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Year 2008

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Piracy Paradox, and Lessons for the
Recording Industry

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“Criminal Minded?”¹: Mixtape DJs, The Piracy Paradox, and Lessons for the Recording Industry

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“There’s nothing that sells music like music.”
- 50 Cent

“Just because you can, doesn’t mean you should.”
- Folk wisdom

For at least the past three years, leading American fashion designers have lobbied for passage of copyright-like protection for the design aspects of their apparel creations.³ For at least as long, the recorded music industry has been engaged in an aggressive campaign to enforce its copyrights in recorded music against a number of technology-enabled and/or culturally sympathetic alleged infringers, including “twelve year-olds” and “grandmothers.”⁴ Although the record labels already have protection under the copyright law while the fashion houses seek it, they have at least one thing in common: some portion of the piracy that they seek to eradicate is more valuable to them than they publicly let on. In their recent article *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, Kal

¹ See Boogie Down Productions, *Criminal Minded* (B-Boy Records 1987)

² Associate Professor, Pace Law School. The author gratefully acknowledges LiRon Anderson, Don Doernberg, Steven Goldberg, Lissa Griffin, Peter Lee, Randolph McLaughlin, and Ruth Okediji, who provided helpful comments on previous drafts. The author also thanks Diana Collins, Hebah Elaiwat, and Katherine Krause for their able research assistance.

³ H.R. 2033, sponsored by Rep. William D. Delahunt (D-Ma.) and introduced on April 25, 2007, has been referred to the House Subcommittee on Courts, the Internet, and Intellectual Property. Its counterpart, S. 1957, sponsored by Sen. Charles E. Schumer and introduced on August 8, 2007, is before the Senate Committee on the Judiciary. The proposed legislation, supported by the Council of Fashion Designers of America, is titled the Design Piracy Prohibition Act. The Act would provide three years of protection for the creators of original fashion designs by amending the section of the Copyright Act now used to protect boat hull designs.

⁴ See Matthew Sag, *Twelve-Year-Olds, Grandmothers, and Other Good Targets For the Recording Industry’s File Sharing Litigation*, 4 NORTHWESTERN J. TECH. & INTELL. PROP. 133 (2006). By one estimate, the industry’s strategy of suing end users has led it to file over 20,000 lawsuits in three years.

Raustiala and Chris Sprigman explore the “low-IP equilibrium” of the fashion design industry, as well as the unexpected value created by a low-protection regime. This Article examines a parallel, and potentially related, phenomenon in the record business: the economic value added to an intellectual property (“IP”) asset by the technically infringing behavior of the mixtape DJ.⁵

In an extension of the recording industry’s aggressive civil litigation strategy, the labels have begun to use the criminal law to seek the arrest and prosecution of purveyors of mixtapes (the common term for a hip-hop compilation CD).⁶ The most recent visible targets of this campaign have been several prominent DJs, the creators of some of the most popular recent mixtapes.⁷ On January 16, 2007, Atlanta-area police, working with the Recording Industry Association of America (RIAA), raided the offices of Tyree Simmons, professionally known as DJ Drama, and confiscated 81,000 mixtape CDs, along with computers and recording equipment. Drama, along with protégé DJ Don Cannon, was also arrested and charged with a felony count of violation of Georgia’s Racketeering Influenced Corrupt Organization law.⁸ The state of Georgia requires that the name of the copyright owner of any recorded music for sale be displayed on the packaging. According to the complaint, failure by Simmons and Cannon to do so

⁵ In hip-hop culture, a “mixtape” is a compilation of preexisting songs or portions of songs (including many unreleased tracks), arranged, remixed, and altered by a disc jockey, or “DJ”. Although originally distributed on cassette, mixtapes are currently distributed in the CD format or as digital audio files. The hip-hop mixtape is distinguishable from the ordinary compilations of favorite songs exchanged between friends, also known as “mixtapes,” or “mixed tapes.”

⁶ Section 506 of the Copyright Act, 17 U.S.C. § 506, provides for criminal punishment for willful infringement for purposes of commercial advantage or financial gain, for reproduction or distribution of copies valued at more than \$1,000, or for distributing via a computer network a work intended for commercial distribution by its owner. In the case of the mixtape DJs, however, the recording industry has chosen to use state RICO laws as the basis for criminal complaint.

⁷ Although the record labels often conflate the two, mixtapes are distinguishable from “bootleg” CDs due to the creative contribution of the DJ. A mixtape is a compilation of singles selected, arranged, and remixed or otherwise altered by the creating DJ. A bootleg CD is generally understood to be an exact copy of a full album, burned onto a blank CD and sold on the street as an alternative to purchasing the official CD release. The mixtape typically contains significant creative input from the DJ who produces it, while a bootleg involves no creative contribution from its manufacturer whatsoever.

⁸ See Hillary Crosley, *DJ Drama Arrested in Mixtape Raid*, BILLBOARD, January 17, 2007, available at http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id=1003533767; Kelefa Sanneh, *With the Arrest of DJ Drama, the Law Takes Aim at Mixtapes*, NEW YORK TIMES, January 18, 2007, at E1.

with their mixtape CDs represented a large-scale, organized and ongoing attempt to engage in illegal reproduction and distribution of the copyrighted works of others. A conviction would earn Drama and Cannon one to five years in prison and a fine of anywhere between \$10,000 and \$100,000.⁹ Drama is regarded as one of the industry’s most influential mixtape DJs, and news of his arrest led to the removal of mixtape products from store shelves and online sites across the country.¹⁰ Along with earlier raids of small music retailers¹¹, the Drama/Cannon raid has increased fear and uncertainty in the mixtape trade and led to a chilling of mixtape production and sales.¹²

One might ask whether there is anything wrong with chilling an unlawful activity such as large-scale copyright infringement. This article argues that there *is* something wrong with such a result, but that the owners of the copyright in the recordings either fail to appreciate the problem or fail to account for the problem in executing their enforcement strategy. DJ Drama and his peers are engaged in productive infringement – infringing activity or improper appropriation that adds value to the infringed asset, rather than leading to losses for the copyright owner. Dealing with such infringement requires an approach different from typical recording industry tactics. This Article argues that, in order to preserve and enhance the value of their own assets, the record labels should practice strategic forbearance.

Part I describes the “Piracy Paradox,” which this Article posits is an industry-specific instance of a more general phenomenon, and introduces the concept of “productive infringement,” along with “strategic forbearance.” In Part II, the recent history of copyright enforcement in the music industry is offered as a possible reason for the posture that the industry has taken against mixtape DJs. Part III outlines a brief history of hip-hop music and culture, and describes how that culture has clashed with application of the copyright law in music cases. Part IV draws parallels between the rap

⁹ See Nick Marino and S.A. Reid, *Two Hip-Hop DJs’ Arrests Spotlight Atlanta as Hotbed for Music Piracy*, ATLANTA JOURNAL AND CONSTITUTION, January 19, 2007, at A1; S.A. Reid, *DJs to Appear today in Court*, ATLANTA JOURNAL AND CONSTITUTION, January 24, 2007 at D6.

¹⁰ See Hillary Crosley, *Mixed Messages: DJ Drama’s Bust Leaves Future of Mixtapes Uncertain*, BILLBOARD, January 27, 2007, at 8.

¹¹ E.g., Mondo Kim’s in New York City; Berry’s Music in Indianapolis, Indiana; Dapp Don Clothing Co. in Norfolk, Virginia; and Rhode Island Records in Pawtucket, Rhode Island.

¹² See *Id.* (quoting an online mixtape seller as saying, “Ultimately, it’s going to change everything . . . Our site will not be distributing mixtapes anymore. It’s the end of any way to sell physical mixtapes”).

music industry and the fashion industry (in which the Piracy Paradox was observed), explores the specific role of the mixtape DJ in the hip-hop economy, and describes how the DJ’s role fits into the general economic structure of the recording industry. A model is introduced in Part V that attempts to aid in determining the most appropriate contexts in which to employ strategic forbearance, by calculating the value actually added to a copyrighted song by its otherwise infringing use in a hip-hop DJ’s mixtape. Part V concludes by offering a few specific potential applications of the model by courts and copyright owners.

I. The Piracy Paradox

a. Brief Description of the Paradox

Raustiala and Sprigman address a seeming anomaly of the fashion design industry.¹³ The conventional wisdom (and philosophical underpinning) of intellectual property protection in creative industries is that in order to give incentives for creators to create, we must provide for their creations strong protection against copying.¹⁴ In the absence of strong protection, free riders will appropriate the inspiration of innovators, and innovators will choose to invest their time and resources elsewhere.¹⁵ In short, there will be no innovation without intellectual property protection.

Fashion design belies this assumption. Despite several attempts during the 20th and 21st centuries,¹⁶ copyright law in the United States has never

¹³ See generally Kal Raustiala and Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

¹⁴ This utilitarian approach to protection for creative/innovative work is the cornerstone of protection in the United States for copyrights and patents. Article I, Section 8, Clause 8 of the U.S. Constitution provides that Congress shall secure “for limited times to authors and inventors the exclusive right to their respective writings and discoveries,” in order to “promote the Progress of Science and useful Arts.” U.S. CONST. Art. I, § 1, Cl. 8. Providing some reasonable period of exclusivity for the creator of a work is the key to building a rich public store of expressive and technological works.

¹⁵ See, e.g., William M. Landes and Richard A. Posner, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 18 (2003).

¹⁶ See, e.g., *Copyright Hems and Haws; Trying to Protect Fashion Designs From Knock-offs Would be Too Difficult and Would Smother Innovation*, LOS ANGELES TIMES Aug. 15, 2007 A18; Hagin, Leslie J., *A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copy-*

protected designs of clothing.¹⁷ Although there are a number of alleged economic, historical and sociological reasons for this omission,¹⁸ the doctrinal rationale is the “useful article” doctrine. Under that doctrine, copyright may only be used to protect expression, not functionality.¹⁹ When creative expression and functionality appear in the same item (e.g., mannequins used to hold and display clothing), only the expressive or aesthetic aspects of the item are potentially copyrightable. The test is separability; the aesthetic aspects of the work must be physically or conceptually separable from its functional aspects.²⁰ To the extent that the aesthetic characteristics have been adjusted to meet functional needs, conceptual separability is destroyed.²¹ Clothing is useful, and therefore the design of clothing is subject to, and usually fails, the copyrightability test of the useful article doctrine. Thus, although a small number of works related to fashion or apparel (such as fabric patterns) receive limited copyright protection, by and large fashion designs are unprotectable by the Copyright Act.²²

The lack of protection by the copyright law creates the opportunity for copyists to refer to, imitate, or reproduce wholesale the original clothing designs of others. A dress may be observed on the runway in Paris, New York or Milan, its design may be photographed, sketched, or memorized, and a cheaper competing version of the dress may be in U.S. stores even before the original.²³ The original designer has no recourse under U.S.

right Regime, 26 TEX. INT’L L.J. 341 (Spring 1991); Jennifer Mencken, *A Design for the Copyright of Fashion*, 1997 B.C. INTELL. PROP. & TECH. F. 121201 (December 1997).

¹⁷ See, e.g., Samantha L. Hetherington, *Fashion Runways are No Longer the public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design*, 24 Hastings Comm. & Ent. L.J. 43, 44 (2001).

¹⁸ See, e.g., Written Statement of Susan Scafidi on H.R. 5055, presented to the Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property, July 27, 2006 at 4 (stating that clothing design’s historical status as a household task, as women’s work, and as a consumption-related activity slowed its recognition as a form of creative expression).

¹⁹ See 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery . . .”).

²⁰ See *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F. 2d 411 (2nd Cir. 1985).

²¹ See *Brandir International, Inc. v. Cascade Pacific Lumber*, 834 F. 2d 1142 (2nd Cir. 1987).

²² See *Celebration International, Inc. v. Chosun International, Inc.*, 234 F.Supp.2d 905, (S.D.Ind. 2002); *Queenie, Ltd. V. Sears, Roebuck, & Company*, 124 F.Supp.2d 178, (S.D.N.Y. 2000). See also Patti Waldmeir, *Why Knock-offs are Good for Fashion*, FINANCIAL TIMES USA, September 12, 2007.

²³ See, e.g., *Copy Shops: Fashion Knockoffs Hit Stores Before Originals As Designers Seethe – Photos, Fax, Fedex and Spies Make Imitation Pervasive and all but Instantaneous – An Expensive Suit for Lauren*, THE WALL STREET JOURNAL EUROPE, August 8, 1994

copyright law. Other areas of the law may provide protection in some situations. If the copyist has attempted to pass his copy off as an actual product of the original designer by using identical or confusingly similar labeling, brand names, or logos, then the designer may have a cause of action for trademark infringement. This sort of “passing off” encompasses the classic “knock-off” goods sold on many streets in New York (and increasingly on the Internet) – the impossibly inexpensive Louis Vuitton bag or Lucky jeans, for example.²⁴ A manufacturer contracted to produce an item for the original designer may be liable for breach of contract for producing a similar item for a copyist. And many commentators have debated the merits and sufficiency of other arguable legal avenues for protection.²⁵

In the absence of copyright protection for their creative expression, clothing designers have resorted to extra-legal forms of aid such as cartelization and boycotts,²⁶ extreme secrecy in the design process,²⁷ and euphemization of the copying as flattery or homage.²⁸ And, of course, the indus-

²⁴ See, e.g., *Fashion’s Bid to Knock Out Knockoffs*, BUSINESS WEEK April 10, 2006; *OK Knockoffs, This is War*, NEW YORK TIMES, March 30, 2006; *Katrina Pounds Trademarks: It’s Good and Bad That Hurricane Survivors Are Getting Counterfeit Wares*, LEGAL TIMES October 10, 2005.

