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"Criminal Minded?": Mixtape DJs, The 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."[2]
- 50 Cent

"Just because you *can* do something, doesn't mean you *should* do it."[3]
- 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.[4] 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, culturally sympathetic alleged infringers, including "twelve year-olds" and "grandmothers."[5] Although the record labels already have protection under the copyright law while the fashion houses seek it, both groups have at least

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1. BOOGIE DOWN PRODUCTIONS, *Criminal Minded, on* CRIMINAL MINDED (B-Boy Records 1987).

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2. This quote is widely attributed to 50 Cent. *See also* 50 CENT WITH CHRIS EX, FROM PIECES TO WEIGHT 216 (MTV 2005) ("[N]othing sells more records than good music.").

3. PATRICIA J. PARSONS ET AL., ETHICS IN PUBLIC RELATIONS 108 (2004).

4. H.R. 2033, 110th Cong. (2007). The bill, sponsored by Rep. William D. Delahunt (D-Ma.) and introduced on April 25, 2007, has been referred to the House Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property. 153 CONG. REC. H4174 (daily ed. Apr. 25, 2007). Its counterpart, S. 1957, sponsored by Sen. Charles E. Schumer and introduced on August 8, 2007, is before the Senate Committee on the Judiciary. Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007). The proposed legislation, supported by the Council of Fashion Designers of America, 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. *Id.* § 2(c).

5. 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, 133–34 (2006). By one estimate, the industry's strategy of suing end users has led it to file over 20,000 lawsuits in three years. *Id.* at 133.

one thing in common: some portion of the piracy that they seek to eradicate is more valuable to them than they publicly let on.[6] In their recent article, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, Kal 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, a value they term the "Piracy Paradox."[7] 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 disc jockey (DJ).[8]

In an extension of the recording industry's aggressive civil litigation strategy, labels have begun to look to the criminal law to seek the arrest and prosecution of purveyors of mixtapes (the common term for a hip-hop compilation CD).[9] The latest targets of this campaign have been several prominent DJs, the creators of some of the most popular recent mixtapes.[10]

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6. *Id.* at 136; Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation & Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1691 (2006).

7. Raustiala & Sprigman, *supra* note 6, at 1692.

8. BILL BREWSTER & FRANK BROUGHTON, LAST NIGHT A DJ SAVED MY LIFE 173–74 (1999); David F. Gallagher, *For the Mix Tape, A Digital Upgrade and Notoriety*, N.Y. TIMES, Jan. 30, 2003, at G1. 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." BREWSTER & BROUGHTON, *supra*, at 173. Although originally distributed on cassette, mixtapes are currently distributed in the CD format or as digital audio files. Gallagher, *supra*, at G1. The hip-hop mixtape is distinguishable from the ordinary compilations of favorite songs exchanged between friends, also known as "mixtapes," or "mixed tapes." *Id.* A hip-hop mixtape "might include a remix of a hit, a collaboration between two artists, a freestyle rhyme, a preview of a forthcoming official album or all of the above." Nick Marino & S.A. Reid, *Two Hip-Hop DJs' Arrests Spotlight Atlanta as Hotbed for Music Piracy*, ATLANTA J.-CONST., Jan. 19, 2007, at A1, A4.

9. 17 U.S.C.S. § 506 (LEXIS through 2008 legislation); Kelefa Sanneh, *With Arrest of DJ Drama, the Law Takes Aim at Mixtapes*, N.Y. TIMES, Jan. 18, 2007, at E1 [hereinafter Sanneh, *Arrest*]. Section 506 of the Copyright Act 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. 17 U.S.C.S. § 506. In the case of the mixtape DJs, however, the recording industry has chosen to use state RICO laws as the basis for criminal complaint. Sanneh, *Arrest*, *supra*, at E1.

10. Sanneh *Arrest*, *supra* note 9, at E1. Although the record labels often conflate the two, mixtapes are distinguishable from bootleg, or counterfeit, CDs due to the creative contribution of the DJ. *See* Kelefa Sanneh, *Mixtape Crackdown Sends a Mixed Message*, N.Y. TIMES, June 16, 2005, at E1 [hereinafter Sanneh, *Mixtape Crackdown*]. A mixtape is a compilation of singles selected, arranged, and remixed or otherwise altered by the creating DJ. *Id.* A bootleg CD is generally understood to be an exact copy of a full album or live performance, burned onto a blank CD and sold on the street as an alternative to purchasing the official CD release. *See id.* The mixtape typically contains significant creative input from the DJ who produces it, while a bootleg involves no creative contribution from its

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.[11] Drama, along with protégé DJ Don Cannon, was arrested and charged with felony violation of Georgia's Racketeering Influenced Corrupt Organization (RICO) law.[12] The state of Georgia requires that the name of the copyright owner of any recorded music for sale be displayed on the packaging.[13] According to the complaint, failure by Drama and Cannon to so label their mixtape CDs represented a large-scale, organized, and ongoing attempt to engage in illegal reproduction and distribution of the copyrighted works of others.[14] A conviction could earn Drama and Cannon one to five years in prison and a fine between $10,000 and $100,000.[15] 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.[16] Along with earlier raids of small music retailers,[17] the Drama/Cannon raid has increased fear and uncertainty in the mixtape trade and has led to a chilling of mixtape production and sales.[18]

One might ask whether anything is wrong with chilling an unlawful activity such as large-scale copyright infringement. This Article argues that something *is* wrong with such chilling, 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 were arguably engaged in "productive infringement"—infringing activity or improper appropriation that adds value to the infringed asset,

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manufacturer whatsoever. *See id.*

11. Hillary Crosley & Ed Christman, *Mixed Messages: DJ Drama's Bust Leaves Future of Mixtapes Uncertain*, BILLBOARD, Jan. 27, 2007, at 8.

12. *Id.*; Sanneh, *Arrest*, *supra* note 9, at E1.

13. GA. CODE ANN. § 16-8-60(b) (LEXIS through 2008 Sess.).

14. Nick Marino & S.A. Reid, *Two Hip-Hop DJs' Arrests Spotlight Atlanta as Hotbed for Music Piracy*, ATLANTA J.-CONST., Jan. 19, 2007, at A1; S.A. Reid, *DJs to Appear today in Court*, ATLANTA J.-CONST., Jan. 24, 2007, at D6.

15. Marino & Reid, *supra* note 14, at A1; Reid, *supra* note 14, at D6.

16. Crosley & Christman, *supra* note 11, at 8.

17. *See* Alan Berry, *The Tale of the Tapes*, INT'L HERALD TRIB., May 12, 2006, at 9 (discussing the raid of a record store called Dappa Don Clothing Co. in Norfolk, Virginia); Crosley & Christman, *supra* note 11, at 9 (discussing how the owner of Rhode Island Records in Pawtucket, Rhode Island, received five years probation and $14,500 in legal fees, fines, and restitution after a police raid); Sanneh, *Mixtape Crackdown*, *supra* note 10, at E1 (discussing the N.Y. Police Department's raid of the record and video ship Mondo Kim's in New York City); Douglas Wolk, *A Void Named Sued*, VILLAGE VOICE, Oct. 14, 2003, at 174 (discussing the raid of Berry's Music in Indianapolis, Indiana).

18. *See* Crosley & Christman, *supra* note 11, at 9 (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.").

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" instead of pursuing copyright enforcement actions.

Part I describes the "Piracy Paradox," which this Article posits is an industry-specific instance of a more general cross-industry phenomenon, and this Part introduces the concepts of "productive infringement" and "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 V draws parallels between the rap music industry and the fashion industry in which the Piracy Paradox was originally 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. Part V introduces a model 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 potential applications of the model by courts and copyright owners.

I. THE PIRACY PARADOX

A. Brief Description of the Paradox

With the term "Piracy Paradox," Professors Raustiala and Sprigman address a seeming anomaly of the fashion-design industry.[19] The conventional wisdom (and philosophical underpinning) of intellectual-property protection in creative industries is that in order to give incentives for creators to create, the government must provide strong protection against copying.[20] In the absence of strong protection, free riders will appropriate the inspiration of innovators, and innovators will choose to

19. Raustiala & Sprigman, *supra* note 6, at 1689.

20. *Id.* This utilitarian approach to protection for creative/innovative work is the cornerstone of protection in the United States for copyrights and patents. *Id.* 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, § 8, 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. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

invest their time and resources elsewhere.[21] In short, there will be no innovation without intellectual-property protection.

The fashion-design industry belies this assumption.[22] Despite several attempts during the Twentieth and Twenty-First centuries,[23] copyright law in the United States has never protected designs of clothing.[24] Although there are a number of alleged economic, historical, and sociological reasons for this omission,[25] the doctrinal rationale is the "useful article" doctrine.[26] Under that doctrine, copyright may only be used to protect expression, not functionality.[27] 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.[28] The test is separability; the aesthetic aspects of the work must be physically or conceptually separable from its functional aspects.[29] To the extent that the aesthetic characteristics have been adjusted to meet functional needs,

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21. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 18 (2003).

22. *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) ("Clothing design is not patented by federal copyright, trademark/tradedress, or patent law, nor is it protected by any state intellectual property regime.").

23. *See, e.g.*, Editorial, *Copyright Hems and Haws; Trying to Protect Fashion Designs From Knockoffs Would be Too Difficult and Would Smother Innovation*, L.A. TIMES, Aug. 15, 2007, at A18; Leslie J. Hagin, *A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime*, 26 TEX. INT'L L.J. 341, 474–88 (1991) (suggesting the need for protection in the fashion industry and discussing the advantages and disadvantages); Jennifer Mencken, *A Design for the Copyright of Fashion*, 1997 B.C. INTELL. PROP. & TECH. F. 4, 2–4 (1997) (discussing attempts of protection in patent, trademark, and other areas of law to end fashion industry piracy).

24. *See, e.g.*, Hetherington, *supra* note 22, at 44.

25. *See, e.g.*, *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. On the Judiciary*, 109th Cong. 80–82 (2006) (statement of Susan Scafidi, Associate Professor of Law & Adjunct Professor of History, Southern Methodist University) (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).

26. 17 U.S.C. § 101 (2000) ("A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."); *See* Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1143 (2d Cir. 1987).

27. *See* 17 U.S.C. § 102 (2000) ("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 . . . .").

28. *See Brandir Int'l, Inc.*, 834 F.2d at 1143.

29. Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411, 418 (2d Cir. 1985).

conceptual separability is destroyed.[30] Clothing is useful; therefore the design of clothing is subject to and usually fails to be copyrightable under the useful-article doctrine.[31] Thus, although a small number of works related to fashion or apparel, such as fabric patterns, receive limited copyright protection, fashion designs are generally unprotected by the Copyright Act.[32]

The lack of protection by copyright law creates the opportunity for copyists to refer to, imitate, or reproduce wholesale the original clothing designs of others.[33] A dress may be observed on the runway in Paris, New York, or Milan, and 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.[34] The original designer has no recourse under U.S. copyright law.[35] Other areas of the law, however, may provide protection in some situations.[36] If the copyist has attempted to pass his or her 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.[37] 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.[38] A

30. *Brandir Int'l, Inc.*, 834 F.2d at 1145.

31. *See* 17 U.S.C. § 102(b).

32. *See* Celebration Int'l, Inc. v. Chosun Int'l, Inc., 234 F. Supp. 2d 905, 915 (S.D. Ind. 2002) (holding that a tiger costume is copyrightable due to its aesthetic aspects being separable from its functionality); Queenie, Ltd. v. Sears, Roebuck & Co., 124 F. Supp. 2d 178, 180 (S.D.N.Y. 2000) ("'The means of expression are the artistic aspects of the work [and, thus, protectable]; the mechanical or utilitarian features are not protect[a]ble.'" (quoting Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp., 25 F.3d 119, 123 (2d Cir. 1994))); *see also* Patti Waldmeir, *Why Knock-offs are Good for Fashion,* THE FINANCIAL TIMES, Sept. 12, 2007, at 12.

