also be granted the cost of attorney’s fees.¹⁴⁰

Courts may also issue temporary or permanent injunctions to stop a mixtaper from further infringing. Any infringing works may be impounded or destroyed.¹⁴¹ Temporary or permanent injunctions may also be issued to seize the infringing goods and prevent mixtapers from creating or selling more in the future.¹⁴²

Mixtapers may also be charged with criminal copyright infringement, although this is a rare occurrence.¹⁴³ There are two types: (1) willful copyright infringement for purposes of commercial advantage or private financial gain;¹⁴⁴ and (2) “the reproduction or distribution, including by electronic means ... of 1 or more copies or

phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000.¹⁴⁵ Willful copyright infringement is defined as fraudulently applying copyright notice to a work when the infringer has no legitimate copyright in it, fraudulently removing a copyright notice from a work, or including false information on an application for copyright registration.¹⁴⁶ Each instance of criminal copyright infringement bears a fine of \$2,500.00.

III: FAIR USE AND MIXTAPES

The Four-Factor Test

Before Generation Mixtape throws its collective arms up in despair over potential infringement lawsuits, there is a defense for mixtapers that may provide considerable comfort: fair use. To that concept we now turn.

In its most basic sense, fair use has been incorporated into copyright law as a means of enabling potentially infringing yet valuable creations that otherwise “promote the Progress of Science and useful Arts.”¹⁴⁷ This exception to rigid copyright protection is essential since all creativity, particularly mixtapes, owes some debt to earlier works. The appeal of mixtapes lies primarily in the melding of the old and the new. For a mixtape to succeed, it needs to take, use, and borrow from those original creations that are well known and

instantly recognizable.¹⁴⁸ The fair use doctrine helps by limiting the exclusive rights granted to owners.¹⁴⁹ Fair use can defeat a copyright infringement claim.¹⁵⁰

The use of another copyrighted work without permission is presumed to be infringing if the rights holder does not approve of this use. Fair use is an affirmative defense available to an alleged copyright infringer to rebut such allegations. This means that even though the defendant has admitted he used another’s copyright without consent, he contends that he used the copyrighted ingredients in a manner that relieves him of any liability to the rights holder. Even though a work is protected by copyright, others may still use it without the copyright holder’s permission, so long as the use is found to be non-infringing.¹⁵¹ Because a defendant’s unilateral assertion that his use was fair is not legally binding, courts must verify whether each unauthorized use at issue is infringing or not.

The fair use doctrine was codified in the 1976 revision of the Copyright Act. Whether a fair use defense will succeed depends on four factors:

(1) the purpose and character of the use (with a focus on whether the use is commercial in nature); (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 the use has on the potential market for or value of the copyrighted work.¹⁵²

These factors are weighed against the facts of each case. They are a series of balancing tests that a court employs in considering whether an infringement is nevertheless covered under the doctrine of fair use.

Fair use is not a bright-line rule.¹⁵³ The fair use analysis must be applied on a case-by-case basis. The four-factor test is subjective so courts can evaluate and reconcile the interests of both rights holders and mixtapers. The factors should be analyzed together, but the relative importance of each factor may vary depending upon the circumstances of each case.¹⁵⁴ Courts are also free to evaluate any other relevant factors outside the statutory guidelines when deciding whether a particular use is really fair.

(1) *Purpose and Character of the Use*

When undertaking a fair use analysis, the natural starting point is to determine the purpose and character of the use. This factor is actually easier to understand if separated into three sub-factors: the purpose of the use, the transformative character of the mixtape, and the economic nature of the mixtape.¹⁵⁵

The first sub-factor looks to why the mixtaper used another's copyrighted work. "Purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" are usually deemed non-infringing because they are socially enriching.¹⁵⁶ These statutory examples are not the only purposes that will support a finding of fair use. A mixtape can still be a fair use even if creative expression or profit were the prime motivators.

The second sub-factor considers whether the character of a work is transformative. This sub-factor is closely tied to the originality requirement for copyright protection. "[If] a secondary work transforms the expression of the original work such that the two works cease to be substan-

tially similar, then the secondary work is not a derivative work and, for that matter, *does not infringe the copyright of the original work.*"¹⁵⁷ A transformative use changes the character of a work so that it no longer fills the same niche. For example, a mixtaper could edit the trailer for the family musical *Mary Poppins* into a trailer for a nonexistent horror film called *Scary Mary*.¹⁵⁸ Criticism, such as a video essay, is presumptively transformative. "The movie reviewer does not simply display a scene from the movie under review but as well provides his or her own commentary and criticism. In so doing, the critic may add to the copy sufficient 'new expression, message, or meaning' to render the use fair."¹⁵⁹ The more transformative a use is, the more likely it will be found to be non-infringing. The closer the mixtape is to the copyrighted work, the less transformative it is. In deciding whether a work is sufficiently transformative, courts tend to consider how much new material or value has been added to the original work.¹⁶⁰

The final sub-factor is whether the new use has a commercial nature. Was the mixtape made for the sake of art, or does the mixtaper intend to profit from distribution of his creation? A finding of commercial intent tends to weigh against finding that the use was fair.¹⁶¹ Nonprofit works, however, are frequently ruled to be non-infringing. Even when the commercial nature of a work is high it should still be considered in connection with the other factors before any final determination of the fairness of a use can be made.¹⁶² Even a non-profit mixtape could fail the fair use test if its character is not transformative. Because sponsored web advertisements make it possible

for Internet users to profit without directly selling products, whether a mixtaper commercially profited from another's work is not always obvious.

The second sub-factor is often the most difficult to evaluate. One of the first cases to explain the concept of transformative use was *Campbell v. Acuff-Rose Music, Inc* in 1994. In that case, a rap group known as 2 Live Crew borrowed and revamped Roy Orbison's "Oh, Pretty Woman" (1964) into a parody version simply called "Pretty Woman" (1989). More specifically, 2 Live Crew revised the song by replacing the original lyrics of "Oh, Pretty Woman" with new, shocking lyrics that were intended to mock and ridicule Orbison's message. The Supreme Court held that this use of the original song was transformative because the parody had clearly altered the original, and imparted it with a "new expression, meaning or message." The court recognized that a parody is only a worthwhile commentary on the original when it mimics or copies parts of the original. The parody at issue turned a popular love song into a song about sexual conquest, thereby embodying a new expression and message. The claim of copyright infringement was defeated because the parodic reinterpretation of the original was ruled a fair use.

Parody is an excellent example of a transformative use because it recasts the original work in a comedic context. Parody requires some degree of copying; otherwise the audience would not readily understand the commentary alluded to by the new expression.¹⁶³ The parody artist's message flows from the meanings and connotations of the original work. Therefore, in a parody, the artist uses the

original work as a form of commentary and is permitted to do so because of the value of the commentary being made.¹⁶⁴

Much like originality, parody has no statutory definition. Whether a mixtape is a parody is subjective. Therefore, mixtapers will not always prevail at trial just by claiming their mixtapes are parodies. Jeff Koons found that out the hard way in 1992.¹⁶⁵ In 1980, Art Rogers took a black and white photo of Jim Scanlon and his wife holding eight German shepherd puppies while seated on a bench. In 1984, he licensed the photograph, titled *Puppies*, to be reproduced on note cards. Jeff Koons bought one of the *Puppies* note cards to use as the basis for a sculpture in his 1988 Banality Show at the Sonnabend Gallery. He insisted that the Demetz Studio, which was producing four copies of the statue for him in Italy, replicate the photograph in wood as closely as possible. Koons had torn the copyright notice off the note card before providing it to the studio for reference.

The Demetz Studio produced a life-sized three-dimensional replica of the *Puppies* note card in wood. The sculpture didn't depict the Scanlons' complete legs, just as in the photograph. One major difference was that Koons had instructed the studio to paint the sculpture in vivid pastels. The litter of puppies was painted with blue fur and white circles on their noses to evoke the highlights from the Rogers photo. The puppies were given more expressive cartoon-like eyes. Daisies were added to the Scanlons' hair. Whereas the Scanlons were cheerful in the photo, they appear more like drug-dazed lotus-eaters in the sculpture. Koons called this derivative work *String of*

Puppies. Koons made a total of \$367,000 by selling three of the four copies of the statues to collectors.

In 1989, Rogers sued Koons and the Sonnabend Gallery for copyright infringement. The judge ruled “that the copying was so blatantly apparent as not to require a trial” and permanently enjoined Koons and the Sonnabend gallery from “making, selling, lending or displaying any copies of, or derivative works based on, *String of Puppies*.” They were also ordered to hand over all copies of the statue to Rogers. The court held Koons in contempt for loaning one of the copies to a German museum just nine days after the injunction was issued.

In examining *String of Puppies*, the appellate court held that this sculpture and its copies were made for purely commercial purposes to enrich Koons and The Sonnabend Gallery. The court noted that “copies made for commercial or profit-making purposes are presumptively unfair.” It decided “that Koons’s substantial profit from his intentionally exploitive use of Rogers’s work also militates against the finding of fair use.”

In addressing the character of the work, Koons claimed that *String of Puppies* was a parody. Koons insisted that his work was “a fair social criticism and asserts to support that proposition that he belongs to the school of American artists who believe the mass production of commodities and media images has caused a deterioration in the quality of society.” The court felt, however, that Koons could not prevail on this defense because *Puppies* wasn’t really the object of his parody. “By requiring that the copied work be an object of the parody, we merely

insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist.” The court meant that Koons copied too much of *Puppies* to make *String of Puppies* recognizable as a parody to casual observers. It felt that merely adding color and some daisies to this exact replica was insufficient to convey his parodic message. The court believed that consumer society was the true object of Koons’s satire, but the massive profits Koons was making from the work undermined his critique of commercialism.

Another lesson mixtapers can learn from this case is that changing the medium of a work does not necessarily make a work transformative enough to avoid liability. Mixtapers frequently transpose from one medium to another. Acoustic songs become embedded in digital mash-ups. Photographs become computer-rendered models. Comic books become amateur films. Elements from several different media get mixed together in the cauldron of the mixtaper’s creative expression. Just changing the format of another’s work, however, is not enough to make it transformative. For example, making a digital file of an eight-bit video game is insufficiently transformative because the file merely reproduces the content from an obsolete game cartridge in a modern format. To transform is to alter the expression of a work. Shifting media can help mixtapers transform works, but they must also mutate what the works communicate to audiences.