²⁵ See e.g., S. Priya Bharathi, *There is More Than One Way to Skin a Copycat: The Emergence of Trade Dress to Combat Design Piracy of Fashion Works*, 27 TEX. TECH. L. REV. 1667 (1996) (describing trade dress law as superior to copyright law for providing protection against design piracy, given the United States Supreme Court’s expansive description of trade dress as a product’s “total concept and overall appearance” in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 US 763 (1992)); Samantha L. Hetherington, *Fashion Runways are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design*, 24 HASTINGS COMM. & ENT. L.J. 43 (Fall 2001) (advocating use of the right of publicity to protect designs because of the unique and personal nature of a designer’s services, and because of the connection between a designer’s creations and her identity); Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J. 169 (Winter 2002) (discussing the shortcomings of patent, copyright, and trademark law in providing protection for apparel designs, and arguing for *sui generis* protection).

²⁶ In the 1930s the Fashion Originators’ Guild prohibited its members from copying each other’s designs and pressured retailers not to sell the designs of design copiers. The U.S. Supreme Court held the Guild’s activities to be an antitrust violation. See generally *Fashion Originators’ Guild v. Federal Trade Commission*, 312 U.S. 457 (1941).

²⁷ For example, at least one designer bans the release of any photographs of clothing until they arrive in stores. See Vanessa Friedman, *Flattery Will Get You Everywhere: The High Street Owes a Great Debt to High Fashion, and it’s Time it Admitted So*, FINANCIAL TIMES, November 17, 2007 at 6 (citing Didier Grumbach, president of the Chambre Syndicale de la Haute Couture in Paris).

²⁸ See, e.g., *OK Knockoffs, This is War*, NEW YORK TIMES, March 30, 2006; *Vive Le Knockoff*, LOS ANGELES TIMES October 10, 2007; *Why Knockoffs Are Good for Fashion*,

try continues to press for legislation either to expand copyright protection to fashion designs, or to create *sui generis* protection.²⁹ Despite the lack of protection under the Copyright Act, the apparel industry is not on its last legs. There is plenty of innovation in fashion design, the industry is growing and vibrant, and the established houses continue to be very profitable.³⁰

Raustiala and Sprigman explain the apparel industry’s vitality and profitability in the face of piracy as the product of a remarkably stable low-IP equilibrium. Despite low levels of legal protection for creative expression in the form of fashion designs, there is no sustained political movement in the direction of more protection, as has been the case in the music and film industries.³¹ In fact, despite “occasion[al] efforts . . . to alter the legal regime governing design copying, the regime has persisted unchanged for over six decades.”³² This paradox follows from two characteristics peculiar (but not necessarily unique) to the fashion world: “induced obsolescence” and “anchoring.”

Induced obsolescence is the process whereby designs and styles are diffused through disparate levels of the marketplace. High-fashion apparel is a “positional” good, conferring status on its user rather than just providing him/her utility.³³ Garments are replaced even when they are still functionally serviceable, because, as more people gain access to a garment, the garment’s ability to communicate the high status of the early purchasers is diminished. In order to communicate their lofty status anew, the early adopt-

FINANCIAL TIMES September 12, 2007; *Telling You So Again*, NEW YORK TIMES March 18, 2006.

²⁹ The latest of these attempts is HR 2033, discussed *supra* note 2.

³⁰ Opponents of HR 2033 argue that it is unnecessary because the fashion industry is flourishing despite the lack of protection for designs. Steve Maiman, a co-owner of a women’s and clothing manufacturer based in Los Angeles, opposes the bill because he believes that the fashion industry “has grown into a huge industry, a competitive industry, an innovative and vibrant industry – all without any help – of interference – from copyright law.” Maiman went so far as to distinguish copyright laws for fashion design from other copyright laws, and testified in front of the House committee that “Unlike the music industry or the movie business, digital improvements in communications have not contributed to any revolutionary changes in the way apparel is designed, distributed, or marketed.” See *Designer vs. Vendor: Battle Over Copyright Issue Hits Congress*, Women’s Wear Daily.com, February 15, 2008; Testimony of Steve Maiman in Opposition to H.R. 2033, U.S. House of Representatives Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property. Presented February 14, 2008.

³¹ See, e.g., David Bollier and Laurie Racine, *Control of Creativity? Fashion’s Secret: Film and Music Industries Might Heed the Wisdom*, THE CHRISTIAN SCIENCE MONITOR, September 9, 2003 at 9.

³² Raustiala and Sprigman at 1699.

³³ *Id.* at 1718.

ers must move on to a different garment or style.³⁴ “Copying often results in the marketing of less expensive versions, thus pricing in consumers who otherwise would not be able to consume the design. What was elite becomes mass.”³⁵ As elite becomes mass, it is necessary to define a new elite, in order to give the most exclusive customers of the industry a new point of differentiation.

The industry’s longstanding tolerance of appropriation contributes to the rapid diffusion of original designs. Rapid diffusion leads early-adopter consumers to seek out new designs on a regular basis, which in turn leads to more copying, which fuels yet another design shift. The fashion cycle, in sum, is propelled by piracy.³⁶

Copying of designs, far from harming the industry, contributes to the cycle of turnover that creates a fresh appetite for designs each season, and thus increases industry revenues.

The second characteristic of fashion design contributing to the industry’s stable low-IP equilibrium is “anchoring,” the use of, and coalescence around, particular aspects of the copied design as indicators of the design direction for the season. Anchoring helps communicate trends to the marketplace and “ensures that consumers understand when the styles have changed.”³⁷ Copying helps to identify the key design themes of a given season, as copyists seize on particular aspects of a garment in making their copies. If copyists focus on the fabric from which a bag is made, the slimness of the silhouette of a suit, or the presence of a wide belt on a dress, for example, such focus allows specific themes to emerge and become trends. “Thus anchoring helps fashion-conscious consumers understand (1) when the mode has shifted, (2) what defines the new mode, and (3) what to buy to remain within it.”³⁸

Together, induced obsolescence and anchoring lead to greater consumption of fashion goods than would be the case in the absence of free appropriation of designs. As status seekers must constantly seek out designs that have not yet been adopted by the masses, they create a constant market

³⁴ *See id.* at 1719-1720.

³⁵ *Id.* at 1722.

³⁶ *Id.* at 1726.

³⁷ *Id.* at 1728.

³⁸ *Id.* at 1729.

for new fashion goods, the “next new thing.”³⁹ This is no mere U.S. phenomenon. In the European Union, where a combination of national laws and EU-level laws provide protection for fashion designs⁴⁰, the rights appear rarely to be enforced, suggesting that some benefit from copying may outweigh any loss from it.⁴¹

The low-IP equilibrium of the fashion industry may be viewed narrowly, as a peculiarity of a specific business. However, it is more usefully viewed as a particular example of a broader phenomenon: a corner of the creative world where the value-enhancing properties of copying make forbearance a more valuable strategy than enforcement of rights. As discussed *infra*, this broader phenomenon encompasses the enhancement of value contributed by the copying of the hip-hop mixtape DJ.

b. Productive Infringement and Strategic Forbearance

Raustiala and Sprigman’s Piracy Paradox describes one example of an industry where the value contributed by an appropriator of intellectual property can enhance, rather than detract from, the overall value of the property. In apparel design, induced obsolescence renders the appropriation productive. In the more general case, the productivity may derive from other structural characteristics of the industry or of the parties involved. Appropriation may be a sign of particular intensity of demand and connection among a particular community of consumers. Copying may serve to boost such demand and its intensity. An example of this sort of appropriation is fan fiction. A consumer who takes the time to copy characters from, say, the Star Wars series, develop a derivative work starring those characters, share that story with other consumers, and solicit input from them in the further development of the story, all without financial gain, is likely a fervent fan of the series. The unauthorized copying and preparation of derivative works are, in this context, levers for getting a committed sub-group of consumers even more excited about the franchise. Far from harming the intellectual property surrounding the franchise, the appropriation makes it more valuable. It is this group of appropriators that will organize and attend conventions, line up in advance for the next installment in theaters, and purchase large amounts of franchise-related merchandise. These copyists must

³⁹ *Id.* at 1733.

⁴⁰ See Council Directive 98/71 1998 O.J.(L289) 28 (EC).

⁴¹ Raustiala and Sprigman at 1735.

obviously be treated differently than, for example, the bootleg DVD producer who is also copying protectable elements of the franchise.⁴²

The usual intellectual property strategic paradigm is always to enforce, or at least credibly threaten to enforce for the purpose of extracting concessions from the appropriator. When the appropriation is productive for the property owner, however, it will often be in the property owner's best interest to forgo enforcement. Where the net value of the appropriation to the owner is positive, that is, where the owner gains more from the copying than it loses, forbearance delivers a more favorable outcome than enforcement. In fact, enforcement may carry hidden costs that unexpectedly impair the value of the property. In the Star Wars example given above, strict enforcement of the exclusive right to make copies, or of the exclusive right to prepare derivative works would lead to no recovery of lost revenue, and no additional streams of revenue. The only result would likely be to sour the relationship with a very involved and active sub-group of consumers. As a strategy for maximizing the value of the content, non-enforcement is superior to enforcement in the fan fiction context. Although rational self-interest should lead to forbearance in many appropriation situations, the music industry has taken the contrary approach of hyper-enforcement in recent years.

II. The Recording Industry's Recent Enforcement Posture

With regard to recorded music, the law recognizes two distinct copyrights for any given song – one for the composition and one for the recording of the composition. First, section 102 (a)(2) of the Copyright Act includes musical works, or musical compositions (including lyrics), within the subject matter of copyright.⁴³ Copyright in musical works usually vests in the composer of the work, and the owner has the following exclusive rights provided by section 106:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;

⁴² Some commentators have argued for fair use treatment for certain types of fan fiction. See, e.g., *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597 (2007).

⁴³ 17 U.S.C. § 102(a)(2).

- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) . . . to perform the copyrighted work publicly;
- (5) . . . to display the copyrighted work publicly⁴⁴

The second type of copyright is copyright in the sound recording.⁴⁵ This is the song as it was actually recorded in a particular recording session or other performance. Protection is provided for the sounds captured by the recording equipment, and so the composer does not necessarily have any claim on copyright for this category of work. Ownership of the copyright may vest in the performers, or some subset of them, in the session producer, or in a sound engineer. If any of these persons happens also to be the composer, then that person may claim the copyright in both the musical composition and the sound recording. Under section 106, the exclusive rights of the owner of the sound recording copyright do not include rights of public performance or public display, but they do include an additional right unavailable to the owner of copyright in the composition: the right to perform the work by means of a digital audio transmission.⁴⁶ The exclusive right to make copies of, and prepare derivative works based upon, the sound recording is limited to copying the actual sounds fixed in the recording, and does not extend to any re-performance of the underlying musical composition.⁴⁷

The recent history of enforcement by the recording industry of its copyrights in compositions and sound recordings has been heavily influenced by the introduction and development of file-sharing and peer-to-peer (“P2P”) technology. The touchstone of this period of enforcement was the Napster litigation,⁴⁸ and both the stakes and the result of that case have arguably set the tone for an extremely aggressive approach to enforcement that colors the strategy in the mixtape cases.

⁴⁴ 17 U.S.C. § 106 (1)–(5).

⁴⁵ 17 U.S.C. § 102(a)(7).

⁴⁶ 17 U.S.C. § 106(6). An example of a digital audio transmission is the transmission of a sound recording over the Internet on a Web radio station.

⁴⁷ 17 U.S.C. § 114(b).

⁴⁸ *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (9th Cir. 2001).

There was no allegation that Napster itself was directly infringing any of the exclusive rights of the copyright holders.⁴⁹ Rather, Napster was sued under theories of vicarious and contributory copyright infringement, based upon the directly infringing activities of the company’s end-users.⁵⁰ A contributory infringer is one who, with knowledge of the infringing activity of another, induces, causes, or materially contributes to such infringing conduct.⁵¹ Due in part to the centralized nature of Napster’s network, in which user requests for MP3 files were routed through the company’s own servers, the Ninth Circuit upheld the district court’s finding that Napster had “actual knowledge that specific infringing material [was] available using its system.”⁵² Napster’s failure to remove or block access to the infringing material was sufficient to support a finding of contributory liability against the company.⁵³

The copyright law recognizes vicarious infringement where the defendant “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”⁵⁴ An actionable financial interest exists where “the availability of infringing material acts as a draw for customers.”⁵⁵ The growth in Napster’s user base as the amount of infringing material available on its network increased was sufficient to support a finding of financial benefit from the direct infringement.⁵⁶ And the company’s right to block users’ access to its system, as well as its ability to

⁴⁹ The plaintiff-copyright owners in the case were A&M Records, Inc.; Geffen Records, Inc.; Interscope Records; Sony Music Entertainment, Inc.; MCA Records, Inc.; Atlantic Recording Corp.; Island Records, Inc.; Motown Record Co.; and Capitol Records, Inc.

