

# User-Friendly Licensing for a User-Generated World: The Future of the Video-Content Market

## ABSTRACT

*A picture may say a thousand words, but in today's artistic culture, video is the true king. User-generated remix and mashup videos have become a central way for people to communicate their ideas, to be a part of popular culture, and to bring life to their own artistic visions. Digital technology and the rise of user-generated Internet platforms have enabled professionals and amateurs alike to participate in the creation of web videos, which often incorporate popular content. But this has led to a growing tension between amateur sampling artists and copyright rightsholders. The current video-content-licensing scheme requires individually negotiated contracts for authorized use of copyrighted material, but amateur artists frequently lack the bargaining power and understanding of copyright law to comply with licensing requirements.*

*This Note argues that amateur remix and mashup videos have become a staple in our artistic culture, and the video-licensing system needs to evolve to accommodate artists of all levels. Some have advocated for a "sharing economy approach" to copyright, in which rightsholders voluntarily agree to collaborate in "peer-to-peer" marketplaces. While that approach accommodates the needs of amateur artists, it does not fully satisfy content owners' interest in monetary compensation for the licensing of their original works. In contrast, a collectively managed taxation model, with rates that distinguish between professional and amateur artists, would balance the interests of content owners and sampling artists. It would remove the need for individually negotiated licenses, enable amateur artists to easily experiment with new art forms, and create a viable video-content market. The web video is here to stay, so it is time to turn copyright infringement into profit.*

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In 1921, T.S. Eliot remarked: “Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different.”<sup>1</sup> While emulation may be a standard practice among artists, Eliot distinguished between those who merely copy and those who ultimately find a voice of their own.<sup>2</sup> When done skillfully, borrowing from other artists can result in more than just an echo; it can give rise to something new.<sup>3</sup> By mining existing art for material, creators remain connected with our shared culture while producing works that speak to society in a novel way.<sup>4</sup> In the context of film, for example,

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1. T.S. ELIOT, *Philip Massinger*, in *THE SACRED WOOD: ESSAYS ON POETRY AND CRITICISM* 123, 125 (Methuen & Co. 1960) (1920) (critiquing the way in which poet Phillip Massinger borrowed from the works of William Shakespeare).

2. *See id.*

3. RIP!: A REMIX MANIFESTO (Eyesteelfilm & National Film Board of Canada, 2009) (presenting a “remix manifesto” based on four premises, the first of which is the idea that “[c]ulture always builds on the past”); *see* ELIOT, *supra* note 1 (“The good poet welds his theft into a whole of feeling which is unique, utterly different from that from which it was torn.”).

4. *See supra* note 3.

producers often use modernized retellings of old stories to relate to new audiences: *Clueless* and *Bridget Jones's Diary*, loosely based on the stories of Jane Austen, taught Generation Y lessons of class structure and female empowerment in contemporary language,<sup>5</sup> while *10 Things I Hate About You* and Baz Luhrman's *Romeo + Juliet* invited a new generation to experience Shakespeare in the context of modern society.<sup>6</sup>

The "recycling of old culture" is a deep-rooted tradition, and digital technology, such as video-editing software, has now made it even easier for both amateur and professional artists to revise or reuse existing artistic works.<sup>7</sup> Internet platforms, like YouTube and other user-generated video websites, allow individuals to share these new creations online; this ultimately gives everyone with Internet access the potential for fame and the ability to participate in culture.<sup>8</sup> People who were formerly consumers of art and entertainment now have the digital tools to be entertainers themselves.<sup>9</sup> This has led to a shift in values toward a more democratic artistic culture.<sup>10</sup> Young people, in particular, have come to expect that, no matter who you are or what your background is, you have a right to join in the fun.<sup>11</sup> Today's reality is that, when a twelve-year-old posts a homemade video to

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5. *Jane Austen in Popular Culture*, JANE AUSTEN MULTI-GENRE PROJECT, <https://sites.google.com/a/weberschool.org/jane-austen/home/jane-austen-in-pop-culture> (last visited Oct. 14, 2012).

6. Jessica Scheibach, *Top 15 Films Inspired by Shakespeare*, IMDB, <http://www.imdb.com/list/bVEcJ6CCiCc> (last updated Aug. 5, 2011).

7. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 14 (2008) (quoting Gregg Gillis of the one-man band Girl Talk that "[w]e're living in this remix culture"); Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1872 (2008) ("[R]emix works are created by taking digital snippets from various sources and combining them to create a new work."); Eduardo Navas, *Regressive & Reflexive Mashups in Sampling Culture*, in MASHUP CULTURES 157, 159 (Stefan Sonvilla-Weiss ed., 2010) (defining "remix" as "the activity of taking samples from pre-existing materials to combine them into new forms"); Code of Best Practices Comm., *Code of Best Practices in Fair Use for Online Video*, CTR. FOR SOC. MEDIA, 2 (June 2008), [http://www.centerforsocialmedia.org/sites/default/files/online\\_best\\_practices\\_in\\_fair\\_use.pdf](http://www.centerforsocialmedia.org/sites/default/files/online_best_practices_in_fair_use.pdf).

8. Yalda T. Uhls & Patricia M. Greenfield, *The Rise of Fame: An Historical Content Analysis*, CYBERPSYCHOLOGY: J. PSYCHOSOCIAL RES. ON CYBERSPACE (July 2011), <http://www.cyberpsychology.eu/view.php?cisloclanku=2011061601>.

9. See, e.g., Matthew Mirapaul, *Why Just Listen to Pop When You Can Mix Your Own*, N.Y. TIMES (Aug. 20, 2001), <http://www.nytimes.com/2001/08/20/arts/arts-online-why-just-listen-to-pop-when-you-can-mix-your-own.html> (describing a website that compiled hundreds of amateur remixes of a pop artist).

10. See *id.*

11. See Uhls & Greenfield, *supra* note 8 (analyzing a study that indicated the high value younger people place on achieving fame and celebrity).

YouTube, he just might become a star; this was, in fact, how record executives discovered pop music sensation Justin Bieber.<sup>12</sup>

The growing desire for fame, particularly among members of Generation Y, has made the creation of user-generated web videos very popular.<sup>13</sup> Viral videos have become a common way for ordinary people to respond to, and be a part of, popular culture and maybe even advance their own entertainment careers.<sup>14</sup> In addition to producing purely original material, many web users create videos that build on existing copyrighted material to create novel meaning.<sup>15</sup> These videos, which can sometimes take the form of mashups or remixes, often feature original footage combined with famous content.<sup>16</sup>

Referred to as “sampling” in the music context, this practice is like creating a collage—piecing together disparate elements to make something new.<sup>17</sup> A musician, for instance, might pull samples from jazz, funk, and psychedelic records to create a completely different sound from any one of these genres alone.<sup>18</sup> In the context of user-generated videos, websites such as YouTube are alive with artistic works that combine fragments of popular culture into something unexpected; for example, one video artist created a mashup of clips of President Barack Obama’s speeches, which together form the lyrics to the pop song “Call Me Maybe” by Carly Rae Jepsen.<sup>19</sup> Another video mashup brings together footage of Michael Jackson from the 1980s, Britney Spears from the 1990s, and Taylor Swift from the 2000s to make one music video that spans the decades.<sup>20</sup> It used to be that a picture was worth a thousand words, but today, video is king.

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12. Desiree Adib, *Pop Star Justin Bieber Is on the Brink of Superstardom*, ABC NEWS (Nov. 14, 2009), <http://abcnews.go.com/GMA/Weekend/teen-pop-star-justin-bieber-discovered-youtube/story?id=9068403>.

13. See Navas, *supra* note 7, at 171; John Izzo, *A Culture of Fame*, HUFFINGTON POST (Nov. 19, 2007, 5:20 PM), [http://www.huffingtonpost.com/john-izzo/a-culture-of-fame\\_b\\_73366.html](http://www.huffingtonpost.com/john-izzo/a-culture-of-fame_b_73366.html) (discussing a survey in which 1/3 of high school students said their goal was to be famous); Sharon Jayson, *Generation Y's Goal? Wealth and Fame*, USA TODAY (Jan. 10, 2007), [http://usatoday30.usatoday.com/news/nation/2007-01-09-gen-y-cover\\_x.htm?csp=1](http://usatoday30.usatoday.com/news/nation/2007-01-09-gen-y-cover_x.htm?csp=1).

14. Code of Best Practices Comm., *supra* note 7.

15. *Id.*

16. *Id.* The defining feature of mashup and remix videos is the creator’s use of existing video and audio content to create original meaning. *Id.*

17. Guy Raz, *DJ Shadow on Sampling as a “Collage of Mistakes”*, NPR (Nov. 17, 2012), <http://www.wbur.org/npr/165145271/dj-shadow-on-sampling-as-a-collage-of-mistakes>.

18. *Id.*

19. Baracksdubs, *Barack Obama Singing Call Me Maybe by Carly Rae Jepsen*, YOUTUBE (Jun. 4, 2012), <http://www.youtube.com/watch?v=hX1YVzdnpe&feature=plcp>.

20. Cappapie, *Norwegian Recycling—Miracles*, YOUTUBE (Sept. 21, 2010), [http://www.youtube.com/watch?v=i9qW6HEBo\\_c](http://www.youtube.com/watch?v=i9qW6HEBo_c).