33. *See, e.g.*, Teri Agins, *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 ST. J., Aug. 8, 1994, at A1.

34. *See id.* ("[A] $1,232 rubberized-silk miniskirt was barely off the runway in Milan when Macy's and other U.S. retailers began ordering a look-alike vinyl version that would sell for just $170 . . . [and] beat Versace's dress into stores by several months.").

35. Waldmeir, *supra* note 32, at 12.

36. *See* Mencken, *supra* note 23, at 2–3.

37. *See id.* (noting that Nike's "Swoosh" has protection).

38. *See, e.g.*, Elizabeth Woyke, *Fashion's Bid to Knock Out Knockoffs*, BUSINESS WEEK, Apr. 10, 2006, at 16 ("Mass Market retailers have always carried inexpensive versions of the designer fashions their customers have glimpsed on the red carpet or the runway."); Eric Wilson, *O.K., Knockoffs, This is War*, N.Y. TIMES, Mar. 30, 2006, at G1 (discussing the popularity of inexpensive designer lookalikes); Susan Scafidi, *Katrina Pounds Trademarks: It's Good and Bad That Hurricane Survivors Are Getting Counterfeit Wares*, LEGAL TIMES, Oct. 10, 2005, at S6 (discussing how the federal government is giving Katrina victims previously seized counterfeit designer clothing).

manufacturer under contract to produce an item for the original designer may be liable for breach of contract if it produces a similar item for a copyist. Many commentators have debated the merits and sufficiency of other avenues of legal protection.[39]

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,[40] extreme secrecy in the design process,[41] and euphemization of the copying as flattery or homage.[42] In addition, the industry continues to press for legislation either to expand copyright protection to fashion designs or to create *sui generis* protection.[43] Despite the lack of protection under the Copyright Act, the apparel industry is not on its last legs.[44] The industry is vibrant, constantly growing, continually innovating, and very profitable for the established houses.[45]

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39. *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, 1668 (1996) (citing Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992)) (describing trade dress law as superior to copyright law for providing protection against design piracy, given the U.S. Supreme Court's expansive description of trade dress as a product's total concept and overall appearance); Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J. 169, 180–213 (2002) (discussing the shortcomings of patent, copyright, and trademark law in providing protection for apparel designs, and arguing for *sui generis* protection); Hetherington, *supra* note 22, at 47–56 (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).

40. *See generally* Fashion Originators' Guild of Am., Inc. v. Fed. Trade Comm'n, 312 U.S. 457 (1941) (finding the Fashion Originators' Guild's prohibition on members copying each other's designs and pressure on retailers not to sell the designs of copiers to be a violation of antitrust laws).

41. *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*, FIN. TIMES, Nov. 17, 2007, at 6 (quoting Didier Grumbach, president of the Chambre Syndicale de la Haute Couture in Paris) (discussing how at least one designer bans the release of any photographs of clothing until the clothing arrives in stores).

42. *See, e.g.*, Gioia Diliberto, *Vive Le Knockoff . . . and the Paradox: Copies Are the Price Designers Pay for Success*, L.A. TIMES, Oct. 10, 2007, at A21 (discussing how designers enjoy when their work inspires others but *not* when it is directly copied); Dan Mitchell, *Telling You So Again*, N.Y. TIMES, Mar. 18, 2006, at C5; Waldmeir, *supra* note 32, at 12.

43. *See supra* note 4 and accompanying text.

44. *Design Law: Are Special Provisions Needed to Protect Unique Industries? Hearing on H.R. 2033 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary* 110th Cong. 31 (2008) (statement of Steve Maiman, Proprietor, Stony Apparel, in Opposition to H.R. 2033). Opponents of HR 2033 argue that it is unnecessary because the fashion industry is flourishing despite the lack of protection for designs. *Id.* 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

Professors 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.[46] Despite low levels of legal protection for creative expression in fashion designs, no sustained political movement has pushed for added copyright-like protection, as has been the case in the music and film industries.[47] In fact, despite "occasional[] efforts . . . to alter the legal regime governing design copying, the regime has persisted unchanged for over six decades."[48] This paradox follows from two characteristics peculiar (but not necessarily unique) to the fashion world: "induced obsolescence" and "anchoring."[49]

"Induced obsolescence" is the process whereby designs and styles are diffused through disparate levels of the marketplace.[50] High-fashion apparel is a "positional" good, conferring status on its users rather than simply providing utility.[51] 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.[52] In order to communicate their lofty status anew, the early adopters must move on to a different garment or style.[53] Professors Raustiala and Sprigman explain that "[c]opying 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."[54] As the elite become mass in nature, a new elite must be

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industry "has grown into a huge industry, a competitive industry, an innovative and vibrant industry—all without any help—or interference—from copyright law." *Id.* 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 "[u]nlike 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." *Id. See also* Kristi Ellis, *Designer vs. Vendor: Battle Over Copyright Issue Hits Congress*, WOMEN'S WEAR DAILY, Feb. 15, 2008, at 1, 4.

45. *Hearing on Design Law: Are Special Provisions Needed to Protect Unique Industries? Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary* 110th Cong. 31 (2008) (statement of Steve Maiman, Proprietor, Stony Apparel, in Opposition to H.R. 2033).

46. Raustiala & Sprigman, *supra* note 6, at 1699.

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

48. Raustiala & Sprigman, *supra* note 6, at 1699.

49. *Id.* at 1722, 1728.

50. *Id.* at 1722.

51. *Id.* at 1718.

52. *Id.* at 1719.

53. *See id.* at 1719–20 (noting that prestige and value are diminished in fashion with the diffusion of copies).

54. *Id.* at 1722.

defined in order to give the most exclusive customers of the industry a new point of differentiation:[55]

> [T]he 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.[56]

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.[57]

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.[58] Anchoring helps communicate trends to the marketplace and "ensure[s] that consumers understand when the styles have changed."[59] 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.[60] 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 defines specific themes that become trends.[61] Accordingly, "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."[62]

Together, induced obsolescence and anchoring lead to greater consumption of fashion goods than would the absence of free appropriation of designs.[63] As status seekers must constantly seek out designs that have not yet been adopted by the masses, they create a constant market for new fashion goods, the "next new thing."[64] This persistent market is no mere U.S. phenomenon.[65] In the European Union (EU), where a combination of national and EU laws provide protection for fashion designs,[66] the rights are

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55. *Id.*
56. *Id.* at 1726.
57. *See id.*
58. *Id.* at 1728.
59. *Id.*
60. *Id.*
61. *Id.* at 1728–29.
62. *Id.* at 1729.
63. *Id.* at 1733. Some designs do not adhere to this trend.
64. *Id.*
65. *Id.* at 1735.
66. *See* Council and Parliament Directive 98/71, 1998 O.J. (L289) 28 (directive of the European Parliament and the Council of 13 on the legal protection of designs).

rarely enforced, suggesting that the designers' profits from copying outweigh any losses suffered.[67]

The low-IP equilibrium of the fashion industry may be viewed narrowly, as a peculiarity of a specific business.[68] 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 from suit a more valuable strategy than enforcement of rights.[69] As discussed in Part 0, *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

Professors 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.[70] In apparel design, induced obsolescence renders the appropriation productive.[71]

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.[72] Copying may serve to boost such demand and its intensity.[73] An example of this sort of appropriation is fan fiction.[74] A consumer who takes the time to copy characters from a popular series, such as *Star Wars*, develop a derivative work starring those characters, share that story with other consumers, and solicit input in the further development of the story—all without financial gain—is likely a fervent fan of the series rather than a malicious profiteer.[75] In this context, the unauthorized copying and preparation of derivative works serve as levers for getting a committed sub-group of consumers even more excited about the franchise.[76] Far from harming the intellectual property surrounding the franchise, the appropriation makes it more valuable.[77] This group of appropriators is one that will organize and attend

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67. Raustiala & Sprigman, *supra* note 6, at 1735.
68. *Id.* at 1699.
69. *Id.* at 1722.
70. *Id.*
71. *Id.*
72. *See, e.g.*, Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 655 (1997).
73. *Id.*
74. *Id.*
75. *Id.* at 658.
76. *See id.*
77. *Id.* at 669–76.

conventions, line up in advance for the next installment in theaters, and purchase large amounts of franchise-related merchandise.[78] These copyists must obviously be treated differently than, for example, the bootleg DVD producer who is also copying protectable elements of the franchise.[79]

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, the property owners' best interest will often be served by forgoing enforcement. Where the net value of the appropriation to the owner is positive -- that is, where owners gain more from the copying than they lose -- 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 to prepare derivative works would lead to no recovery of lost revenue and no additional streams of revenue. The only likely result would 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.[80] First, Section 102(a)(2) of the Copyright Act includes musical works or musical compositions (including lyrics) as copyrightable subject matter.[81] Copyright in musical works usually vests in the composer of the work.[82] 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;

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78. *Id.* at 669.

79. *See, e.g., id.* at 654 (arguing for fair use treatment for certain types of fan fiction); Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, *passim* (2007) (same).

80. 17 U.S.C. § 102(a)(2), (7) (2000).

81. *Id.* § 102(a)(2).

82. Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of* Bridgeport v. Dimension Films *on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 96 n.16 (2007) (citing Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1669 (1999)).

(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 publicly.[83]

The second type of copyright is copyright in the sound recording.[84] This recording is the song as it was actually recorded at a particular recording session or other performance.[85] Protection is provided for the sounds captured by the recording equipment, so the composer does not necessarily have any claim on copyright for this category of work.[86] Ownership of the copyright may vest in the performers, or in some subset of them; the session producer; or a sound engineer.[87] If any of these persons also happens to be the composer, then that person may claim the copyright in both the musical composition and the sound recording.[88] 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.[89] The exclusive right to make copies or prepare derivative works of 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.[90]

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.[91] The touchstone of this period of enforcement has been the Napster litigation,[92] and both the stakes and the result of that litigation have arguably set the tone for an extremely aggressive approach to enforcement that colors the strategy in mixtape cases.

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83. 17 U.S.C. § 106(1)–(5) (2000 & Supp. 2004).
84. *Id.* § 102(a)(7) (2000).
85. *Id.* § 102(a).
86. 1-2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.10[A][3] (2d ed. 1997).
87. *Id.*
88. *See id.* §§ 2.05, 2.10[A][3].
89. 17 U.S.C. § 106(6) (2000 & Supp. 2004). An example of a digital audio transmission is the transmission of a sound recording over the Internet on a web-based radio station.
90. 17 U.S.C. § 114(b) (LEXIS through 2008 legislation).
91. *See, e.g.*, Craig A. Grossman, *From Sony to Grokster, The Failure of the Copyright Doctrines of Contributory Infringement and Vicarious Liability to Resolve the War Between Content and Destructive Technologies*, 53 BUFF. L. REV. 141, 145 (2005).
92. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1010–11 (9th Cir. 2001).

Napster was not alleged to infringe directly any of the exclusive rights of the copyright holders.[93] Rather, Napster was sued under the theories of vicarious and contributory copyright infringement based upon the directly infringing activities of the company's end-users.[94] A contributory infringer is one who, with knowledge of the infringing activity of another, induces, causes, or materially contributes to such infringing conduct.[95] Due in part to the centralized nature of Napster's network, in which user requests for mpeg-1, audio-layer-3 formatted computer files—commonly referred to by their file extension, .mp3—were routed through the company's own servers, the United States Court of Appeals for the Ninth Circuit upheld the district court's finding that Napster had "actual knowledge that specific infringing material [was] available using its system."[96] Napster's failure to remove or block access to the infringing material was sufficient to support a finding of contributory liability against the company.[97]

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."[98] An actionable financial interest exists where "the availability of infringing material acts as a draw for customers."[99] The growth in Napster's user base as the amount of infringing material available on its network increased was sufficient to support a finding that Napster benefited financially from the direct infringement.[100] The company's ability to block users' access to its system and to locate infringing material on its search index—both abilities were rooted in its centralized architecture—supported the district court's finding

93. *Id.* at 1011. 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. *Id.* at 1004.