(2) *The Nature of the Copyrighted Work*

The second factor of a fair use analysis is the nature of the copyrighted work.¹⁶⁶ This factor has two prongs.

The first deals with whether the work is factual or fictitious. If the copyrighted work is factual, there is more leeway for fair use. Like idea, facts are not copyrightable. Copyright only protects unique expressions of facts and ideas. Mixtapers are free to use the underlying facts so long as they don't copy how those facts are expressed. If a copyrighted work is fictional, a mixtape of it is less likely to constitute fair use because fiction relies so heavily on individual expression.

Clear examples of uncopyrightable facts are the phone numbers and addresses found in telephone directories.¹⁶⁷ Textbooks are considered primarily factual. The line between fact and fiction is blurred in biographical and historical works. As the *Dastar* case showed, mixtapers cannot copy the exact expressions historical events presented in other works.¹⁶⁸

Mixtapers have less freedom to borrow from fictional works. In 2000, Steve Vander Ark created The Harry Potter Lexicon, a reference website for J. K. Rowling's popular book series.¹⁶⁹ In 2007, RDR Books contracted with him to publish a book version of The Harry Potter Lexicon and agreed to "defend and indemnify Vander Ark in the event of any lawsuits."¹⁷⁰ Warner Bros. and Rowling promptly sued RDR Books. Even though the information in The Lexicon was factual, the Potter books themselves are fictional. The court held that The Lexicon copied verbatim too much of Rowling's writing, without a sufficient degree of scholarly commentary. In 2008, the court permanently enjoined RDR to keep it from publishing its initial version of The Lexicon.

Mixtapers who manipulate others' photos should note that they are usually treated as fictional works. During his appeal, Koons claimed that although Rogers had a valid copyright in the *Puppies* photograph, he couldn't claim copyright over the portions copied by Koons because they were unoriginal.¹⁷¹ He believed that the photograph was a factual work because it was an unimaginative depiction of living beings. The court rejected this argument, relying on more than a century of precedents that granted photographers copyright over the artistic choices they incorporated into their photographs, choices such as lighting, angles, and composition.¹⁷² *Puppies* was original since "the quantity of originality that need be shown is modest—only a dash of it will do."¹⁷³ Photographs by photographers with less control of the subject matter and artistic elements, such as crime scene photography, are more likely to be viewed as factual works.

The second prong is whether copyrighted work had already debuted to the public. Copyright holders have the right to decide when and how their works will be released. Under "the right of first publication," it is almost never a fair use if the mixtape becomes public before the work it borrows from. Jumping the gun deprives the rights holders from reaping the rewards of producing new works.

This issue was precisely at issue in the 1985 case of *Harper & Row Publishers, Inc. v. Nation Enterprises*. In 1977, Harper & Row licensed to *Time Magazine* a 7,500-word excerpt of former President Gerald Ford's memoirs to be published before the book went on sale.¹⁷⁴ Before this licensed excerpt went to press, *The Nation*

Magazine obtained an advance copy of Ford's memoirs. *The Nation* published a 2,250 word article based on the leaked memoirs a few weeks before *Time* was scheduled to run its excerpt. Because it was scooped, *Time* cancelled its contract with Harper & Row. Harper & Row sued *The Nation* for theft, interference with contract, and copyright infringement.

The Nation claimed that its publication was fair use because news reporting is one of the infringement exceptions explicitly listed in the Copyright Act. Because this article was reporting on memoirs, not current events, and did not add any new facts, *The Nation* could not avail itself of the newsworthiness exception. It was published first merely to gain an economic advantage over a rival magazine. Nor did it help that *The Nation* had stolen a copy of Ford's manuscript and returned it before *Time* noticed. Harper & Row's right of first publication was violated. Furthermore, *The Nation's* "hastily put together" article was "composed of quotes, paraphrases, and facts drawn exclusively from the manuscript" without any "independent commentary, research or criticism." While *The Nation* did print an article distinct from the manuscript and its planned excerpt, the minimal level of independent expression involved did not expand upon the underlying work in a transformative manner.

(3) *The Amount and Substantiality of the Portion Used in Relationship to the Copyrighted Work as a Whole*

The third factor of fair use requires looking at whether the quantity and value of the copied material was reasonable for the purpose of creating the new work.¹⁷⁵ This fac-

tor entails an examination of both the size of the infringement and the quality of the portion taken by the defendant from the original work.¹⁷⁶ The larger the portion of the original used, the less likely the use will be considered fair. If only a small portion of the work was used, courts must decide how important that portion is in relation to the whole. Even using a minuscule part of the original is not fair use if it's one of the most memorable and vital components of the original, whereas borrowing a small and indistinct portion would likely be considered a fair use.

Because substantial similarity is a necessary element of a successful infringement claim, this third factor is crucial. Substantial similarity is another ill-defined concept. One of the ways to assess substantial similarity is to consider "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."¹⁷⁷ Expert observer tests are usually used instead of lay observer tests when the suit concerns musical works. Copying most of another work or its most important features indicates that a mixtape is substantially similar to another work, and therefore likely an infringement.

If a mixtaper borrows only an insubstantial or unimportant portion of another work, he can assert the *de minimis* defense.¹⁷⁸ Simple copying alone is not an automatic infringement. Some copying is permitted, and the law is unconcerned with minute or trivial instances. In determining whether the use of a work was *de minimis*, a court analyzes the amount copied in relation to the entirety of the original work. The analysis looks quantitatively at the

copied portion's length and qualitatively at the portion's importance to the original work. When the quantity copied is small but the qualitative importance of the portion copied is great, a finding of substantial similarity will be likely. However, if only a very brief or inconsequential aspect of the asserted copy is similar to the original, a court may find against infringement because the similarity was *de minimis*.

In the *Harper & Row* case, *The Nation* attempted to show that its copying was *de minimis*. Out of Ford's entire manuscript, *The Nation* quoted only about 400 words verbatim.¹⁷⁹ These quotations dealt with Ford's pardon of Nixon. The court decided that most people wanted to read Ford's memoirs only for his explanation of this event. The "heart" of Ford's book was therefore encapsulated in those 400 words.¹⁸⁰ The Supreme Court ruled that it was not a fair use to steal the most important part of work, especially before that work was scheduled for release.

How much of a work can be used by mixtapers varies with the purpose of the derivative work. A parody may use more of the original than most other uses because parodies fail when audiences don't see how they relate to earlier works. Parodies can use as much of the original work as necessary to conjure up the original.¹⁸¹ This "conjure up" test limits artists to taking "no more than would be necessary" to evoke the image of the original work in the mind of the audience. A new work that relies so heavily on the original as to substitute for the original, however, would go too far.

Now this is not to suggest that the heart of the original work cannot be used. The heart of the original could be the very portion necessary to conjure up the original in the audience's mind. If that is the case, then fair use would be an appropriate defense. Thus, in *Campbell*, although 2 Live Crew used the first line and the base riff at the heart of "Oh, Pretty Woman," it was also the most readily available portion that would conjure up the original in the audience's mind. Allowing a taking of the heart of the original work and substantial portions of the original work indicated that the Court was willing to be flexible when it was faced with the task of determining whether the borrowed portion was "no more than necessary."¹⁸²

The amount of an original that a mixtaper may incorporate under fair use is of particular concern to mixtapers who make video essays. Although criticism and comment are explicitly protected by fair use, rights holders often consider extensive quoting to be an infringement. Red Letter Media's review of *Star Wars: Episode II—Attack of the Clones* had once been removed from YouTube because of a DMCA takedown notice from Cartoon Network, the broadcaster of the *Star Wars: The Clone Wars* cartoon series.¹⁸³ Although Red Letter Media's reviews include plenty of commentary and satirical elements, the fact that this video essay contained so many clips that were both long and integral to the movie was one of the reasons for the takedown. Mike Stoklasa, the mixtaper responsible for the Red Letter Media reviews, remarked "I had someone actually talk to a copyright lawyer, and *they* didn't know what to make of the reviews. It's a new thing....

You can get away with using a clip from a movie for the purpose of review or commentary, but can you dissect an entire film like that?” After an outcry on the Internet, the entire review was restored and no subsequent legal action was taken.

(4) The Effect of the Use on the Potential Market for or on the Value of the Copyrighted Work

The fourth factor in any fair use analysis, how a derivative work affects the value of the original, is typically given more weight than the other three.¹⁸⁴ In applying it, courts must consider whether the infringing use, if allowed to continue, would have any detrimental effects on the direct and derivative markets for the original work.¹⁸⁵ When the mixtape is commercial, there is always a possibility that it could be stealing profits that would otherwise go toward the original. But when the mixtaper’s use sufficiently transforms the original, it is less likely to become a market substitute for the original.

In *Campbell*, 2 Live Crew’s parody was sufficiently transformative and therefore unlikely to become a substitute for the original. Instead the parody served a “different market function” by critiquing the original. Under these circumstances, the Court found no detriment to the market for the original.¹⁸⁶ It’s irrelevant whether such a transformative use becomes more popular than the original as long as it fills a distinct niche. Parody and criticism may destroy or suppress demand for the original, but these effects are permissible because they are not replacing a market for the original.¹⁸⁷ Copyright holders rarely produce works that criticize their own output, and free

speech concerns make it necessary to protect the expression of opinions, even if scathing.

This fourth factor also takes into account that rights holders, unlike mixtapers, can make authorized derivative works. So even if a mixtape doesn’t affect the current market for a specific work, it could hurt the market for the official derivative works the rights holders intend to produce in the future. “The owner of a copyright with respect to this market-factor need only demonstrate that if the unauthorized use becomes ‘widespread’ it would prejudice his potential market for his work.”¹⁸⁸ For example, it could be said that *String of Puppies* wouldn’t harm the market for *Puppies* since a high-end wood sculpture serves a different economic niche than a black-and-white photograph. But the court held that Koons’s statue would impair Rogers’s ability to license derivative works of *Puppies*. The likelihood of another sculptor paying Rogers to make an authorized sculpture based on *Puppies* was undercut by Koons’s unauthorized version. Koons could also license photos of *String of Puppies*, which would undermine Rogers’s ability to further license the original *Puppies* photograph.