This “creative tsunami”<sup>21</sup> has given rise to great discord between copyright owners and remix artists.<sup>22</sup> Under the copyright regime, a content owner holds an exclusive right to prepare derivative works; end-users must obtain permission through individually negotiated licensing agreements before manipulating content.<sup>23</sup> Many rightsholders have worked hard to protect this control they have over future uses, with some even bringing legal action against infringers or making public statements asserting their rights.<sup>24</sup>

The reality, however, is that many amateur artists share and remix copyrighted works without obtaining permission.<sup>25</sup> In this age of participatory and democratized art, amateur video artists often believe they are free to enter the pop culture world through their use of famous content.<sup>26</sup> Modern America has become a call-and-response society; as Greg Gillis of Girl Talk noted, “Every single P. Diddy song that comes out, there’s going to be ten-year-old kids doing remixes and then putting them on the Internet.”<sup>27</sup> On the one hand, the increased creative involvement of non-traditional creators, such as amateur remix artists, benefits creative culture because innovation often comes from “outside of the box.”<sup>28</sup> Nevertheless, when amateur artists disregard copyright law, content owners lose both licensing fees and control of their work.<sup>29</sup>

Still, this issue runs deeper than lost profits. It is about a clash of ideology: copyright control versus creativity.<sup>30</sup> The traditional licensing system encourages content owners to exercise control over their works, reserving all rights unless they would benefit from a

21. Pat Aufderheide et al., *Recut, Reframe, Recycle: Quoting Copyrighted Material in User-Generated Video*, CTR. FOR SOC. MEDIA 1 (Jan. 2008), [http://infojustice.org/download/copyright-flexibilities/articles/CSM\\_Recut\\_Reframe\\_Recycle\\_report.pdf](http://infojustice.org/download/copyright-flexibilities/articles/CSM_Recut_Reframe_Recycle_report.pdf).

22. See generally RIP!: A REMIX MANIFESTO, *supra* note 3.

23. 17 U.S.C. § 106 (2006); RON IDRA & JAMES L. ROGERS, PROFIT FROM INTELLECTUAL PROPERTY: THE COMPLETE LEGAL GUIDE TO COPYRIGHTS, TRADEMARKS, PATENTS, PERMISSIONS AND LICENSING AGREEMENTS 171 (2003).

24. LESSIG, *supra* note 7, at 10; see, e.g., Robert J. Ambrogi, *Yoko Ono Wins Fight Over Lennon Footage*, LEGAL BLOG WATCH (July 1, 2009, 2:31 PM), [http://legalblogwatch.typepad.com/legal\\_blog\\_watch/2009/07/yoko-ono-wins-fight-over-lennon-footage.html](http://legalblogwatch.typepad.com/legal_blog_watch/2009/07/yoko-ono-wins-fight-over-lennon-footage.html); Shelley Germeaux, *Yoko Ono Makes it Clear—She Owns Content of Letters Lennon Sent to Others*, EXAMINER.COM (Jan. 25, 2011), <http://www.examiner.com/article/yoko-ono-makes-it-clear-she-owns-content-of-letters-lennon-sent-to-others>.

25. See generally RIP!: A REMIX MANIFESTO, *supra* note 3.

26. See *id.*

27. LESSIG, *supra* note 7 (quoting Gregg Gillis of Girl Talk).

28. *Id.*

29. See generally AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 580-81 (4th ed. 2010), available at [http://books.google.com/books?id=0vkIhwzTs\\_UC&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.com/books?id=0vkIhwzTs_UC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false) (explaining how content owners can maximize the value of their works through licensing).

30. See generally RIP!: A REMIX MANIFESTO, *supra* note 3.

licensing agreement.<sup>31</sup> This system functionally excludes amateur artists, who have little bargaining power or ability to pay the high cost of licensing content.<sup>32</sup>

Rather than refraining from the use of copyrighted material, however, many artists continue to create as though this were an “open source” society, in which anyone is free to use existing content.<sup>33</sup> These artists value the innovation that comes from a democratized culture, and they view the traditional licensing system as a restriction on creativity.<sup>34</sup> Because of this fundamental clash of values, a breakdown in the licensing market has occurred. The legal avenue for obtaining permission excludes amateur artists, so they simply continue to create without obtaining a license, while content owners lose their fair share of licensing fees.<sup>35</sup> Given the depth of this cultural impasse, copyright law needs to evolve to meet the needs of both amateur artists and content owners.<sup>36</sup>

This Note argues that culture is becoming more participatory and democratized, with both professionals and non-professionals producing works of art and publishing them to the Internet. In order to accommodate the needs of all levels of artists, the video-content licensing system must evolve to allow for greater amateur access.<sup>37</sup> Analogizing to the performing-rights organizations in the music industry, this Note advocates for a compulsory-licensing system for video content. Part I uses two music-sampling cases, *Grand Upright Music v. Warner Bros. Records* and *Bridgeport v. Dimension Films*, to illustrate the use of bright-line rules in copyright clearance.<sup>38</sup> It also explains why the fair use doctrine in copyright law does not provide sufficient protection to remix artists. Part II argues that this strict “one size fits all” system is out of touch with the values and social norms of the “remix generation” and has led to confusion and noncompliance.<sup>39</sup>

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31. See generally LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 200 (2001); Daniel J. Gervais, *The Role of Copyright Collectives in Web 2.0 Music Markets*, FROM THE SELECTED WORKS OF DANIEL J GERVAIS (Oct. 2007), [http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=daniel\\_gervais](http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=daniel_gervais).

32. See *supra* note 31.

33. RIP!: A REMIX MANIFESTO, *supra* note 3.

34. See *id.*

35. See *id.*

36. See *id.*

37. LESSIG, *supra* note 7, at 25.

38. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005); *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).

39. See generally Pat Aufderheide et al., *The Good, the Bad, and the Confusing: User-Generated Video Creators on Copyright*, CTR. FOR SOC. MEDIA (Apr. 3, 2007), [http://www.centerforsocialmedia.org/sites/default/files/good\\_bad\\_confusing.pdf](http://www.centerforsocialmedia.org/sites/default/files/good_bad_confusing.pdf).

Part III presents two alternative solutions to the current licensing system: (1) an expansion of the “sharing economy” approach,<sup>40</sup> in which copyright owners voluntarily agree to collaborate in “peer-to-peer” marketplaces,<sup>41</sup> and (2) a compulsory-licensing model with statutory rates that encourage sampling and distinguish between professional and amateur artists.<sup>42</sup> While both models remove the need for individually negotiated licenses and enable amateur artists to easily experiment with new art forms, Part III ultimately advocates for the compulsory license model. Such an approach would best balance the interests of content owners and remix artists, creating a viable market for video content. Part IV concludes that, despite the conflicting interests of rightsholders, remix and mashup videos are here to stay; the next step forward is to design a workable way to generate profit from them.

#### I. “GET A LICENSE OR DO NOT SAMPLE”: A RIGID APPROACH

Long before the rise of the video remix, music sampling took root in popular culture, becoming central to the “ethos of rap [and] hip hop music.”<sup>43</sup> The repurposing of familiar melodies and harmonies allowed listeners to experience music from past genres and redefined originality in the music industry.<sup>44</sup> But record companies challenged the use of unauthorized samples, even material as simple as a guitar riff.<sup>45</sup> Additionally, “an increasingly hostile judiciary” responded by limiting the freedom of artists to sample.<sup>46</sup>

Two music-sampling cases paved the way for courts’ strict approach to licensing requirements: *Grand Upright Music v. Warner Bros. Records* and *Bridgeport v. Dimension Films*.<sup>47</sup> These cases created legal and financial roadblocks for art forms like the mashup

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40. LESSIG, *supra* note 7, at 226.

41. Erica Swallow, *The Rise of the Sharing Economy*, MASHABLE (Feb. 7, 2012), <http://mashable.com/2012/02/07/sharing-economy>.

42. See KOHN & KOHN, *supra* note 29, at 733.

43. LESSIG, *supra* note 7, at 104; Sheila Rule, *Record Companies are Challenging “Sampling” in Rap*, N.Y. TIMES (Apr. 21, 1992), <http://www.nytimes.com/1992/04/21/arts/record-companies-are-challenging-sampling-in-rap.html>.

44. *Digital Music Sampling: Creativity or Criminality?*, NPR (Jan. 28, 2011), <http://www.npr.org/2011/01/28/133306353/Digital-Music-Sampling-Creativity-Or-Criminality>; see also Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227 (2012).

45. Kembrew McLeod, *How Copyright Changed Hip Hop: An Interview with Public Enemy’s Chuck D & Hank Shocklee*, STAY FREE!, [http://www.stayfreemagazine.org/archives/20/public\\_enemy.html](http://www.stayfreemagazine.org/archives/20/public_enemy.html) (last visited Nov. 24, 2012).

46. LESSIG, *supra* note 7, at 104.

47. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005); *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

and remix, for they held that sampling even one second of a sound recording requires a license.<sup>48</sup> The licensing crackdown increased the cost of producing albums featuring sampled material, and many artists, for the first time, experienced copyright laws as a limit on their creativity.<sup>49</sup> Copyright law grew out of a desire to protect artists' rights and thus induce creativity, but in this area, it began to financially burden remix artists.<sup>50</sup> Today, video-remix artists face the same concerns, as copyright law continues to heavily favor copyright owners, rather than sampling artists.<sup>51</sup>

*A. The Impact of Grand Upright Music and Bridgeport on Licensing*

The sustainability of the entertainment business relies upon the enforcement of copyright and the ability to license content for a profit.<sup>52</sup> There is monetary value associated with art because copyright law gives content owners exclusive rights in their works, which they may limit in exchange for licensing fees.<sup>53</sup> Still, licensing is valuable not only because it creates profits from royalties but also because it engenders intangible benefits.<sup>54</sup> For example, licensing a song for use in a network television show increases national visibility, which can lead to increased sales of that song on iTunes.<sup>55</sup> After a promotional campaign for the television show *Grey's Anatomy* featured the Fray song "How to Save a Life," the song became one of the most downloaded singles of 2006.<sup>56</sup>

In addition to increasing profits and visibility, a license allows a content owner to set the parameters of authorized use to protect the long-term value of the copyrighted work.<sup>57</sup> A license is the primary vehicle through which a content owner maximizes revenue, controls the scope of use, and ensures that future use comports with the

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48. See Tomasz Rychlicki & Adam Zieliński, *Is Sampling Always Copyright Infringement?*, WIPO MAG. (Nov. 2009), [http://www.wipo.int/wipo\\_magazine/en/2009/06/article\\_0007.html](http://www.wipo.int/wipo_magazine/en/2009/06/article_0007.html).

49. See Rule, *supra* note 43.

50. McLeod, *supra* note 45 (discussing how the crackdown on copyright infringement impacted Public Enemy's music). Public Enemy had previously been sampling thousands of sounds, but it became too expensive to defend against copyright claims. *Id.*

51. Aufderheide, *supra* note 39, at 1.

52. DARREN WILSEY & DAYLE DEANNA SCHWARTZ, *THE MUSICIAN'S GUIDE TO LICENSING MUSIC* 72 (2010).

53. *Id.* at 4.