94. *Id.* at 1013. 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. *Id.*

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

96. *A&M Records, Inc.*, 239 F.3d at 1022.

97. *Id.*

98. *Id.* (quoting *Fonovisa*, 76 F.3d at 262).

99. *Id.* at 1023.

100. *Id.* Although the users were making no direct payments to Napster, Napster's intent to "[derive] revenues directly from increases in userbase" was sufficient under the vicarious liability cases for a finding of "direct" financial benefit. *Id.* at 921; *see Fonovisa*, 76 F.3d at 263 ("[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.").

that Napster had both the right and the ability to supervise the content available on its servers.[101] The Ninth Circuit affirmed the district court's preliminary injunction in favor of plaintiffs.[102]

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.[103] 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.[104] 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.[105] Copyright owners, including record companies, movie studios, songwriters, and music publishers, prevailed in litigation, despite the decentralized nature of Grokster and Streamcast's networks, because the peer-to-peer networks had made statements and engaged in behavior that indicated an intent to induce direct infringement on the part of former Napster users.[106]

Although the recording industry had thus defeated several adversaries in legal battles, unauthorized file distribution and P2P sharing of copyrighted material did not go away.[107] To a certain extent, file sharing

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101. *A&M Records, Inc.*, 239 F.3d at 1024.

102. *Id.* 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. Clay Shirky, *Music Industry Will Miss Napster*, WALL ST. J., July 28, 2000, at A14. A new incarnation of Napster, as a for-pay authorized music seller, began operation in 2006. Press Release, Napster, Napster Previews New Music Service (Oct. 9, 2003), *available at* http://investor.napster.com/releasedetail.cfm?ReleaseID=119782).

103. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 919–20 (2005).

104. *See, e.g., id.* at 920–21.

105. *See id.* at 930 n.9.

106. *Id.* at 928. 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. *Id.* at 927–28; *see* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 440 (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. *Grokster, Ltd.*, 545 U.S. at 937–39.

107. *See* Joseph Menn, *Music-Sharing Verdict a Milestone for Record Labels*, L.A. TIMES, Oct. 5, 2007, at A1. 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. John Borland, *RIAA Files New Round of File-Swapping Suits*, CNET

was driven underground, with services being very circumspect, or even silent, regarding potentially infringing uses of their software.[108] 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 decentralizing the business of sharing music and other copyrighted content.[109] Faced with fewer opportunities for clear legal victories against companies like Bit Torrent, the recording industry expanded its efforts against the companies' users.[110] In 2003, the industry began suing the actual direct infringers, the end-users of file-sharing software.[111] The efficacy of this post-2003 retail litigation strategy remains to be seen. In addition to the obvious public relations issues and problems inherent with suing customers, the industry's hyper-aggressive current posture may be unable 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 in Part 0 *infra*, alignment with certain infringing elements of hip-hop culture creates the market for much recorded hip-hop music.

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 DJ-ing), dance (break dancing, "popping," "locking," and others), fashion, and visual art (primarily graffiti).[112] It originated

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News, Apr. 28, 2004, http://news.cnet.com/RIAA-files-new-round-of-file-swapping-suits/2100-1027_3-5201637.html?tag=mncol.

108. *See* Menn, *supra* note 107, at A1.

109. *See* Carmen Carack, *How Bit Torrent Works*, Oct. 6, 2008, http://computer.howstuffworks.com/bittorent.htm.

110. Borland, *supra* note 107.

111. *See* Recording Indus. Assoc. of Am. v. Verizon Internet Srvs., Inc., 351 F.3d 1229, 1231 (D.C. Cir. 2003); Borland, *supra* note 107; *see also* Sudip Bhattacharjee et al., *Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions*, 49 J.L. & ECON. 91, 94 (2006); 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, 381–82 (2005); Racquel Callender, Comment, *Harmonizing Interests on the Internet: Online Users and the Music Industry*, 48 HOW. L.J. 787, 796–800 (2005); Jeffrey Neri, Comment, *Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Settled Special Norms*, 93 GEO. L.J. 733, 752–54 (2005).

112. Vanessa E. Jones, *Old-School Lyrics Were Da'Bomb; Hip-hop's Effect Celebrated in Songs, Books*, CHI. TRIB., Jan. 16, 2003, at N9. DJ-ing is sometimes referred to as turntablism and modern DJs, turntablists. *See* Michael Endelman, *Turntable U? In D.J.'s Hands Professor Sees an Instrument*, N.Y. TIMES, Feb. 11, 2003, at E1.

among black and Latino youth in New York City in the 1970s.[113] Hip-hop's birthplace was the housing projects of the South Bronx, where DJs such as Kool Herc, Grand Wizard Theodore, Afrika Bambaataa, and Grandmaster Flash 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.[114] 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."[115] 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.[116] 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.[117] Today, several of MTV's most popular programs either feature hip-hop performers or otherwise borrow from urban culture.[118] Hip-hop artists are regularly nominated for Grammy awards, which they win.[119] Along with this

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113. TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 2 (1992).

114. *See* BREWSTER & BROUGHTON, *supra* note 8, at 204. Among such techniques were "scratching," "punch phrasing," and "break spinning." NELSON GEORGE, HIP HOP AMERICA 17–19 (1999). 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 back drop for MCs or rappers to create the other musical element of hip hop: rapping. *Id.* at 17, 19.

115. *Id.* at *ix*.

116. *See* BREWSTER & BROUGHTON, *supra* note 8, at 16.

117. Richard Harrington, *Rock Around the Clock: From 'I Want My MTV' to 'Anything MTV Want—10 Years of Music Television*, WASH. POST, July 28, 1991, at G1; Robert Hilburn, *Striking Tales of Black Frustration and Pride Shake the Pop Mainstream*, L.A. TIMES, April 2, 1989, at 7; Janice C. Simpson, *Yo! Rap Gets on the Map; Led By Groups Like Public Enemy, it Socks a Black Message to the Mainstream*, TIME, Feb. 5, 1990, at 60.

118. MTV—Music Reality Series, Specials, Afternoon Programming—All Shows, http://www.mtv.com/ontv/all/index.jhtml. 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. MTV—*Pimp My Ride*, http://www.mtv.com/ontv/dyn/pimp_my_ride/series.jhtml (last visited Nov. 20, 2008); MTV—*Run's House*, http://www.mtv.com/ontv/dyn/runs_house/series.jhtml (last visited Nov. 20, 2008); MTV—*MTV Cribs*, http://www.mtv.com/ontv/dyn/cribs/series.jhtml (last visited Nov. 20, 2008). Programs such as *Celebrity Rap Superstar* feature performances of hip-hop music and dance. MTV—*Celebrity Rap Superstar*, http://www.mtv.com/ontv/dyn/celebrityrapsuperstar/series.jhtml (last visited Nov. 24, 2008). *Wild 'N Out* exposes the MTV audience to the age-old African-American art of "snapping," or "the dozens." MTV—*Nick Cannon Presents: Wild 'N Out*, http://www.mtv.com/ontv/dyn/nick_cannon_wildnout/series.jhtml (last visited Nov. 20, 2008). In the words of rapper/producer Kanye West, "this dark diction has become America's addiction." Kanye West, *Crack Music*, *on* LATE REGISTRATION (Roc-A-Fella 2005).

119. *See generally* Grammy.com, http://www.grammy.com (last visited Nov. 20, 2008).

acceptance in broader cultural circles has come enormous commercial success.[120]

Despite its migration into the mainstream (and arguable dilution as a form of black, urban cultural expression),[121] hip-hop's cultural norms continue to be influenced, and even directed, by their ghetto roots.[122] 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 recording industry and in the copyright law. The core cultural norms of the music that distinguish hip-hop from many other genres can be divided into norms of creation, performance, and distribution.

1. 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 . . . ."[123] Beats often consist of sounds sampled

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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. GRAMMY Winners Search, http://www.grammy.com/GRAMMY_Awards/Winners/Results.aspx?title=&winner=Lauryn%20Hill&year=0&genreID=0&hp=1 (last visited Nov. 19, 2008). Her 1998 wins included wins in the categories of Best New Artist and Album of the Year. *Id.* Outkast won Album of the Year in 2004 for *Speakerboxx/Love Below*, and Kanye West has won a total of 10 Grammy awards. GRAMMY Winners Search, http://www.grammy.com/GRAMMY_Awards/Winners/Results.aspx?title=&winner=Outkast&year=0&genreID=0&hp=1 (last visited Nov. 19, 2008); GRAMMY Winners Search, http://www.grammy.com/GRAMMY_Awards/Winners/Results.aspx?title=&winner=Outkast&year=0&genreID=0&hp=1 (last visited Nov. 19, 2008).

120. *See* RIAA 2006 Consumer Profile, http://www.riaa.com/keystatistics.php?content_selector=consumertrends, (follow "2006 10-year Music Consumer Trends Chart" hyperlink) (indicating that 11.4%, or $1.3 billion, 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).

121. A typical lament is that of DJ Grandmixer D.ST of the Zulu Nation, and the 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 74 (Alan Light ed. 1999).

122. 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 13 (2003 ed.) (citing Zora Neale Hurston, *Characteristics of Negro Expression*, *in* THE SANCTIFIED CHURCH at 59–60 (Marlowe & Co. 1981)).

123. JOSEPH G. SCHLOSS, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP 2 (2004) (stating that beats may be constructed using a number of different techniques and equipment, including twin turntables, MIDI synthesizers, drum machines, digital samplers, or live instruments).

from other people's recordings.[124] The looping and repetition of such samples provide the backdrop over which MCs[125] compose their rhymes.[126] Hip-hop has recognized borrowing and repetition as culturally central to the genre, even in its modern incarnation.[127] Greg Tate has described the creative ethos of the music as a "reanimation" of the past and as "ancestor worship."[128] Tricia Rose has described it as an "affirm[ation] of black musical history [that] locates these 'past' sounds in the 'present.'"[129]

The centrality of the DJ or producer is another enduring norm related to the creation of hip-hop music.[130] In the early days of hip-hop culture, DJs were the stars.[131] Early performances featured a DJ playing "break-beats," the most rhythmic sections of popular R&B and disco records,[132] along with an MC exhorting partygoers to dance.[133] A DJ's prowess in re-contextualizing recorded music was the basis of his or her fame and elevated status in hip-hop circles:[134]

> [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 [sic] 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

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124. *Id.*

125. Although the term "MC" has been defined variously ("Microphone Controller," "Microphone Commander," 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." WILLIAM JELANI COBB, TO THE BREAK OF DAWN: A FREESTYLE ON THE HIP HOP AESTHETIC 8 (2006).

126. Olufunmilayo Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 630 (2006).

127. *Id.* (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).

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

129. ROSE, *supra* note 113, at 89.

130. COBB, *supra* note 125, at 7; SCHLOSS, *supra* note 123, at 31.

131. COBB, *supra* note 125, at 8; BEATS, RHYMES & LIFE: WHAT WE LOVE AND HATE ABOUT HIP-HOP 229 (Kenji Jasper & Ytasha Womack eds. 2007) [hereinafter BEATS, RHYMES & LIFE].