Mixtapes typically tend to fall within genres separate and distinct from those of the original sources. Generation Mixtape caters to a fanbase that values an artist’s ability to bring different works together into one new work, and the product serves a “different market function.” If anything, it seems more plausible that the mixtapes will not substitute for the original works but instead, renew interest in them, possibly increasing the sales of the

original work.¹⁸⁹ From this perspective, mixtaping can be seen as free promotion for the original artist's creation. In order to encourage audiences to seek out the originals, mixtapers should publically acknowledge the source material for each mixtape. Posting disclaimers explaining that they claim no copyright ownership of the underlying works would also help mixtapers prove that they are not trying to usurp the markets for the original works.

Mixtapers should try to avoid making mixtapes that occupy niches that the rights holder was intending to fill with authorized derivative work. Rowling supported *The Lexicon* when it was just a free website.¹⁹⁰ It was only because she intended to write her own Harry Potter reference book that she sued RDR Books to prevent it from releasing a print version of *The Lexicon*. Sales of the unauthorized reference book that quoted substantially from Rowling's works would have definitely served as a consumer substitute for Rowling's version and might have diminished sales of the Harry Potter books themselves. In 2009, *The Lexicon* was released in book format after Vander Ark added substantial scholarly analysis to the earlier draft.¹⁹¹ This additional and transformative content allows the book to fill a separate niche that had not already been filled by Rowling's books. Its cover also features a large disclaimer so buyers will not mistake it for an authorized Harry Potter reference guide.

Fair Use and Good Faith

While the four factors are the bedrock of the fair use test, they are not the only factors courts can consider in

judging whether a mixtape is fair use. One of the most important indicia not included in the Copyright Act is whether the mixtaper acted in good faith. "Fair use presupposes good faith and fair dealing."¹⁹² This maxim means that mixtapers should not willfully plagiarize others' works and then hide behind a fair use defense when caught. They must honestly believe that a contested mixtape meets the fair use criteria. The presence of bad faith and unfair dealing indicates willful copyright infringement. While it's difficult to prove good faith, evidence of bad faith is damning.

In the *Rogers* case, Koons's arrogance did not engender sympathy for his questionable artistic pursuits. His removal of the copyright information from the note card was akin to attempting to destroy evidence. Koons could have easily requested permission from Rogers to parody his photo. His argument that Rogers's photograph was unoriginal did not sound sincere given Koons's involvement in the art world. His willful refusal to immediately turn over the last copy of *String of Puppies* gave the impression that Koons felt he was above the law. Selling reproductions of a banal photo manufactured by an overseas studio for hundreds of thousands of dollars to ridicule commercialism smacked of unabashed hypocrisy. Taken together, these actions and attitudes could be summed up as examples of bad faith. Mixtapers would do well not to emulate Koons's behavior if they want to prevail in a lawsuit.

The recent copyright controversy between Shepard Fairey and the Associated Press over his Obama portrait underscores the importance of good faith to an even greater

degree. Fairey's Obama portraits clearly derive from the Associated Press's iconic photograph. Fairey merely reproduced the photo in a patriotic color scheme and added a presidential campaign button to the lapel and a variety of inspirational titles to the bottom. Fairey's legal troubles arose in reaction to his extensive merchandizing. Obey Giant, Inc., sold reproductions of his derivative Obama portraits on a variety of products including posters, t-shirts, and hoodies.¹⁹³ The tremendous financial success of these products and the resulting publicity caused the Associated Press to realize its image had been misappropriated.

Before The Associated Press could sue him for infringement, Fairey preemptively sought to have his Obama portrait and its merchandise be declared a fair use. In its counterclaim, the AP alleged that Fairey's use was unfair since his Obama merchandise usurped the ability of the Associated Press to merchandise and license its own photograph. Fairey should have obtained a license from the Associated Press to commercially exploit his mixtape of its photograph. Although his composition differs in presentation and medium, Fairey can't say that his portrait is overwhelmingly transformative because he did not significantly add to the Associated Press's Obama photograph or change its context. The essence of both works is that they are respectful and inspiring depictions of President Obama.

At the beginning of this legal conflict, Fairey claimed that his Obama artwork was based on a photo taken of Obama next to George Clooney and was not the same as that shot by the Associate Press. Fairey's claims were disproved when it was revealed that he had falsified evi-

dentiary documents, destroyed other evidence, and made false statements to the public about the matter.¹⁹⁴ Fairey later claimed he was mistaken about which photo he used as reference, although it is unlikely he forgot about cropping out Clooney to make the image. Fairey's lies were so egregious that the court granted his original lawyers' request to withdraw from the case rather than violate their professional ethics. "I've never seen anything like this," commented U.S. District Judge Alvin K. Hellerstein.¹⁹⁵

The trial was scheduled for March 21, 2011. On January 12, 2011, the Associated Press announced that it had settled with Fairey out of court.¹⁹⁶ "In settling the lawsuit, the AP and Mr. Fairey have agreed that neither side surrenders its view of the law."¹⁹⁷ Instead of having a court decide whether Fairey's use was fair, the Associated Press dropped its claim in return for a share of the rights in and profits from his Obama portrait. Fairey has also agreed that he will seek licenses for any further works based on Associated Press photographs.

Although the financial terms are confidential and both sides refused to change their view of the use, the settlement strongly suggests that Fairey had little hope of succeeding at trial, since he had merchandized the composition so thoroughly. Exploiting a derivative work commercially often leads juries to conclude that greed rather than art was the prime motive for producing the derivative work. Fairey's lying in court documents and falsifying evidence would have destroyed his case. Courts obviously frown upon perjury. Fairey's conduct was more egregious than Koons's tearing the copyright information

off the *Puppies* note card.¹⁹⁸ Even were a court to believe that his use was fair, Fairey's perjury would likely have overridden a potential ruling in his favor. To hold otherwise would set a dangerous precedent for public policy. The settlement terms are essentially a ruling in favor of the Associated Press, except that Fairey won't be officially branded a willful copyright infringer.

Sampling and Fair Use

Mixtapers who specialize in music should be aware that courts have generally held that the fair use test does not apply in cases about sampling. The paradigmatic case on this issue is 2005's *Bridgeport Music v. Dimension Films*. This case arose after "Get Off Your Ass and Jam" (1975) by George Clinton and the Parliament Funkadelic was sampled in "100 Miles and Runnin'" by N.W.A. on the soundtrack to the 1998 film *I Got the Hook Up*.¹⁹⁹ "Specifically, a two-second sample from the guitar solo was copied, the pitch was lowered, and the copied piece was 'looped' and extended to 16 beats.... [T]his sample appears in the sound recording '100 Miles' in five places."²⁰⁰ Dimension Films was sued because it failed to obtain a license to digitally sample the song, although it did have a license for the composition.²⁰¹ Dimension Films claimed that this sample was too short and unoriginal to merit copyright protection. "After listening to the copied segment, the sample, and both songs, the district court found that no reasonable juror, even one familiar with the works of George Clinton, would recognize the source of the sample without having been told of its source."

On appeal, the court decided that whether general audiences judged two works to be substantially similar was irrelevant when it came to digital sampling. Access and direct copying are implicit in sampling. "For the sound recording copyright holder, it is not the 'song' but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one." The license the defendants had in the composition permitted them to make a new sound recording based only on the original arrangement. It did not allow them to copy a sound recording based on that composition. They bought the wrong license, and their sampling was declared a clear case of copyright infringement.

This precedent has a direct bearing on Generation Mixtape. It interprets the portion of the Copyright Act dealing with sound recordings to mean that "a sound recording owner has the exclusive right to 'sample' his own recording." Just because a sample has been remixed so that listeners don't recognize it as part of another song does not mean it loses original copyright protection. *Bridgeport* declares that the only way an artist can sample another's sound recording is by paying a licensing fee or by receiving permission from the copyright owner. "Get a license or do not sample." The rationale is that rights holders of sound recordings require strict protection of their copyright because samplers can copy their recordings exactly with a minimum of effort.

Of course, having a license for digital samples doesn't always mean the end of legal troubles. The Beastie Boys were once sued for sampling the first three notes of flutist and composer James Newton's "Choir" in 1992's "Pass the Mic."²⁰² "Beastie Boys repeated or 'looped' this six-second sample as a background element throughout 'Pass the Mic,' so that it appears over forty times in various renditions of the song."²⁰³ The Beastie Boys had purchased a license to sample this sound recording but failed to obtain a license to the underlying composition of "Choir," and so Newton sued.

Newton had acquired a copyright in the composition of "Choir" because it was fixed in a 1978 sound recording, even though he didn't write it down as sheet music. He argued that his flute performance on the recording was so masterful and unique that it became inseparable from the underlying composition. In 2004, the court rejected Newton's argument. "Whatever copyright interest Newton obtained in this 'dense cluster of pitches and ambient sounds,' he licensed that interest to ECM Records over twenty years ago, and ECM Records in turn licensed that interest to Beastie Boys."²⁰⁴

The court agreed with the band that the portion of the composition embodied in the sample was too short and unrecognizable to lay audiences to constitute infringement. The court relied on an expert's testimony that the sampling of three notes separated by a half step was "simple, minimal and insignificant." In addition, upon further examination, the Court determined that the digital sample represented only two percent of the entire original

song.²⁰⁵ Under those circumstances, the court held that the defendant had copied only "nonessential matters" of the musical composition that were not original enough for copyright protection. "Having failed to demonstrate any quantitative or qualitative significance of the sample in the 'Choir' composition as a whole, Newton is in a weak position to argue that the similarities between the works are substantial, or that an average audience would recognize the appropriation."²⁰⁶ The Beastie Boys prevailed because they licensed the sample in good faith and any infringement of the composition (if there was any at all) was *de minimis*.

While Newton's claim of composition infringement was rejected, *Diamond* didn't sufficiently explain whether licensing a sample relieves the necessity of also licensing the composition. The court implies that the underlying composition is embedded in each sound recording and would be covered by the sampling license. Otherwise any license of a sound recording is useless without another license to its composition. Because this issue has yet to be definitively resolved, it's still wise for mixtapers to try to obtain both licenses. If a mixtaper can afford only one license, however, the license to sample is clearly more important for avoiding liability.

The Copyright Act does not require rights holders to grant mixtapers licenses in either compositions or recordings, so the refusal of any party to license could make a mixtape an infringement.²⁰⁷ Because there are no fair use defenses for using unlicensed samples, the refusal of a rights holder is especially problematic for mixtapers who

sample. Critics of *Bridgeport* believe this result is unfair because it can cost mixtapers thousands of dollars to rent a studio and record their own sounds whereas a sampling license may cost only a few hundred dollars.²⁰⁸ The disparity in expense could stifle the creativity and careers of fledgling musicians. A proposed alternative would be compulsory licensing of samples: once a sound recording is released for public consumption, any mixtaper could sample it on paying a licensing fee and statutory royalties. But Congress so far has failed to amend the Copyright Act to require compulsory licensing.