54. *Id.*

55. *Id.*

56. *About The Fray*, ARTISTS.MTV, <http://www.mtv.com/artists/the-fray> (last visited Nov. 18, 2012).

57. KOHN & KOHN, *supra* note 42, at 584.



owner's interests.<sup>58</sup> The heart of licensing is copyright owners' right to exclude others from using their works, either absolutely or in certain contexts.<sup>59</sup> For example, Twisted Sister frontman Dee Snider publicly denounced 2012 Vice Presidential candidate Paul Ryan's use of his signature anthem, "We're Not Gonna Take It."<sup>60</sup> Stating that he has "never objected to anybody using that song," he drew the line at its use in this context because of his strong condemnation of the candidate's views.<sup>61</sup>

Because licenses are the means through which rightsholders specify what types of use are permissible, when mashups and remixes started gaining popularity in the 1980s, record companies and content owners fought to enforce licensing restrictions.<sup>62</sup> Courts responded with strong statements in support of the exclusive rights of content owners.<sup>63</sup> The court in *Grand Upright Music v. Warner Bros. Records* fundamentally changed "the *modus operandi* of the hip-hop music industry" by requiring preauthorization for all samples.<sup>64</sup> In *Grand Upright Music*, the court's opinion began with the biblical quote "thou shalt not steal."<sup>65</sup> According to the court, the defendant Biz Markie had violated not only the seventh commandment, but also US copyright laws.<sup>66</sup> While the defendant argued that this practice had become commonplace in the hip-hop and rap industry, the court maintained that this pervasiveness did not justify infringement.<sup>67</sup> *Grand Upright Music* led the way for further criminalization of unauthorized sampling, burdening a tradition that had become second-nature to artists.<sup>68</sup>

Courts subsequently continued to rigidly enforce licensing requirements, culminating in the landmark decision *Bridgeport v. Dimension Films*.<sup>69</sup> Responding to the growth of digital sampling disputes, the US Court of Appeals for the Sixth Circuit decided that something "approximating a bright-line rule" would benefit both the

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58. WILSEY & SCHWARTZ, *supra* note 53, at 4.

59. KOHN & KOHN, *supra* note 42, at 350.

60. *Joy Behar: Say Anything!* (Current TV broadcast Sept. 10, 2012), available at <http://current.com/shows/joy-behar/videos/dee-snider-i-denounce-paul-ryans-use-of-were-not-gonna-take-it>.

61. *Id.*

62. McLeod, *supra* note 45.

63. LESSIG, *supra* note 7, at 104.

64. *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

65. *Id.*

66. *Id.*

67. *Id.* at 185.

68. See Rychlicki & Zieliński, *supra* note 48.

69. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

music industry and the courts.<sup>70</sup> Rather than requiring courts to analyze the length of the sample, or its similarity to the original work, the court announced that any amount of intentional sampling is sufficient to establish infringement.<sup>71</sup> Even a de minimis amount of unauthorized sampling of a sound recording constitutes infringement, because “the part taken is something of value.”<sup>72</sup> The court held that “a sound recording owner has the exclusive right to ‘sample’ his own recording,” and found that a license is required regardless of the amount that the sampling artist intends to use.<sup>73</sup> In no uncertain terms, the court warned artists: “Get a license or do not sample.”<sup>74</sup>

In the aftermath of *Grand Upright Music* and *Bridgeport*, content owners can pursue a copyright claim against a remix artist for any unauthorized sampling.<sup>75</sup> While there have been a few victories for sampling artists—in *Newton v. Diamond*, for example, the Ninth Circuit found that the sample was minimal and that the average person would not recognize the appropriation of the copyrighted material<sup>76</sup>—courts’ general trajectory in recent years has been toward increased copyright enforcement.<sup>77</sup>

### B. The Fair Use Doctrine: A Safety Net with Too Many Holes

Despite courts’ unforgiving stance on licensing requirements, the fair use provision in the Copyright Act permits some use of copyrighted material without a license.<sup>78</sup> The fair use doctrine allows for certain minimal uses that do not infringe on the content owner’s exclusive rights to reproduce and reuse the original work.<sup>79</sup> Section 107 of the Copyright Act sets out a multi-factor analysis for

70. *Id.* at 799.

71. *Id.* at 801.

72. *Id.* at 802; see also *Digital Music Sampling: Creativity or Criminality?*, *supra* note 44.

73. *Bridgeport Music*, 410 F.3d at 801.

74. *Id.*

75. Ben Challis, *The Song Remains the Same: A Review of the Legalities of Music Sampling*, WIPO MAG. (Nov. 2009), [http://www.wipo.int/wipo\\_magazine/en/2009/06/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2009/06/article_0006.html).

76. *Newton v. Diamond*, 388 F.3d 1189, 1196-97 (9th Cir. 2003).

77. KEMBREW MCLEOD ET AL., CREATIVE LICENSE 140, 147 (2011), available at <http://books.google.com/books?hl=en&lr=&id=nOWdriHLHgQC&oi=fnd&pg=PR5&dq=McLeod+and+DiCola.+Creative+License:+The+Law+and+Culture+of+Digital+Sampling&ots=lzOfnLA9mn&sig=wq8UGM0rpScZWPNVw5-z1BcudW8#v=onepage&q&f=false>.

78. *The Code of Best Practices in Fair Use for Media Literacy Education*, CTR. FOR SOC. MEDIA, <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-media-literacy-education> (last visited Jan. 13, 2013).

79. *Copyright Basics: Fair Use*, COPYRIGHT CLEARANCE CTR., <http://www.copyright.com/Services/copyrightoncampus/basics/fairuse.html> (last visited Nov. 24, 2012).

determining whether something is fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work.<sup>80</sup> These factors primarily allow for the use of copyrighted materials for “commentary, parody, news reporting, research and education.”<sup>81</sup>

Nevertheless, the fair use doctrine does not automatically apply to every amateur remix and mashup video, and relying on the doctrine is a risky and uncertain alternative to obtaining a license. First, fair use is most accurately understood, not as an exception to the rule, but as a legal defense to a copyright infringement claim.<sup>82</sup> When remix artists use copyrighted material without permission, even if it is potentially fair use, the content owners may still pursue legal claims against them.<sup>83</sup> End-users may assert a fair use defense in response, but the burden of proof is on the defendants to show that their work falls under the protection of fair use.<sup>84</sup> Moreover, even if an end-user ultimately succeeds in establishing a fair use defense, there are legal expenses associated with defending against a copyright claim.<sup>85</sup>

Secondly, the Copyright Act merely provides guidelines, not absolutes, for determining fair use, which makes the doctrine too uncertain to provide dependable refuge for remix artists.<sup>86</sup> Determinations of fair use depend on the case-by-case judgment of courts, and “[t]he distinction between what is fair use and what is infringement . . . [is] not always clear or easily defined.”<sup>87</sup> Because fair use is context-specific, end-users have no clear guidance when deciding whether a license is necessary. For example, while one of the fair use factors is the amount and substantiality of the use, the statute does not specify how many seconds of a video may be safely used in a remix.<sup>88</sup> In making such determinations, a court will engage in a “qualitative” balancing test: if a remix artist uses only a small

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80. *Fair Use*, US COPYRIGHT OFF., <http://www.copyright.gov/fls/fl1102.html> (last visited Sept. 25, 2012).

81. COPYRIGHT CLEARANCE CTR., *supra* note 79.

82. *Id.*

83. *Id.*

84. *Id.*

85. McLeod, *supra* note 45.

86. Challis, *supra* note 75.

87. US COPYRIGHT OFF., *supra* note 80.

88. CTR. FOR SOC. MEDIA, *supra* note 78.

amount, but it was the “heart of the [original] work,” then the fair use doctrine may not apply.<sup>89</sup>

This leaves amateur artists with mixed results: on the one hand, strict enforcement of copyright laws by courts, but on the other hand, a broad and highly situational fair use provision. With little education in copyright law, amateur artists are left with the choice of seeking a license or risking possible litigation. It ultimately burdens amateur creativity to require remix artists to make such determinations of fair use and licensing, especially when they have very little guidance or expertise in copyright law. The confusion surrounding fair use underscores the need for a licensing system that is streamlined for easy use by amateur artists.

### *C. Square Pegs: Trying to Fit Untraditional Art into a Traditional Framework*

Without clear protection from the fair use doctrine, remix artists must assume that a legal challenge to their work is always a possibility. However, complying with copyright’s strict licensing requirements has proven challenging for the remix and sample generation, because, as Professor Daniel Gervais notes, “copyright was not originally designed to deal with consumers”; rather, it was mainly used to “make transactions between authors, publishers, producers, and distributors possible.”<sup>90</sup> In its present form, copyright licensing is a one-size-fits-all model for buyers with bargaining power and artists who can easily negotiate a licensing agreement with content owners.<sup>91</sup> This traditional model creates two main obstacles for remix and mashup artists: (1) the expense of licensing a large quantity of samples, and (2) the inaccessibility of content owners to the average person.<sup>92</sup> These challenges are especially pronounced where the original content owner is a large media company or other party with substantial bargaining power.<sup>93</sup>

#### 1. The \$4.2 Million Album

The present licensing system, which is based in contract law, requires sampling artists to negotiate licenses from copyright

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89. COPYRIGHT CLEARANCE CTR., *supra* note 79.

90. Gervais, *supra* note 31, at 3-5.

91. *See id.*

92. KOHN & KOHN, *supra* note 42, at 57 (explaining that it is often difficult for non-commercial end-users to even identify the rightsholders of the copyrighted material they wish to use).