132. SCHLOSS, *supra* note 123, at 31–33.

133. *Id.* 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. JEFF CHANG, TOTAL CHAOS: THE ART AND AESTHETICS OF HIP-HOP 352 (2006). Immigrants from the Caribbean Island during the 1970s brought with them "sound-system" culture. *Id.* 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. *Id.*

134. BEATS, RHYMES & LIFE, *supra* note 131, at 232–33.

> 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.[135]

DJs 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, such as scratching or other percussion, to records.[136] In the hands of the right DJ, "a recording [could] be 'played like an electronic washboard.'"[137] The star status of DJs was reflected in the superior billing granted to DJs over MCs in a number of the early rap groups.[138]

2. Performance Norms

Rap music began as a predominantly live performance vehicle.[139] To this day, the art form's performance norms retain a high degree of importance.[140] For example, audience participation remains a central element to any hip-hop concert.[141] Even when 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 is still the most important criterion by which many fans judge the artist.[142] Many rap groups employ individuals,

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135. Interview with Fab 5 Freddy of "Yo! MTV Raps," *Foreword* to HAVELOCK NELSON & MICHAEL A. GONZALES, BRING THE NOISE: A GUIDE TO RAP MUSIC AND HIP-HOP CULTURE, at vi–vii (Harmony Books 1991).

136. David Sanjek, *"Don't Have to DJ No More": Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L. J. 607, 608 (1992).

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

138. COBB, *supra* note 125, at 8. 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. BEATS, RHYMES & LIFE, *supra* note 131, at 229; COBB, *supra* note 125, at 8, 47, 92. 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. BEATS, RHYMES & LIFE, *supra* note 131, at 229; COBB, *supra* note 125, at 8–9. Other DJ/producers such as Marley Marl and Prince Paul, were known for signature sounds that complemented various MCs and groups. *See* BEATS, RHYMES & LIFE, *supra* note 131, at 229; COBB, *supra* note 125, at 26.

139. COBB, *supra* note 125, at 42.

140. *See id.*

141. Jacqueline Cook, *The Role of the 'Hype Man' in Hip-Hop*, THE HILLTOP ONLINE, Apr. 21, 2006, *available at* http://www.thehilltoponline.com/life_style/1.464291.

142. COBB, *supra* note 125, at 9. At least one artist, Kris Parker, professionally known as KRS-One, maintains a strong reputation in the industry on the strength of his live performances, despite relatively poor album sales in recent years. *See* 4 AFRICANA 530–31 (Kwame A. Appiah & Henry L. Gates, Jr. eds., Oxford Univ. Press 2d ed. 2005); Peter Watrous, Review/Rap, *K.R.S.-One Fuses Personality and Technology*, N.Y. TIMES, Apr. 11,

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.[143]

Once on stage, performers fall into patterns of engagement with the audience that recall other communication forms derived from the African Diaspora.[144] 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.[145] Similarly, chants that have little to do with the specific material of a given performer, but that are common in the culture, are often used to excite the crowd.[146] Improvisation, called "freestyling" in hip-hop, is as much a part of the history of rap music as of jazz music.[147] Related to the improvisation norm is the value placed on competitive performance, or "battling."[148] A battle may be conducted between rappers or DJs.[149] The competitors trade performance sound-bites, usually sixteen-bar lyrical passages in the case of MC "battles."[150] The competitors alternate until one of them runs out of material and is unable to respond to the most recent salvo.[151] This particular performance norm is deeply connected with the role of the mixtape in hip-hop.[152] Many of the

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1992, at 20.

143. Cook, *supra* note 141.

144. COBB, *supra* note 125, at 7.

145. JEFF CHANG, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP HOP GENERATION 132 (2005); WILLIAM E. SMITH, HIP HOP AS PERFORMANCE AND RITUAL: BIOGRAPHY AND ETHNOGRAPHY IN UNDERGROUND HIP HOP 13–14 (2005).

146. SMITH, *supra* note 145, at 13; Cook, *supra* note 141. 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!'" *See* Cook, *supra* note 141. The audience responds with the requested phrase. *See id.*

147. SMITH, *supra* note 145, at 13–14.

148. Marcyliena Morgan, *After . . . Word! The Philosophy of the Hip-Hop Battle*, *in* HIP HOP & PHILOSOPHY: RHYME 2 REASON 205–06 (Derrick Darby & Tommie Shelby eds. 2005); Dan DeLuca, *Rap Attack; Hip-Hop Feuds Are Nothing New*, PHILADELPHIA INQUIRER MAG., Apr. 3, 2002.

149. Morgan, *supra* note 148, at 205–06.

150. *Id.* "Battles" are wars of words between rappers. *See* John Leland et al., *Feuding for Profit: Rap's War of Words; In Rap Industry, Rivalries as Marketing Tool*, N.Y. TIMES, Nov. 3, 2002, at 1. Historically, battles were conducted face-to-face, but now they are conducted almost entirely via a series of successive "dis' records" released by the combatants. *Id.*

151. Morgan, *supra* note 148, at 205–06.

152. Geoff Boucher, *Mix-tape Mania: Custom-made Rap Collections Are Selling on the Streets and Launching Careers*, L.A. TIMES, Apr. 28, 2003, at D5; DeLuca, *supra* note 148; Rashaun Hall, *Mix Tapes Rise from the Street as Hip-Hop Promo, A&R Tool*, BILLBOARD, Apr. 26, 2003, at 1, 68.

most popular mixtapes are "battle tapes," which chronicle a temporally extended "battle," or "beef," between two performers.[153]

3. Distribution Norms

In addition to the creation and performance norms described above, several norms involving the distribution of music also survive.[154] Many early hip-hop songs and DJ mixes were shared via multiple generations of recording on a cassette tape.[155] Consumers of hip-hop today experience the music through interaction and exchange within a social circle, methods that might be described as "viral" by marketing professionals.[156] Beyond the immediate social circle, music is promoted and distributed via street teams and exposure at clubs and parties.[157] DJs (including mixtape DJs) are often central to the perpetuation and practice of creation, performance, and distribution norms.[158] As a result, DJs are influential in the choices made by listeners about what musical works they favor.[159] Despite the importance of hip-hop's cultural norms in influencing consumer choice, the recording industry has not always viewed the genre's norms favorably.[160] As the next Subsection indicates, recording-industry litigation has been an unpleasant fact for hip-hop artists and producers since the genre's initial flirtation with the mainstream.[161]

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153. CAMERON LAZERINE & DEVIN LAZERINE, RAP-UP: THE ULTIMATE GUIDE TO HIP-HOP AND R&B 202–13 (Grand Central Publishing 2008) [hereinafter LAZERINE & LAZERINE, RAP-UP]; DeLuca, *supra* note 148. 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. *Id.*

154. *See generally* THAT'S THE JOINT! THE HIP-HOP STUDIES READER (Murray Forman & Mark A. Neal eds., 2004) [hereinafter THAT'S THE JOINT!]. Other persistent norms that are beyond the scope of this Article including braggadocio, materialism, misogyny, homophobia, hard-edged (directionally nihilistic) storytelling, and a constant quest for "realness," or authenticity. Paul Gilroy, *It's a Family Affair*, *in id.* at 90, 116.

155. BEATS, RHYMES & LIFE, *supra* note 131, at 231.

156. Davarian L. Baldwin, *Black Empires, White Desires: The Spatial Politics of Identity in the Age of Hip-Hop*, *in* THAT'S THE JOINT!, *supra* note 154, at 167.

157. Keith Negus, *The Business of Rap*, *in* THAT'S THE JOINT, *supra* note 154, at 535.

158. *Id.*

159. *Id.*

160. *Id.* at 527.

161. Thomas G. Schumacher, *"This is a Sampling Sport": Digital Sampling, Rap Music, & the Law in Cultural Production*, *in* THAT'S THE JOINT, *supra* note 154, at 444.

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

Copyright law has had a mixed record regarding acceptance of hip-hop's cultural norms.[162] In cases where copyright law 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.[163] In *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 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.[164] Defendant Marcel Hall, professionally known as Biz Markie, sampled the O'Sullivan recording in creating the song "Alone Again" for his album "I Need a Haircut."[165] In finding for the plaintiff, the court cited the Seventh Commandment's admonition against stealing[166] and dismissed defendants' arguments regarding the pervasiveness of borrowing in the rap music world.[167] In addition to enjoining further distribution of the album (which is widely believed to have stalled Biz Markie's career fatally),[168] the court referred the matter to the United States Attorney for possible criminal prosecution.[169]

In comparison, *Campbell v. Acuff-Rose Music, Inc.* 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.[170] At issue in *Campbell* was the 1989 song "Pretty Woman" by Campbell's rap group, 2 Live Crew.[171] The 2 Live Crew recording borrowed heavily, in terms of both musical and lyrical structure, from the 1964 Roy Orbison ballad "Oh, Pretty Woman."[172] The degree of appropriation was such that, in the absence of a finding of fair use, the court would have almost certainly found that the 2 Live Crew song infringed on Orbison's original.[173] Campbell asserted that his group's recording was a parodic fair use and moved for summary judgment at trial on that basis.[174] The Middle District

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162. *Id.*
163. *Id.*
164. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).
165. *Id.*
166. *Id.*
167. *Id.*
168. *See, e.g.*, LAZERINE & LAZERINE, RAP-UP, *supra* note 153, at 19.
169. *Grand Upright Music Ltd.*, 780 F. Supp. at 185.
170. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 600 (1994).
171. *Id.* at 572.
172. *Id.* at 571–72.
173. *Id.* at 574.
174. *Id.* at 573.

of Tennessee granted summary judgment for Campbell,[175] but the Sixth Circuit reversed.[176] On certiorari, the United States Supreme Court reversed again and opened up the possibility of a grant of fair-use status for a commercial rap parody of a copyrighted composition.[177]

Generally, the Copyright Act grants to the owner of copyright in a work the exclusive right to reproduce or distribute the work or to prepare derivative works based upon the work.[178] Such rights are subject to the limitations of Sections 107–122 of the Copyright Act.[179] Section 107, the fair-use provision, deems certain uses of a copyrighted work not to be infringing:

> [T]he 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—
>
> (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.[180]

Writing for a unanimous Court, Justice Souter found that, on the first fair-use factor, Campbell's use of the copyrighted song was commercial, but the commercial character of his use was not fatal to his fair-use claim.[181] Instead, the fact that the 2 Live Crew song was a parody supported Campbell's position because it commented on and critiqued the original work (even if it did so crudely).[182] Such transformative works generally further "the goal of copyright, to promote science and the arts."[183] Regarding the second factor, the Court found that, although Orbison'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.[184]

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175. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1160 (M.D. Tenn. 1991).
176. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1439 (6th Cir. 1992).
177. *Campbell*, 510 U.S. at 594.
178. *See* 17 U.S.C. § 106 (2000 & Supp. 2004).
179. *Id.*
180. *Id.* § 107.
181. *Campbell*, 510 U.S. at 584–85.
182. *Id.*
183. *Id.* at 579.
184. *Id.* at 586.