IV: THE DIGITAL MILLENNIUM COPYRIGHT ACT'S EFFECTS ON MIXTAPING

Background of the DMCA

In previous chapters we have provided an overview of copyright. These concepts are the foundation of any legal understanding of mixtaping. In this chapter we turn to a recent piece of federal legislation, the Digital Millennium Copyright Act (DMCA), which specifically applies to the aspects of mixtaping that make it unique. This statute was enacted to deal with the intersection of emerging digital technology and copyright. While this law is vital to the future of intellectual property, the DMCA is so complicated that most people, mixtapers or not, lack a firm understanding of what it means and how it operates.

This ignorance contributes to a high cost of enforcement and much uncertainty.

Advances in technology in the 1990s became a significant concern for industries specializing in copyrighted entertainment. "The medium-specific model for technological protection began to disintegrate."²⁰⁹ Digital means of storing entertainment on CDs and DVDs became standard as cassette tapes and VHS tapes became obsolete. This general-purpose digital storage was a double-edged sword because advanced and affordable computers became widespread in homes during this time. The digital software available for these personal computers is compatible with the new digital methods of media storage. While consumers could make only imperfect copies of whole albums and television programs using old technology like tape recorders and VCRs, the new computer software allows users to make perfect copies of any digital media. To head off a wave of perfect bootlegs, the entertainment industry lobbied Congress to pass new legislation to prevent wide-scale digital piracy.

As a result, the DMCA was enacted in 1998 as an amendment to the Copyright Act and essentially outlaws high tech piracy.²¹⁰ Rather than applying the new legislation to protect a specific method of storage from piracy, the DMCA broadly applies to any technological means of storing and protecting works. Because it is broadly worded, the DMCA need not be updated every time the entertainment industries market a new media format or means of encryption. The DMCA directly affects both mixtapers and the Internet service providers and websites

that host mixtapes. But because the DMCA was enacted before any significant Internet copyright cases arose, a major complaint is that it desperately needs updating to address actual trends in copyright usage on the Web.

DMCA Takedowns

On July 12, 2009, all of Kevin B. Lee's video essays (a total of approximately 300 minutes of film criticism and mash-ups) were deleted from his YouTube account because of copyright infringement complaints from various movie studios.²¹¹ This mass deletion is not an isolated incident against a mixtaper whose uploads could be considered fair use.

Mixtapes can be removed from websites after copyright holders file "DMCA takedown notices."²¹² Takedown notices (sometimes called "notices of claimed infringement") are legal documents sent to Internet providers and hosting websites to inform these intermediaries that the rights holders have a good faith belief that the items listed in the notice violate their copyrights. As indicated in these takedown notices, these intermediaries must promptly remove the items presumed to be infringing lest they be liable for fostering copyright infringement. Rather than risk any legal disputes, recipients of takedown notices almost always remove the identified items as ordered.

Because DMCA takedowns have the same effect as injunctions without the expense or length of a trial, they have frequently been abused to chill speech on the Internet.²¹³ It is difficult to track exactly how often unwar-

ranted takedowns occur because there is no public registry of DMCA takedown notices and counterclaims.²¹⁴ From 876 notices collected between January 2002 and August 2005, the Chilling Effects project found that 21% "target hobbyists, critics, and educational users." One third of the notices presented invalid, flawed, or weak copyright claims. The Electronic Frontier Foundation curates a "Takedown Hall of Shame" to chronicle egregious abuses of the DMCA takedown system.²¹⁵

Mixtapers can contest takedowns by filing counter-notices if they have a good-faith belief that their content is not infringing.²¹⁶ The host must wait ten to fourteen days after receiving any counterclaim before it can restore the content. Anyone who knowingly files a false notice of infringement or counter-notice, however, is liable for any damages incurred.²¹⁷ The Chilling Effects project found that a disproportionately small number of counter-notifications (only seven) were filed compared to the number of takedown notices filed.²¹⁸

A possible explanation for the disparity is that mixtapers may not be aware that a counter-notification is a valid response to an improper takedown. Hosting sites usually mention that counter-notifications are an option but they seldom explain the process well. YouTube, on the other hand, provides a straightforward tutorial on how to file a counter-notification through its site.²¹⁹

A major issue with DMCA takedown notices is that their accuracy is not enforced. Individuals often file improper DMCA claims against content that may violate trademarks or privacy rights but that are not copyright

claims.²²⁰ The notices are also invalid if there is a copyright claim filed by someone other than the owner of the copyright in question. Both Viacom and the Science Fiction Writers of America have sent mass takedown notices that included copyrights not owned by those organizations. The service providers and hosting websites are supposed to take it on faith that the allegations are accurate because DMCA notices are legal forms; they generally remove the content immediately without double-checking whether there is a proper copyright claim.

As a result, DMCA takedown provisions have been used to stifle speech. DMCA takedown notices are often so intimidating that mixtapers avoid filing counter-notifications fearing matters might escalate into a lawsuit.²²¹ While the statute prohibits the filing of knowingly false DMCA notices, the victims of invalid DMCA claims are unlikely to seek restitution because they cannot afford to sue. Rarely is anyone sued for perjurious takedown notices, although it is a valid cause of action.²²² Even if a lawsuit against improper takedown notices is filed, it may be difficult to show that the notice was filed with malice and was not instead a good-faith mistake. The mandatory fortnight removal for all content implicated in a false takedown notice could hurt the reputations and careers of mixtapers without any repercussions for the false accusers.²²³

The proper method of resolving a takedown dispute is uncertain because the statute is ambiguous. In 2007, Professor Wendy Seltzer of Brooklyn Law School uploaded to YouTube a clip of a football game that announced the National Football League's overly restrictive copyright policy

that prohibits any use of its telecasts without consent so that she could comment on how it runs contrary to fair use.²²⁴ The NFL removed the clip with a DMCA takedown notice. Asserting that the clip was fair use for the purposes of criticism and education, Professor Seltzer sent YouTube a counter-notification and had the clip restored. Then the NFL sent a second takedown notice and had it removed again. Seltzer insisted that once the NFL was informed that its DMCA claim had been contested on fair use grounds, it could no longer make a claim in good faith that its copyright was violated. She believed that a civil suit should have been brought against her to bar the reposting of her clip if there was still controversy over the copyright. The NFL said that its action was valid because there is neither a fair-use exception nor a prohibition against repeat takedown notices. But the NFL eventually relented after its two takedown notices were met with two counter-notifications.²²⁵

This procedural ambiguity on how conflicts between rights holders and mixtapers should be resolved allows mixtapers to be harassed indefinitely without a prospect of a judicial decision over whether a copyright has actually been violated in any particular case. Service providers or hosts may permanently terminate mixtapers' accounts rather than lose the safe harbor protection by fostering claimed copyright infringers. Clearer guidelines on the procedure for resolving takedown disputes are needed so that a disputed mixtape will not be forever stuck in limbo between rights holder takedowns and mixtaper counter-notices.

Although there is no explicit fair use defense in the DMCA, courts have ruled against rights holders who don't

take fair use into account before sending takedown notices. In June, 2007, Universal Music sent numerous takedown notices to YouTube regarding videos that used Prince's songs. One of the videos removed was a 29-second video by Stephanie Lenz of her children dancing in her kitchen to "Let's Go Crazy."²²⁶ After restoring her video with a counter-notification, Lenz sued Universal Music for making a false representation under the DMCA and interfering with her contractual relationship with YouTube.²²⁷

The DMCA requires that takedown notices contain a "statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law."²²⁸ Lenz argued that the takedown notice was improper because fair use is an authorized use under the Copyright Act and Universal had not considered whether her video was a fair use before ordering it removed.²²⁹ The court agreed that this was a correct interpretation of the statute. Universal Music had publically stated that its actions in filing the takedowns were in support of Prince's desire "to reclaim his art on the internet [*sic*]" and had "nothing to do with any particular video that uses his songs. It's simply a matter of principle." Because Universal admitted that it had not made any evaluation of whether Lenz's video was a fair use before issuing the takedown notice, Lenz's claim that Universal Music knowingly violated the DMCA was viable.

While this case sounds like a victory for mixtapers, Universal is still appealing the ruling. It is also very difficult to produce evidence at trial of whether copyright

holders performed any fair use evaluation before sending a takedown notice. Therefore it's very difficult to hold rights holders accountable for making false DMCA claims. While rights holders have a duty to examine whether each presumed infringement is a fair use, this ruling does not require that their fair use evaluation coincide with a court's analysis of the same work. The court's interpretation of the DMCA still fails to explicitly make fair use an absolute bar to DMCA takedowns. It is unclear what lasting effect this case will have on the legal rights of Generation Mixtape.

No Fair Use Defense

The portion of the DMCA that most applies to the creation of mixtapers prohibits the removal or alteration of electronic information detailing the copyright in a work.²³⁰ It also prohibits bypassing security measures on digitally protected devices like Blu-Rays, DVDs, and CDs.²³¹ These rules are significant because most mixtapes are created from content that has been extracted from such devices and posted to the Internet. Even if the mixtaper was not the first person to hack into the digitally protected device and post its content online, he could still be liable under the DMCA if he alters the electronic copyright information encoded in the work while creating a mixtape. Even though the DMCA supplements the Copyright Act, it does not provide a fair use defense for violations of its new provisions.²³²

As we have explained earlier, fair use is an exception to a copyright holder's exclusive right to control his work.

Without an express exception for fair uses, rights holders can use the DMCA to squelch mixtapes that would not ordinarily be considered infringements. In fact, courts have interpreted the statute as specifically denying any fair use exceptions. “If Congress had meant the fair use defense to apply to such actions, it would have said so. Indeed, as the legislative history demonstrates, the decision not to make fair use a defense to a claim under [the DMCA] was quite deliberate.”²³³ As a consequence, the DMCA is a major stumbling block to legal mixtaping.