93. Gervais, *supra* note 31, at 3-5.

owners.<sup>94</sup> For most end-users, the actual and transaction costs of a license are prohibitively expensive; it simply costs too much for most users to legally create a remix or mashup video.<sup>95</sup> Mashups, by their very nature, call for the use of multiple copyrighted samples, which creates an unreasonably high price of production for most creators, since they must license each sample individually.<sup>96</sup> It is possible for artists to purchase sample libraries, but such media catalogues typically consist of short, garden-variety snippets.<sup>97</sup> The appeal of the mashup is that it incorporates *recognizable* images or sounds, such as the drumbeat from James Brown's "Funky Drummer," one of the most sampled drumbeats in history.<sup>98</sup> However, acquiring the rights to use a well-known sample, like this popular drumbeat,<sup>99</sup> is an "expensive and complicated process."<sup>100</sup>

To illustrate with an example from the music industry: DJ Gregg Gillis, also known as "Girl Talk," is perhaps the most famous digital mashup artist, but he regularly declines to follow copyright laws because of the cost of licensing.<sup>101</sup> Known for creating a "feverish collision of unlike music," Gillis used 372 overlapping samples in his 2010 album, "All Day."<sup>102</sup> While clearance for some copyrighted material is not unreasonable (an end-user can attain a license to use certain text, photos, and artwork for under \$200 per use),<sup>103</sup> that price skyrockets for remixes and mashup artists that, like Gillis, use hundreds of samples per project.<sup>104</sup>

94. RICHARD STIM, *GETTING PERMISSION: HOW TO LICENSE & CLEAR COPYRIGHTED MATERIALS ONLINE & OFF* 10 (4th ed. 2010); Gervais, *supra* note 31, at 3-5 (illustrating the idea that, without a copyright collective or clearinghouse, end-users must negotiate directly with rightsholders).

95. *RIP!: A REMIX MANIFESTO*, *supra* note 3.

96. *Id.*

97. *Digital Music Sampling: Creativity or Criminality?*, *supra* note 44.

98. *Id.*

99. Joe Fassler, *How Copyright Law Hurts Music, From Chuck D to Girl Talk*, ATLANTIC (Apr. 12, 2011, 9:05 AM), <http://www.theatlantic.com/entertainment/archive/2011/04/how-copyright-law-hurts-music-from-chuck-d-to-girl-talk/236975> ("If you wanted to sample, say, 'Fight the Power' by Public Enemy—well, that song contains 20 samples. You'd have to get permission from Def Jam, which owns the sound recording rights, and then Public Enemy's song publisher. Then you'd have to go to the other 20 song publishers and get permission to use the song—it creates kind of a domino effect.").

100. *Id.*

101. *Id.*; Joe Mullin, *Why the Music Industry Isn't Suing Mashup Star 'Girl Talk'*, PAIDCONTENT (Nov. 17, 2010, 3:24 AM), <http://paidcontent.org/2010/11/17/419-why-the-music-industry-isnt-suing-mashup-star-girl-talk>.

102. Kyle Eustice, *Girl Talk's Gregg Gillis Rides the Sample Wave a Little Longer*, THE PITCH (June 12, 2012), <http://www.pitch.com/kansascity/girl-talk-gregg-gillis-june-2012-ke-live/Content?oid=2907124>.

103. STIM, *supra* note 94.

104. *RIP!: A REMIX MANIFESTO*, *supra* note 3.

Because Gillis uses about twenty-one music clips per song, if he were to legally purchase each sample, it would amount to an average of \$260,000 per song and \$4.2 million per album.<sup>105</sup> Even as Gillis continues to sell out large venues, he has made it clear that he is unwilling and unable to follow the law at such a price.<sup>106</sup> Although Gillis's mashups seem like a "lawsuit waiting to happen," some have speculated that he would be "a ready-made hero for copyright reformers," and content owners would prefer not to martyr him and risk inciting reform of their rights.<sup>107</sup> Gillis enjoys a level of visibility that makes him an unappealing defendant; one journalist speculated that "if he were sued, he'd have some of the best copyright lawyers in the country knocking on his door asking to take his case for free."<sup>108</sup> But most amateur mashup artists do not have the reputation and visibility that Gillis does, and therefore they must choose between paying millions of dollars for samples, risking a copyright suit, or giving up their art.<sup>109</sup>

## 2. Negotiating with Taylor Swift

The rise of the amateur-revised video reflects the democratization of culture, in that more non-professional artists are participating in artistic production on the web than ever. However, the licensing system, for all practical purposes, excludes amateur end-users.<sup>110</sup> Consider what would happen if an amateur artist wished to obtain a license to use and revise footage from a Taylor Swift music video. The amateur would likely have difficulty even locating the owner of the content—whether it is Taylor Swift or a media company—to negotiate a license.

Even if the artist had the opportunity to communicate with the content owner, he would probably be unsuccessful in obtaining a license unless he could show that the rightsholder stood to benefit from the artist's use of the footage. The content owner would be concerned not only about the short-term value of a license (in the form of fees), but also the long-term value of the original work.<sup>111</sup> There is risk involved in indiscriminately licensing to any party that asks, and copyright holders have the prerogative to deny authorization to

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105. *Id.*

106. *Id.*

107. Mullin, *supra* note 101.

108. *Id.*

109. RIP!: A REMIX MANIFESTO, *supra* note 3.

110. *Id.*; Gervais, *supra* note 31, at 3-5.

111. KOHN & KOHN, *supra* note 42, at 584-85.

anyone they choose.<sup>112</sup> If amateur remix artists do not receive permission, or if they are unaware who holds the rights, they are left with two options—they may either engage in unauthorized use of copyrighted material, which may or may not qualify as fair use, or they may accept copyright as a limit on their creativity. In an age in which “everything is a remix”<sup>113</sup> and participatory culture is highly valued, a system that forces amateur artists to choose between illegality and self-censorship can nevertheless have a chilling effect on creativity.<sup>114</sup>

According to renowned intellectual property professor Lawrence Lessig, the exclusion of amateur artists from the licensing system is one example of “copyright control out of control.”<sup>115</sup> Requiring individuals to negotiate contracts with media companies is the functional equivalent of shutting down legal avenues for amateur music to develop.<sup>116</sup> While it is well established that artists deserve compensation for future uses of their work, the traditional “all rights reserved” model of copyright licensing allows industry to control the course of innovation.<sup>117</sup> The web provides a “free space of innovation,” and video-editing technology has become available to the masses, but the copyright-licensing system has not kept pace with these changes.<sup>118</sup> The Internet is a universal resource, and it must be able to grow without limiting creative content, which means adapting licensing in a way that encourages new art forms and democratic participation in culture.<sup>119</sup>

## II. PLAYING BY THEIR OWN RULES: THE IMPACT OF SOCIAL NORMS ON COPYRIGHT COMPLIANCE

Even though *Grand Upright Music v. Warner Bros. Records* and *Bridgeport v. Dimension Films* set the tone for harsh enforcement of copyright law, there is strong evidence that many end-users still do not comply with copyright-clearance requirements.<sup>120</sup> While using copyrighted content in mashups and remixes has become a common artistic practice, many sampling artists decline to obtain permission

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112. *Id.* at 581-82.

113. *About*, EVERYTHING IS A REMIX, <http://www.everythingisaremix.info/about> (last visited Oct. 14, 2012).

114. LESSIG, *supra* note 7.

115. LESSIG, *supra* note 31, at 183.

116. *Id.* at 202.

117. *Id.* at 200.

118. *Id.* at 26.

119. *Id.* at 37.

120. Aufderheide et al., *supra* note 39, at 6.

for a variety of reasons.<sup>121</sup> First, while the law may be at the forefront of content owners' minds, it is not always a primary consideration for artists; rather, they think about licensing requirements only after they have been contacted about possible infringement.<sup>122</sup>

Second, many end-users do not fully understand their responsibilities under the law. In one study, "[r]espondents demonstrated confusion, anxiety, and fear when asked about their copyright behavior."<sup>123</sup> In particular, the fair use provision in the Copyright Act is a major source of uncertainty and misunderstanding.<sup>124</sup> Lastly, the values of today's "remix generation," including adherence to an "open culture" philosophy, strongly inform social norms and conduct.<sup>125</sup> Because remixing is socially acceptable, and often encouraged, fear of "criminal sanctions, cease-and-desist letters, [and] civil suits for infringement" fails to effectively deter unauthorized use.<sup>126</sup> The confluence of these factors presents a major challenge to ensuring copyright compliance.<sup>127</sup>

#### A. *Just an Art Project: Copyright Permission as an Afterthought*

For many sampling artists, copyright permission is an afterthought. Their driving force is creating art, not complying with copyright laws.<sup>128</sup> Thus, they may only become aware of possible copyright infringement when the content owner notifies them with a cease-and-desist letter or lawsuit.<sup>129</sup> The story of *The Grey Album* illustrates the difficulty of incentivizing licensing when artists do not think about copyright clearance before creating.<sup>130</sup> Brian Burton, aka "Danger Mouse," rose to fame in 2004 after releasing *The Grey Album*, a mashup record of the a cappella version of Jay-Z's *The Black Album*

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121. *Id.*

122. *See, e.g.*, Noah Shachtman, *Copyright Enters a Gray Area*, WIRED (Feb. 14, 2004), <http://www.wired.com/entertainment/music/news/2004/02/62276>.

123. Aufderheide et al., *supra* note 39, at 3.

124. JESSICA LITMAN, DIGITAL COPYRIGHT 112 (2006).

125. Aufderheide et al., *supra* note 39, at 12.

126. Hetcher, *supra* note 7, at 1871.

127. *See generally* Aufderheide et al., *supra* note 39, at 12; Hetcher, *supra* note 7, at 1871.

128. *See, e.g.*, Nekesa Mumbi Moody, 'Art Project' Steps into Legal 'Grey' Area, SAN DIEGO UNION-TRIB. (Feb. 29, 2004), [http://www.signonsandiego.com/uniontrib/20040229/news\\_1a29\\_grey.html](http://www.signonsandiego.com/uniontrib/20040229/news_1a29_grey.html) (discussing the legal controversy surrounding the release of DJ Danger Mouse's album, which combined content from Jay-Z and the Beatles).