⁵⁰ Napster’s users, and the users of the P2P file-sharing services that followed Napster, were making and distributing unauthorized copies of copyrighted works, in violation of 17 U.S.C. § 106(1), (3).

⁵¹ See, e.g., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F. 3d 259, 264 (9th Cir. 1996).

⁵² 239 F. 3d 1004 at 1022.

⁵³ *Id.*

⁵⁴ 238 F. 3d at 1022 (quoting *Fonovisa*, 76 F. 3d at 262).

⁵⁵ *Id.*

⁵⁶ Napster’s Website was advertiser-supported and so an increase in the user base would lead to an increase in advertising revenue. Although the users were making no direct payments to Napster, the payments from third parties were sufficient under the vicarious liability cases for a finding of “direct” financial benefit. See *Fonovisa*, 76 F. 3d at 264 (“[T]he defendants reap substantial financial benefits from admission fees, concession stand sales and parking fees, all of which flow directly from customers who want to buy the counterfeit recordings at bargain basement prices. The plaintiff has sufficiently alleged direct financial benefit . . . Our conclusion is fortified by the continuing line of cases, starting with the dance hall cases, imposing vicarious liability on the operator of a business where infringing performances enhance the attractiveness of the venue to potential customers”).

locate infringing material on its search index, both results of its centralized architecture, supported the district court’s finding of a right and ability to supervise.⁵⁷ The Ninth Circuit substantially affirmed the district court’s grant of a preliminary injunction in favor of plaintiffs.⁵⁸

In the wake of this litigation, other file sharing services sought to avoid Napster’s fate by decentralizing and distributing their networks, operating more as peer-to-peer services. Companies such as Grokster and Streamcast sought to avoid contributory or vicarious infringement liability by distributing software that made the users themselves the holders of indices of songs available on the network.⁵⁹ With no need to route requests through a central server controlled by the service, Grokster and Streamcast hoped to avoid both the knowledge prong of the contributory infringement test and the “right and ability to supervise” prong of the vicarious infringement test. When content owners (including record companies, movie studios, songwriters, and music publishers), prevailed in litigation, though, it was because, despite the decentralized nature of their networks, Grokster and Streamcast had made statements and engaged in behavior that indicated an intent to induce direct infringement on the part of former Napster users.⁶⁰

Although the recording industry had defeated several adversaries in legal battles, unauthorized file sharing and P2P distribution of copyrighted material did not go away.⁶¹ To a certain ex-

⁵⁷ *Id.* at 1024.

⁵⁸ Following further proceedings at the district court level that would have required it to remove every infringing copy of a copyrighted work from its system, the original Napster went out of business. A new incarnation of Napster, as a for-pay authorized music seller, began operation in 2003.

⁵⁹ See, e.g., *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 545 U.S. 913, 920-21 (2005).

⁶⁰ The *Grokster* defendants argued that they should be shielded from liability by the so-called *Sony* “safe harbor,” whereby the manufacturer or distributor of a staple article of commerce that has infringing uses (such as the videocassette recorder, or VCR) may nonetheless escape liability where the product is also capable of substantial non-infringing uses. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). The *Grokster* court, however, held that where the distributor’s words and deeds indicate an intent to induce infringement, as where advertising and promotion is apparently aimed at infringing users or former users of an infringing product, then any non-infringing uses do not save the distributor from secondary liability. See generally *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁶¹ According to one estimate, the number of people actively using peer-to-peer networks to download music grew from 18 million to 23 million in the space of two months in 2003.

tent, it was driven underground, with services being very circumspect, or even silent regarding potentially infringing uses of their software. Companies such as Bit Torrent have adopted file-sharing protocols that transfer files in small pieces that do not necessarily reside on the same computer, further de-centralizing the business of sharing music and other copyrighted content. Faced with fewer opportunities for clear legal victories against the distributors of the means to infringe, the recording industry expanded its efforts against the users of such means. In 2003, the industry began suing individual end-users of file-sharing software – the actual direct infringers.⁶² The efficacy of this post-2003 retail litigation strategy remains to be seen. In addition to the obvious public relations issues and the inherent problems in securing future business from customers whom one has sued, it is unclear that the industry's hyper-aggressive current posture is able to differentiate between those users who are simply getting something for nothing, and those users who, although they are technically infringing, are providing value for the copyright owner. This distinction is particularly important where the infringing behavior is bound up with an entrenched culture from which the copyright owner seeks revenues. As discussed *infra*, it is alignment with certain infringing elements of hip-hop culture that creates the market for much recorded hip-hop music.

See *RIAA Files New Round of File-Swapping Suits*, CNET News April 28, 2004, available at http://www.news.com/2102-1027_3-5201637.html?tag=st.util.print.

⁶² See *RIAA v. Verizon*, 351 F.3d 1229 (C.A.D.C. 2003), “RIAA Files New Round of File-Swapping Suits,” by John Borland, April 28, 2004. See also Racquel Callender, *Harmonizing Interests on the Internet: Online Users and the Music Industry*, 48 How. L.J. 787 (2005); Jeffrey Neri, *Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Settled Special Norms*, 93 GEO L.J. 733(2005); Amanda Witt, *Burned in the USA: Should the Music Industry Utilize Its American Strategy of suing Users to Combat Online Piracy in Europe?*, 11 COLUM J. EUR. L. 375(2005); Sudip Bhattacharjee, *Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions*, 49 L.J. & ECON. 91(2006).

III. Hip-Hop vs. Copyright

a. Hip-Hop History and Culture

Hip-hop is an urban American cultural movement containing elements of music (rapping and DJing⁶³), dance (break dancing, popping, locking, and other forms), fashion, and visual art (primarily graffiti art). It originated among black and Latino youth in New York City in the 1970s.⁶⁴ The specific birthplace of the movement was a number of the housing projects of the South Bronx, where DJs such as Kool Herc, Grand Wizard Theodore, Afrika Bambaataa, Grandmaster Flash, and others entertained crowds at outdoor parties with a new musical sound built on techniques executed via twin turntables and a mixer, rather than on notes played on conventional instruments.⁶⁵ From its roots at the urban margins of American society, hip-hop has grown to “assert a lasting influence on American clothing, magazine publishing, television, language, sexuality and social policy.”⁶⁶ In fact, hip-hop culture, mainly through rap music and its artists, has been welcomed into, folded into, and some say co-opted by, the larger pop culture. For example, MTV had a reputation 20 years ago for not playing hip-hop music, and the Grammy Awards were once criticized for not recognizing artists of the genre.⁶⁷ Today, several of MTV’s most popular programs either feature hip-hop performers or otherwise borrow from urban culture.⁶⁸ Hip-hop artists are regularly nominated for, and win, Grammy

⁶³ DJing is sometimes referred to as turntablism, and modern DJs turntablists.

⁶⁴ Tricia Rose, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* (Wesleyan University Press 1992), at 2.

⁶⁵ Among such techniques were “scratching,” “punch phrasing,” and “break spinning.” It was break spinning, the playing of extended “breaks” (looped repetitions of the instrumental “break” sections of R&B and soul records) by DJs, that created a steady rhythmic backdrop for MCs, or rappers, to create the other musical element of hip hop: rapping. See generally Nelson George, *HIP HOP AMERICA* (Penguin Books 1999) at 16-21.

⁶⁶ George, at ix.

⁶⁷ See generally Richard Harrington, *Rock Around the Clock: From ‘I Want My MTV’ to ‘Anything MTV Wants – 10 Years of Music Television*, *THE WASHINGTON POST*, July 28, 1991 at G1; Janice C. Simpson, *Yo! Rap Gets on the Map; Led By Groups Like Public Enemy, it Socks a Black Message to the Mainstream*, *TIME MAGAZINE* February 5, 1990, at 60; Robert Hilburn, *Striking Tales of Black Frustration and Pride Shake the Pop Mainstream*, *LOS ANGELES TIMES*, April 2, 1989, at 7.

⁶⁸ For example, “Pimp My Ride” stars the rapper Xhibit, “Run’s House” features Run of the historic rap group Run DMC, and “Cribs” tours the extravagant homes of many a hip-hop superstar. Programs such as “Celebrity Rap Star” and “Dances From the Hood” feature performances of hip-hop music and dance. “Wild ‘N Out” exposes the MTV audience

awards, within both the rap categories and others.⁶⁹ Along with this acceptance by the wider culture has come enormous commercial success.⁷⁰

Despite its migration into the mainstream (and arguable dilution as a form of black, urban cultural expression),⁷¹ hip-hop's cultural norms continue to be influenced, even directed, by its ghetto roots.⁷² Although rap music is part of the modern multi-billion dollar recording industry, it still retains some of its original culture - a culture which has often been at odds with prevailing norms in the wider recording industry, and in the copyright law. The core cultural norms of the music that distinguish it from many other genres can be divided into norms of creation, performance, and distribution.

Creation Norms

The rhythmic and spiritual core of many songs remains the “beat,” defined by one commentator as a “musical collag[e] composed of brief segments of recorded sound.”⁷³ Beats often consist of sounds sampled from other people's recordings. The looping and repetition of such samples pro-

to the age-old African-American art of “snapping,” or “the dozens.” In the words of the rapper/producer Kanye West, “this dark diction has become America's addiction.”

⁶⁹ For example, Lauryn Hill has won a total of seven Grammys, two as a member of the Fugees in 1996, and five as a solo artist in 1998. Her 1998 wins included wins in the categories of Best New Artist and Album of the Year. Outkast won Album of the Year in 2004 for “Speakerboxx/Love Below,” and Kanye West has won a total of 10 Grammy awards. See generally www.grammy.com.

⁷⁰ By one estimate, the size of the hip-hop music industry is approximately \$1.3 billion. See RIAA 2006 Consumer Profile (indicating that 11.4% of 2006 sound recording sales were in the rap/hip-hop genre, and that total sound recording sales for 2006 in all genres were \$11.5 billion).

⁷¹ A typical lament is that of DJ Granmixer D.ST of the Zulu Nation, and early hip-hop collective: “Making rap records ‘tore everything apart . . . That's what killed hip-hop. As far as the culture, it was over. Cause the money [took over] and the people who had no knowledge of the culture but had better knowledge of the business aspect got control of the shit and messed it up.” THE VIBE HISTORY OF HIP-HOP (Three Rivers Press 1999) at 74.

⁷² Indeed, the hip-hop genre's roots go back further than the urban time and place of its birth. Each of the norms discussed *infra* speaks to the African-American oral tradition in literature and music of “skillful [oral] rendering and repetition,” imitation, “immediate audience response,” and collective storytelling. See Siva Vaidhyanathan, COPYRIGHTS AND COPYWRONGS (New York University Press 2001) at 13 (citing Zora Neale Hurston, *Characteristics of Negro Expression in the Sanctified Church* (Berkeley Turtle Island 1981) at 59-60).

⁷³ Joseph G. Schloss, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP, Wesleyan University Press (2004) at 2. Beats may be constructed using a number of different techniques and equipment, including twin turntables, MIDI synthesizers, drum machines, digital samplers, or live instruments.

vide the backdrop over which MCs compose their rhymes. Borrowing and repetition have been recognized as culturally central to hip-hop, even in its modern incarnation.⁷⁴ The creative ethos of the music has even been described by Greg Tate as a “reanimation” of the past, and as “ancestor worship,”⁷⁵ and by Tricia Rose as “affirm[ation] of black musical history” that locates the music of the past in the present.⁷⁶

Another enduring norm related to the creation of hip-hop music is the centrality of the DJ or producer. In the early days of hip-hop culture, DJs were the stars. Early performances featured a DJ playing “break-beats,” the most rhythmic sections of popular R&B and disco records, along with an MC⁷⁷ exhorting partygoers to dance.⁷⁸ A DJ’s prowess in re-contextualizing recorded music was the basis of his fame and elevated status in hip-hop circles.

“[Hip-hop DJs] were some of the smartest people. The way the best of them put records together was nothing short of brilliant. I mean, some of them wasn’t doing nothing too flamboyant on the scratching, but, I swear to God, they drove masses of people to peaks of, like, euphoria. I mean, masses of people would just be jumping off each other. It was just the height of what the shit could be at its rawest, its purest. Out-of-body experiences, with everybody there feeling it with every record that came on”⁷⁹

⁷⁴ See, e.g., Olufunmilayo Arewa, FROM J.C. BACH TO HIP HOP: MUSICAL BORROWING, COPYRIGHT AND CULTURAL CONTEXT, 84 N.C. L. REV. 547, 630 (2006) (Explaining that understanding borrowing and repetition is central to understanding the treatment of sampling under the copyright law, and arguing that borrowing should be recognized as a norm in musical practice for purposes of designing a liability rule for copyright infringement, rather than a property rule).