Without a fair use provision, the DMCA effectively prohibits the technologically sophisticated means of modern mixtaping. It criminalizes the method by which the mixtape is made, rather than whether the content of the mixtape is an infringement. Because nearly all modern content is being released exclusively in digital format and analog editing is increasingly obsolete, the DMCA even encompasses mixtapes that would be fair use if made in the pre-digital era. For example, may portions of a DVD be digitally “quoted” in a student’s documentary.²³⁴ This hypothetical example was dismissed outright in 2001 in one of the core cases involving the DMCA.²³⁵ The court said: “Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original.”²³⁶ Constitutional attacks on this interpretation of the DMCA have failed because “[the] Supreme Court has never held that fair use is constitutionally required.”

This argument is counterintuitive since it holds that the standardized digital format of modern media auto-

matically makes quoting an infringement without evaluating the use itself. Such quoting could be fair use only if the mixtape was created with analog editing methods and equipment that were made obsolete by the digital formats that necessitated the DMCA. While the electronic alteration rules are not a bar to using works that existed in earlier formats, newer entertainments have not been commercially released in these obsolete analog formats. These rules therefore deprive mixtapers of access to most modern media. Even transferring an movie on DVD to a VHS tape for analog mixtaping into a video essay would be prohibited since the CD’s digital encryption needs to be bypassed for the transfer. Since there is no fair use exception to the DMCA, mixtapers have less protection for their compositions when they share them over the Internet than if they had not posted them online. So while mixtapes could be protected expression, the means used to create and transmit them may be illegal under the DMCA.

Amending the current DMCA to add a fair use exception would help recognize the interests of mixtapers so that they would not be legitimate targets. By requiring copyright owners to indicate on the DMCA notice that they believe the work they want removed is “not a fair use,” it puts the statute more in tune with the rest of the Copyright Act.²³⁷ It would encourage rights holders to evaluate each suspected infringement rather than send off mass takedown notices based on keyword searches. It would also give mixtapers firmer grounds to sue when fraudulent DMCA notices are sent.

Safe Harbor Provision

The DMCA added a safe harbor provision to the Copyright Act that provides service providers and hosting websites some immunities from copyright liability: so long as they were unaware the content was infringing, hosts and providers are not liable for hosting infringing content by third parties over the Internet.²³⁸ This safe harbor provision allows rights holders to send “takedown” notices if they find content on websites which they believe in good faith to violate their copyrights. The host must remove the alleged infringing content to avoid any liability for knowingly abetting copyright infringement. The host must in turn notify the user who uploaded the content that it was removed for allegedly violating the DMCA.

The DMCA’s safe-harbor provision mostly applies to mixtape-hosting sites such as YouTube, Vimeo, Daily Motion, and PhotoBucket. Hosting sites that do not qualify for this safe harbor may be found liable for facilitating copyright infringement. The result is often that these sites get shut down. If Internet intermediaries are closed down for violating this portion of the DMCA, it will effectively dry up the channels mixtapers use for sharing their compositions with the world. In 2003, Aimster tried to use the safe harbor provision as a defense to charges that its file sharing club facilitated copyright infringement.²³⁹

Aimster claimed it did not have knowledge of infringing uses of its services by users since all files were encrypted, but the court declared “that a service provider that would otherwise be a contributory infringer does not obtain immunity by using encryption to shield itself from actual

knowledge of the unlawful purposes for which the service is being used.”²⁴⁰ It couldn’t show that encryption enhanced its services nor that it would be disproportionately costly to implement ways to reduce the likelihood of infringement. It couldn’t show evidence of its services ever being used for non-infringing purposes either.

Since Aimster was funded by subscription fees rather than ads, it profited directly from users infringing copyrights in sound recordings. “In explaining how to use the Aimster software, the tutorial gives as its *only* examples of file sharing the sharing of copyrighted music, including copyrighted music that the recording industry had notified Aimster was being infringed by Aimster’s users.” The site’s own instruction materials indicated that Aimster had actual knowledge that its services were being used for copyright infringement and actively encouraged it:

Far from doing anything to discourage repeat infringers of the plaintiffs’ copyrights, Aimster invited them to do so, showed them how they could do so with ease using its system, and by teaching its users how to encrypt their unlawful distribution of copyrighted materials disabled itself from doing anything to prevent infringement.²⁴¹ As a result, Aimster was barred from hiding behind the DMCA safe-harbor provision to avoid liability.

The issue came out differently when Viacom sued YouTube in 2007 for \$1 billion for vicariously infringing its content.²⁴² Viacom alleged that YouTube was not only...generally aware of, but welcomed, copyright-infringing material being placed on their website. Such material was attractive to users, whose increased usage en-

hanced defendants' income from advertisements displayed on certain pages of the website, with no discrimination between infringing and non-infringing content.²⁴³

Unlike *Aimster*, however, YouTube has a video take-down policy to minimize the harm by infringing users.²⁴⁴ "When Viacom over a period of months accumulated some 100,000 videos and then sent one mass take-down notice on February 2, 2007, by the next business day YouTube had removed virtually all of them."²⁴⁵

The DMCA places the burden on copyright owners to find specific instances of infringement and notice service providers. "General knowledge that infringement is 'ubiquitous' does not impose a duty on the service provider to monitor or search its service for infringements." YouTube users are now estimated to "upload approximately thirty-five hours of video files every minute," so it would be extremely burdensome for YouTube to verify that each upload is non-infringing.²⁴⁶ YouTube has a three-strikes system for banning users who repeatedly upload infringing content as well as an optional filtration system that copyright owners can use to automatically deal with uploads that match samples of their copyrighted content.²⁴⁷ Because of these anti-infringement measures, YouTube was able to avail itself of the DMCA's safe harbor provision. The court reached this decision in June 2010 after three years of litigation. Viacom filed to appeal the ruling in this case in December of that year, so there is still the possibility that the verdict may be overruled.²⁴⁸

One consequence of the *Aimster* and *YouTube* cases is that mixtape hosting sites are adopting more stringent

usage terms to make sure they qualify for the safe-harbor provision. These policies generally encourage users to report content that might be infringing and allow the hosts to delete any content they suspect to be infringements. Mixtapers are concerned that these hosts will delete their mixtapes and terminate their accounts based on unproven allegations. YouTube's new content filtration system is fully automated, so it is unlikely a human will watch all the flagged videos to check if any are fair uses.²⁴⁹ When deletions occur, a lack of feedback often prevents mixtapers from understanding how not to violate the DMCA. Some frustrated mixtapers have considered hosting their own sites to avoid being subject to others' content guidelines, but doing so would not protect them from DMCA claims.

The overwhelming concern of mixtapers is that the DMCA gives unfair deference to rights holders. The rigid extra-judicial policies of the DMCA also run contrary to established copyright law. Many disputes between rights holders and mixtapers require courts to evaluate the nuances of each alleged infringement. As a result, the DMCA does not adequately protect the interests of mixtapers.

V: INTERNATIONAL ISSUES

Moral Rights

In contrast to the United States, authors in most of the Europe Union and a few other countries such as Brazil and Japan also possess what are known as moral rights.²⁵⁰

These are inalienable rights of artists that exist independently of economic rights in their works.²⁵¹ Moral rights vest permanently in authors regardless of whether they have transferred their copyrights to other parties. There are four moral rights, although the enforceable extent of each varies somewhat from one country to another: the rights of disclosure, withdrawal, attribution, and integrity.

The right of disclosure allows authors to decide how and when to make their work publically available. Authors also have the right to “withdraw a work from publication or to modify the work, even if the rights to exploit the work have been transferred.” The right of attribution actually encompasses three sub-rights: the right to be recognized as the author of a work and all its copies, “the right to prevent his work from being attributed to someone else,” and the right not to be named the author of work he didn’t create. The right of integrity prevents others from intentionally modifying the work.

In France, where moral rights are most strongly enforced, moral rights are perpetual, inviolable, and unassignable. “Generally, the rights of authorship and integrity survive the author.... Not only may an artist not waive the prerogative, but the artist may not transfer the right to a third party.” At the other end of the spectrum, the United States scarcely recognizes moral rights. Domestic copyright laws are more concerned with protecting the economic rights that follow the transfer of copyrights to others. The lack of moral rights prevents the author of a work from interfering with the current rights holders over how that work should be made available to the public.

The United States has adopted only limited rights of attribution and integrity to authors of works of visual art.²⁵² Protection of works of visual art is narrowly restricted to paintings, drawings, prints, sculpture, or photographs “existing in a single copy or as a signed edition of 200 copies or fewer that are signed and consecutively numbered by the author.”²⁵³ This provision of the Copyright Act primarily applies to works found in galleries, museums, and private collections as opposed to those that are heavily reproduced and distributed for public consumption. In the United States, artists may waive their limited moral rights by written consent.

The zeal that some domestic rights holders have shown in having transformative mixtapes removed suggests that they mistakenly believe they also have expansive moral rights. Perhaps much of the controversy surrounding mixtaping would be alleviated if the Copyright Act recognized the moral right of attribution for all work and not just a limited capacity for “fine” art. Giving credit to the original creators and rights holders would prompt fans of mixtapes to seek out the originals. Lincoln Cushing includes it in “his best practices” for using others’ images, but it applies just as well to all varieties of mixtapes.²⁵⁴

Because they put more emphasis on moral rights, many foreign countries are just as concerned with the rights of original authors as the economic rights held by other entities. Under a moral rights system, it’s easy to see that mixtapes could be considered mutilations. Mixtapes often alter the artistic integrity of original content. While

domestic law does not provide the same level of moral rights afforded in most other countries, foreign authors have still found ways to enforce their moral rights in America. In 1976, for instance, the members of Monty Python successfully sued the American Broadcasting Company for editing out 24 minutes from a 90-minute *Monty Python's Flying Circus* episode that it had broadcast to Americans.²⁵⁵ ABC lost because Monty Python had not granted it the right to edit its program along with the broadcasting rights. Now thanks to the DMCA, international authors can prevent American mixtapers from violating their moral rights even without a contractual relationship. As Constantin Film's request for a mass deletion of *Downfall* parodies from YouTube shows, DMCA take-downs are an effective way to preserve moral rights.²⁵⁶ This feature of the DMCA has inadvertently harmonized the U. S. recognition of moral rights with those of the international community.

Restoration of Foreign Copyrights

The intersection of public domain and foreign works also presents complications for mixtapers. Works do not fall into the public domain on the same schedule in all countries. Under the Uniform Copyright Convention, foreign works from countries that the U.S. has treaties with are considered to be published simultaneously in the U.S. for purposes of U.S. copyright and vice versa.²⁵⁷ Foreign works that did not comply with U.S. formalities like notice and renewal used to be cast into the public domain even if they were still copyrighted in their native coun-

tries.²⁵⁸ A 1996 amendment to the Copyright Act restored U. S. copyright protection for foreign works, as long as the foreign copyright had not expired in its native country prior to 1996 and the foreign country is a member of the Berne Convention or the World Trade Organization. "The length of protection for a restored copyright is the remainder of the term of copyright that the work would have been granted had it not lost protection."