129. *E.g., id.*

130. *Id.*



and instrumentals from the Beatles' *The White Album*.<sup>131</sup> Response to the album was “thermonuclear”; it was “hotter-than-hot.”<sup>132</sup> But because Burton failed to obtain a legal license for the content he used, EMI, the copyright holder for the Beatles, took legal steps against him.<sup>133</sup>

After EMI ordered Danger Mouse and retailers to cease distribution, Burton responded: “I intended for it to be for friends and for people who knew my stuff. I figured it would get passed around, and it would be this little underground thing, but it kind of took off on its own.”<sup>134</sup> In what has become a common refrain for remix artists, Burton stated, “[It] was not my intent to break copyright laws. It was my intent to make an art project.”<sup>135</sup>

Despite EMI's efforts and Burton's cooperation, no one could stop fans from circulating *The Grey Album*.<sup>136</sup> A few thousand printed copies quickly turned into must-have collectors' items, with the album selling on eBay for \$81.<sup>137</sup> Then, in a protest event dubbed “Grey Tuesday,” an activist group posted copies of the album for free download on various websites in demonstration against the cease-and-desist letters.<sup>138</sup> While such action by a third party may seem like a victimless crime, it divests content owners of licensing opportunities and profits.<sup>139</sup> This story highlights the reality that, even where artists do not intend to violate copyright laws, licensing is too often a secondary consideration.<sup>140</sup>

### *B. Mass Confusion over Licensing: Copyright's Version of the Hanging Chad*

People often do not observe licensing requirements because copyright laws are “complicated, arcane, and counterintuitive.”<sup>141</sup> A study conducted by the Center for Social Media (CSM) studied the attitudes and practices of college and graduate students who upload online video, and discovered that participants were “universally

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131. Ryan, *Music/Video Mashups: What's at Stake?*, TOPICS IN DIGITAL MEDIA—SPRING 2010 (Apr. 5, 2010, 4:49 PM), <http://cultureandcommunication.org/tadm/s10/04/05/musicvideo-mashups-whats-at-stake>.

132. Shachtman, *supra* note 122.

133. Moody, *supra* note 128.

134. *Id.*

135. *Id.*

136. Ryan, *supra* note 131.

137. Shachtman, *supra* note 122.

138. Ryan, *supra* note 131.

139. Moody, *supra* note 128.

140. *Id.*

141. LITMAN, *supra* note 124.

under-informed and misinformed about [copyright] law.”<sup>142</sup> For example, some participants conflated trademark and copyright concepts, and others mistakenly believed that open culture, rather than copyright protection, was the default setting of copyright law.<sup>143</sup>

Where participants lacked a nuanced understanding of how copyright law applies situationally, they used a variety of binary, “good-bad” categories to order their choices.<sup>144</sup> The individual’s own sense of right and wrong, rather than copyright fundamentals, guided the individual’s copyright-related behavior.<sup>145</sup> Under the participants’ own logic, their amateur art had no real impact on major marketplace actors, so the participants should be able to freely create as long as their work had low commercial value.<sup>146</sup> Participants were essentially “making up rules themselves about what kind of existing intellectual property it was appropriate to use in their own creation.”<sup>147</sup> Using their self-made rules, they rationalized their use of unauthorized material as contributing to the art community without materially harming content owners.<sup>148</sup>

As copyright scholar Jessica Litman has noted, the statutory fair use provision is also a strong source of confusion for prospective licensees.<sup>149</sup> According to the CSM study, the student participants revealed a significant misunderstanding of the fair use provision in the copyright statute.<sup>150</sup> As discussed in Part I, fair use provides a right to reproduce copyrighted material without permission or payment under some circumstances.<sup>151</sup> For example, individuals may use copyrighted pieces for some educational purposes or in parodies of that original work.<sup>152</sup> Section 107 of the Copyright Act sets out a multi-factor analysis for determining whether something is fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work.<sup>153</sup>

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142. Aufderheide et al., *supra* note 39, at 1.

143. *Id.* at 6.

144. *Id.* at 1.

145. *Id.*

146. *Id.* at 6.

147. *Id.* at 9.

148. *Id.*

149. LITMAN, *supra* note 124.

150. Aufderheide et al., *supra* note 39, at 7.

151. US COPYRIGHT OFF., *supra* note 80.

152. *Id.*

153. *Id.*

As is common with many such tests, however, the factors are often difficult to apply because they are merely guidelines. For instance, one factor is the amount of copyrighted material used, but the statute does not specify a number of words, lines, or notes that may safely be used without permission.<sup>154</sup> The CSM study highlights the ambiguity and confusion surrounding fair use and the risk that end-users undertake in using copyrighted works. The majority of survey respondents (76 percent) believed that the exception protected their use of copyrighted materials, although no one was able to accurately describe the doctrine.<sup>155</sup> The respondents conveyed a variety of inaccurate beliefs about fair use, including two participants who thought the statute “stipulated a fixed amount of time, e.g., ‘over 15 seconds of someone else’s song.’”<sup>156</sup> Such mistaken beliefs could put end-users at risk of copyright infringement, since, as the courts in *Grand Upright Music* and *Bridgeport* established, sampling even a small amount is not fair use.<sup>157</sup>

Another participant in the CSM study incorrectly believed that there is an exemption for all educational and non-commercial use.<sup>158</sup> Under the fair use doctrine, however, there are no absolutes, which means that there is no clear-cut legal definition of “non-commercial.”<sup>159</sup> While some non-commercial uses may be fair use, there are grey areas, particularly in the context of online videos. Even if a remix artist is not seeking monetary compensation for his work, the website might, nonetheless, profit from advertising or data mining, through which companies increase revenue by gathering information about consumer buying habits.<sup>160</sup>

Misconceptions about fair use underscore the difficulty in enforcing compliance with current copyright laws, and the risk that end-users assume when they create unauthorized remixes. Many creators of user-generated videos do not seek a license because they do not believe the law applies to them.<sup>161</sup> Moreover, end-users generally possess a narrow view of “market impact,” believing that their actions do not cause market harm because no one would intentionally buy

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154. *Id.*

155. Aufderheide et al., *supra* note 39, at 7.

156. *Id.*

157. *See supra* Part I.A.

158. Aufderheide et al., *supra* note 39, at 7.

159. *Myths and Realities About Fair Use*, TECHDIRT (June 1, 2012), <http://www.techdirt.com/articles/20120530/17333319132/myths-realities-about-fair-use.shtml> (excerpting PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE (2011)).

160. *Id.*

161. Aufderheide et al., *supra* note 39, at 6.

their work instead of the original artist's work.<sup>162</sup> In contrast to this belief, the potential market goes far beyond direct substitution; most notably, there is a licensing market in which content owners profit from allowing others to use their work in new projects.<sup>163</sup> For rights-holding musicians, for instance, there is often more money in licensing their music than there is in either record deals or touring.<sup>164</sup> But, when average individuals conceptualize the market and rationalize their own use of copyrighted material, they often fail to consider their impact on secondary markets.<sup>165</sup>

As the Second Circuit indicated in the photocopying case *American Geophysical Union v. Texaco*, there is market harm where a party fails to utilize an available licensing market.<sup>166</sup> While the Texaco research center could have paid royalties through the established copyright clearance house in the publishing industry, it instead copied articles from scientific journals without paying the proper fees.<sup>167</sup> The court found that Texaco's unauthorized copying was not fair use, and that it resulted in the harm of lost royalties.<sup>168</sup> The lesson of *Texaco* is that "courts . . . consider whether potential market harm might exist beyond that of direct substitution, such as in the potential existence of a licensing market."<sup>169</sup> The complete picture of market harm has yet to become ingrained in the public consciousness, however, as individual end-users continue to believe their small-time web videos pose no financial threat to powerful content owners.<sup>170</sup> Because many end-users mistakenly believe that their works do not affect anyone's financial interests, they do not see why securing authorization for their creative projects is necessary.<sup>171</sup>

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162. LESSIG, *supra* note 7, at 13 ("I think, just morally, that the music wasn't really hurting anyone. And there's no way anyone was buying my CD instead of someone else's [that I had sampled]." (alteration in original) (quoting Gregg Gillis)).

163. WILSEY & SCHWARTZ, *supra* note 52, at 72.

164. *Id.*

165. Aufderheide et al., *supra* note 39.

166. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926-27 (2d Cir. 1994).

167. *Id.* at 930.

168. *Id.* at 930-31.

169. William F. Heinze, *Fair Use Doctrine Under U.S. Copyright Law*, I/P UPDATES (Mar. 3, 2010), <http://ip-updates.blogspot.com/2010/03/fair-use-doctrine-under-us-copyright.html>.

170. Aufderheide et al., *supra* note 39 ("One interviewee said that quoting copyrighted material from an unknown is good because it draws attention to their work, and taking it from a very famous owner is harmless because so much profit has already been made.").

171. *Id.* at 9 ("This study thus shows the need for better general understanding of the use rights of creators, in order to create a more stable and useful framework within which new creation can flourish.").

## 1. YouTube Copyright School: Even a Cartoon Pirate Cannot Save this Sinking Ship

Despite public-education attempts, such as the “Just Say Yes to Licensing” campaign promoted by the White House Information Infrastructure Task Force, misconceptions about copyright law continue to inform public behavior.<sup>172</sup> The CSM study reported that respondents generally did not understand basic facts about copyright, even when professors had trained them on the topic and warned them about the risks of copyright infringement.<sup>173</sup> This highlights the challenges of changing social norms through greater awareness, as “[t]he current copyright statute has proved to be remarkably education-resistant.”<sup>174</sup>

After lawmakers and the entertainment industry criticized Google for being too quiet in the fight against copyright infringement, the company started its own program to educate copyright violators and correct common misconceptions about copyright law.<sup>175</sup> To increase compliance with copyright law, Google requires infringers to attend YouTube Copyright School.<sup>176</sup> This education program required copyright violators to watch a four-and-a-half minute tutorial about copyright rules, followed by a multiple-choice quiz.<sup>177</sup> The video featured a cartoon pirate character who “inadvertently breaks copyright laws” by taping scenes from a film in a movie theater and uploading them to YouTube.<sup>178</sup>

Some bloggers have pointed out flaws in Google’s program, questioning its effectiveness in clearing up public confusion.<sup>179</sup> For instance, while the YouTube Copyright School tutorial singles out remixes as potential copyright danger zones, it fails to explain in explicit terms what is legal and what is illegal with respect to this creative practice.<sup>180</sup> It suggests that users can avoid copyright infringement by making “original works,” but it does not further

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172. LITMAN, *supra* note 124, at 111 (explaining that people do not follow laws that they do not believe in or understand).