⁷⁵ Greg Tate, *Diary of a Bug*, VILLAGE VOICE, Nov. 22, 1988, at 73.

⁷⁶ See Rose at 89.

⁷⁷ Although the term “MC” has been defined variously (“Mic Controller” and “Move the Crowd”/“Mover of Crowds” are among the meanings ascribed to the acronym), the most popular definition is that the term is short for “Master of Ceremonies.”

⁷⁸ See Schloss, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP, at 2. This paired performance between an entertainer playing records and an entertainer speaking over the music on a microphone was an import from Jamaica. Immigrants from the Caribbean Island during the 1970s brought with them “sound-system” culture. Sound systems were organizations that organized outdoor parties featuring a “selector” looping instrumental portions of reggae records while a toaster (also known as a “DJ”) “chatted” over the music to excite the crowd. See, e.g., Jeff Chang, TOTAL CHAOS: THE ART AND AESTHETICS OF HIP-HOP (Basic Civitas Books 2006), at 352.

⁷⁹ Fab 5 Freddy in Havelock Nelson and Michael A. Gonzales, BRING THE NOISE: A GUIDE TO RAP MUSIC AND HIP-HOP CULTURE (Harmony Books 1991) at vii.

DJs created, and still create, their own mixes by altering the speed or pitch of the records being played, juxtaposing sounds from different songs, blending songs so that they flow together seamlessly to the listener, and adding their own sonic touches to records, such as scratching or other percussion.⁸⁰ In the hands of the right DJ, “a recording [could] be ‘played like an electronic washboard.’”⁸¹ The star status of DJs was reflected in the superior billing granted to DJs over MCs in a number of the early rap groups.⁸²

Performance Norms

Rap music began as a predominantly live performance vehicle.⁸³ To this day, the art form’s performance norms retain a high degree of importance. For example, audience participation remains a central element to any hip-hop concert. Even where an artist has had considerable success as a recorder and seller of studio albums, the ability (or inability) to “move the crowd” at a live show will still be the most important criterion by which many fans will judge the artist.⁸⁴ Many rap groups employ persons, known as “hype men,” whose sole purpose in the group is to whip concert audiences into a state of high excitement in advance of, or contemporaneously with, the appearance of the featured performer on the stage.

Once on stage, performers fall into patterns of engagement with the audience that recall other communications forms derived from the African Diaspora. Call-and-response singing of lyrics, where the performer may begin a well-known line from a song and allow the audience to complete it, is a staple of hip-hop performance. Similarly, chants that have little to do with the specific material of a given performer, but which are common in

⁸⁰ See ‘Don’t Have to Sample No More’: Sampling and the ‘Autonomous’ Creator, 10 CARDOZO ARTS & ENT. L. J. 607, 608 (1992).

⁸¹ *Id.* (quoting John Oswald, *Plunderphonics, or Audio Piracy as a Compositional Prerogative*, 34 Musicworks 5, 7 (1986))

⁸² For example, names of DJs appeared first in the names of the following groups: Grand Master Flash and the Furious Five, Afrika Bambaataa and the Soul Sonic Force, and Eric B and Rakim. DJs such as Jam Master Jay (Run DMC), Scott La Rock (Boogie Down Productions), and Terminator X (Public Enemy) were as integral to their respective groups as the MCs whose voices were heard on the groups’ recordings. Other DJ/producers such as Marley Marl and Prince Paul, were known for signature sounds that complemented various MCs and groups.

⁸³ See, e.g., William Jelani Cobb, *TO THE BREAK OF DAWN: A FREESTYLE ON THE HIP HOP AESTHETIC* 42 (New York University Press 2007).

⁸⁴ At least one artist, Kris Parker, p/k/a KRS-One, maintains a strong reputation in the industry on the strength of his live performances, despite relatively poor album sales in recent years.

the culture, are often used to excite the crowd.⁸⁵ Improvisation, called “freestyling” in hip-hop, is as much a part of the history of rap music as of jazz music. Related to the improvisation norm is a norm that values competitive performance, or “battling.” A battle may be conducted between rappers, or between DJs. The competitors trade performance sound-bites, as it were, usually sixteen-bar lyrical passages in the case of MC battles. The competitors alternate until one of them runs out of material and is unable to respond to the most recent salvo from his or her opponent. This particular performance norm is deeply connected with the role of the mixtape in hip-hop. Many of the most popular mixtapes are “battle tapes,” chronicling a temporally extended battle, or “beef” between two performers.⁸⁶

Distribution Norms

In addition to the creation and performance norms described above, several norms involving the distribution of music survive as well.⁸⁷ Much as early hip-hop songs and DJ mixes were shared among friends and acquaintances via multiple generations of recording on a cassette tape, consumers of hip-hop today experience the music through interaction and exchange within a social circle, methods that marketing professionals might describe as “viral.” Beyond the immediate social circle, music is promoted and distributed via street teams and exposure at clubs and parties. DJs (including mixtape DJs) are often central to the perpetuation and practice of creation, performance, and distribution norms. As a result, DJs are influential in the choices made by listeners about what musical works they favor. Despite the importance of hip-hop’s cultural norms in influencing consumer choice, however, the recording industry has not always viewed the genre’s norms favorably, and, as the next part indicates, recording industry litigation has been a fact of life for hip-hop artists and producers ever since the music started flirting with the mainstream.

⁸⁵ In one common chant, the performer shouts to the audience, “Hold your hands in the air, and wave ‘em like you just don’t care. If you [performer improvises conditional statement], somebody say: ‘Oh yeah!’” The audience responds with the requested phrase.

⁸⁶ For example, long-running feuds between Jay-Z and Nas, as well as between 50 Cent and Ja Rule, have provided recent fodder for many mixtape DJs.

⁸⁷ Other persistent norms that are beyond the scope of this article include: braggadocio, materialism, misogyny, homophobia, hard-edged (directionally nihilistic) storytelling, and a constant quest for “realness,” or authenticity.

b. The Clash of Hip-Hop Cultural Norms and Copyright Enforcement in the Music Industry

The copyright law has had a mixed record regarding acceptance of hip-hop’s cultural norms. In cases where copyright has squarely confronted one of hip-hop’s creation, performance, or distribution norms, the norm has been defeated as often as it has carried the day. In *Grand Upright Music Ltd. vs. Warner Bros. Records, Inc.*,⁸⁸ the Southern District of New York considered a preliminary injunction action brought by Grand Upright Music, the owner of the copyright in the song “Alone Again (Naturally),” composed and originally performed by Raymond “Gilbert” O’Sullivan. Defendant Marcel Hall, p/k/a Biz Markie,⁸⁹ sampled the O’Sullivan recording in creating the song “Alone Again” for his album “I Need a Haircut.”⁹⁰ In finding for the plaintiff, the court cited the Seventh Commandment’s admonition against stealing⁹¹ and dismissed defendants’ arguments regarding the pervasiveness of borrowing in the rap music world.⁹² In addition to enjoining further distribution of the album (which is widely believed to have fatally stalled Biz Markie’s career)⁹³, the court referred the matter to the United States Attorney for possible criminal prosecution.⁹⁴

*Campbell v. Acuff-Rose Music, Inc.*⁹⁵ can be portrayed as a victory of sorts for defendant Luther Campbell and for hip-hop norms, but the case’s specific holding presents a more nuanced picture. At issue was the 1989 song “Pretty Woman” by Campbell’s rap group, 2 Live Crew. The 2 Live Crew recording borrowed heavily, in terms of both musical and lyrical structure, from the 1964 Roy Orbison ballad “Oh, Pretty Woman.” The degree of appropriation was such that, in the absence of a finding of fair use, the 2 Live Crew song would certainly have been deemed infringing.⁹⁶ Campbell asserted that his group’s recording was a parodic fair use and

⁸⁸ 780 F. Supp. 182 (S.D.N.Y. 1991).

⁸⁹ Also known as “The Inhuman Orchestra” for his skill at making melodic and percussive sounds with his mouth in the hip-hop art of “beatboxing.”

⁹⁰ 780 F. Supp. at 183.

⁹¹ *Id.*

⁹² *Id.* at 186.

⁹³ See, e.g., Cameron Lazerine and Devin Lazerine, *RAP-UP: THE ULTIMATE GUIDE TO HIP-HOP AND R&B* 19 (Grand Central Publishing 2008).

⁹⁴ 780 F. Supp. at 186.

⁹⁵ 510 U.S. 569 (1994).

⁹⁶ *Id.* at 574.

moved for summary judgment at trial on that basis. The District Court for the Middle District of Tennessee granted summary judgment for Campbell,⁹⁷ but the Sixth Circuit reversed.⁹⁸ In reversing the Sixth Circuit, the United States Supreme Court opened up the possibility of a grant of fair use status for a commercial rap parody of a copyrighted composition.

Generally, the Copyright Act grants to the owner of copyright in a work the exclusive right, *inter alia*, to reproduce or distribute such work or to prepare derivative works based upon the work.⁹⁹ Such rights are subject to the limitations of Sections 107-120 of the statute.¹⁰⁰ Section 107, the fair use provision, deems certain uses of a copyrighted work not to be infringing:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include-

- (a) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (b) the nature of the copyrighted work;
- (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (d) the effect of the use upon the potential market for or value of the copyrighted work.¹⁰¹

Writing for a unanimous Court, Justice Souter found that, on the first fair use factor, Campbell's use was commercial, but the commercial character of his use was not fatal to his fair use claim. Instead, the fact that the use was a parody, commenting on and critiquing the original work (even if crudely and poorly), supported Campbell's position. Such transformative works generally further "the goal of copyright, to promote science and the arts."¹⁰² Regarding the second factor, the Court found that, although Orbi-

⁹⁷ 754 F. Supp. 1150 (M.D. Tenn. 1991).

⁹⁸ 972 F. 2d 1429 (6th Cir. 1992).

⁹⁹ See 17 U.S.C. § 106.

¹⁰⁰ *Id.*

¹⁰¹ 17 U.S.C. § 107.

¹⁰² 510 U.S. at 579.

son’s work was a creative rather than a factual work (which would ordinarily weigh against a finding of fair use), such status was not significant in the case of parodies, as most parodies seek to lampoon established, creative works. Factor three of the test similarly worked in Campbell’s favor. Although he had used a significant amount of, and substantively important portions of, Orbison’s work in creating the 2 Live Crew song, the Court recognized that the parodist must take enough of the original work to “conjure up” the original.¹⁰³ According to Justice Souter, Campbell had copied that which was necessary to create a successful parody, and the law did not require him to take any less.

The Court’s analysis of the fourth fair use factor, effect on the market for the copyrighted work, presents a mixed result regarding hip-hop’s borrowing norm. On one hand, Justice Souter agreed with Campbell that 2 Live Crew’s “Pretty Woman” would cause no market harm to Roy Orbison’s “Oh Pretty Woman” (few, if any, consumers who might have purchased Orbison’s airy rock-and-roll ballad would opt for 2 Live Crew’s raunchy musical insult instead). On the other hand, the effect of Campbell’s use on the market for a rap (non-parody) derivative version of Orbison’s song was unaddressed by the parties’ arguments. As the owner of the copyright in Orbison’s song, Acuff-Rose Music had the exclusive right to prepare derivative works, including rap versions, based on the original work.¹⁰⁴ The presence of a rap version by 2 Live Crew in the marketplace might have an unfair impact on the market prospects of an authorized rap version. The Court remanded the case for further proceedings on the issue of the rap derivative market, but the parties settled before any resolution of the issue by the District Court.¹⁰⁵ In the end, the Supreme Court’s decision generally acknowledged the notion of parodic borrowing in rap music as fair use, but stopped short of granting such borrowing the full and complete protection of the fair use defense.

In *Newton v. Diamond*,¹⁰⁶ the Ninth Circuit reached a result somewhat more consistent with hip-hop’s cultural norms. The case involved the sampling of the James Newton composition “Choir” by the rap group the Beastie Boys. The Beastie Boys included a three-note segment of the work,

¹⁰³ Id. at 588.

¹⁰⁴ 17 U.S.C. 106.

¹⁰⁵ See *Acuff-Rose Settles Suit With Rap Group*, MEMPHIS COMMERCIAL APPEAL, June 5, 1996 at A14.

¹⁰⁶ 388 F. 3d 1189 (9th Cir. 2004).

lasting three seconds, in their 1992 release “Pass the Mic.”¹⁰⁷ The group had obtained a license from ECM records, the owner of the copyright in the “Choir” sound recording, but did not obtain a license from Newton, the owner of copyright in the underlying composition.¹⁰⁸ The court held for the defendants, finding that the Beastie Boys sampling was *de minimis* and not actionable. Even conceding the fact of copying and the pervasiveness of the copied material in the accused work, “the relevant inquiry is whether a substantial portion of the protectable material in the *plaintiff’s* work was appropriated, not whether a substantial portion of *defendant’s* work was derived from plaintiff’s work.”¹⁰⁹ According to the court, no reasonable jury could find Diamond’s six-second sample of Newton’s four-and-a-half minute composition to be a significant portion of the copied work, quantitatively or qualitatively.¹¹⁰ Mike Diamond and the Beastie Boys, the samplers and representatives of hip-hop cultural norms in this case, were entitled to summary judgment.