The third factor of the test similarly worked in Campbell's favor.[185] 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.[186] 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.[187]

The Court's analysis of the fourth fair-use factor, effect on the market for the copyrighted work, presented a mixed result regarding hip-hop's borrowing norm.[188] 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.[189] On the other hand, the effect of Campbell's use on the market for a rap (non-parody) derivative version of Orbison's original song was unaddressed by the parties' arguments.[190] 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.[191] 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.[192] The Court remanded the case for further proceedings on the issue of the rap derivative market,[193] but the parties settled before any resolution of the issue by the district court.[194] 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.[195]

In *Newton v. Diamond*, the Ninth Circuit reached a result somewhat more consistent with hip-hop's cultural norms.[196] The case involved the sampling of the James Newton composition "Choir" by the rap group the Beastie Boys.[197] The Beastie Boys included a three-note segment of the work, lasting six seconds, in their 1992 release "Pass the Mic."[198] The

185. *Id.* at 588.
186. *Id.*
187. *Id.*
188. *Id.* at 590–94.
189. *Id.* at 592–93.
190. *Id.* at 593.
191. 17 U.S.C. § 106 (2000 & Supp. 2004).
192. *Campbell*, 510 U.S. at 594.
193. *Id.*
194. *Acuff-Rose Settles Suit With Rap Group*, COMMERCIAL APPEAL (Memphis, Tenn.), June 5, 1996, at A14.
195. *Campbell*, 510 U.S. at 594.
196. Newton v. Diamond, 388 F.3d 1189, 1190 (9th Cir. 2004).
197. *Id.*
198. Although the sampled segment was short, the Beastie Boys, following common

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.[199] The court held for the defendants, finding that the Beastie Boys sampling was *de minimis* and not actionable.[200] Even conceding the Beastie Boys' copying and the pervasiveness of the copied material in the accused work, "[t]he 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."[201] According to the Ninth Circuit, 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.[202] Mike Diamond and the Beastie Boys, the samplers and representatives of hip-hop cultural norms in this case, were entitled to summary judgment.[203]

The Sixth Circuit reached the opposite result from the *Newton* court when faced with a recent sampling case arising from the use of a portion of a copyrighted sound recording.[204] In *Bridgeport Music, Inc. v. Dimension Films*, the 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.[205] The film producers' 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.[206] The court found that no inquiry was necessary into the potentially *de minimis* nature of the copying at issue.[207] 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,"[208] ordinary substantial-similarity analysis has little meaning.[209] The Sixth Circuit read into the statute an exclusive right on the

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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. *Id.*; BEASTIE BOYS, *Pass the Mic*, *on* CHECK YOUR HEAD (Grand Royal 1992).

199. *Newton*, 388 F.3d at 1191.

200. *Id.* at 1190.

201. *Id.* at 1195 (quoting Worth v. Selchow & Righter Co., 827 F.2d 569, 570 n.1 (9th Cir. 1987)).

202. *Id.* at 1195–96.

203. *Id.* at 1196.

204. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 795 (6th Cir. 2005).

205. *Id.*

206. *Id.* at 796.

207. *Id.* at 801–02.

208. *Id.* at 799 (quoting 17 U.S.C. § 114(b) (2000)).

209. *Id.* at 801 (citing Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 LOY. L. REV. 879, 896 (1992)).

part of the copyright owner to sample his or her own recording.[210] 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.[211] Where the defendant had knowingly taken even a small part of a sound recording, either to save costs or to add something of value to his or her own recording, the copyright law did not recognize any exception to the general rule of liability for copying.[212] In setting forth a "new" rule that may impact settled expectations in the hip-hop community, the Sixth Circuit acknowledged that a given rap artist may view the rule as hampering the creative process.[213] However, as "today's sampler is tomorrow's samplee," the court expected the industry as a whole to benefit from the rule.[214]

Hip-hop's performance norms have fared better under the copyright law than have its creation norms. In both *Boone v. Jackson* and *Lil' Joe Wein Music, Inc. v. Jackson*, copyright owners sued rap artists for including passages in their songs that previously appeared in the plaintiffs' copyrighted works.[215] In *Boone*, plaintiff songwriter was owner of the copyright in the 1999 Trajik release "Holla Back."[216] Defendant John Jackson, professionally known as Fabolous, recorded a work in 2001 entitled "Young'n," which 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.[217] 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.[218] 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."[219] The *Boone* court granted summary judgment for defendant Fabolous, and the *Lil' Joe Wein* court upheld a summary judgment below in favor of defendant 50 Cent.[220] In both cases, the courts found that the lyrics at issue were not original to the owner of copyright in the song, despite such songs being the first places

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210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 804.

214. *Id.*

215. Lil' Joe Wein Music, Inc. v. Jackson, 256 F. App'x 873, 874–75 (11th Cir. 2007) (per curiam); Boone v. Jackson, No. 03 Civ. 8661(GBD), 2005 WL 1560511, at *1 (S.D.N.Y. Jul. 1, 2005).

216. *Boone*, 2005 WL 1560511, at *1.

217. *Id.* at *1.

218. *Lil' Joe Wein Music, Inc.*, 245 F. App'x at 875.

219. *Id.*

220. *See id.* at 875; *Boone*, 2005 WL 1560511, at *6.

where the phrases may have been fixed in a manner cognizable by the copyright law.[221] Instead, the lyrics were phrases common in hip-hop clubs and performance venues (or even in ordinary conversation[222]) 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.[223]

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—is square with prevailing hip-hop performance norms.

Hip-hop's norms are reflective of a postmodern view of art and creation, but as the mixed litigation results indicate, the law still does not fully embrace that view.[224] Flexibility on the part of those enforcing or seeking enforcement of the copyright law is necessary in order for any alignment between legal and hip-hip norms to come about. Strategic forbearance based on a finding of productive infringement provides the opportunity for such flexibility.

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221. *See Lil' Joe Wein Music, Inc.*, 245 F. App'x at 879; *Boone*, 2005 WL 1560511, at *3.

222. *See Boone*, 2005 WL 1560511, at *4 n.5 (citing Urban Dictionary—Holla Back, http://www.urbandictionary.com/define.php?term=holla+back&f=1 (defining "holla back" as a phrase that may be used as greeting, goodbye, or aid in emphasizing a point).

223. *Lil' Joe Wein*, 245 F. App'x at 878 (quoting Rep. of Tricia Rose at 2).

224. *Compare* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (finding infringement in favor of the copyright holder) *with* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 571–72 (1994) (finding 2 Live Crew's parody of Roy Orbison's "Oh, Pretty Woman" to be a fair use) *and* Lil' Joe Wein Music, Inc. v. Jackson, 256 F. App'x. 873, 874 (11th Cir. 2007) (per curiam) (finding that the accused song was not substantially similar to the original). *Cf.* Roland Barthes, *The Death of the Author*, *in* IMAGE-MUSIC-TEXT 148 (Stephen Heath trans. 1977) (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). 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. *Id.*

IV. FASHION, HIP-HOP, DJS, AND THE MACRO-ECONOMY OF MUSIC

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

A well-recognized commercial overlap exists between the fashion world and hip-hop culture.[225] In addition to its core elements of turntablism, rapping, dance, and writing, hip-hop has always had a strong and influential fashion aesthetic.[226] Trends from the streets of New York, Los Angeles, and other urban centers have long found their way to Seventh Avenue[227] and Madison Avenue.[228] The modern hip-hop career is incomplete without a clothing line. Shawn Carter, professionally known as Jay-Z, rapper and former president and CEO of Def Jam Recordings, is the owner of the Roca Wear line.[229] Rap producer and Bad Boy Records CEO Sean Combs, professionally known as Diddy, sells apparel under the brand Sean John.[230] Hip-hop mogul Russell Simmons and his former wife Kimora Lee Simmons operate the Phat Farm and Baby Phat clothing labels, respectively.[231]

Beyond the historical overlap, significant structural economic parallels also exist between the fashion and hip-hop industries. Both cultures are driven by what is new and "fresh," and what products are considered current frequently changes.[232] 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.[233] Similarly, hip-hop products are subject to a relatively brief window of currency.[234] The success or failure of major-label album releases, including hip-hop releases, is

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225. *See* Eric Peterson, *Urban Wear*, WEARABLES BUSINESS, Apr. 2001, at 31.

226. *Id.*

227. Seventh Avenue runs through New York's Garment District and is commonly known as "Fashion Avenue."

228. *See* Maureen Jenkins, *Hip-Hop Culture: Now an Everyday Thing*, CHI. SUN-TIMES, Oct. 13, 1996, at 17; Eric Peterson, *Urban Wear*, WEARABLES BUS., Apr. 2001, at 31–42; Guy Trebay, *The Definitive Style*, TORONTO STAR, Oct. 21, 2003, at C04.

229. Marci Kenon, *Fashion Statements: Who, What, and Wear: Dressing Cool Today Has a Hefty Price Tag—And Designers of Hip-Hop Clothing Are Getting It*, BILLBOARD, Dec. 9, 2000, at 48.

230. *Id.*

231. Constance C.R. White, *The Hip-Hop Challenge: Longevity*, N.Y. TIMES, Sept. 3, 1996, at B6; Baby Phat—About Us, http://www.babyphat.com/aboutus.php?category=aboutus (last visited Dec. 28, 2008); Phat Farm—About Us, http://www.phatfarm.com/about/ (last visited Dec. 28, 2008).

232. *See* Guy Trebay, *Beauty and the Feast*, N.Y. TIMES, Oct. 12, 2004, at B9.

233. *See* Amanda Fortini, *How the Runway Took Off: A Brief History of the Fashion Show*, SLATE, Feb. 8, 2006, *available at* http://www.slate.com/id/2135561; Trebay, *supra* note 232, at B9.

234. *See* Kelefa Sanneh, *Two Big Rap Stars Bicker, Ignoring a Larger Threat*, N.Y. TIMES, Sept. 20, 2007, at E1.

increasingly determined by early (first day, first week) sales data gleaned from the Neilson Sound Scan sales tracking system.[235] Early success or failure heavily influences decisions regarding continued investment in promotion of a given release or artist.[236] The frequent turnover in these industries is coupled with a high volume of creative output.[237]

Both the recording industry and the fashion industry deal in what commentators have called "credence goods," products whose quality is difficult to assess, either before purchase or afterward.[238] The value of these goods is determined by the credence given them by some third party.[239] The reputation of a designer (e.g., Tom Ford) or the reputation of a particular recording artist (e.g., Nasir Jones, professionally known as Nas) might give signals to consumers about the value of a particular offering. Similarly, the reputation of the distributor, fashion house, retailer, or 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.[240] 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.[241] Prudent advertisers attempt to build their standing with the relevant subgroup as part of their marketing strategy regarding the larger group.[242]

The value of credence goods is mainly inferred from the authority of others.[243] Therefore, some level of appropriation, and appropriation by certain people, may provide a benefit to the seller of the goods.[244] In essence, "the copying legitimates their designs as ones that are desirable

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235. *See id.*

236. *See* Kelefa Sanneh, *Waiting (and Waiting) for a Big Rap Moment*, N.Y. TIMES, Feb. 4, 2008, at 7 ("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.").

237. *See* BBC News Online, *Record Rise in UK Album Releases*, May 3, 2006, http://news.bbc.co.uk/nolpda/ukfs_news/hi/newsid_4969000/4969598.stm (stating that British recording companies released 31,291 albums in 2005); IFPI DIGITAL MUSIC REPORT 2008, at 6 (2008), http://www.ifpi.org/content/library/DMR2008.pdf [hereinafter 2008 REPORT] (stating that over 6,000,000 singles were available for download on licensed music services in 2007).

238. *See* Brian Hilton, Chong Ju Choi, & Stephen Chen, *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*, 55 J. BUS. ETHICS 345, 347 (2004). 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. *Id.*

239. *See id.* at 346.

240. *See id.*

241. *See id.*

242. *See id.*

243. *Id.*

244. *See id.* at 351.

and worth copying. In the absence of other indicators of desirability, copying is an indicator of worth."[245] If the copying helps set a "style cycle," 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 value of the seller's property.[246] The principles of distributive equity may even suggest that the seller compensate the copyist for the valuable publicity brought to the brand by the copying.[247]

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.[248] 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.[249] The hip-hop mixtape dates back to the beginning of the genre in the 1970s.[250] DJs made cassette recordings of their nightclub sets in order to promote themselves and their abilities.[251] In an era when hip-hop records were seldom sold in stores and received virtually no radio play, the mixtape was a vital promotional tool and source of additional income for the DJ.[252] The tapes were distributed hand-to-hand, and the reputations of

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245. *See id.*

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

247. *See* Hilton, *supra* note 238, at 351.