173. Aufderheide et al., *supra* note 39, at 6.

174. LITMAN, *supra* note 124, at 114.

175. Jennifer Martinez, *Google to Sentence YouTube Violators to “Copyright School”*, POLITICO (Apr. 14, 2011, 9:04 AM), <http://www.politico.com/news/stories/0411/53178.html>.

176. Nick Bilton, *YouTube Sentences Copyright Offenders to School*, N.Y. TIMES BITS (Apr. 14, 2011, 2:57 PM), <http://bits.blogs.nytimes.com/2011/04/14/youtube-sentences-copyright-offenders-to-school>.

177. *Id.*

178. *Id.*

179. Jodie Griffin, *My First Day at (YouTube Copyright) School*, PUB. KNOWLEDGE (Apr. 15, 2011), <http://www.publicknowledge.org/blog/my-first-day-youtube-copyright-school>.

180. *Id.*

define that term.<sup>181</sup> Moreover, it glosses over the fair use doctrine, essentially noting its existence without any further explanation.<sup>182</sup> The basic message of the program is to create with caution and avoid using copyrighted material altogether, rather than risk liability for copyright infringement by remixing.<sup>183</sup>

YouTube's Copyright School fails to provide concrete guidance to prospective sampling artists, instead serving as a general warning that legal issues might arise when individuals use copyrighted material. The description claims that "YouTube remains committed to protecting original creative works, whether produced by an established star or the next breakout artist."<sup>184</sup> But its education program fails to shed light on how an up-and-coming sampling artist can legally participate in remix culture.<sup>185</sup> The company notes that any uncertainty should be directed to a "qualified copyright attorney."<sup>186</sup> Such advice is reasonable, as many have questioned whether it is even YouTube's responsibility to ensure compliance, yet it is probably unrealistic to expect that average users will hire an attorney.<sup>187</sup> The inadequacy of YouTube's Copyright School brings to light the dearth of suitable resources available to amateurs interested in creating legally revised videos.<sup>188</sup> The simplistic cartoon tutorial does very little to remedy common misconceptions or advance innovative, yet legally created, art.<sup>189</sup> It instead relegates remix and mashup videos to a grey area and suggests that users simply avoid such unpredictable terrain.<sup>190</sup>

### C. A War of Ideas: Innovation v. Control

Many end-users also openly defy copyright laws out of indignation for a system that prioritizes copyright control over

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181. *Id.*

182. *Id.*

183. *Id.*

184. Justin Green, *YouTube Copyright Education (remixed)*, YOUTUBE BLOG (Apr. 14, 2011), <http://youtube-global.blogspot.com/2011/04/youtube-copyright-education-remixed.html>.

185. *Id.*

186. *Id.*

187. LITMAN, *supra* note 124, at 116 ("We can't rely on voluntary compliance because the great mass of mankind will not comply voluntarily with the current rules."); Aufderheide et al., *supra* note 51, at 6 (suggesting that, rather than clearing up misconceptions with a legal authority, end-users make up their own rules).

188. Green, *supra* note 184.

189. Griffin, *supra* note 179.

190. *YouTube Copyright School*, YOUTUBE, [http://www.youtube.com/copyright\\_school](http://www.youtube.com/copyright_school) (last visited Feb. 19, 2012).

creativity.<sup>191</sup> In this zero-sum game, in which a legal victory for rightsholders means a loss for end-users, a ruling for the industry can severely restrict the freedom of artists to experiment with new forms.<sup>192</sup> Because many end-users value open culture over the ability of a content owner to control his works, court rulings that restrict the freedom of artists to experiment with new forms are difficult to enforce. As copyright scholar Jessica Litman has argued, “People don’t obey laws that they don’t believe in.”<sup>193</sup> For example, the protestors who kept Danger Mouse’s *The Grey Album* alive on the web perceived EMI’s cease-and-desist letters as acts of corporate censorship.<sup>194</sup> In their view, by preventing distribution, EMI was trying to control what the public could and could not hear.<sup>195</sup> What was ultimately at stake to them was the future of an art form and the ability of artists to control innovation.<sup>196</sup>

Other advocates of free culture have made similar social-cost arguments, claiming that, under the current system, a clash of values is inevitable as the “old” collides with the “new.”<sup>197</sup> According to the open-source documentary, *RIP!: A Remix Manifesto*, “[t]his is a war of ideas, and the battleground is the Internet.”<sup>198</sup> To some who oppose strict copyright enforcement, powerful content owners seek to maintain the current business model because it concentrates culture in their hands.<sup>199</sup> Such individuals see copyright restrictions as an impediment to innovation, and argue that, “to build free societies, you must limit the control of the past.”<sup>200</sup> Rather than embracing the ideals of free culture, however, content owners and digital platforms like YouTube are cracking down on copyright infringement more than

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191. RIP!: A REMIX MANIFESTO, *supra* note 3 (indicating that copyright owners’ fixation on control of their content is a hindrance to creativity and that “to build free societies you must limit the control of the past”).

192. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991) (changing the *modus operandi* of the hip-hop industry by holding that all sampling must be cleared with the copyright owner).

193. LITMAN, *supra* note 124.

194. Moody, *supra* note 128.

195. *Id.*

196. *Id.*

197. RIP!: A REMIX MANIFESTO, *supra* note 3.

198. *Id.*

199. *Id.*

200. *Id.*

ever.<sup>201</sup> Many revised videos are often simply removed from the web using software that does not require human review.<sup>202</sup>

One example of such content-management software is YouTube's ContentID. Using ContentID, content owners provide YouTube with reference files and metadata describing the content they own.<sup>203</sup> They also choose a policy they would like YouTube to apply in the event ContentID technology identifies their copyrighted material—their choices are to monetize, track, or block the unauthorized uses.<sup>204</sup> YouTube then compares the files uploaded to the website with the reference data, and ContentID technology automatically identifies matching content and applies the preferred policy.<sup>205</sup> Because ContentID is automatic and requires no human intervention, this content-management system efficiently blocks many videos that remix copyrighted material.<sup>206</sup>

Lawrence Lessig, perhaps the most prominent voice for free culture, argues that such blanket removal policies drive remix culture underground, “criminalizing” art forms like mashups.<sup>207</sup> As Lessig suggests, remixing and repurposing is the way that this generation communicates, so copyright law needs to legitimize, rather than criminalize, this practice.<sup>208</sup> Our democratized artistic culture needs a legal space in which remixes and mashups can thrive.<sup>209</sup>

### III. THE FUTURE OF VIDEO-CONTENT LICENSING: SHARING ECONOMIES V. COMPULSORY LICENSING

There are many indications that the video-licensing system is flawed.<sup>210</sup> Requiring amateurs to navigate the complexities of copyright law has resulted in systematic noncompliance.<sup>211</sup> This Note

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201. *Content ID*, YOUTUBE, <http://www.youtube.com/t/contentid> (last visited Feb. 20, 2012) (explaining YouTube's new technology that enables rights holders to better manage their content).

202. Andy Baio, *No Copyright Intended*, WAXY (Dec. 9, 2011), [http://waxy.org/2011/12/no\\_copyright\\_intended](http://waxy.org/2011/12/no_copyright_intended).

203. *ContentID*, *supra* note 201.

204. *Id.*

205. *Id.*

206. Fred Von Lohmann, *YouTube's Content ID (C)ensorship Problem Illustrated*, ELEC. FRONTIER FOUND. (Mar. 2, 2010), <https://www EFF.org/deeplinks/2010/03/youtubes-content-id-censorship-problem>.

207. LESSIG, *supra* note 7, at xvii (“What does it mean to a society when a whole generation is raised as criminals?”).

208. *Id.* at 18.

209. *Id.* (describing the criminalization of a generation as “collateral damage” in the copyright wars and urging reconsideration of these policies).

210. *See supra* Part II.

211. *See, e.g.*, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).



suggests two possible solutions that would simplify the current system and provide increased access for remix artists: (1) an expansion of the “sharing economy” approach,<sup>212</sup> exemplified by Creative Commons licenses, in which copyright owners voluntarily agree to participate in a collaborative “peer-to-peer” marketplace;<sup>213</sup> and (2) a compulsory-licensing model, with statutory rates that encourage sampling and distinguish between professional and amateur artists.<sup>214</sup> In evaluating these possible licensing arrangements, it is important to consider the value systems that underlie each framework and whether they promote a balance between rightsholders and future users.

*A. The “Sharing Economy” Approach: How It Launched an SNL Star*

Sharing economies, otherwise known as “collaborative consumption” or “peer-to-peer marketplaces,” connect people and provide open access to resources and information.<sup>215</sup> An example is the online community marketplace, Airbnb, which allows individuals to list and monetize their extra living space for vacationers seeking short-term accommodations.<sup>216</sup> In this example of a transaction-based sharing economy, money changes hands between members of the community. In contrast, borrowing-based networks such as the travel website, Couchsurfing, encourage free sharing of resources between members.<sup>217</sup> With participants contributing their resources to a “user-drive collaborative workspace” or “library,” the heart of these marketplaces is exchange and mutual benefit, not money.<sup>218</sup> In this type of community, “access to culture is regulated not by price, but by a complex set of social relations.”<sup>219</sup>

Using the principles of borrow-based marketplaces, the nonprofit organization Creative Commons has created a licensing infrastructure that maximizes the sharing of creative resources.<sup>220</sup> Co-founded by Lawrence Lessig, Creative Commons offers an alternative to traditional licensing by replacing individually negotiated agreements with easy-to-use standardized licenses.<sup>221</sup> The

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212. LESSIG, *supra* note 7, at 226.

213. Swallow, *supra* note 41.

214. KOHN & KOHN, *supra* note 42.

215. LESSIG, *supra* note 7, at 156-62.

216. AIRBNB, <https://www.airbnb.com/home/about> (last visited Oct. 19, 2012).

217. Swallow, *supra* note 41.

218. LESSIG, *supra* note 7, at 146, 170.

219. *Id.* at 145.