Faced with a recent sampling case arising from the use of a portion of a copyrighted sound recording, The Sixth Circuit reached the opposite result from the *Newton* court. In *Bridgeport Music, Inc. v. Dimension Films*,¹¹¹ defendant film producers used the song “100 Miles and Runnin,” which contained a sample from “Get off Your Ass and Jam,” a recording by George Clinton and Funkadelic. The accused song used a two-second sample of a guitar solo from the Funkadelic recording, looped it, lowered its pitch, and created a seven-second derivative segment that appeared in “100 Miles and Runnin” in five places.¹¹² The court found that no inquiry was necessary into the potentially *de minimis* nature of the copying at issue. As the owner of copyright in a sound recording has the exclusive right to “directly or indirectly recapture the actual sounds fixed in the recording,”¹¹³ ordinary substantial similarity analysis has little meaning.¹¹⁴ The court read into the statute an exclusive right on the part of the copyright owner to sam-

¹⁰⁷ Although the sampled segment was short, the Beastie Boys, following common practice in the genre, looped the sample, recording it repeatedly and seamlessly, so that it could serve as part of the sonic background for “Pass the Mic,” the album version of which was four minutes and seventeen seconds long.

¹⁰⁸ See *supra* re: the distinction between copyright in compositions and copyright in sound recordings.

¹⁰⁹ 388 F. 3d at 1195 (citing *Jarvis v. A&M Records*, 827 F. Supp. 282, 289-90; 4 Nimmer on Copyrights § 13.03[A][2], at 13-47 to 48 & n. 97).

¹¹⁰ *Id.* at 1195-6.

¹¹¹ 410 F. 3d 792 (6th Cir. 2005).

¹¹² *Id.* at 796.

¹¹³ *Id.* at 800 (quoting 17 U.S.C. § 114(b)).

¹¹⁴ *Id.* at 803 (citing *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad “Rap”?*, 37 LOY. L. REV. 879, 896 (1992)).

ple his own recording.¹¹⁵ Thus, any subset of sounds taken from the original sound recording would be subject to this exclusive right and would need to be licensed in order to avoid infringement liability.¹¹⁶ Where the defendant has knowingly taken even a small part of a sound recording, either to save costs or to add something of value to his own recording, the copyright law should not recognize any exception to the general rule of liability for copying. In setting forth a “new” rule that may impact settled expectations in the hip-hop community, the court acknowledged that a given rap artist may view the rule as hampering the creative process. However, as “today’s sampler is tomorrow’s samplee,” on balance the Court expected the industry as a whole to benefit from the rule.¹¹⁷

Hip-hop’s performance norms have fared better under the copyright law than have its creation norms. In both *Boone v. Jackson*¹¹⁸ and *Lil’ Joe Wein Music, Inc. v. Jackson*,¹¹⁹ copyright owners sued rap artists for including passages in their songs that previously appeared in plaintiff’s copyrighted works. In *Boone*, plaintiff songwriter was owner of the copyright in the 1999 Trajik release “Holla Back.” Defendant John Jackson, professionally known as Fabolous, recorded a work in 2001 entitled “Young’n”. The Fabolous recording included a hook, or chorus, that incorporated the phrase “holla back” in a manner that allegedly imitated the phrasing and musical structure of Boone’s composition.¹²⁰ In *Lil’ Joe Wein Music*, plaintiff was the owner of the copyright in the 1994 Luther Campbell composition “It’s Your Birthday,” which incorporated the repeated chant “Go _____, it’s your birthday,” with a different person’s name inserted every time the phrase was sung. In 2003, defendant Curtis Jackson, professionally known as 50 Cent, released “In Da Club,” which included the lyrics “Go go go Shorty, it’s your birthday.” The *Boone* court granted summary judgment for defendant Fabolous, and the *Little Joe Wein* court upheld a summary judgment below in favor of defendant 50 Cent. In both cases, the court found that the lyrics at issue were not original to the owner of copyright owner in the song, despite such songs being the first places where the phrases may have been fixed in a manner cognizable by the copyright law. Instead, the lyrics were phrases common in hip-hop clubs and performance

¹¹⁵ *Id.* at 801.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 803-4 FN18.

¹¹⁸ 2005 WL 1560511 (S.D.N.Y. 2005).

¹¹⁹ 2007 WL 2274519 (11th Cir. 2007).

¹²⁰ *Boone* at *1.

venues (or even in ordinary conversation¹²¹), whose use long pre-dated any recording of them by either party:

A signature and long-standing feature of live performance rap music is the hip hop chant. The chant is a form of audience engagement staged by the performer (mc, dj, or rapper) who provides a familiar phrase or saying, often in call and response format, designed to energize, include, affirm, and engage the audience.¹²²

The results of these cases, denials of ownership rights in that which had already been a part of hip-hop speech and performance, despite the plaintiffs' priority of fixation, square with prevailing hip-hop performance norms.

Hip-hop's norms are reflective of a post-modern view of art and creation,¹²³ but as the mixed litigation results indicate, the law still does not fully embrace that view. Flexibility on the part of those enforcing or seeking enforcement of the copyright law is necessary in order for any alignment between law and hip-hop norms to come about. Strategic forbearance based on a finding of productive infringement provides the opportunity for such flexibility.

IV. Fashion, Hip-Hop DJs, and the Macro-economy of Music

a. Parallels Between the Worlds of Hip-Hop and Fashion

There is a well-recognized commercial overlap between the fashion world and hip-hop culture. In addition to its core elements of turntablism, rapping, dance and writing, hip-hop has always had a strong and influential fashion aesthetic. Trends from the streets of New York, Los Angeles, and other urban centers have long found their way to Seventh Avenue, and to

¹²¹ The *Boone* court cites an entry in the Urban Dictionary defining “holla back” as a phrase that may be used as greeting, goodbye, or aid in emphasizing a point. See *Boone* at *4 FN5 (citing <http://www.urbandictionary.com/define.php?term=holla+back&f=1>).

¹²² *Lil' Joe Wein* at *4 (quoting Report of Tricia Rose at 2).

¹²³ The ability of users to borrow from and elaborate on existing works and public domain material is consistent with the postmodern notion that the author should be superseded by the reader. See, e.g., Roland Barthes, *The Death of the Author*, in *IMAGE-MUSIC-TEXT*, Stephen Heath trans., (Hill and Wang 1977) at 148 (arguing that a creative work is not the product of a single Godlike Author, but of the multiple interpretations brought to the text by readers).

Madison Avenue.¹²⁴ The modern hip-hop career is incomplete without a clothing line. Shawn Carter, professionally known as (“p/k/a”) Jay-Z, rapper and former president and CEO of Def Jam Recordings, is the owner of the Roca Wear line. Rap producer and Bad Boy Records CEO Sean Combs, p/k/a Diddy, sells apparel under the brand Sean John. Hip-hop mogul Russell Simmons and his former wife Kimora Lee Simmons operate the Phat Pharm and Baby Phat clothing labels, respectively.¹²⁵

Beyond the historical overlap, there are also significant structural economic parallels between the two industries. Both cultures are driven by what is new and “fresh,” and there is frequent turnover of what products are considered current. Fashion products enjoy a short (1/2 year) season of currency, driven by the schedule of runway shows in the fashion centers of Paris, Milan, London and New York.¹²⁶ Similarly, hip-hop products are subject to a relatively brief window of currency. The success or failure of major label album releases, including hip-hop releases, is increasingly determined by early (first day, first week) sales data gleaned from the Neilson Sound Scan sales tracking system.¹²⁷ Early success or failure heavily influences decisions made regarding continued investment in promotion of a given release or artist.¹²⁸ The frequent turnover in these industries is coupled with a high volume of creative output.¹²⁹

¹²⁴ See generally Guy Trebay, *The Definitive Style*, THE TORONTO STAR, October 23, 2003, at C04; Maureen Jenkins, *Hip-Hop Culture: Now an Everyday Thing*, CHICAGO SUN-TIMES, October 13, 1996, at 17; Eric Peterson, *Urban Wear*, WEARABLES BUSINESS, April 2001, at 4.

¹²⁵ See, e.g., Constance C.R. White, *The Hip-Hop Challenge: Longevity*, THE NEW YORK TIMES, September 3, 1996, at B6; Marci Kenon, *Who, What, and Wear – Dressing Cool Today Has Hefty Price Tag and Designers of Hip-Hop Clothing are Getting It.*, BILLBOARD, December 9, 2000.

¹²⁶ See, e.g., Amanda Fortini, *How the Runway Took Off: A Brief History of the Fashion Show*, SLATE, February 8, 2006, available at <http://www.slate.com/id/2135561> (last visited March 27, 2008).

¹²⁷ See, e.g., Kelefa Sanneh, *Two Big Rap Stars Bicker, Ignoring a Larger Threat*, The New York Times, September 20, 2007 at E1.

¹²⁸ See, e.g., Kelefa Sanneh, *Waiting (and Waiting) for a Big Rap Moment*, THE NEW YORK TIMES, February 4, 2008 (“Since the conventional wisdom is that hip-hop albums need to start strong, it’s not uncommon for rappers to wait months or years while labels try to figure out the right single, the right track selection, the right marketing plan.”).

¹²⁹ For example, British recording companies released 31,291 albums in 2005, and over 6,000,000 singles were available for download on licensed music services in 2007. See BBC News Online, *Record Rise in UK Album Releases*, May 3, 2006, available at http://news.bbc.co.uk/1/hi/newsid_4969000/4969598.stm; IFPI Digital Music Report 2008 at 6, available at <http://www.ifpi.org/content/library/DMR2008.pdf>.

Both the recording industry and the fashion industry deal in what commentators have called “credence goods.” Credence goods are products whose quality is difficult to assess, either before purchase or afterward.¹³⁰ The value of these goods is determined by the credence given them by some third party.¹³¹ The reputation of a designer (e.g., Tom Ford), or the reputation of a particular recording artist (e.g., Nasir Jones p/k/a Nas), might give signals to consumers about the value of a particular offering. Similarly, the reputation of the distributor (fashion house, retailer, record label) may lend credence to the product. Most importantly for this article’s purposes, use of the product by a particular small set of consumers aids the larger set of consumers in assessing quality.¹³² That is, use of the product by celebrity consumers or some other admired subset of consumers implies that the product has utility for the rest of the group. Prudent advertisers attempt to build their standing with the relevant subgroup as part of their marketing strategy regarding the larger group.¹³³

The value of credence goods is mainly inferred from the authority of others. Therefore, there may be some level of appropriation, and certain types of appropriation, that provide a benefit to the seller of the goods. “The copying legitimates their designs as ones that are desirable and worth copying. In the absence of other indicators of desirability, copying is an indicator of worth.”¹³⁴ If the copying helps set a “style cycle,” that is, if it sets a trend that is followed or adopted by successively wider circles of consumers, then it may be creating value for the seller rather than detracting from the seller’s property.¹³⁵ It has even been suggested that principles of distributive equity would support the seller’s compensating the copyist for the valuable publicity brought to the brand by the copying.¹³⁶

¹³⁰ Credence goods may be distinguished from search goods, whose value can be assessed at the time of purchase, and experience goods, whose value can be determined post-sale through the user’s objective experience with the product. See Brian Hilton, Chong Ju Choi, and Stephen Chen, *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*, 55 JOURNAL OF BUSINESS ETHICS 345, 347 (2004).

¹³¹ See *Id.* at 346.

¹³² See *Id.*

¹³³ See *Id.*

¹³⁴ See *Id.* at 351.

¹³⁵ See, e.g., Safia A. Nurbhai, *Style Piracy Revisited*, 10 J.L. & POL’Y 489, 492 (2002).