248. Further, in the early days of the genre, any number of albums featured singles with little or no rapping. *See, e.g.*, BIG DADDY KANE, *Mister Cee's Master Plan*, *on* LONG LIVE THE KANE (Cold Chillin' 1988); BIZ MARKIE, *Cool V's Tribute to Scratching*, *on* GOIN'OFF (Cold Chillin' 1988); EPMD, *D.J. K la Boss*, *on* STRICTLY BUSINESS (Priority 1988); ERIC B. & RAKIM, *Chinese Arithmetic*, *on* PAID IN FULL (4th & Broadway 1987); ERIC B. & RAKIM, *Extended Beat*, *on* PAID IN FULL (4th & Broadway 1987); KOOL G RAP & DJ POLO, *Cold Cuts*, *on* ROAD TO RICHES (Cold Chillin' 1989); PUBLIC ENEMY, *Terminator X to the Edge of Panic*, *on* IT TAKES A NATION OF MILLIONS TO HOLD US BACK (Def Jam 1988); RUN D.M.C., *Jam-Master Jay*, *on* RUN-D.M.C. (Profile 1984). 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.

249. Anita M. Samuels, *New Urban Art Form, Old Copyright Problem*, N.Y. TIMES, Nov. 4, 1996, at D8; *see* Kelley L. Carter, *What Does Around . . . DJ Waxtax-n-Dre Scratches Out a Good Living from his Work as a Hip-Hop Mixmaster*, DETROIT FREE PRESS, June 3, 1999, at 1E; Denene Millner, *'Mixtapes' Make Deejays the Stars*, DAILY NEWS (New York, N.Y.), Nov. 23, 1998, at 42.

250. *See* Geoff Boucher, *Mix Tapes: Piracy or Talent Mother Lode?*, CHI. TRIB., May 1, 2003, at 3; David Hinckley, *Flex Time: Funkmaster's Mix of Radio & Club Stardom Makes Him New York's Hot-Test DJ*, DAILY NEWS (New York, N.Y.), Sept. 3, 1997, at 37.

251. *See* Boucher, *supra* note 250, at 3; Jon Kalish, *World of Hip-Hop Mix Tapes, All Things Considered* (National Public Radio broadcast Mar. 3, 2004).

252. *See* Millner, *supra* note 249, at 42.

hip-hop artists spread by word of mouth.[253] In the case of at least some of the best-known DJs, distribution was facilitated by livery cab drivers.[254] More and more, "[as DJs] realized they could make money selling tapes of the mixes they played at clubs, an inner-city industry was born. Mixtapes became one of the best ways of spreading rap music throughout the country—and the world."[255]

The role of the mixtape is acknowledged by many to have been shaped by the success of the rapper Curtis Jackson, professionally known as 50 Cent.[256] As an up-and-coming performer in 1999, Jackson antagonized many established rappers with pointed lyrics aimed at them in a single called "How to Rob."[257] Jackson faced violent retaliation for his lyrics, becoming the victim of both a stabbing and a shooting in 2000.[258] 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.[259] Instead of attempting to sign with another record label immediately using the traditional method, "shopping a demo,"[260] Jackson produced, marketed, and distributed mixtapes of his own material.[261] The resultant buzz brought the record labels to Jackson's door seeking a deal:

> 50 [Cent] 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.[262]

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253. Lola Ogunnakike, *Deejay Mix Masters Make the Hip-Hop World Spin: Record Companies Cultivate the World of Underground Tapes to Build Credibility and Demand*, DAILY NEWS (New York, N.Y.), Feb. 24, 2000, at 24.

254. See Boucher, *supra* note 250, at 3 (quoting pioneering DJ Afrika Bambaataa).

255. Ogunnakike, *supra* note 253, at 24.

256. *See* Steve Jones, *Money in the Mixtape*, USA TODAY, Apr. 21, 2006, at E1.

257. 50 CENT, *How to Rob*, *on* IN TOO DEEP [ORIGINAL SOUNDTRACK] (Sony 1999); *see* Chuck Philips, *No Small Change; Backed by Eminem and Dr. Dre, Rapper 50 Cent is Ready to Cash In*, L.A. TIMES, Jan. 14, 2003, at E1 ("The stick up fantasy satirized dozens of wealthy entertainers, including P. Diddy, DMX and Big Pun.").

258. *See* Philips, *supra* note 257, at E1.

259. RAP-UP, *supra* note 153, at 181; Jones, *supra* note 256, at E1.

260. *See* NADINE CONDON, HOT HITS, CHEAP DEMOS: THE REAL-WORLD GUIDE TO MUSIC BUSINESS SUCCESS 137 (2003). Often, recording artists were signed by record labels by convincing an Artists & Repertoire (A&R) 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. *Id.*

261. Jones, *supra* note 256, at E1.

262. *Id.*

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.[263]

In today's market for hip-hop music, the mixtape is widely acknowledged as a valuable tool for the promotion and marketing of artists and their work.[264] 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."[265]
- "Record labels need us because we can get to places they can't."[266]
- "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."[267]
- "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."[268]
- "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."[269]

In a time of declining sales,[270] budget cuts, reduction of artist rosters, and general retrenchment,[271] the mixtape has emerged as a cost-effective proxy for both the traditional Artists and Repertoire (A&R)[272] function and

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263. See RIAA Gold and Platinum Searchable Database, http://riaa.org/goldandplatinumdata.php?table=SEARCH (search "50 Cent" in the "artist" field and "Get Rich" in the "title" field) (last visited Oct. 3, 2008).

264. *See* Boucher, *supra* note 250, at 3; Ogunnakike, *supra* note 253, at 24.

265. Ogunnakike, *supra* note 253, at 24 (quoting Kevin Black, Head of Rap Promotions at Interscope Records).

266. *Id.* (quoting DJ Juice).

267. Boucher, *supra* note 250, at 3 (quoting Riggs Morales, a music executive at Shady Records, the label owned by rap artist Eminem).

268. *Id.* (quoting New York radio personality Kay Slay).

269. Jones, *supra* note 256, at E1 (quoting Shanti Das, Executive Vice President for Marketing and Artist Development at Universal Motown).

270. *See Appendix*, Figures A & B. RIAA—Key Statistics, http://www.riaa.com/keystatistics.php (follow "2006 U.S. Manufacturers' Unit Shipments and Value Chart" hyperlink) (last visited Dec. 29, 2008).

271. *See, e.g.*, Kelefa Sanneh, *The Shrinking Market is Changing the Face of Hip-Hop*, N.Y. TIMES, Dec. 30, 2007, at 1.

272. A&R is the division of a record label whose job is to discover new artists and help develop currently signed artists. BOBBY BORG, THE MUSICIAN'S HANDBOOK 37 (2003).

the traditional imprimatur of the radio station disk jockey.[273] When making a signing decision, labels will find that monitoring the response to an artist's mixtape appearances is much less expensive than either investing in recording and promoting an artist based on the opinion of a single A&R executive or investing heavily in the A&R function at all.[274] The labels selling hip-hop have come to depend 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.[275]

In addition to helping launch a career, the mixtape provides the artist additional benefits. Appearing on a mixtape allows an artist to expand creatively beyond what is usually palatable to the record company executives who approve material for major-label releases.[276] Artists are able to push the envelope with harder-edged content, experiment with different rapping styles, demonstrate skill in the art of "freestyling," and launch salvos in "battles" with other artists.[277] 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 whichever record label releases his or her next official recording.[278] The mixtape also provides a point of entry into the market for many consumers:

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273. *See, e.g.*, *How to Make it in Music*, ATLANTA J.-CONST., Aug. 5, 2005, at G6 (quoting mixtape producer DJ Drama of the Aphilliates, a defendant in the criminal case described *supra* at pp. 5–9, 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. Jones, *supra* note 256, at E2.

274. *See, e.g.*, Jones, *supra* note 256, at E1 ("For many artists, mixtapes are a way to attract the attention of labels increasingly reluctant to invest in finding new artists."); Anita M. Samuels, *New Urban Art Form, Old Copyright Problem*, N.Y. TIMES, Nov. 4, 1996, at D8. Typically, a record company spends up to 20% of revenues on the A&R function. 2008 REPORT, *supra* note 237, at 13. A&R has historically been very labor-intensive, involving a great deal of legwork and large expense accounts. *See id.* (quoting Mike Smith, Managing Director of 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 somebody 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.").

275. *See, e.g.*, Ogunnakike, *supra* note 253, at 24 ("[A] deejay's endorsement—or lack of it—can make or break a song.").

276. *See* RIAA—Key Statistics, http://www.riaa.com/keystatistics.php (follow "2006 U.S. Manufacturers' Unit Shipments and Value Chart" hyperlink) (last visited Dec. 29, 2009).

277. "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. *See* LAZERINE & LAZERINE, RAP-UP, *supra* note 153, at 203–13.

278. *See, e.g.*, Ogunnakike, *supra* note 253, at 24 (quoting Justo, Director of Rap Promotions at Epic Records, as saying, "It's a way for artists to maintain street credibility

> 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.[279]

The mixtape format can expand the market for a record label's product beyond what it would otherwise be.[280] The format is an inexpensive way for a consumer to be exposed to a new artist or to new music from a known artist.[281] Like the imitations of a fashion design,[282] mixtapes can also perform a valuable "anchoring" function.[283] Common themes established on the most popular mixtapes (e.g., featuring the "Dirty South" rapping/production style,[284] sampling music from a particular era or artist, or focusing on a "beef" between two particular rappers) inform record labels about what "the streets" are listening to now and what the broader hip-hop audience is likely to demand next.[285] The hip-hop world recognizes the value of the mixtape with its 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.[286]

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without messing up relations with their label or radio . . . . On mix tapes, you can come as raw as you want.").

279. *Id.* (quoting an employee of Fat Beats, a New York music store that specializes in hip-hop music).

280. *See* Ogunnakike, *supra* note 253, at 24.

281. *See* Jones, *supra* note 256, at 2E.

282. *See supra* Part I.

283. *See* Oliver Wang, *Tales of the Tape*, VILLAGE VOICE, July 23, 2003, at 60; Shaheem Reid, *Mixtapes The* Other *Music Industry: An MTV News Feature Report*, MTV NEWS, http://www.mtv.com/bands/m/mixtape/news_feature_021003/ (last visited Oct. 19, 2008).

284. Dirty South hip-hop takes its name from a song on Goodie Mobb's debut album, *Soul Food*. GOODIE MOBB, *Dirty South*, *on* SOUL FOOD (Arista 1995). Dirty South is a "violent, sex-obsessed, and (naturally) cuss-oriented brand of modern hip-hop." Urban Dictionary: Dirty South, http://www.urbandictionary.com/define.php?term=dirty+south (last visited Dec. 28, 2008).

285. Wang, *supra* note 283, at 60; Reid, *supra* note 283.

286. 2008 Justo Mixtape Award Winners—HNL Hip Hop, Apr. 30, 2008, http://honoluluhiphop.wordpress.com/2008/04/30/2008-justo-mixtape-award-winners/ (listing the winners of the 2008 Justo's Mixtape Awards); illRoots—Blog Archive—Justo's Mixtape Awards, Feb. 5, 2008, http://illroots.com/2008/02/05/vote-dub-floyd/ (listing the nominees). The awards are named for their creator, the late hip-hop promoter Justo Faison. Chris Harris, *Justo Faison, Founder of Annual Mixtape Awards, Killed in Car Crash*, MTV NEWS, May 16, 2005, http://www.mtv.com/news/articles/1502356/20050516/index.jhtml (last visited Oct. 18, 2008).