220. *About*, CREATIVE COMMONS, <http://creativecommons.org/about> (last visited Feb. 21, 2012).

221. *Id.*

default setting of copyright requires end-users, such as remixers, to obtain explicit permission for use in advance.<sup>222</sup> Creative Commons has flipped this standard on its head, allowing content owners to grant blanket permission to all end-users in advance by contributing their works to a collective “pool of . . . creativity,” while specifying which rights they wish to retain.<sup>223</sup> For example, artists decide before releasing their works into the commons whether they will allow end-users to modify their material, use it for commercial purposes, or license derivative works.<sup>224</sup> Prospective end-users need not negotiate these terms with the copyright owners because the Creative Commons license specifies which uses are authorized.<sup>225</sup>

By enabling rightsholders to change from the traditional default of “all rights reserved” to “some rights reserved,” this sharing economy gives end-users access to certain copyrighted content without the step of asking for permission.<sup>226</sup> Collective Commons licenses remove the need to pay-per-use, thereby providing amateur artists with a pool of content that they can share or remix for free.<sup>227</sup> The advantage of “collaborative consumption”<sup>228</sup> is that it brings together artists by creating “a pool of content that can be copied, distributed, edited, remixed, and built upon, all within the boundaries of copyright law.”<sup>229</sup> It reduces transaction costs and the expense of licensing through a free, public, and standardized infrastructure.<sup>230</sup> By minimizing the costs to end-users, Creative Commons encourages both professionals and amateurs to legally participate in creative culture.<sup>231</sup> This ultimately fosters cultural production by removing the hurdle of negotiating a license for use.

The Creative Commons model also strikes a balance between the needs of artists and licensees by creating the opportunity for mutual benefit and exchange. For example, before they were a household name, the comedy group “Lonely Island,” featuring Andy Samberg, developed a fan base by releasing their material online under a Creative Commons license.<sup>232</sup> The group shot a pilot for Fox,

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222. *Id.*

223. *Id.*

224. *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses> (last visited Nov. 24, 2012).

225. *See id.*

226. *Id.*

227. *Id.*

228. Swallow, *supra* note 41.

229. CREATIVE COMMONS, *supra* note 220.

230. *See id.*

231. *See id.*

232. Mia Garlick, *Lonely Island*, CREATIVE COMMONS (Oct. 17, 2005), <http://creativecommons.org/weblog/entry/7065>.

but after the network decided not to air it, Lonely Island posted the video on their website using an Attribution-NonCommercial-ShareAlike license.<sup>233</sup> This licensing option allowed fans to use their material without requesting permission, with the following conditions on end-users: (1) they must attribute their uses in the way specified by Lonely Island; (2) they may not use their copyrighted works for commercial purposes; and (3) if they change the original material, they may only distribute the resulting work using a similar license to this one.<sup>234</sup> Lonely Island chose this type of license because they wanted to encourage their fans to remix their material and share it with others, but they also wanted to reserve some control for themselves, such as the exclusive right to use their works for commercial purposes.<sup>235</sup>

By developing their fan base and spreading their works online, Lonely Island was ultimately able to cross over to a transaction-based economy.<sup>236</sup> Creative Commons licensing ultimately paved the way for Lonely Island's commercial success.<sup>237</sup> After someone at *Saturday Night Live* saw Lonely Island's work on the web, the NBC show asked Andy Samberg to join the cast, and it featured the entire group in a number of popular digital shorts from 2005 to 2012.<sup>238</sup>

As this example illustrates, the Creative Commons model accomplishes two things that the traditional all-rights-reserved approach does not. First, it takes into account the social norms of the "remix generation" by minimizing restrictions on creativity and eliminating the need for individually negotiated contracts.<sup>239</sup> Second, it creates an easy framework in which the copyright owner can manage his content and enumerate which rights he wishes to reserve.<sup>240</sup>

Nevertheless, even though the "digital commons" model enables a creativity-sharing network for both professional and nonprofessional artists, it is not a sustainable replacement for traditional licensing of video content. While it provides a beneficial alternative in many circumstances of amateur art, removing money

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233. See *id.*

234. Attribution-NonCommercial-ShareAlike 2.5 Generic (CC BY-NC-SA 2.5), CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc-sa/2.5> (last visited Nov. 24, 2012).

235. Garlick, *supra* note 232.

236. LESSIG, *supra* note 7, at 227-28.

237. See *id.*

238. See *id.*

239. Garlick, *supra* note 232.

240. See *id.*

from the equation entirely has a number of downsides.<sup>241</sup> For instance, by granting advanced permission for use to all prospective licensees, content owners lose a significant amount of control over future use.<sup>242</sup> Because Creative Commons licenses do not involve individually negotiated contracts, owners often do not know who is using their work once they release it into the collective pool of content.<sup>243</sup>

Moreover, while artists may benefit from the redistribution and free publicity for their work, end-users do not directly compensate the artists for permission to use their works.<sup>244</sup> A specific demographic of artists—primarily aspiring or up-and-coming artists—stand to gain from this arrangement because it enables them to build a fan base. In contrast, well-known artists may not benefit from using a Creative Commons license, as they have more opportunities for commercial licensing than amateur artists.<sup>245</sup> To be sustainable on a widespread basis, all parties would need to buy into the idea of free culture. Creative Commons licensing, however, typically does not attract the popular content that remix artists wish to use.

In browsing the Creative Commons pool of creative material, there is a notable lack of current VH1 Top 20 music videos and material from popular television shows. Established artists and producers have little incentive to participate in a community built on mutual exchange because their works already have monetary value.<sup>246</sup> If a content owner can easily find a licensee to pay per use of his material, it would be financially irrational to release it for free into the commons. As a result, while the Creative Commons market connects amateur artists in a network of shared creativity, this system is not a viable replacement for the licensing of “famous” content. Without a mechanism for generating direct profit, the Creative Commons alternative will continue to have a limited role in licensing.

### *B. A Compulsory-Licensing Model: Collective Management of Video Content*

In the music world, some cover songs become so popular that

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241. *7 Things You Should Know about . . . Creative Commons*, EDUCAUSE LEARNING INITIATIVE (Mar. 2007), <http://net.educause.edu/ir/library/pdf/ELI7023.pdf>.

242. *Id.*

243. *Id.*

244. *Id.*

245. See *Criticism and Disadvantages of CC*, KIRUBA WIKI, [http://www.kiruba.com/copyrightandleft/wiki/index.php?title=Criticism\\_and\\_Disadvantages\\_of\\_CC](http://www.kiruba.com/copyrightandleft/wiki/index.php?title=Criticism_and_Disadvantages_of_CC) (last updated July 27, 2011).

246. *Id.*

they eclipse the original work.<sup>247</sup> When people hear “R-E-S-P-E-C-T,” only one name comes to mind: Aretha Franklin. Despite the fact that Otis Redding originally wrote and performed the song “Respect,” Aretha was the one who won the Grammy.<sup>248</sup> Even though many cover artists do not achieve this level of success, copyright law allows anyone to try.<sup>249</sup> Under § 115 of the Copyright Act, artists may record and distribute any musical composition that has been previously recorded and released to the public, as long as they obtain a compulsory mechanical license.<sup>250</sup> This provision requires that an artist send a notice of intent to the publisher within thirty days of distribution and pay statutorily determined royalties (currently 9.1 cents per copy per song).<sup>251</sup>

While Congress adopted compulsory licensing to prevent monopolies in the music publishing industry,<sup>252</sup> today it benefits amateur artists in a significant way. Prospective licensees do not need to ask permission from a music publisher to use copyrighted musical compositions; if they cannot locate the copyright owner, or if that rightsholder is unwilling to negotiate, licensees can still obtain a license through a copyright clearinghouse.<sup>253</sup> Artists who wish to record an existing musical composition may easily obtain the legal rights they need through the Harry Fox Agency (HFA), which acts as an “information source, clearinghouse, and monitoring service” for musical copyright licensing.<sup>254</sup> HFA simplifies licensing by serving as a single source for the collection and distribution of royalties, which removes the hurdle of individually negotiating a contract for use.<sup>255</sup>

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247. Dylan Moore, *Top 10 Cover Songs More Famous than the Original*, TOPTEENZ.NET, <http://www.toptenz.net/top-10-cover-songs-more-famous-than-the-original.php> (last visited Nov. 24, 2012).

248. *Id.*

249. *See* 17 U.S.C. § 115 (2006).

250. *Id.*

251. US COPYRIGHT OFF., COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS (Mar. 2011), *available at* <http://www.copyright.gov/circs/circ73.pdf>; *Mechanical License Royalty Rates*, US COPYRIGHT OFF., <http://www.copyright.gov/carp/m200a.pdf> (last visited, Nov. 24, 2012).

252. Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 220 (2010), *available at* <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1499&context=ctlj> (discussing the history of compulsory licensing).

253. US COPYRIGHT OFF., *supra* note 251, at 3.

254. *About HFA*, HARRY FOX AGENCY, INC., <http://www.harryfox.com/public/AboutHFA.jsp> (last visited Nov. 24, 2012).

255. *See* Shane Valenzi, Note, *A Rollicking Band of Pirates: Licensing the Exclusive Right of Public Performance in the Theatre Industry*, 14 VAND. J. ENT. & TECH. L. 759, 790 (2012) (citing *Mechanical Licensing*, HARRY FOX AGENCY, INC., <http://www.harryfox.com/public/MechanicalLicenseslic.jsp> (last visited Nov. 24, 2012)).