¹³⁶ See Hilton et al., 55 JOURNAL OF BUSINESS ETHICS at 351.

b. The Legitimizing Role of the Mixtape and the Mixtape DJ

The DJ has always played an important role in hip-hop, and DJs have been considered artists in their own right, alongside the rappers whose names grace album covers and headline major award shows.¹³⁷ The importance of the DJ to hip-hop culture has been augmented by the development of the role of the mixtape, also known as the street tape or the DJ compilation. The hip-hop mixtape dates back to the beginnings of the music in the 1970s. DJs made cassette recordings of their nightclub sets in order to promote themselves and their abilities. In an era where there were few hip-hop records to speak of being sold in stores, and where there was little to no radio play, the mixtape was a vital promotional tool (and source of additional income) for the DJ. The tapes were distributed hand-to-hand, and the reputations of hip-hop artists spread by word-of-mouth. In the case of at least some of the best-known DJs, distribution was facilitated by livery cab drivers.¹³⁸ As DJs realized that “they could make money selling tapes of the mixes they played at clubs, an inner-city industry was born. Mix tapes became one of the best ways of spreading rap music throughout the country – and the world.”¹³⁹

The role of the mixtape is acknowledged by many to have been shaped by the success of the rapper Curtis Jackson, p/k/a 50 Cent. As an up-and-coming performer in 2000, Jackson antagonized many established rappers with pointed lyrics aimed at them in a single called “How to Rob.” Jackson faced violent retaliation for his lyrics, becoming the victim of both a stabbing and a shooting later that year. Columbia Records, the label to which Jackson was then signed, severed all ties with him, and he was without a recording contract or distribution deal.¹⁴⁰ Instead of attempting to sign with another record label immediately using the traditional method –

¹³⁷ Further, in the early days of the genre, any number of albums featured singles with little or no rapping. Many of these tracks were either completely instrumental, or they featured lyrics focused on the DJ’s prowess. The purpose of such tracks was to highlight and demonstrate the skill of the group’s DJ. Some examples were Run DMC’s “Jam-Master Jay”; Public Enemy’s “Terminator X to the Edge of Panic”; EPMD’s “DJ K La Boss”; Big Daddy Kane’s “Mister Cee’s Master Plan”; Eric B and Rakim’s “Eric B is on the Cut”, “Chinese Arithmetic”, and “Extended Beat”; Biz Markie’s “Cool V’s Tribute to Scratch-ing”; and Kool G Rap & DJ Polo’s “Cold Cuts”.

¹³⁸ See Geoff Boucher, *Mix Tapes: Piracy or Talent Mother Lode?*, CHICAGO TRIBUNE May 1, 2003 at 3 (quoting pioneering DJ Afrika Bambaataa).

¹³⁹ Lola Ogunnakike, *Deejay Mix Masters Make the Hip-Hop World Spin: Record Companies Cultivate the World of Underground Tapes to Build Credibility and Demand*, NEW YORK DAILY NEWS, February 24, 2000 at 24.

¹⁴⁰ Cameron Lazerine and Devin Lazerine, *RAP-UP: THE ULTIMATE GUIDE TO HIP-HOP AND R&B 180-181* (Grand Central Publishing 2008).

“shopping a demo”¹⁴¹ – Jackson produced, marketed, and distributed mixtapes of his own material. The resultant buzz brought the record labels to Jackson’s door seeking a deal.

50 flooded the streets with his own mixtapes and ignited a bidding war between labels trying to sign him. Eminem – who had made his name through mixtapes – and Dr. Dre beat everyone to the punch, signing the charismatic rapper to Shady/Aftermath [Records] for \$1 million. 50’s 2003 debut album, *Get Rich or Die Tryin’*, sold 872,000 [units] in its first week.¹⁴²

Riding the street credibility built by his mixtapes, 50 Cent’s first album ultimately was certified six times platinum, reflecting sales of at least six million copies.¹⁴³

In today’s market for hip-hop music, the mixtape is widely acknowledged to be a valuable tool for the promotion and marketing of artists and their work. The words of the industry players themselves are instructive:

You’re not going to market DMX the same way you market Sheryl Crow. Hip-hop is street music. If you’re a major label and you’re not using a mix-tape deejay, your music is not going to reach the streets.¹⁴⁴

Record labels need us because we can get to places they can’t.¹⁴⁵

¹⁴¹ Often, recording artists were signed by record labels by convincing an Artists & Repertoire (“A&R) or other executive at a label to listen to a short sample of their work – a “demo,” or demonstration, tape or CD consisting of 3-5 songs.

¹⁴² Steve Jones, *Money in the Mixtape*, USA TODAY April 20, 2006, available at http://www.usatoday.com/life/music/news/2006-04-20-mixtapes-main_x.htm.

¹⁴³ See RIAA database regarding gold and platinum certification, available at http://riaa.org/goldandplatinumdata.php?table=SEARCH_RESULTS.

¹⁴⁴ Kevin Black, head of rap promotions at Interscope Records, quoted in Lola Ogunnaike, *Deejay Mix Masters Make the Hip-Hop World Spin: Record Companies Cultivate the World of Underground Tapes to Build Credibility and Demand*, NEW YORK DAILY NEWS February 24, 2000 at 24.

¹⁴⁵ Bay area artist DJ Juice, quoted in *Id.*

The lousy radio stations don't break new artists in rap, it's the mix tape deejays calling the shots now. They are telling you who is hot.¹⁴⁶

For those artists who can't get on MTV, those artists that can't get on the radio or don't have a major label to put them on the road . . . they have the mix tapes.¹⁴⁷

If you have a song or a freestyle on a DJ Clue mixtape, you've sort of arrived, because it's hard to get on one . . . It's about associating with the DJ that has the most influence in a particular market. Most mixtapes are released regionally, and it's especially important in hip-hop for an artist to have credibility in their own backyard.¹⁴⁸

In a time of declining sales (see Figures 1 and 2 *infra*), budget cuts, reduction of artist rosters and general retrenchment,¹⁴⁹ the mixtape has emerged as a cost-effective proxy for both the traditional A&R function and the traditional imprimatur of the radio station disk jockey.¹⁵⁰ It is much less expensive to monitor the response to an artist's mixtape appearances in making a signing decision than either to invest in recording and promoting an artist based on the opinion of a single A&R executive, or to invest heavily in the A&R function at all.¹⁵¹ The labels selling hip-hop have come to de-

¹⁴⁶ Riggs Morales, executive at Shady Records, label owned by rap artist Eminem, quoted in Geoff Boucher, *Piracy or Mother Lode?*, Chicago Tribune May 1 2003 3.

¹⁴⁷ New York's DJ Kay Slay, quoted in *id.*

¹⁴⁸ Shanti Das, executive at Universal Motown, quoted in Steve Jones, *Money in the Mixtape*, USA Today April 20, 2006, available at http://www.usatoday.com/life/music/news/2006-04-20-mixtapes-main_x.htm.

¹⁴⁹ See, e.g., Kelefa Sanneh, *The Shrinking Market is Changing the Face of Hip-Hop*, THE NEW YORK TIMES December 30, 2007.

¹⁵⁰ See, e.g., *How to Make it in Music*, ATLANTA JOURNAL AND CONSTITUTION, August 5, 2005 G6 (quoting mixtape producer DJ Drama, a defendant in the criminal case described *supra* at 1-3, as saying "Basically, we're the unofficial A&R department for a lot of these record labels . . . Before [Atlanta area rapper Young Jeezy] got a deal, he and his manager were at my door like, 'Can we do business?'"). Young Jeezy was introduced to the wider marketplace via appearances in DJ Drama's *Gangsta Grillz* series of mixtapes.

¹⁵¹ See, e.g., Anita Samuels, *New Urban Art Form, Old Copyright Problem*, New York Times, November 4, 1996 at 8; Steve Jones, *Money in the Mixtape* ("For many artists, mixtapes are a way to attract the attention of labels increasingly reluctant to invest in finding new artists."). Typically, a record company spends up to 20% of revenues on the A&R function. A&R has historically been very labor-intensive, involving a great deal of leg-work and large expense accounts. See IPFI Digital Music Report 2008 at 13 (quoting Mike Smith, Managing Director at Columbia Records: "Ten years ago, I would hear about a potentially great act and spend all day on the phone to everyone I knew. Eventually some-

pend heavily on the ear of the mixtape DJ in deciding whether and how to handle an artist, and the DJ’s seal of approval is often a good predictor of how lucrative a particular artist’s recordings will prove to be for the label.¹⁵²

Figure 1

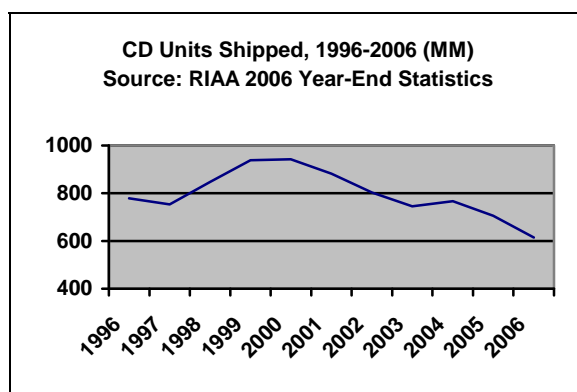
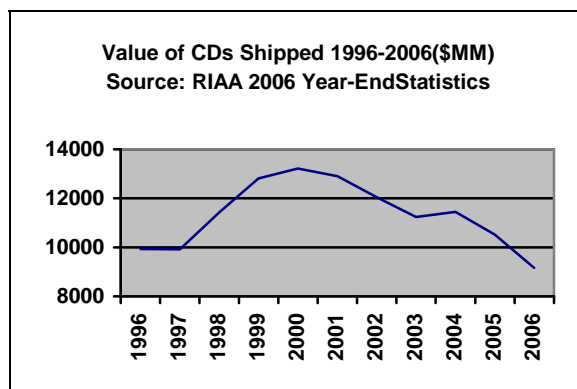


Figure 2



In addition to helping launch a career, the mixtape provides the artist additional benefits. Appearing on a mixtape allows an artist to expand crea-

body would have a tape and I’d send a bike across town to get it. I’d listen to it and then try and track down the manager, get on the phone to him and arrange to see the band live”).¹⁵² See, E.g., Ogunniake (“A deejay’s endorsement – or lack of it – can make or break a song”) (also quoting DJ Justo: “If someone puts a cat on his mix tape, you can best believe he’s hot . . . Labels know the mix tape cats have the ear. They know what’s real.”).

tively beyond what is usually palatable to record company executives approving material for major label releases. Artists are able to push the envelope with harder-edged content, experiment with different rapping styles, demonstrate skill in the art of freestyling (improvising lyrics), and launch salvos in “battles” with other artists.¹⁵³ Any of these uses of the mixtape format will serve to enhance the artist’s street credibility, thus increasing the value of the artist’s work to whatever record label releases his next official recording.¹⁵⁴ The mixtape also provides a point of entry into the market for many consumers:

A lot of people don’t have turntables, they don’t have money to buy every single, they don’t feel like dropping \$17 for a CD, so they buy a mix tape . . . For \$10, you can get like 25, 30 songs. That’s mad cheap, and you get variety.¹⁵⁵

The mixtape format provides the possibility, explored *infra*, of expanding the market for a record label’s product beyond what it would otherwise be. The format is a relatively inexpensive way for a consumer to be exposed to a new artist, or to new music from a known artist. Like the imitations of a fashion design,¹⁵⁶ the mixtape can also perform a valuable “anchoring” function, as common themes established on the most popular mixtapes (e.g., featuring the “Dirty South” rapping/production style, sampling music from a particular era or artist, or focusing on a “beef” between two particular rappers) give labels a clue as to what “the streets” are listening to now, and what the broader hip-hop audience is likely to demand next. The hip-hop world so recognizes the value of the mixtape that it presents annual awards to DJs in thirty-five categories, including Best Mixtape of the Year, Best West Coast DJ, Best Canadian Mixtape DJ, and Best Reggaeton Mixtape DJ.¹⁵⁷

¹⁵³ “Battles” are wars of words between rappers. Historically, battles were conducted face-to-face, but they are conducted almost entirely via a series of successive “dis’ records” released by the combatants.

¹⁵⁴ See, e.g. Ogunnaike (quoting DJ Justo: “It’s a way for artists to maintain street credibility without messing up relations with their label or radio. On mix tapes, you can come as raw as you want”).

¹⁵⁵ Ogunnaike (quoting an employee of Fat Beats, a Greenwich Village, New York music store specializing in hip-hop music).

¹⁵⁶ Discussed *supra*, Part I.

¹⁵⁷ The awards are named for their creator, the late hip-hop promoter Justo Faison. For a list of categories and winners, see the 11th Annual Mixtape Awards Website, available at <http://themixtapeawardsonline.com/awards/voting.aspx>.

c. The Modern Economics of Music

The traditional justification for granting copyright protection to works of authorship revolves around the free rider problem. Information goods, including the types of works that are protected by copyright, are public goods. They are non-excludable, that is, the producers of such goods have difficulty preventing others from enjoying the benefits of such production.¹⁵⁸ Once the information is released, it cannot be fenced off, as a piece of real property could be, nor can it be placed in a safe like a valuable chattel. Information goods are also non-rivalrous – the enjoyment of a good by one party does not preclude others from simultaneously or successively enjoying the same good.¹⁵⁹ As Thomas Jefferson famously observed in a letter to Isaac McPherson:

He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.¹⁶⁰

If the creator of the public good cannot exclude others and direct the benefits of the good only to those who have paid for it, the conventional thinking predicts that the creator will cease creating. For example, in the absence of IP protection, if Kris invests time, money, and energy to create a song, he risks losing control over the song if he performs or otherwise releases it. Peter may hear the song, appropriate it, and perform or otherwise release it as his own. As Peter has not invested in the creation process, he has no costs to recover and may sell the song (in the form of a copy or of his singing the song in a performance setting) for less than Kris' price. Eventually (or perhaps immediately), Kris will view song creation as a poor use of his time and resources, as he is unable to capture any of the value of his creations. Kris will exit the song creation business and seek some other employment. Assuming that Kris' contributions would have been interesting and/or important, society as a whole loses out when Kris decides not to

¹⁵⁸ See, e.g., Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TULANE L. REV. 187, 193 (2006); Wendy Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 855 (1992).