Any person who exploited a foreign work in the U. S. under the reasonable belief that the work was in the public domain at the time of the exploitation is called a reliance party. To take advantage of restoration, a foreign rights holder must have filed a notice of intent to enforce restored works with the Copyright Office by 1998.²⁵⁹ Alternatively, foreign rights holders can serve a reliance party with a notice of intent to enforce at any time before suing. The Federal Register must publish lists of restored copyrights and officially filed notices of intent to enforce.²⁶⁰ Once a foreign rights holder files a notice of intent to enforce his restored copyright, the law gives American reliance parties a year to cease any continued exploitation of the restored work and divest themselves of any inventory related to it before the enforcement trial begins.

The paradigmatic restoration case for mixtapers is German photographer Thomas Hoepkner and model Charlotte Dabney's lawsuit against American collagist Barbara Kruger. Hoepkner photographed Dabney holding a magnifying glass in an image titled *Charlotte as Seen by Thomas*, published in the magazine *Foto Prisma* in 1960.²⁶¹ In the U.S., Hoepkner was granted a 28-year

copyright under the 1909 version of the Copyright Act. Because Hoepkner did not file a renewal with the U.S. Copyright Office, *Charlotte as Seen by Thomas* entered the public domain in the United States in 1988. German copyright law, however, granted Hoepkner a copyright for the duration of his life plus 70 years.²⁶²

In 1990, Kruger created an untitled collage incorporating *Charlotte as Seen by Thomas*.²⁶³ “Kruger cropped and enlarged Hoepkner’s photographic image, transferred it to silkscreen and, in her characteristic style, superimposed three large red blocks containing words that can be read together as, ‘It’s a small world but not if you have to clean it.’”²⁶⁴ She sold this composition to The Museum of Contemporary Art in Los Angeles and granted it a non-exclusive license to reproduce it. The composition was sold on t-shirts, magnets, note cubes, postcards, and in a book of Kruger’s work. Kruger’s composition was exhibited at The Whitney Museum of American Art in New York in 2000. The Whitney commissioned the piece to be reproduced as a billboard to advertise its Kruger exhibition, although the museum contended that the billboard was intended as art rather than marketing. This piece also appeared on the now defunct American Visions website.

Hoepkner and Dabney sued Kruger and all parties involved in reproducing and creating derivative works based on her composition. Because the statute on foreign copyright restoration was passed in 1994, Hoepkner could not sue for any acts of infringement that occurred between 1988 and 1994. The amendment was never intended to

provide retroactive damages. “The amended Copyright Act restores copyright only for prospective acts of infringement.”²⁶⁵ Hoepkner alleged that Kruger and her co-defendants were infringing his copyright on an ongoing basis after it had been restored. Because the defendants were reliance parties, Hoepkner’s claims against them were dismissed because he had never served any of them with a required notice of intent to enforce his restored copyright or filed such a note with the Copyright Office. Dabney also sued the defendants under New York law for violating her right to privacy through exploitation of Kruger’s collage.²⁶⁶ Although her likeness was used without permission, this claim was also dismissed because Kruger’s collage and its derivative works were made primarily as art rather than for advertising or trade.

Even though this case was a victory for Kruger, mixtapers should still take note of it. Hoepkner lost on a technicality. Had he sent the defendants notices of his intent to enforce his restored copyright, the case may have turned out differently. Had Kruger created her composition after 1994, Hoepkner’s case would have been much stronger. Had Kruger not been a professional artist, the court might not have considered the merchandising and advertising of her composition to be incidental to its status as art.

Mixtapers need to be very cautious about using foreign works thought to be in the public domain. They must check the fixation dates of works to see whether they are still copyrighted and obtain licenses if they are. Foreign rights holders can serve notices of intent to enforce their copyrights at any time if they believe their rights have been

infringed. Mixtapers should check the foreign copyright durations when using nondomestic works. While most nations also have a copyright term of the life of the author plus seventy years, some have longer copyright terms.

National Treatment

Copyright disputes can become even more complicated when parties from different nations are involved. For example, no legislation or treaty dictates which country's laws should be invoked in an international copyright dispute.²⁶⁷ On the other hand, it has been widely accepted that all litigants are covered by the principle of national treatment. This doctrine means that they will all receive the same treatment under the laws of the country where the suit is being heard regardless of what citizenship they hold.

Generally speaking, copyright laws don't travel outside their country of origin. A copyright claim arising from an infringement outside the U. S. cannot be heard in the U.S. because the Copyright Act has no extraterritorial power.²⁶⁸ For example, websites or service providers whose servers and place of business are located outside the U. S. faces no legal consequences if it does not comply with a DMCA takedown request, unless it operates a subsidiary within the U. S. In 2006, Michael Crook sent fraudulent DMCA notices to censor negative articles about himself to several websites including BoingBoing.net, which faced no legal sanctions for its noncompliance because its Internet service provider, Priority Colo, is Canadian.²⁶⁹ (In 2007, Crook was compelled to accept a settlement agreement for filing fraudulent DMCA takedown notices.²⁷⁰) In 2009,

BoingBoing and Priority Colo also ignored a DMCA notice from Ralph Lauren requesting the removal of an embarrassingly Photoshopped advertisement.²⁷¹ These matters are currently unresolved.²⁷²

Foreign nations will recognize each other's copyright terms, but otherwise interpret international claims under their own laws. A foreign act of infringement is not actionable in the U.S. unless it was predicated upon other acts of infringement that did occur in this country. It does not matter which country felt the harm of an initial act of infringement.²⁷³ A suit can be heard only in the nation where the infringement actually occurred. In 1999, Norwegian teenager Jon Johansen helped hack the standardized encryption needed to play DVDs in order to make a DVD player program compatible with the Linux operating system.²⁷⁴ He also posted this program online, to the umbrage of the motion picture industry. Johansen was tried in Norway and was exonerated of copyright infringement in 2003 because his program was found to be a fair use under Norwegian law. In 2000, the Americans who further distributed Johansen's program over the Internet, however, were found to have violated the DMCA.²⁷⁵

Foreign nations usually apply this rule in return. This principle explains why Hoepkner and Dabney sued Kruger in New York rather than in Berlin.²⁷⁶ Kruger produced her composition entirely in the United States so Germany was an inappropriate forum for the lawsuit even though the original photograph was created in Germany and the aggrieved parties were German citizens.

This principle benefits mixtapers. If foreign parties believe a mixtaper has infringed their intellectual properties, the mixtaper does not have to travel around the world to defend him or herself if the mixtape was created locally. Of course this would not apply if the mixtaper illegally copied the source material for their mixtape overseas before returning home to craft it. Since international travel expenses increase the expense of litigation, most foreign rights holders will not initiate an international infringement lawsuit against a mixtaper unless they think they can win substantial damages or really want to make a point. It is much easier and cheaper for the foreign party to just file a takedown notice against infringing mixtapes.

A major source of uncertainty is that the European Union's copyright system may undergo a dramatic change. It has been suggested that in order to avoid a "20th Century black hole" on the Internet, the European Union needs to abandon the rigid copyright system advocated by the U. S.²⁷⁷ The plan would bolster the Accessible Registries of Rights Information and Orphan Works (ARROW) initiative by dramatically increasing the amount of copyrighted work available on the digital library Europeana.²⁷⁸ Expansive databases would be implemented for the owners of orphan works (whose current copyright ownership is unknown) to claim their works and reduce the disproportionate cost in indentifying rights holders. The ideal result of this initiative would enhance mixtapers' access to work and their ability to find rights holders. It is too early to tell what the actual effect this pending mass digitaliza-

tion will have on Generation Mixtape, but mixtapers should be aware that the global interconnectivity of the Internet could open them up to global liability.

VI: WRAPPING UP

Claims beyond Copyright

Copyright is not the only legal minefield that mixtapers may have to navigate. They can also run afoul of several common-law claims. The laws governing such claims vary from one state to another because they are not preempted by federal law. The laws in these fields are as complicated and nuanced as copyright. Because mixtapers will most likely encounter copyright infringement claims, we have chosen to focus on them. To summarize these other less frequent claims in equal depth would overcomplicate the analysis and detract from the heart of the discussion. Mixtapers should still be aware that they could face liability under other claims as well.

The most common state law claims are violations of the right of publicity or privacy.²⁷⁹ These rights cover essentially all aspects of a person that cannot be copyrighted or trademarked. A violation of the right of publicity occurs when a person's name, likeness (artistic depictions like paintings and sculptures), image (photographs and video), voice, or signature is used without permission for commercial purposes. Some states extend the right of publicity beyond the death of an individual. A violation

of the right of privacy is similar except that it covers non-commercial purposes. California and New York have especially strong laws protecting these rights. Since mixtapers rely on previously created material, it is possible they might incorporate items that infringe on others' publicity or privacy rights. To avoid liability, mixtapers must obtain licenses to use a person's name, likeness, characteristics, or attributes. Many states have an exception for newsworthy persons or if the use of a person's name or likeness is incidental to any commercial purpose such as commentary on current events.²⁸⁰ Mixtapers could face both copyright and privacy claims if they remixed media of a thespian portraying a copyrighted character, such as Renee Zellweger in the role of Bridget Jones. Whenever possible, mixtapers should ask anybody that they are going to include in a remix to sign a release form waiving their right to sue for invasions of privacy and publicity.²⁸¹

Similarly, mixtapers could also be sued for defamation. Defamation is a false statement that injures a person's reputation and is communicated to third parties. For a statement about public officials or other public figures to be actionable as defamation, its speaker had to either know that the statement is incorrect or communicate the statement with reckless disregard for its accuracy.²⁸² Public figures may be celebrities or ordinary citizens who are thrust into the public eye because of a newsworthy event. The standard of proof is lower for private citizens who are not in the public eye. Defenses to defamation are that the statement was a reasonable opinion or that the speaker believed the statement was true on

the basis of his research. People with prior negative reputations such as a history of criminal offenses cannot be defamed if the defamation refers to that widely held negative reputation. An opinion may still be actionable if it is presented as a factual statement. There may be a parody defense if the alleged defamation is so nonsensical that it could not be misinterpreted as fact.²⁸³ Mixtapers should make sure that any potentially inflammatory opinions in their mixtapes are not presented as factual statements.