C. The Modern Economics of Music

The traditional justification for granting copyright protection to works of authorship revolves around the free-rider problem.[287] Information goods, including the types of works that are protected by copyright, are public goods.[288] They are non-excludable; the producers of such goods have difficulty preventing others from enjoying the benefits of such production.[289] 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 valuable chattel.[290] Information goods are also non-rivalrous—the enjoyment of a good by one party does not preclude others from simultaneously enjoying the same good.[291] 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."[292]

If the creator of a 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.[293] For example, in the absence of intellectual-property protection, if a person, Kris, invests time, money, and energy to create a song, he risks losing control over the song if he performs or otherwise releases it. Another person, 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's price. Eventually, Kris will view song creation as a poor use of his time and resources, as he is unable to capture 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 or important, society as a whole loses when Kris decides not to be a songwriter. The free rider brings about a loss not only to the creator but also to the public.

The classic solution to the free-rider problem is to provide intellectual-property protection and exclusive rights enforceable by the creator.[294] The

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287. Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 855 (1992).

288. *See* Matthew J. Saq, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187, 193 (2006).

289. *See id.*; Gordon, *supra* note 287, at 854–55.

290. *See* ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 1 (rev. 4th ed. 2007).

291. *See* Saq, *supra* note 288, at 193.

292. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON, at 334 (Albert Ellery Bergh ed. 1907).

293. *See* Saq, *supra* note 288, at 193–94.

294. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L.

U.S. Constitution authorizes Congress to "promote the [p]rogress of [s]cience and useful [a]rts" by granting to authors and inventors exclusivity in their "[w]ritings and [d]iscoveries."[295] 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.[296] Further, the creator is able to charge a price for the work that at least recoups the cost of creation, and the public domain is enriched.[297] But the information age—and its attendant increase in creative output in the marketplace—produces problems for creators and owners of creative output that are not solved by aggressive enforcement of copyrights.[298] Such enforcement may adversely affect the demand for the copyright owner's music. In fact, given the new supply and demand structure of music, enforcement can give rise to new challenges, even as it solves the free-rider problem.[299]

While the total demand for recorded music is surging,[300] demand for recorded music in the compact disc (CD) format is declining.[301] Consumption of music is subject to strong network effects: "as more people consume a song, the greater the demand for that song becomes."[302] 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 attraction to the

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REV. 1031, 1033 (2005). The traditional solution is not universally accepted by scholars, nor is the need for a solution at all. *Id.* at 1032. Mark Lemley has described efforts to eliminate free riding for intellectual goods as "misguided." *Id.* 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. *Id.* at 1032–33. In most competitive markets, the owners of production are not deemed deserving of 100% of the social benefits of their properties. *Id.* at 1032. 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. *Id.* The monopoly-like government subsidy created by IP protection amounts to a grant of the full social value of the property and is excessive. *Id.* at 1047–48.

295. U.S. CONST. art. I, § 8, cl. 8.

296. Lemley, *supra* note 294, at 1032, 1039–40.

297. *See id.* at 1041.

298. *See id.* at 1046–65.

299. *See* Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135, 135–42 (2007).

300. 2008 REPORT, *supra* note 237, at 12; *see also* Henry. H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT. L.J. 259, 306 (2007) (estimating that the new songs released in CD format are insufficient to meet the demand of the population for new music).

301. *See* Perritt, *supra* note 300, at 282; Figures 1 and 2, *supra* note 270.

302. *Id.* at 304–05.

performer, search costs, and network effects[303] all contribute to the purchase decision. The last two factors in particular, search costs and network effects, bring together supply-and-demand issues in a problematic way for owners of copyright in music. Strict enforcement of copyright holders' rights could limit their ability to leverage network effects and tap unmet demand.

Despite the decline in demand for CDs, the availability of information goods in general has exploded as new releases constantly flow into the market.[304] Approximately 350,000 new songs were released in 2006.[305] The number of books published each year in the United States exceeds 100,000.[306] 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 a consumer to find a certain product.[307] "For consumers to benefit from a greater supply of music, they must be able to find it without encountering intolerable search costs,"[308] but the increase in supply has been so great that it has been characterized as an "information overload" on consumers.[309] Today, a consumer seeking to download a music track legally faces a choice of over 6 million tracks in over 100 different formats.[310] Thus, a critical response to this overload would be to increase the role of agents and vehicles with the ability to reduce search costs.[311] 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.[312] Others, equally if not more valuable, are unauthorized.[313] These are typically peer-produced vehicles such as file-sharing and -recommendation sites and unlicensed tastemakers and intermediaries.[314] Yochai Benkler has argued the "nonmarket, peer-produced" filters have the best chance of easing the overload problem.[315] Enforcement of the copyright law will halt valuable

303. *See id.* at 308–09.

304. *Id.* at 282.

305. *Id.* at 313.

306. Pasquale, *supra* note 299, at 135.

307. *See* Perritt, *supra* note 300, at 328.

308. *Id.*

309. *See* Pasquale, *supra* note 299, at 166–67. Frank Pasquale goes so far as to characterize the information overload as an externality imposed on the information "environment" not unlike the pollution cast upon the physical environment by some producers of tangible goods. *Id.*

310. *See* 2008 REPORT, *supra* note 237, at 6.

311. *See* Perritt, *supra* note 300, at 314.

312. *See id.*

313. *See id.* at 343–44.

314. *See id.* at 343.

315. YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 12 (2006).

transaction-facilitating activity to the extent that these filters or intermediaries make or distribute copies or derivative works.[316]

Adding to the disconnect between the need for intermediaries and the copyright law's rough treatment of them, the current model of creation does not resemble the traditional assumptions about creation embedded in U.S. copyright law.[317] The Copyright Act assumes that creative works are produced by solitary authors or centralized creative entities motivated entirely by the opportunity for remuneration and that the works of these geniuses are immutable once fixed by them.[318] Increasingly, the "remix culture" pervades the creative sphere.[319] "People adapt, distribute, trade, and comment on all sorts of preexisting works," including online and widely distributed mass-media works.[320] Even the preexisting works themselves are often the product of more decentralized or collaborative processes than might be assumed under the copyright law.[321] Players of online multi-player games, such as *World of Warcraft*, or virtual worlds, such as *Second Life*, not only consume content presented by game developers, but also create content themselves that shapes their virtual environment.[322] Open-source software development depends upon the input of a user community to shape modifications and future versions.[323] Bloggers and their readers contribute content to the "finished" product.[324] Although these examples are connected with modern technology, Professor Julie Cohen argues a collaborative and de-centered model of creation need not be limited to the modern day.[325] One consequence of this divergent model should be the recognition that some amount of remixing "adds to rather than detracts from profits," but the Copyright Act does not yet adopt this view.[326]

Given the marketplace challenges presented by information overload, the literature has recognized a role for groups called "Categorizers" and "Conducers" in the online and digital-information contexts.[327] Professor

316. *Id.* at 25.

317. *See* Erez Reuveni, *Authorship in the Age of the Conducer*, 54 J. COPYRIGHT SOC'Y U.S.A. 285, 290–91 (2007).

318. *Id.* at 285.

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

320. *Id.*

321. Reuveni, *supra* note 317, at 285.

322. *Id.* at 299–300.

323. *Id.* at 292.

324. *Id.* at 286–87.

325. *See* Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1153, 1180–81 (2007) (arguing for a "model of creative processes as complex, decentered, and emergent [where] it is neither individual creators nor social and cultural patterns that produce artistic and intellectual culture but rather the dynamic interaction between them").

326. *See* Merges, *supra* note 319, at 1263.

327. Pasquale, *supra* note 299, at 178; Reuveni, *supra* note 317, at 286.

Frank Pasquale defines "Categorizers" as the filters, recommenders, and tastemakers who serve as guides to online content.[328] They provide "metadata (i.e., data about data) essential to finding the expression one wants."[329] Categorizers can be as varied as the *New York Review of Books*, a favorite movie critic, a customer review on Amazon.com or in the iTunes store, search engines in general, or the Google Print Project.[330]

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."[331] In the hands of the Categorizer, an unlicensed use is a boon to the copyright owner.[332] 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."[333] Pasquale argues that, just as we allow referential uses of another's trademark under the "nominative use" defense, we should allow referential uses by Categorizers.[334] Such referential uses reduce consumer search costs and are "necessary to counteract the negative effects of information overload."[335] Pasquale would privilege categorization uses as permissible fair uses under Section 107 of the Copyright Act.[336] Alternatively, his approach would allow a Categorizer to raise the equitable "copyright misuse" defense[337] where the copyright owner attempts to leverage monopoly control over referential uses.[338] Although this Article does not advocate Professor 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.[339]

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328. Pasquale, *supra* note 299, at 136–37.

329. *Id.* at 136.

330. *See id.* at 136–37.

331. *Id.* at 140–41.

332. *Id.* at 173–75.

333. *Id.* at 172 (emphasis omitted).

334. *Id.* at 175–76; *see, e.g.*, New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 308 (9th Cir. 1992). 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. *Id.*

335. Pasquale, *supra* note 299, at 184.

336. *See id.* at 186–89.

337. *Id.* at 190. 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 190–91.

338. *See id.* at 190.

339. *See infra* Part V.

Erez Reuveni defines a "Conducer" as a person who both consumes creative works and simultaneously adds creative content to them.[340] Copyright law has trouble dealing with these actors because its whole framework is a remnant of a centralized corporate-production model.[341] 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 creations[342] that are becoming increasingly common today.[343] The distributed nature of the creation argues for weaker intellectual-property protection in conductive creative industries.[344] Reuveni proposes several approaches to reallocate 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 they make to a developer's work.[345]

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.[346] The DJs are Conducers, iterating on the singles manufactured by record labels by mixing them and presenting them in a new collective context.[347] They are also Categorizers, adding their imprimatur to the work of an artist and thereby aiding consumers in the decision of whether to purchase the artist's work in the traditional-album format.[348] 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 new work of established artists at the monopoly prices charged by the copyright owner.[349] 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.[350] The appearance of a song on the mixtape of a DJ with a large following and

340. *See* Reuveni, *supra* note 317, at 286.

341. *Id.* at 290.

342. Reuveni calls these works "conductive creativity." *Id.* at 287.

343. *See id.* at 327, 329.

344. *Id.* at 287–88.

345. *Id.* at 315–339. Reuveni proposes four alternative solutions. First, "leave copyright 'as is' and . . . permit the existing legal framework to govern conductive creativity." *Id.* at 315. Second, "rely on contract law, granting developers the power to determine privately . . . who controls creativity within their virtual worlds." *Id.* Third, "rely on existing copyright and contract law, but invoke a more vigorous doctrine of preemption." *Id.* Finally, "amend the Copyright Act to explicitly recognize [collaborative virtual works]." *Id.* at 316, 322.

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

347. *See* Reuveni, *supra* note 317, at 286.

348. *See* Pasquale, *supra* note 299, at 136–37.

349. *See* Hall, *supra* note 152, at 1, 68.

350. *See id.*

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, which is significantly lower than the monopoly price charged by the record label.[351] A significant number of eventual purchasers of an album released by the label are attracted in the first place by the mixtape DJ.[352]

The mixtape DJ plays a role similar to "reputation rentals" in the retail sector.[353] For experience goods, a moral-hazard problem exists where sellers have incentive to provide low-quality goods but charge a high price.[354] Sellers of high-quality goods are disadvantaged by this incentive, but they can cure the disadvantage by leveraging the reputation of a highly regarded retailer.[355] Sellers effectively signal quality to the marketplace by placing the product with a retailer that has a reputation for providing high quality goods.[356] This placement is a particularly valuable tactic for a seller without a strong brand name of its own.[357]

Many major labels have less brand equity as hip-hop or rap brands, despite having strong brand recognition in general.[358] During the 1980s and 1990s, many of the dedicated hip-hop labels were either acquired by major labels or closed.[359] In order to signal quality to the hip-hop marketplace, the

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351. *See id.*

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

353. Wujin Chu & Woosik Chu, *Signaling Quality by Selling Through a Reputable Retailer: An Example of Renting the Reputation of Another Agent*, 13 MARKETING SCI. 177, 178 (1994).