¹⁵⁹ See Matthew Sag, 81 TULANE L. REV. at 193.

¹⁶⁰ THE WRITINGS OF THOMAS JEFFERSON, edited by Andrew A. Lipscomb and Albert Ellery Bergh (1903), reproduced in THE FOUNDERS' CONSTITUTION, VOL. 3, available at http://press-pubs.uchicago.edu/founders/print_documents/a1_8_8s12.html.

be a songwriter. The free rider brings about a loss not only to the creator, but to the public.

The classic solution is to provide legal exclusivity to creators. The United States Constitution authorizes Congress to “promote the progress of science and useful arts” by granting to authors and inventors exclusivity in their “writings and discoveries.”¹⁶¹ When the exclusive right to make and distribute copies is granted to a creator, the low-cost free rider is never able to enter the market (the cost of free riding effectively becomes prohibitively high), the creator is able to charge a price for the work that at least recoups the cost of creation, the creator desires to remain employed as a creator, and the public domain is (eventually) enriched.

Thus, the traditional solution to the free rider problem is intellectual property protection and enforcement of exclusive rights.¹⁶² But the information age - and its attendant increase in the amount of creative output in the marketplace - gives rise to problems for creators and the owners of creative output that are not solved by aggressive enforcement of copyright. In fact, given the structure of demand for music, such enforcement can exacerbate these relatively new harms.

Demand for recorded music in the compact disc (CD) format is in decline,¹⁶³ and consumption of music is subject to strong network effects, that is, “as more people consume a song, the greater the demand for that song becomes.”¹⁶⁴ In a shrinking pool of potential consumers, therefore, consumption by some subset of consumers may be leveraged into further consumption by the larger group. Henry Perritt has identified several drivers of actual demand for music, that is, factors that convert potential demand into actual purchases by consumers. Genre preference (hip-hop over heavy metal, for example), perceived talent of the performer, personal at-

¹⁶¹ U.S. Const., art. I, § 8, cl. 8.

¹⁶² The traditional solution is not universally accepted by scholars, nor is the need for a solution at all. Mark Lemley has described efforts to eliminate free riding for intellectual goods misguided. Eliminating free riding, according to Lemley, is the equivalent of allowing the IP owner to capture 100% of the social value of the IP good. In most competitive markets, the owners of production are not deemed deserving of 100% of the social benefits of their properties. We are usually content to allow owners of real property and tangible personal property to earn enough from their properties to cover costs and receive a reasonable return on fixed cost investment. The monopoly-like government subsidy created by IP protection amounts to a grant of the full social value of the property and is excessive. *See* 83 TEX. L. REV. 1031 (2005).

¹⁶³ *See* Figures 1 and 2 *supra*.

¹⁶⁴ Henry. H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT. L.J. 259, 304-5 (2007).

traction to the performer, search costs, and network effects all contribute to the purchase decision.¹⁶⁵ The last two of these factors in particular, search costs and network effects, bring together supply and demand issues in a problematic way for owners of copyright in music.

While demand for CDs has declined, the market for information goods in general has experienced an explosion in supply. The CD format alone featured approximately 350,000 new songs in 2006.¹⁶⁶ The number of books published each year in the United States exceeds 100,000.¹⁶⁷ A dramatic increase in supply necessarily leads to an increase in consumer search costs, or the amount of time, energy, and resources it will take the consumer to find the product she seeks in the marketplace. “For consumers to benefit from a greater supply of music, they must be able to find it without encountering intolerable search costs.”¹⁶⁸ But the increase in supply has been so great that it has been called the source of an “information overload” on consumers.¹⁶⁹ Today, a consumer seeking to download a music track legally faces a choice of over 6 million tracks in over 100 different formats.¹⁷⁰ A critical response to this overload would be to increase the role of agents and vehicles with the ability to reduce search costs. Some of these agents and vehicles, such as advertising, music reviews, and radio play, are authorized by the copyright owners or allowed under the fair use doctrine. Others, equally if not more valuable, are unauthorized. These are typically peer-produced vehicles such as file sharing and recommendation sites, and unlicensed tastemakers and intermediaries.¹⁷¹ Yochai Benkler has argued that it is these “nonmarket, peer-produced” filters that have the best chance of easing the overload problem.¹⁷² But, to the extent that these filters or intermediaries are engaged in making or distributing copies or derivative works (as they often are), enforcement of the copyright law will halt valuable transaction-facilitating activity.

¹⁶⁵ See *id.* at 308-9.

¹⁶⁶ See Perritt, 29 HASTINGS COMM. & ENT. L.J. at 313.

¹⁶⁷ See Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135 (2007).

¹⁶⁸ Perritt, 29 HASTINGS COMM. & ENT. L.J. at 328

¹⁶⁹ Frank Pasquale goes as far as to characterize the information overload as an externality imposed on the information “environment” not unlike the pollution visited on the physical environment by some producers of tangible goods. See Pasquale, 60 VAND. L. REV. at 166-7. The industry itself describes the level of supply as “greater than ever before.” See IFPI Digital Music Report 2008 at 12.

¹⁷⁰ See *Id.* at 6.

¹⁷¹ See Perritt, 29 HASTINGS COMM. & ENT. L.J. at 314, 328.

¹⁷² Yochai Benkler, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM*, (Yale University Press 2006) at 12.

Adding to the disconnect between the need for intermediaries and the copyright law’s rough treatment of them, the current de facto model of creation does not resemble the traditional assumptions about creation embedded in U.S. copyright law. The Copyright Act assumes that creative works are produced by solitary genius authors (or centralized creative entities employing such types) motivated entirely by the opportunity for remuneration, and that the works of these geniuses are immutable once fixed by them.¹⁷³ Increasingly, though, what Robert Merges has called the “remix culture” pervades the creative sphere. “People adapt, distribute, trade, and comment on all sorts of preexisting works,” especially online and including widely distributed mass-media works.¹⁷⁴ Even the preexisting works themselves are often the product of more decentralized or collaborative processes than might be assumed under the copyright law. Players of online multiplayer games such as World of Warcraft or virtual worlds such as Second Life not only consume content presented to them by game developers, but create content themselves that contributes to and shapes the environment in which they play. Open source software development depends upon the input of a user community to shape modifications and future versions. Bloggers and their readers both contribute content to the “finished” product.¹⁷⁵ These examples are recent ones connected with modern technology, but Julie Cohen argues that the salience of a collaborative and de-centered model of creation need not be limited to the modern day.¹⁷⁶ One consequence of recognition of this divergent model should be a recognition that some amount of remixing “adds to rather than detracts from profits,” but the Copyright Act does not yet adopt this view.¹⁷⁷

Given the marketplace challenges presented by information overload, the literature has recognized a role for groups called “categorizers” and “conduces” in the online and digital information contexts. Frank Pasquale defines categorizers as the filters, recommenders, and tastemakers who serve as guides to online content. They provide “metadata (i.e., data about data) essential to finding the expression one wants.”¹⁷⁸ Categorizers can be as varied as the New York Review of Books, a favorite movie critic,

¹⁷³ See, e.g., Erez Reuveni, *Authorship in the Age of the Conducer*, 54 J. COPYRIGHT SOC’Y U.S.A. 285 (2007).

¹⁷⁴ Robert Merges, *Locke Remixed*, 40 U.C. DAVIS L. REV. 1259, 1259 (2007).

¹⁷⁵ See Reuveni, 54 J. COPYRIGHT SOC’Y U.S.A. at 286-7.

¹⁷⁶ See generally Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007).

¹⁷⁷ See Merges, 40 U.C. DAVIS L. REV. at 1263

¹⁷⁸ Pasquale, 60 VAND. L. REV. at 136.

a customer review on amazon.com or in the iTunes store, search engines in general, or the Google Print Project in particular.¹⁷⁹

Pasquale argues for favorable copyright treatment for categorizers, as their activities belie the common assumption among copyright owners that “all unlicensed uses amount to free-riding.”¹⁸⁰ To the contrary, in the hands of the categorizer, an unlicensed use is a boon to the copyright owner. For example, a search engine result acts like a trademark, “increasing the salience of particular products and services, elevating them above the run of things by associating them with particular words, images, and prior experiences.”¹⁸¹ Pasquale argues that, just as we allow referential uses of another’s trademark under the nominative use defense, we should allow referential, though not necessarily competing, uses by categorizers.¹⁸² Such referential uses reduce consumer search costs and are “necessary to counteract the negative effects of information overload.”¹⁸³ Pasquale would privilege categorization uses as permissible fair uses under section 107 of the Copyright Act.¹⁸⁴ Alternatively, his approach would allow a categorizer to raise the equitable copyright misuse defense¹⁸⁵ where the copyright owner attempts to leverage monopoly control over referential uses.¹⁸⁶ Although this article does not go as far as Pasquale’s recommendations, it does argue for a more nuanced treatment of mixtape DJs based in part on the DJs’ trademark-like, value-enhancing effects on the copyrighted works they use.¹⁸⁷

Erez Reuveni defines a “conducer” as a person who both consumes creative works and simultaneously adds creative content to them.¹⁸⁸ Copyright law has trouble dealing with these actors because its whole framework

¹⁷⁹ *See Id.*

¹⁸⁰ *Id.* at 138.

¹⁸¹ *Id.* at 172.

¹⁸² Trademark law’s nominative fair use defense permits defendant’s use of plaintiff’s trademark, where (1) the product or service in question is not readily identifiable without use of the trademark, (2) only so much of the mark is used as is reasonably necessary to identify the product or service, and (3) the defendant does nothing to suggest sponsorship or endorsement by plaintiff. *See, e.g., New Kids on the Block v. News Am. Publ’g., Inc.*, 971 F. 2d 302 (9th Cir. 1992).

¹⁸³ Pasquale, 60 VAND. L. REV. at 184.

¹⁸⁴ *See Id.* at 186-9.

¹⁸⁵ Copyright misuse is the attempt by a copyright owner to extend its control over copyrighted works in one market into other markets in which it enjoys no government-sanctioned exclusivity. *See Id.* at 189.

¹⁸⁶ *See Id.* at 190-2.

¹⁸⁷ *See infra.*

¹⁸⁸ *See Erez Reuveni, Authorship in the Age of the Conducer*, 54 J. Copyright Soc’y U.S.A. 285, 286 (2007).

is a remnant of a centralized corporate production model. Other than works that fit certain narrow definitions under the Copyright Act (such as joint works or collective works), the Act does not address the kind of collaborative, iterative, and cumulative creation (dubbed “conductive creativity by Reuveni) that is becoming increasingly common today.¹⁸⁹ The distributed nature of the creation argues for weaker intellectual property protection in conductive creativity industries, and Reuveni proposes several approaches to reallocating the rights of owners, including contractual solutions, industry-specific enforcement standards, and creation of a new class of works, “collaborative virtual works,” which would grant end-users some rights in the contributions that they make to a developer’s work.¹⁹⁰

Although mixtape DJs have historically operated in the brick and mortar world, the justifications for privileging and forbearing in the online context are equally salient when applied to the DJs.¹⁹¹ The DJs are both conductors, iterating on the singles manufactured by record labels by mixing them and presenting them in a new collective context, and categorizers, adding their imprimatur to the work of the artist and label in question and thereby aiding consumers in the decision of whether to purchase the artist’s work in the traditional album format. In fact, the DJs fill certain economic and structural gaps in the creation and distribution model of the modern content owner. Without the mixtape format, many consumers hesitate to purchase the work of new artists, or even the new work of established artists, at the monopoly prices charged by the copyright owner. The choices are simply too vast, and few consumers have the inclination or ability to sample every new release, even those in their favorite genre. The appearance of a song on the mixtape of a DJ with a large following and a reputation for spotting quality inures to the benefit of the copyright holder. The mixtape allows the consumer to sample the product, for a per-song price significantly lower than the monopoly price charged by the record label. A significant number of eventual purchasers of an album released by the label are attracted to the release in the first place by the mixtape DJ.¹⁹²

¹⁸⁹ *See Id.* at 329.

¹⁹⁰ *See Id.* at 332-4.

¹⁹¹ It should be noted that mixtape DJs are increasingly offering their mixes online, so the parallels between them and online conductors and categorizers will continue to develop.