Unlike claims for violation of privacy, publicity, and defamation, trademark claims are governed by federal law. Trademark violation claims are most likely to be brought against mixtapers specializing in graphic works. Trademark owners tend to be very litigious about how their marks are seen by the public since trademarks draw their value from public perception and good will.²⁸⁴ Casting trademarks in a negative light and mimicking them too closely are common ways of infringing trademarks. It is not a violation to use the trademark in a descriptive or comparative sense. Parody has also been recognized as a defense to trademark infringement. Trademark protection can last indefinitely as long as the trademark is renewed every decade.

Music Licenses

Mixtapers may need many separate music licenses, depending on the scope the mixtape. Mixtapers need licenses to sample sound recordings and often licenses to use the underlying composition. To transmit any musical mixtape over the Internet, a public performance license is

needed.²⁸⁵ A synchronization license is needed to incorporate the mixtaped music into a video.

Although mixtapers usually need many different music licenses, licensing music is often more straightforward than licensing other copyrighted media, because most licenses can be cleared through performing rights organizations, which act as intermediaries between music rights holders and those seeking licenses. These organizations license public performance and synchronization rights. One license generally covers all the songs in the organization's repertoire. There are three performing rights organizations in the U. S.: The American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and The Society of European Stage Authors and Composers (SESAC). Each performing rights organization licenses a different repertoire of music containing different artists, so licenses from multiple agencies may be needed.

The American Society of Composers, Authors and Publishers (ASCAP) is located at One Lincoln Plaza, New York, NY 10023.²⁸⁶ Its phone number is (212) 621-6000 and its website is www.ascap.com. Broadcast Music, Inc. (BMI) licenses the same kinds of rights in its own catalog of music, comprising about half the songs heard on the radio.²⁸⁷ BMI has six different offices in the U. S.; its website is <http://www.bmi.com>. The Society of European Stage Authors and Composers (SESAC) has reciprocal licenses with foreign performing rights organizations.²⁸⁸ It has five U. S. offices and its website is <http://www.sesac.com>. There are also many other foreign performing rights

organizations. The International Confederation of Societies of Authors and Composers (CISAC) comprises 229 performing rights organizations across 121 countries.²⁸⁹ Its website is www.cisac.org. Mixtapers can contact artists directly through these organizations to license a single song rather than the entire catalog of each organization.

Mixtapers need to contact rights holders, usually record companies, to obtain licenses for compositions and samples.²⁹⁰ Performing rights organizations can usually direct mixtapers to the particular rights holders they need and provide current contact information. Internet searches are also useful for this purpose. While some rights holders may grant mixtapers free licenses for non-commercial uses, others may charge a fee ranging from hundreds to thousands of dollars. Rights holders also have the option to withhold composition and sampling licenses from mixtapers. If a rights holder does not grant clearance to use a sample, a mixtaper should not use it since there is no fair use defense for samples.

If a mixtaper wants to record his own version of a song and remix it, he should obtain a mechanical license, which is needed to record and distribute songs based on copyrighted compositions.²⁹¹ The resulting recording is called a "cover" version of a song. After the first recording of a composition has been made for public consumption, anybody who wants to make a cover of it may do so simply by purchasing a mechanical license. Under the Copyright Act, mechanical licenses are compulsory for rights holders, and in return they are guaranteed a per-

centage of royalties from these covers. “Mechanical royalties currently range from 9.10 cents per copy for songs of 5 minutes or less, or 1.75 cents per minute of playing time for songs over 5 minutes.”²⁹² To obtain a mechanical license, contact The Harry Fox Agency, at 601 West 26th Street, Suite 500, New York, NY 10001. The agency is reachable by phone at (212) 834-0100, by fax at (646) 487-6779, and online at <http://www.harryfox.com/public/index.jsp>. The Harry Fox Agency provides Songfile as an interactive tool for acquiring mechanical licenses at <http://www.harryfox.com/public/songfile.jsp>.

Limelight is an alternate source for obtaining mechanical licenses. In addition to statutory licensing fees, Limelight users pay \$15.00 per song for each mechanical license needed.²⁹³ Limelight offers discounts if users are buying mechanical licenses for multiple songs. The statutory royalty rate for mixtapers who make their music available through “on demand” interactive streaming is one penny per digital transmission stream. Limelight can issue most users mechanical licenses in ten to fifteen business days. Digital releases and physical releases of cover versions of songs require separate mechanical licenses, so mixtapers may need to buy an extra mechanical license if they want to distribute physical copies of the covered song. Limelight can be contacted at (646) 863-6375, and its website is <http://www.songclearance.com>.

The amount and variety of musical licenses a mixtaper needs to avoid all liability can be daunting. The Music Bridge is a good resource for confused mixtapers. It offers

a free consultation for individual licensing needs. It can also serve as an intermediary with performing rights organizations for mixtapers who do not want to deal with them directly. Its website is <http://www.themusicbridge.com>. It can be reached by mail at P.O. Box 661918, Los Angeles, CA 90066 or by phone (310) 398-9650.

On a related note, YouTube has an AudioSwap feature to reduce infringement claims from the music industry.²⁹⁴ Mixtapers often upload videos with unlicensed music tracks, which lead rights holders to have such videos removed. AudioSwap provides what is essentially a synchronization license, allowing mixtapers to replace the audio tracks to their videos with free music from a catalog of music that has been pre-licensed for use by users of the site. Although AudioSwap reduces the freedom of mixtapers to choose any music they want, it does protect them from takedown notices by the recording industry.

Non-Musical Licenses

Savvy mixtapers in any medium should try to clear the rights in the underlying works before any conflicts come up. Unfortunately, outside the music world, this process is cumbersome and requires considerable effort. Licenses from a wide array of rights holders are generally not available through giant intermediary organizations as in the case with musical rights. There is also no all-encompassing directory for rights holders of every medium.

The Catalog of Copyright Entries maintained by the U.S. Copyright Office is a good place to start. It

covers works published from 1891 through 1982.²⁹⁵ It is not online, but it is available in print and microfiche in the Copyright Public Records Reading Room of the James Madison Memorial Building of the Library of Congress at 101 Independence Avenue, S.E., Washington, DC 20559-6304. For hours or other information, call (202) 707-3000 or 1-877-476-0778. While the Catalog is a comprehensive index of copyright registrations, it isn't always helpful in determining copyright ownership because it does not contain addresses of copyright claimants or entries for assignments, terminations, and transfers. The online version of the Catalog, covering works registered from 1978 to the present, includes some of those records but not the addresses.²⁹⁶ It is at <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First>. Mixtapers can request additional information concerning copyright ownership from the Copyright Office by filling out a form and paying a search fee based on an hourly rate.²⁹⁷ This search may prove inconclusive because not all copyrighted works are federally registered.

The International Federation of Reproduction Rights Organization (IFRRO) is a coalition of copyright organizations from every continent except Antarctica. Its member organizations are an excellent resource for mixtapers interested in foreign works. Its member index is available at <http://www.ifrro.org/RRO>. IFRRO can be contacted at secretariat@ifrro.org or by calling +32 2 551 08 99. The IFRRO's headquarters is located at Rue du Prince Royal 87, B-1050 Brussels, Belgium.

Internet search engines are useful for finding rights holders of media such as artwork. One of the benefits of the Internet's growth is that just about anyone can be contacted through it, especially if they have intellectual property. Mixtapers can be directed to contact information even if they know only a work's title or author. For licenses to movie and television clips, visit The Internet Movie Database, a comprehensive search tool for locating companies that hold the rights to specific works, at <http://www.imdb.com>. Even if the initial contact information does not lead to the current rights holder, the person or entity contacted can usually direct mixtapers to whoever does hold the rights or handles the licensing.

Mixtapers of images may be interested in sites offering royalty-free or stock photography. Even though a photograph is copyrighted, you do not pay royalties for each use of the photo after an initial license has been paid, and the licensing fees are much more affordable than those needed to remix photographs that are not royalty free. Dreamstime lets users download photos for as little as 20¢, and many are free. It can be contacted at (800) 243-1791 and <http://www.dreamstime.com>. Licenses on iStockphoto start as low as \$1.00 per photo. It is located at 1240 20th Ave, S.E., Suite 200, Calgary, Alberta T2G 1M8, Canada, and can be reached at (866) 478-6251 and <http://www.istockphoto.com>. Mixtapers can also use stock.xchng to exchange their own photographs with other users for free. That site has the same contact information as iStockphoto and is available on the Web at <http://www.sxc.hu>.

Although searching out rights holders may be inconclusive or frustrating, it is an important process for mixtapers. Evidence that a mixtaper has tried to obtain a license is beneficial if they are ever sued by previously unreachable rights holders. Even if the mixtaper is ultimately unable to secure the required licenses, proof that he made a good faith effort to find the rights holders for permission permits an inference that the resulting use is fair.

Creative Commons Licenses

Creative Commons is an organization founded in 2001 that seeks to foster growth and productivity in the Internet age by simplifying the licensing of copyrighted content.²⁹⁸ As of 2009, estimates put Creative Commons licensed works at 350,000,000. Creative Commons licenses are excellent resources for mixtapers looking to incorporate without much hassle content that isn't in the public domain.

Under a Creative Commons license, copyright owners can choose from four basic features with corresponding symbols explaining how mixtapers use their open content: (1) Attribution allows mixtapers to reuse the content in any way so long as the original author is credited, (2) Noncommercial means that the work can be used so long as the mixtaper does not profit from it, (3) Share Alike allows mixtapes to be made so long as they follow the same licensing guidelines as the underlying work, and (4) No Derivative Works means that the work can be copied, distributed, displayed, or per-

formed as long as no mixtapes are made with it.²⁹⁹ These features can combine to form six different licenses, but No Derivative Works and Share Alike cannot be combined since they are incompatible. A Public Domain mark has recently been added for users who want to make their work available free of any copyright restrictions.³⁰⁰ The Creative Commons method of licensing is more flexible than the system that developed out of the Copyright Act.