354. *Id.* at 177.

355. *See id.* at 178.

356. *Id.*

357. *See id.*

358. *See* Keith Negus, *The Business of Rap: Between the Street and the Executive Suite*, *in* THAT'S THE JOINT, *supra* note 154, at 535.

359. Among the imprints that no longer exist, or no longer stand alone, are Priority Records, Sleeping Bag Records, Uptown Records, Profile Records, 4th & B'way, and Sugar Hill Records. Discogs, 4th & B'way, http://www.discogs.com/label/4th+%26+B%27way+Records (last visited Oct. 28, 2008); Discogs, Priority Records, http://www.discogs.com/label/Priority+Records (last visited Oct. 28, 2008); Discogs, Profile Records, http://www.discogs.com/label/Profile+Records (last visited Oct. 28, 2008); Discogs, Sleeping Bag Records, http://www.discogs.com/label/Sleeping+Bag+Records (last visited Oct. 28, 2008); Discogs, Sugar Hill Records, http://www.discogs.com/label/Sugar+Hill+Records (last visited Oct. 28, 2008); Discogs, Uptown Records, http://www.discogs.com/label/Uptown+Records (last visited Oct. 28, 2008); *see* Robert

major labels need assistance. They could do so by "renting" the reputation of the mixtape DJ in the same way that clothing designers "rent" the reputation of a Nordstrom or a Neiman-Marcus by offering their clothing exclusively through those premium outlets. In the absence of some promotional assistance, such as reputation renting, the market for many musical works would not exist.

If a market does not evolve for a work due to transactions costs or other externalities, such as high search costs, then enforcing copyright law prevents copying without conferring any economic advantage on the copyright owner.[360] Thus, the only way to realize the value of the property fully is to allow someone, including Categorizers and Conducers, to create a market for the property where the owner is unable to do so effectively.[361] Whether unauthorized copying by these market-makers has led to a decrease in the number of works supplied or in the profitability of individual works is unclear.[362] What is clear is that these users are adding to the value of copyrighted works by inducing significant numbers of consumers to purchase them.[363] Mixtape DJs and other Categorizers or Conducers are not free riders in the traditional sense, and where the risk of free riding is decreased, a good reason exists to decrease both the "intensity of copyright protection" and the intensity of enforcement choices by copyright owners.[364]

Owners of copyrighted works should forgo enforcement of rights under the Copyright Act given the supply and demand landscape that they face.[365] Regarding the mixtape DJ, the cultural norms of hip-hop have created an influential and well-established class of Categorizers and Conducers.[366] The law should recognize the contribution of these people to the industry and should structure both liabilities and remedies analyses accordingly. The next Part will discuss a model for doing so.

Hilburn, *Looking at the Future with Influential Figures in the World of Arts and Entertainment*, L.A. Times, Jan. 6, 1999, at F1; Ben Wener, *Rising Star Anthony Hamilton a Soul Survivor*, Chi. Trib., May 11, 2006, at C11. 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. *See* Jude Rogers, *The Labels that Turned the Tables: Selling Millions of Records is No Longer the Preserve of the Majors*, THE GUARDIAN (LONDON), Sept. 12, 2008, at 5.

360. Gordon, *supra* note 287, at 857–58.

361. Chu, *supra* note 353, at 186.

362. *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).

363. Chu, *supra* note 353, at 186.

364. *See* Perritt, *supra* note 300, at 259, 270.

365. *Id.* at 341.

366. *See* Funk Master Flex, http://www.funkmasterflex.com/corporate.asp (last visited Oct. 6, 2008).

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. The method begins by determining the value of such an asset, regardless of the appropriation. One manner of determining the asset's value is the income approach, which expresses 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."[367] 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 stream will actually come to fruition.[368] Market factors will significantly influence the answer to these questions.[369] Consumer demand for a product, including volume, timing of demand, and the ability to convert potential demand into actual purchases, affects the value of the asset upon which the product is based.[370] 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.[371] Protection of intellectual property 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.[372]

The value of a mixtape DJ's appropriation will be a function of the DJ's reputation, the DJ's ability to signal to customers the quality of the featured

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367. 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).

368. *Id.*

369. *Id.* at 725–26.

370. Perritt, *supra* note 300, at 304–05.

371. *Id.* at 320–21.

372. *See* Ku, *supra* note 362, at 277, 279. The copyright owner can increase the size of the income stream by charging a monopolist's price, or close to it, for her product. *Id.* To the extent that excluding competitors from the market for the product will increase the probability, the copyright owner can increase the probability of realizing the stream of income. *Id.* 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.

artist, and the total supply of music in the marketplace (i.e., the amount of "noise" that must be overcome in order to deliver a message to consumers regarding a particular product).[373] All of these will factor into the size of the potential income stream generated by a particular song and the likelihood that such an income stream will actually materialize. Quantitatively, these factors can be represented by growth in the customer base for a particular new artist, excess sales beyond an established sales baseline for new releases, 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. By way of the mixtape, the DJ will expose some number of his or her own fans to a release with which they would not otherwise have come in to contact, given the large volume of releases and high consumer search costs.[374] Assuming that the industry typically converts a certain percentage of new listeners into purchasers, 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 change in the copyright owner's customer base attributable to the DJ's influence. The monetary value of this addition is determined over a long time period, as each person who becomes a customer of a new artist will spend differing amounts on that artist's future releases.[375]

The value of the DJ's contribution to a new release may be determined if the copyright owner has an expected sales baseline for a new release. If a release features a single that is included on a mixtape before the release date and the release exceeds the sales baseline, then the inclusion may be a factor in the increase. Using this factor in an analysis of value enhancement requires a robust historical database of sales benchmarks and statistical analysis to isolate the DJ's contribution. The contribution may be represented by ΔR_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 these brands can enhance the value of a relatively unknown copyrighted work.[376] Several factors will assist in determining what contribution that brand will make to the value of the release. First, the volume and growth rates of the DJ's own income streams give an idea of what customers have been willing to pay for his or her skills and output. Second, the cost to enter into a licensing or co-

373. *See* Chu, *supra* note 353, at 178; Perritt, *supra* note 300, at 298.

374. *See* Perritt, *supra* note 300, at 298, 329.

375. As discussed *supra* at note 352, 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.

376. *See* Chu, *supra* note 353, at 178.

branding agreement (e.g., for an automobile expo such as the Funkmaster Flex Custom Car and Bike Show[377]) gives an approximation of what the DJ's brand contributes to a particular venture. Perhaps most importantly, 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 to establish a typical level of compensation. The value of the DJ's brand may be given as V_{DJ}.

The factors described previously 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 of the factors discussed but will not necessarily equal $P * \Delta B + \Delta R_i + V_{DJ}$. In many cases, only one or two of the factors will be reliably measurable, if even present. Thus, the observed value of the productive infringement may not include all factors. Despite the inexact interplay between these factors, they are valuable tools to determine whether, and to what extent, technically infringing behavior might actually benefit the copyright owner.

B. Potential Applications of the Model

The model described may be applied to the music-copyright context in at least three ways.[378] 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, pursuing the litigation would not be rational. 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:

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377. *See* Funk Master Flex, http://www.funkmasterflex.com/corporate.asp (last visited Oct. 6, 2008).

378. 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. *See* Introduction, *supra*. 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.[379]

Factors Two and Three will not provide much help for the mixtape DJ defending a copyright infringement action.[380] 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.[381] Any work upon which a recording company sues for copyright infringement is likely a creative, nonfactual work.[382] 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, is the more likely that this factor will go in favor of the plaintiff.[383]

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.[384] A court is more likely to find fair use when the use is transformative rather than supplanting.[385] DJs can argue that their manipulation of a plaintiff's song was transformative.[386] 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.[387] Such a use might be favored under Factor One.[388]

Factor Four asks what effect the use has on the market for the plaintiff's work or on the work's value.[389] If a DJ's use can be determined to be productive, then the 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

379. 17 U.S.C. § 107 (2000).

380. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587–88 (1994) (finding Factors Two and Three to favor the defendant). After considering Factors Two and Three, the court found that the defendant had copied no more than necessary to create a successful parody. *Id.*

381. *Id.* at 586.

382. *Id.*

383. *Id.* at 587.

384. *See id.* at 584. 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. *Id.*

385. *Id.* at 591.

386. *Id.*

387. *Id.*

388. *Id.* at 579.

389. *Id.* at 590.

inquiry into whether a use qualifies as a productive use may lead to Factor Four of the fair-use test favoring the mixtape DJ.

The third possible use of the model arises at the remedy stage of an infringement action after 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 depends on a calculation of "[t]he 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."[390] In cases where the defendant's copying can be shown to be productive, an actual-damages calculation based on lost sales or diminution to the value of plaintiff's asset will be incomplete. In this case, a productive appropriation will have brought sales to the plaintiff that might not have otherwise materialized, increased the fan base for the next release by plaintiff's artist, and increased the value of plaintiff's intellectual property by pairing it 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.

VI. CONCLUSION

The recording industry has entered a new phase of its war against infringers; even grandmothers and twelve-year-olds are fair targets. Mixtape DJs have been dragged into this war, and what impact this involvement will have on their art 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 mixtape DJs' uses of copyrighted works 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 does harm.

390. 17 U.S.C. § 504(b) (Supp. 2005).

APPENDIX

Figure 1

CD Units Shipped (in millions), 1996-2006

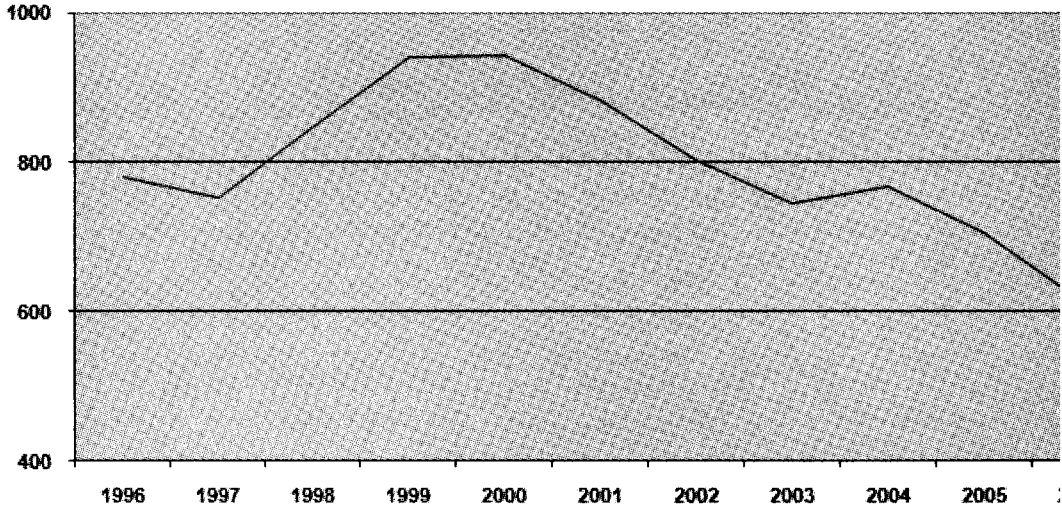

Figure 2

Value of CDs Shipped (in million dollars) 1996-2006