¹⁹² It should be noted that some number of mixtape purchasers are not sampling the songs on the mixtape in order to purchase them in album format later, but are instead substituting the mixtape purchase for any legitimate purchases of the official releases. For the consumer simply seeking to substitute a cheaper street purchase for more expensive official album release purchase, however, the bootleg format (where the purchaser receives a copy of the entire album) rather than the mixtape is the rational choice. This article, and the model described *infra*, assumes that consumers seeking to engage in product substitution

The mixtape DJ plays a role similar to that discussed by some commentators with respect to “reputation rentals” in the retail sector.¹⁹³ For experience goods, there exists a moral hazard problem where sellers have incentive to provide low quality goods but charge a high price. Sellers of high quality goods are disadvantaged by this incentive, but they can cure the disadvantage by trading off of the reputation of a highly regarded retailer.¹⁹⁴ Sellers effectively signal quality to the marketplace by placing the product with a retailer that has a long reputation of providing high quality goods. This is a particularly valuable tactic for a seller without a strong brand name of its own.¹⁹⁵ In the rap music industry, many major labels, although they have strong brand names generally, have less brand equity as hip-hop brands. During the 1980s and 1990s, many of the dedicated hip-hop labels were acquired by major labels or otherwise disappeared.¹⁹⁶ In order to signal quality to the hip-hop marketplace, the major labels need assistance, and that assistance can take the form of renting the reputation of the mixtape DJ the way that a clothing designer might rent the reputation of a Nordstrom or a Neiman-Marcus by offering its clothing exclusively through those premium outlets.

In the absence of some promotional assistance, such as reputation renting, the market for many music works would never be made. As Wendy Gordon has argued, if a market does not evolve for a work due to transactions costs or externalities (such as high search costs), then enforcing copyright law prevents copying without conferring any economic advantage on the copyright owner.¹⁹⁷ The only way to fully realize the value of the property is to allow someone (including categorizers, conducers and other users) to make the market for the property where the owner is unable effectively to do so. It is unclear that unauthorized copying by these market makers has led to a decrease in the number of works supplied or in the prof-

rather than product sampling constitute a very small percentage of mixtape customers (and a very large percentage of bootleg customers).

¹⁹³ Wujin Chu and Woosik Chu, *Signaling Quality by Selling Through a Reputable Retailer: An Example of Renting the Reputation of Another Agent*, 13 *MARKETING SCIENCE* No. 2, at 177 (1994).

¹⁹⁴ *See Id.*

¹⁹⁵ *See Id.*

¹⁹⁶ Among the imprints that no longer exist, or no longer stand alone, are Priority Records, Sleeping Bag Records, Uptown Records, Profile Records, 4th and Broadway, and Sugar Hill Records. Def Jam is a notable exception; it was one of the pioneering hip-hop labels, and is still recognized as a hip-hop label, although it is owned by a major label.

¹⁹⁷ *See* Wendy J. Gordon, *Asymmetric Market Failure and Prisoner’s Dilemma in Intellectual Property*, 17 *U. Dayton L. Rev.* 853, 857-8 (1992).

itability of individual works,¹⁹⁸ And it is clear that these users are adding to the value of copyrighted works by inducing significant numbers of consumers to purchase them. Mixtape DJs, and other categorizers/conducers, are not free riders in the traditional sense, and where the risk of free riding is decreased, there is good reason to decrease both the “intensity of copyright protection,” and the “intensity” of enforcement choices by copyright owners.¹⁹⁹

Given the supply and demand landscapes faced by the owners of copyrighted works, particularly rap music, owners in the industry should forgo enforcement of rights under the Copyright Act, at least some of the time. In the mixtape DJ, the cultural norms of hip-hop have created an influential and well-established class of categorizers and producers. The law should recognize the contribution of such categorizers/producers in this industry, and it should structure liability and remedies analyses accordingly. The next part will discuss a model for doing so.

V. A Model for Applying Productive Infringement and Strategic Forbearance to the Recording Industry

a. Description of the Model

The model offered by this article seeks to identify contributions made by the productive infringer to the overall value of the intellectual asset. A starting point, then, is the method for determining such value regardless of the appropriation. One method is the income approach, expressing the value of the piece of intellectual property by determining “the present value of the anticipated stream of economic benefits that can be secured by ownership of the asset.”²⁰⁰ A valuation exercise would ask what income stream the asset is presumed capable of generating, how long the income stream is scheduled to last, and what probability exists that the income

¹⁹⁸ See Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 298 (2002).

¹⁹⁹ See Perritt, 29 HASTINGS COMM. & ENT. L. J. at 270.

²⁰⁰ See, e.g., Gavin Clarkson, *Avoiding Suboptimal Behavior in Intellectual Asset Transactions: Economic and Organizational Perspectives on the Sale of Knowledge*, 14 Harv. J. L. & Tech. 711, 725 (2001).

stream will actually come to fruition.²⁰¹ Market factors will have a significant influence on the answers to all three of these questions. Consumer demand for a product, including volume and timing of demand, as well as ability to convert potential demand into actual purchases, clearly affects the value of the asset upon which the product is based. The asset owner's proficiency and efficiency with respect to production, distribution, marketing, and promotion also impact the size, duration, and probability of the income stream. Intellectual property protection potentially impacts the income stream by increasing the size of the stream (the intellectual property owner may charge a monopolist's price, or close to it, for her product), increasing the probability of realizing the stream of income (to the extent that excluding competitors from the market for the product increases such probability), and guaranteeing the income for the term of exclusivity provided under the law.

Productive infringement may impact at least two of the three valuation inquiries: the size of the income stream and the probability of the income stream. Although there are numerous ways to think about the impact that a DJ's copying might have on the value of a copyright, this model focuses on income effects, for the sake of consistency with the valuation method.

Generally, the contribution to value of a mixtape DJ's appropriation will be a function of the DJ's reputation or following, the DJ's ability to signal to customers the quality or attention-worthiness of the featured artist, and the total supply of music in the marketplace (i.e., the amount of "noise" that must be penetrated in order to deliver any message to consumers regarding a particular product). All of these will qualitatively factor into the size of the potential income stream generated by a particular song and the likelihood that such income stream will actually materialize. Quantitatively, these factors can be represented by growth in the customer base for a particular new artist attributable to the mixtape, excess sales due to the mixtape beyond some sales baseline for new releases, and/or the value of the DJ's brand.

The value of the DJ's effect in growing the customer base for a release can be derived from the size of the DJ's own fan base. Especially for a new artist, the DJ will expose some number of his own fans to a release who would not otherwise have come in contact with it, especially given a large volume of releases and high consumer search costs. Assuming that

²⁰¹ *Id.*

the industry typically converts a certain percentage of new listeners to purchaser status, then the DJ's impact on value from increasing the customer base may be given as:

$$P * (\Delta B)$$

where P equals the conversion percentage and ΔB equals the addition to the copyright owner's customer base from the DJ's customer base. The monetary value of this addition is determined over the long term, as each person who becomes a customer/fan of a new artist will spend differing amounts on that artist's future releases.²⁰²

The value of the DJ's contribution to a new release may be determined if the copyright owner typically plans for some sales baseline or benchmark for a new release. If a release features a single that is included on a mixtape before the release date, and if the release exceeds the sales baseline, the inclusion may be a factor in the increase. Using this factor in any analysis of value enhancement would require a robust historical database of sales benchmarks and statistical analysis to isolate the DJ's contribution. The contribution may be represented by:

$$\Delta R_i$$

where ΔR_i equals the change in revenue for an initial release over the historical baseline.

Another component of the value of the productive appropriation can be determined by reference to the value of the DJ's own brand. Certain mixtape DJs, among them DJ Clue?, Funkmaster Flex, DJ Drama, and DJ Kay Slay, are brands in their own right, and affiliation with such brands can enhance the value of a relatively unknown copyrighted work. In determining what contribution that brand will make to the value of the release, a number of data may be important. First, the volume and growth rates of the DJ's own income streams give an idea of what premium customers have been willing to pay for his or her skills and output. Second, the cost to enter into a licensing or co-branding agreement (e.g., for an auto expo such as the Funkmaster Flex Custom Car and Bike Show²⁰³), gives an approximation of what the DJ's brand contributes to a particular venture. Perhaps most im-

²⁰² As discussed *supra* at note 193, the model assumes that the percentage of mixtape purchasers who are seeking to use mixtape purchases (as opposed to bootleg purchases) as substitutes for any and all legitimate purchases is very small.

²⁰³ See <http://www.funkmasterflex.com/default.asp>.

portantly, the cost to engage the DJ to produce an “authorized” mixtape is an indication of the value placed on his or her skills by the record company. A “comparables” approach may be used to determine DJ brand value, if there are a sufficient number of data points regarding fees for authorized mixtapes, such that a typical level of compensation may be established. The value of the DJ’s brand may be given as: V_{DJ} .

The factors described *supra* are not necessarily additive, nor will all of them contribute to every calculation of the value added by the productive infringer. The value will be a function $f(P*\Delta B, \Delta R_i, V_{DJ})$, but will not necessarily equal $P*\Delta B + \Delta R_i + V_{DJ}$. In many cases, only one or two of the three factors will be reliably measurable, and so the observed value of the productive infringement may not include all factors. Despite the inexactitude of the interplay of the factors, they present a useful set of data to be gathered in determining whether, and to what extent, technically infringing behavior might actually be helping the copyright owner.

b. Potential Applications of the Model

The model described *supra* may be applied to the music copyright context in at least three ways.²⁰⁴ First, the copyright owners may use the model to determine whether to pursue an action against a particular appropriator in the first place. A given mixtape DJ, for example, may have some perceived negative impact on sales of a particular official release. Before suing for copyright infringement, a copyright owner might weigh the net impact of the copying. How much does the appropriator contribute to the value of the property? In a situation where any lost sales due to substitution that might be recovered in litigation are exceeded by additional sales contributed by the sampling effect of the mixtape, it would not be rational to pursue the litigation. In fact, given that litigation is not costless, the lost sales recovered would have to exceed the sum of the appropriator’s contribution and the estimated cost of enforcement. If the recovery does not exceed that sum in any given case, the copyright owner should forbear.

Second, the model may be used to aid a liability determination in a case where the defendant raises the defense of fair use. As noted above, in determining whether a use is fair, a court will examine four factors:

²⁰⁴ Although the current enforcement situation regarding DJ Drama and DJ Don Cannon arose in the criminal context, the recording industry is not precluded from pursuing civil actions against mixtape DJs. The utility of the productive infringement model is described here in the civil context.

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (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.²⁰⁵

Factors two and three will not provide much help for the mixtape DJ defending a copyright infringement action. Under factor two, the status of the allegedly infringed work as a creative work rather than a factual work (such as a biography or a history) will weigh in favor of the copyright owner.²⁰⁶ Any work upon which a recording company sues for copyright infringement is likely a creative, nonfactual work. Under factor three, the more of a work that is copied, and the more significant the copied portion is to the work as a whole, the more likely that this factor will go in favor of the plaintiff.

Factors one and four, however, provide an opportunity to reach an unexpected result using the productive infringement model. Under factor one, a commercial use is usually, but not always, disfavored.²⁰⁷ A use that is transformative is more likely to be found fair than one that is supplanting. There may be an argument in a particular case that the way in which a particular DJ mixed or manipulated a plaintiff's song in her mixtape was transformative. More generally, and more importantly, a productive use, one that under the model adds value to the copyright owner's property, is the antithesis of a supplanting use. Such a use might be favored under factor one.

Factor four asks what effect the use has on the market for plaintiff's work, or on the work's value. If a DJ's use can be determined to be productive, then its effect on the value of the copyrighted work will be a positive one. Such a use should, under the model, help establish the potential market for the work rather than erode or otherwise injure it. An inquiry into whether a use qualifies as a productive use may lead to factor four of the fair use test favoring the mixtape DJ.

²⁰⁵ 17 U.S.C. § 107.

²⁰⁶ *Id.*

²⁰⁷ The Supreme Court in *Campbell v. Acuff-Rose* made clear that the commercial nature of a use does not bar the use from being found fair. *See* 510 U.S. 569, 584.

The third possible use of the model would be at the remedy stage of an infringement action where a defendant has been found liable. In cases where the plaintiff has not elected to receive statutory damages under section 504(c) of the Copyright Act, any monetary recovery by plaintiff likely depends on a calculation of

the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.²⁰⁸

In cases where the defendant's copying can be shown to be productive, an actual damages calculation based solely on plaintiff's lost sales or diminution to the value of plaintiff's asset will be incomplete. A productive appropriation will have brought sales to plaintiff that would not otherwise have materialized, will have increased the fan base for the next release by plaintiff's artist, and will have increased the value of plaintiff's intellectual property by pairing it in the marketplace with the defendant's valuable brand. The value added to the property by the productive appropriation may be used as an offset to any damages purportedly suffered by plaintiff.

Conclusion

The recording industry has entered a new phase of its war against infringers, and even grandmothers and twelve-year-olds are fair targets. Mixtape DJs have now been dragged into this war, and whether, to what extent, and in what form, their art will survive remains to be seen. The recording companies have every right to defend the exclusivity granted to them by the Copyright Act, but their view in the mixtape cases may be shortsighted. Many of the uses of copyrighted works by mixtape DJs enhance, rather than detract from, the value of the works. Copyright owners stand to benefit from forgoing enforcement of their rights in many of these cases. As many fashion designers understand in their heart of hearts, not everyone who copies one's work is doing one harm.

²⁰⁸ 17 U.S.C. §504 (b).