Creative Commons licenses contain three layers.³⁰¹ The first is the Legal Code, which makes each license legally enforceable. The second is the Commons Deed, which is a summary of the license terms in plain language and with symbols for non-lawyers to understand. Finally, metadata about each is embedded into the online form of each work. This embedded metadata makes it easier for search engines from a variety of websites to locate this open content. An interactive index of the sites that support open content is accessible at <http://labs.creativecommons.org/demos/search>. Because registration is not required to obtain a Creative Commons license from a rights holder, searches of these Creative Commons indexes might not be exhaustive in locating everything that has been made under such a license.

Mixtapers can establish Creative Commons licensing plans for any parts of a mixtape that they originated, such as their own photography. Mixtapes as a whole, however, are not eligible for these licenses (unless explicit permission from rights holders has already been granted) because they include others' copyrighted content.³⁰²

Others can then use these Creative Commons licensed works to make their own mixtapes. Because Creative Commons licenses are non-revocable, mixtapers need to give serious thought to whether they want to make their work available under a Creative Commons license and under which terms.³⁰³

Another similar source is Europeana, a database of art from many European museums and libraries that was launched in 2008.³⁰⁴ It takes a Creative Commons approach to using the art found in its directory. It allows for mixtaping so long as it is not commercial.³⁰⁵ Its web address is <http://www.europeana.eu/portal/index.html> and can be contacted c/o the Koninklijke Bibliotheek, National Library of the Netherlands, P.O. Box 90407, 2509 LK, The Hague, 0031-70 31-40 -991, and Jonathan.Purday@bl.uk.

CONCLUSION

While the majority of this book has been devoted to discussing the legal uncertainties surrounding mixtapes, we know for sure that mixtaping is here to stay. Mixtapes have proven themselves to be a creative and viable form of artwork and a legitimate original creation.

Unfortunately, our legal system has not warmed up to the practice of mixtaping. Courts almost invariably view mixtapes with a suspicious eye. Ultimately, a mixtaper has little hope in the current legal system. But until the copyright landscape changes, there are actions that

members of generation mixtape can take right now to avoid copyright infringement and all its attendant horrors.

Most importantly, mixtapers should seek permission from rights holders before using previous works. More and more artists are granting permission for their songs, movies, or art to be repurposed and reinvented. Not only does permission help avoid legal problems further on, but it also creates a marketplace where ideas are exchanged and modified more openly. The best possible scenario is the creation of an artistic forum where mixtapers and rights holders are aware of one another and respect each others' interests. Asking permission is perhaps the easiest and most important way to shield oneself from legal action. Mixtapers who want to avoid complicated licensing processes should look to work that is already in the public domain or is available through Creative Commons licenses.

Mixtapers would do well to keep the fair use exception at the forefront of their minds when creating. By employing the four factors, Mixtapers have a road map by which to gauge how transformative a creation is and how likely a court would find fair use in an eventual legal proceeding. For example, not reaping economic gain from a mixtape weighs in favor of fair use and frequently dissuades rights holders from taking action in the first place.

Although the DMCA was intended to update our copyright system for a digital world, the DMCA offers little to no protection to mixtapers. Mixtapers should be

aware that the DMCA has no fair-use exception. Moreover, the statute allows for legal sanctions against mixtapers without the need for trial. Since the primary vehicle for mixtapes is the Internet, enforcement of the DMCA can stifle the spread of mixtapes by imposing sanctions for using the Internet as a means of creating and distributing potentially infringing materials. The DMCA sorely needs amending to take into account how Internet uses have evolved.

Although the absences of compulsory licenses for music sampling and a fair use defense under the DMCA are clear impediments to innovation, rectifying these oversights is not a priority for Congress. On April 4, 2011, members of both the House and Senate Judiciary Committees agreed on the need for stronger legislation against online infringement.³⁰⁶ The Judiciary Committees did not differentiate between pirates and mixtapers when discussing the issue, so it is likely that any reforms would further restrict mixtaping rather than encouraging it.

If mixtapes are going to continue to grow in popularity and numbers, Generation Mixtape needs to tread carefully. Mixtapers and rights holders should respect each others' interests. For that to happen, the two sides need to become more receptive to collaborating with one another. Rights holders should not try to stamp out all mixtapes, as mixtapes can be used to promote the works they are based on. Beyond being socially undesirable, eradicating mixtapes seems infeasible considering their omnipresence. Instead, clearer laws on the boundaries of

copyright holders and mixtapers' rights need to be established. Amendments to the Copyright Act in this area are clearly warranted since our culture is constantly expanding the means and desires of mixtapers. Generation Mixtape is pushing the boundaries of copyright law as fast as the latest Internet connections allow.

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116. As the Court noted, MGM “[disputed] this assertion, pointing to the fact that ... the casting director specifically sent requests to talent agencies for “James Bond”-type actors and actresses to star in what conceptually could be “the next James Bond film.”
117. *Id.* at 1294.
118. *Id.* at 1301.
119. The Wonder Woman Pages, WONDER-WOMAN-ONLINE.COM, <http://www.wonderwoman-online.com/> (last visited April 18, 2011).
120. Harvard Law School Web Domain, *Overview of Trademark Law*, HARVARD.EDU, <http://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm> (last visited April 18, 2011).
121. *Trademark FAQs*, United States Patent and Trademark Office, USPTO.GOV, http://www.uspto.gov/faq/trademarks.jsp#_Toc275426707 (last visited April 18, 2011).
122. Pamela Chestek, *Zorro a Preview to Steamboat Willie?*, PROPERTYINTANGIBLE.COM, (Mar. 28, 2010), <http://www.propertyintangible.com/2010/03/zorro-preview-to-steamboat-willie.html> (last visited April 18, 2011).
123. *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 2011 U. S. App. LEXIS 3487, 22-23 (9th Cir. Feb. 23, 2011).
124. *Warner Bros. Entm't v. Dave Grossman Creations, Inc.*, 2010 U. S. Dist. LEXIS 19547 (E.D. Mo. Mar. 4, 2010).
125. George Burden, *The Wonderful Wizard of Oz is Still Enchanting*, LIFEASAHUMAN.COM, (Dec. 21, 2010), <http://lifeasahuman.com/>

- 2010/parenting/the-wonderful-wizard-of-oz-still-enchants/ (last visited April 18, 2011).
126. See 17 U.S.C.A. § 102(a).
127. Sean O’Neil, *UPDATED: South Park sued for spoofing “What What (In The Butt)” two years ago*, AVCLUB.COM, (Nov. 15, 2010), <http://www.avclub.com/articles/updated-south-park-sued-for-spoofing-what-what-in-47695/> (last visited April 18, 2011).
128. Readers can view the full episode at <http://www.southparkstudios.com/full-episodes/s12e04-canada-on-strike>.
129. The initial complaint can be accessed at: <http://images.eonline.com/static/news/pdf/SouthParklawsuit.pdf>. At the time of this edition, there is no indication that the litigation has moved forward.
130. *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992).
131. *Id.*
132. Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 299 (1996).
133. *Bridgeport Music v. Dimension Films*, 410 F. 3d 792, 801 (6th Cir. 2005).
134. In 2010, the Supreme Court clarified that federal courts have exclusive jurisdiction over cases involving copyright. See *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (U.S. 2010). 17 U.S.C. § 411 was previously interpreted as making formal copyright registration a prerequisite for suing in federal court.
135. 17 U.S.C. § 507.
136. *Roley v. New World Pictures*, 19 F.3d 479, 481 (9th Cir. Cal. 1994).
137. *Id.* at 480-481.
138. Cohen, *supra* note 75, at 746-747.
139. 17 U.S.C. § 504.
140. 17 U.S.C. § 505.
141. 17 U.S.C. § 503.
142. 17 U.S.C. § 502.
143. 17 U.S.C. § 506(a).
144. 17 U.S.C. § 101 defines “financial gain” as “the receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.
145. 17 U.S.C. § 506(a)(1)(B).
146. 17 U.S.C. § 506.
147. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S., at 575 (quoting U.S. Const. art. 1, § 8, cl. 8).
148. *Id.* (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845)).
149. 17 U.S.C. § 106.
150. 17 U.S.C. § 107.
151. Cohen, *supra* note 75, at 527.
152. *Id.*

153. *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 561 (1985).
154. See *Campbell*, *supra* note 147, at 578.
155. *Fair Use Overview*, Website Copyright, BENEDICT.COM, <http://www.benedict.com/Info/FairUse/FairUse.aspx>.
156. 17 U.S.C. § 107.
157. *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, 3 (S.D.N.Y. 2001).
158. Chris Rule, *The Original Scary 'Mary Poppins' Recut Trailer*, YOUTUBE.COM, http://www.youtube.com/watch?v=2T5_0AGdFic&feature=related (last visited April 18, 2011).
159. *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 200 (3d Cir. 2003).
160. *Castle Rock Entm't, Inc. v. Carol Publ'n, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).
161. *Harper*, *supra* note 153, at 562.
162. *Campbell*, *supra* note 147 at 584-585; other quoted passages at 579, 572, 580, 583.
163. *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997).
164. *Campbell*, *supra* note 147, at 580.
165. See generally *Rogers*, *supra* note 130, at 301; other referenced materials at 305, 307, 309, 310.
166. *Campbell*, *supra* note 147, at 586.
167. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).
168. See *Dastar*, *supra* note 104.
169. Steve Vander Ark, *The Harry Potter Lexicon*, HP-LEXICON.ORG, <http://www.hp-lexicon.org/index-2.html> (last visited April 18, 2011).
170. *Warner Bros.*, *supra* note 124, at 522.
171. *Rogers*, *supra* note 130 at 306-307
172. See generally *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).
173. See *Rogers*, *supra* note 130, at 307 (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).
174. *Harper*, *supra* note 153, at 542-543.
175. *Id.*, at 544.
176. See generally *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 450 (1984); *Campbell*, *supra* note 147, at 586-87.
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178. *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004).
179. *Harper*, *supra* note 153, at 548.
180. *Id.*, at 568.
181. *Campbell*, *supra* note 147, at 589 ; other quoted passages at 573, 588-589.

182. *Bridgeport Music*, *supra* note 133, at 801.
183. Shawn Adler, *YouTube 'Star Wars' Sensation Explains Copyright Issues*, MTV.COM, (Apr. 6, 2010), <http://www.mtv.com/news/articles/1635555/20100406/story.jhtml> (last visited April 18, 2011).
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186. Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 320-321 (1996).
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227. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).
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232. *Universal City Studios v. Corley*, 273 F.3d 429, 458-459 (2d Cir. 2001).
233. *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000).
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257. Lerner, *supra* note 250, at 1164.
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