Following this model of mandatory collective management, Congress could adopt compulsory licensing of video content as an alternative to traditional licensing. To streamline the process of obtaining a compulsory license, the system would need a copyright clearinghouse to play a similar role to that of HFA. One of the primary benefits of this model is that it provides amateur artists with easy access to copyrighted material. While it does require some affirmative action by end-users, in that they must provide notice and pay statutory royalties, it eliminates the problem of inferior bargaining power. When seeking a compulsory license, prospective licensees do not need to locate rightsholders or persuade them to authorize their intended use.<sup>256</sup> Under the traditional model, end-users would need to demonstrate that a license would be financially beneficial to the content owner. Otherwise, that rightsholder would have no real incentive to yield her exclusive rights. In contrast, compulsory licensing is available to any interested party, regardless of bargaining power, as long as the work has been previously recorded and released to the public.<sup>257</sup>

Additionally, this model addresses the issue of social norms and user confusion by providing a clear process for obtaining a compulsory license. Under the current system, many remix and mashup artists do not understand when a license is necessary or what steps they should take to gain permission.<sup>258</sup> As a result, there is widespread unauthorized use of copyrighted material.<sup>259</sup> A mandatory collective management system, with one source for information and copyright clearance, would simplify the process and help amateur artists with the details of licensing.<sup>260</sup>

Perhaps most importantly, mandatory collective management benefits both the rightsholder and the prospective licensee.<sup>261</sup> Unlike the Creative Commons model, compulsory licensing has a mechanism for generating profit. While any artist, even amateurs, may take advantage of qualifying works, this system still ensures that the content owner receives compensation for such use.<sup>262</sup> End-users pay for the privilege of using copyrighted content, but they do not need to

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256. US COPYRIGHT OFF., *supra* note 251, at 3.

257. RICHARD STIM, *MUSIC LAW: HOW TO RUN YOUR BAND'S BUSINESS* 270 (6th ed. 2009).

258. *See supra* Part II.B.

259. *See supra* Part II.B.

260. *See e.g.*, Valenzi, *supra* note 255.

261. *See* Nate Anderson, *Barenaked Ladies: If I Had a Compulsory Blanket Music License*, ARS TECHNICA (Apr. 27, 2007), <http://arstechnica.com/uncategorized/2007/04/barenaked-ladies-if-i-had-a-compulsory-blanket-music-license>.

262. *Id.*

negotiate a royalty rate because it is statutorily prescribed.<sup>263</sup> Parties may negotiate for a different rate if they wish, but compulsory licensing makes this a matter of choice rather than necessity.<sup>264</sup>

Nevertheless, compulsory licensing, as it exists in the context of musical composition, does not fully address the particularities of remix and mashup videos; accordingly, Congress would need to make certain modifications to this model for video content. In particular, lawmakers would need to establish three elements tailored to the video arts: (1) protection for derivative works, (2) royalty rates that distinguish between amateur and professional artists, and (3) reasonable royalty rates for samples. With these three changes, amateur artists would have increased access to copyrighted content and greater protection for their resulting works than the traditional system provides.

First, § 115 allows licensees of musical compositions to make a new arrangement of the recording, but specifies that the arrangement “shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work.”<sup>265</sup> Cover artists may bring their own meaning and interpretation to a piece of work, but there are limits on the types of changes they can make.<sup>266</sup> However, remix and mashup videos, by their very nature, are all about the unexpected, the pairing of incongruent elements to create the unforeseen.<sup>267</sup> In order to preserve the integrity of this art form, compulsory licensing of video content must allow end-users to freely change the works they are using. The value of amateur video art is in its unpredictable, inventive character, so lawmakers should not restrict the extent to which end-users can use content creatively.

Secondly, copyright royalty judges, who set the mechanical license royalty rates for music compositions, currently distinguish rates on the basis of category (including physical phonorecords, permanent downloads, limited downloads, ringtones, and interactive streaming), and on the basis of the release date of the original work.<sup>268</sup> In addition to these classifications, lawmakers should account for whether the intended user is an amateur or professional artist. The limited bargaining power of amateur artists, as well as the fact that many of their projects are not for commercial use, justifies this differential treatment of amateurs and professionals. High rates run

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263. *Id.*

264. *Id.*

265. 17 U.S.C. § 115 (2006).

266. *See id.*

267. *Raz, supra* note 17.

268. *Mechanical License Royalty Rates, supra* note 251.

the risk of either chilling amateur art, because they make remix and mashup videos prohibitively expensive, or encouraging unauthorized use, as is currently happening with video content.<sup>269</sup> Therefore, in order to encourage a range of artists to legally create remix and mashup art, the compulsory-licensing system needs to offer reasonably affordable rates for amateurs.

Building on this concept, the licensing system should promote the legal use of samples by offering a lower rate for excerpts that are less than a minute in length. For musical compositions, the statutory rate for physical phonorecords is “9.1 cents per minute of playing time or fraction thereof, whichever is larger.”<sup>270</sup> However, many mashup and remix videos feature multiple different samples of copyrighted material, but each clip is only seconds long.<sup>271</sup> A system that uses the minute as the base measure does not properly account for this art form, as it quickly leads to unreasonably high costs. Accordingly, lawmakers need to create a separate and lower standard rate for samples that are less than a minute. This would also encourage the clearinghouse to offer licenses for samples of video content. Currently, HFA directs prospective licensees to obtain sampling permission from the owner of the master recording and the publisher.<sup>272</sup> In order to streamline the process of licensing video samples, however, there needs to be only one source for obtaining authorization: the video-content clearinghouse.

While such a collective-licensing scheme would undoubtedly benefit sampling artists, it does cabin the rights of content owners more than the traditional system of licensing.<sup>273</sup> One possible objection to this proposal is that it removes content owners’ exclusive right to reject prospective licensees.<sup>274</sup> Moreover, it encroaches on rightsholders’ ability to negotiate with individual users for a higher royalty rate.<sup>275</sup>

Nevertheless, on balance, compulsory licensing would better promote the progress of useful arts, in accordance with the principal goal of copyright law.<sup>276</sup> The system would foster amateur art forms

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269. See *supra* Part II.C.

270. *Mechanical License Royalty Rates*, *supra* note 251.

271. See *supra* Part II.C.

272. *General Information: FAQ*, HARRY FOX AGENCY, INC., <http://www.harryfox.com/public/FAQ.jsp> (last visited Nov. 24, 2012).

273. See generally Theresa M. Bevilacqua, *Time to Say Good-Bye to Madonna’s American Pie: Why Mechanical Compulsory Licensing Should Be Put to Rest*, 19 CARDOZO ARTS & ENT. L.J. 285 (2001) (discussing reasons for repealing or rewriting the compulsory-licensing provision).

274. *Id.* at 288.

275. *Id.*

276. See U.S. CONST. art I, § 8, cl. 8.



by providing nonprofessional artists with easy access to licensing. Additionally, the rightsholders of famous content, who might be adversely affected by this scheme, would have already monetized their art in some fashion (otherwise they would not be an attractive target for sampling); therefore, they are unlikely to suffer a disincentive to create in the future. Moreover, this arrangement would ultimately benefit all content owners financially by increasing compliance with copyright laws. Streamlining the process of obtaining permission and providing amateur artists with greater access to the system would encourage current infringers to pursue a legal license, which should allow content owners to earn royalties on what would otherwise be unauthorized, infringing uses. Content owners would also be able to decrease the significant transaction costs associated with bringing infringement suits. Finally, content owners (particularly large ones) would greatly improve their standing in the court of public opinion by providing individuals with a reasonable avenue to license content; this should (theoretically) allow them to more effectively lobby Congress for increased copyright protection (and enforcement) in the future.

Therefore, this modified collective-management approach would best balance the interests of content owners and remix artists, creating a viable market for video content. By incorporating the three proposed elements into a compulsory-licensing scheme, lawmakers would tailor the system to the unique challenges that remix and mashup videos present. While both this proposal and the Creative Commons model offer amateur artists greater access to copyrighted material, the compulsory-licensing system more fully accounts for the economic interests of rightsholders. Copyright laws should foster creativity from a spectrum of artists, not just those with bargaining power; however, it should also reward those who have made original works worth copying.

#### IV. TURNING INFRINGEMENT INTO PROFIT

In the last decade, online-streaming videos have become “interwoven into the fabric of daily life, politics, and commerce” as a major mode of creative expression.<sup>277</sup> Moreover, videos have begun to incorporate the tradition of sampling, as popularized by rap and hip-hop music.<sup>278</sup> Today, both professional and amateur artists often incorporate copyrighted video content into their creative projects, breathing new life into existing material.<sup>279</sup> But there is strong

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277. Aufderheide et al., *supra* note 21.

278. Navas, *supra* note 7.

279. Aufderheide et al., *supra* note 39, at 5.

evidence that noncompliance with video-licensing requirements is a serious problem, one that educational campaigns and crackdowns on copyright infringement have not alleviated.<sup>280</sup> This issue arises from high actual and transactional costs associated with pursuing a license, as well as the fact that many end-users have substantially less bargaining power than content owners.<sup>281</sup> Neither Congress nor current content owners anticipated the growth of an amateur remix and mashup culture, so the video-licensing system does not account for amateur artists' needs, philosophies, or social norms.

Given the ineffectiveness of this system in promoting copyright compliance among amateur artists, it is time for a new licensing framework—one that both promotes creativity and upholds the profit interests of content owners. In light of the meaningful distinctions between professional and amateur artists, it is time to explore alternative approaches to “one size fits all” licensing. This Note recommends a compulsory-licensing model, similar to the system that exists for musical compositions. However, this proposal has three modifications that would tailor licensing to the unique challenges that remix and mashup videos present: (1) protection for derivative works, (2) royalty rates that distinguish between amateur and professional artists, and (3) reasonable royalty rates for samples.

Rather than creating a war of ideas between content owners and future users, such a licensing system would encourage them to benefit from each other. The primary purpose of US copyright law is to encourage creativity, and it should therefore allow amateur-remix video art to thrive. As musical artist Ben Folds recently stated, “Amateurs are the people who are the more talented, more dangerous, more interesting, more creative.”<sup>282</sup> Democratized culture benefits everyone by fostering creativity at all artistic levels, but copyright law should evolve as well in order to also achieve a sustainable market.

*Joanna E. Collins\**

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280. LITMAN, *supra* note 124, at 114.

281. Gervais, *supra* note 31.

282. Edd Hurt, *On Their First Record in 13 Years, the Reunited Ben Folds Five Contemplate Growing Older*, NASHVILLE SCENE (Sept. 13, 2012), <http://www.nashvillescene.com/nashville/on-their-first-record-in-13-years-the-reunited-ben-folds-five-contemplate-growing-older/Content?oid=3012179> (internal quotation marks omitted).

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