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In the year that has passed since this article was originally conceived, the cultural relevance of the mash-up has continued to grow, rather than fade away as mere gimmickry. In a delicious slice of irony, DJ Danger Mouse has been nominated for this year's Grammy for Producer of the Year for his work with the Gorillaz – an album released by EMI, the same company that silenced the *Grey Album* for infringing upon the Beatles. This article aims to differentiate mash-ups from its two most frequent comparisons, digital sampling and appropriation art. Finally, it analyzes the strength of their fair use defense as a format legally equivalent to parody. Whether the conclusion reached is disconcerting or comforting will largely be determined by the reader's point of view.

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I. MASH-UPS AS A DERIVATIVE OF, AND DISTINGUISHED FROM, SAMPLING

In order to make any sense of the legal issues surrounding the mash-up, it is critical to agree on a basic etymology. Sampling refers to a broad spectrum of musical techniques that involve taking some portion of a preexisting sound recording and incorporating it into a new sound recording.[1] Because of its amorphous definition, the roots of sampling have been traced back to various points in time and genres: from folk music;[2] to the post-World War II musique concrete movement;[3] to Jamaican Dub music;[4] or to mid 70's proto-disco.[5] A mash-up is a particular subset of sampling that "consist[s] of a vocal track from one song digitally superimposed on the instrumental track of another . . . ."[6] "[The] hybrid tracks . . . create new songs that are at once familiar yet often startlingly different."[7] A mash-up as discussed throughout the rest of this article is defined by the following elements:

(1) A new sound recording produced entirely of preexisting sound recordings.

(2) Prior recordings must be presented such that they are immediately recognizable to the listener. Authorship of the prior recordings must be equally apparent.

(3) It must comment on or criticize the prior recordings. The Grey Album had a pretty clear intent to comment on the sound recordings of the Beatles and Jay-Z,[8] but for other mash-ups it may be difficult to show.

(4) It should be offered for free, either through personal websites, peer-to-peer file sharing applications, or traditional

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1. M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 63 (Billboard Books 9th ed. 2003).

2. *See* KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP AND INTELLECTUAL PROPERTY 39 (2001).

3. *See generally* Dennis Romero, *Sample This!*, CITY BEAT, Oct. 14, 2004, *available at* http://www.lacitybeat.com/article.php?id=1302&IssueNum=71 (discussing the historical origins of musical sampling).

4. *See* Newton v. Diamond, 349 F.3d 591, 593 (9th Cir. 2003) (stating that the practice of sampling originated in Jamaica in the 1960's).

5. Jeff Leeds, *Mix and Mash*, N.Y. TIMES, Jan. 9, 2005, at 4.

6. Pete Rojas, Bootleg Culture, Salon.com (Aug. 1, 2002), http://archive.salon.com/tech/feature/2002/08/01/bootlegs (last visited Apr. 19, 2006).

7. *Id.*

8. Michael Paoletta, *Danger Mouse Speaks Out On "Grey Album"*, BILLBOARD (Mar. 8, 2004), *available at* http://www.billboard.com/bb/daily/article_display.jsp?vnu_content_id=1000455930. The recording consists of vocal tracks from Jay-Z's "The Black Album" superimposed on beats taken from the Beatles' "White Album." *Id.*

channels of bootleg culture. If a mash-up is going to be commercially released, it needs to be cleared, because that commercial intent would alter the fair use analysis.

The first case dealing with unlicensed sampling was *Grand Upright Music v. Warner Brothers Records*.[9] In an example of judicial absolutism, the court invoked the Eighth Commandment as legal precedent.[10] The court interpreted the fact that a clearance request had been made and denied as conclusive proof that there was no defense to Markie's use of the sample.[11] The industry realized that by establishing a system for clearing samples they could avoid future litigation and cash in on catalogs that had been collecting dust for decades.[12] Sampling became legitimate as long as one was willing, and could afford to pay. The industry dogma continued to be that fair use was never a defense to sampling, and the only defense available was the rare taking that was not "substantial."[13]

Although not directly cited, *Grand Upright's* absolutist attitude toward sampling as theft[14] was pervasive in the Sixth Circuit's decision in *Bridgeport Music v. Dimension Films,* which rejects the possibility of a de minimis defense for sampling sound recordings.[15] At the center of *Bridgeport Music* was an N.W.A. track titled "100 Miles and Runnin'," which used a two second sample that was so edited, looped and distorted that it was unrecognizable to the listener.[16] The court bluntly rejected a de minimis defense and set a bright-line rule: "Get a license or do not sample."[17]

Bridgeport Music illustrates how the traditional concept of sampling is inconsistent with mash-ups. Although it claimed to only analyze the issue of de minimis taking, the court addressed the propriety of the defendant's conduct. The court asserted that producers sample only to "1) save costs, or 2) add something to the

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9. 780 F.Supp. 182 (S.D.N.Y. 1991).

10. *Id.* at 182 (opinion stating "thou shalt not steal," and footnoting to *Exodus*).

11. *Id.* at 184-85.

12. *See* Negativland, *The Public Domain: Two Relationships to a Cultural Public Domain*, 66 LAW & CONTEMP. PROB. 239, 257 (2003) (explaining how the music industry began charging purveyors for use of the music, once the industry realized that collaging was here to stay).

13. *See* KRASILOVSKY & SHEMEL, *supra* note 1, at 96 (discussing the factors to be considered in determining fair use).

14. Judge Duffy took the theft metaphor so seriously that he referred the case to the D.A. for consideration of criminal infringement charges. *Grand Upright*, 780 F.Supp. at 185.

15. Bridgeport Music v. Dimension Films, 383 F.3d 390, 399 (6th Cir. 2004).

16. *Id.* at 394.

17. *Id.* at 398.

new recording, or 3) both."[18] This reliance on pure economics discounts any potential artistic or critical value in the selection and execution of a sample. Mash-ups sample out of necessity, not for parsimony or lack of creativity. The court claimed that the bright line rule will not "stifl[e] creativity in any significant way," because "the market will control the license price and keep it within bounds."[19] This free market theory crumbles when applied to a mash-up because 1) it is often impossible to get a license to create a derivative work that is critical of the original; and 2) if a work will not be offered commercially, nearly any license fee will serve as a bar to its creation. In conclusion, *Bridgeport Music* expresses the current judicial position on traditional sampling, but mash-ups cannot be viewed under that paradigm, because they sample out of necessity, cannot exist under a market theory and have a claim to comment or criticism.

II. MASH-UPS DIFFERENTIATED FROM APPROPRIATION ART

In comparing mash-ups to modern art, the most obvious parallel is "appropriation art"[20] and Jeff Koons, who lost two infringement cases arising out of his 1998 "Banality Show."[21] The exhibit "focused on popular attitudes towards objects and facts of everyday life."[22] Koons's medium for expressing this theme was to "accumulate images from popular culture by cutting out items that he read or by purchasing objects during the course of his travels and then . . . 're-contextualizing' these images into sculptures."[23]

In *Rogers v. Koons*, Koons took a postcard by Art Rogers depicting a couple holding eight puppies and created a sculpture identical to the image.[24] Koons's justification for selecting the source material was that it "[represented] part of the mass culture--'resting in the collective sub-conscious of people regardless of whether the card had actually ever been seen by such people.' "[25] Koons in no way acknowledged Rogers as the author of the original work and physically

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18. *Id.* at 399.

19. *Id.* at 398.

20. Appropriation is "a term [which] refers to the more or less direct taking over into a work of art of a real object or even an existing work of art." Tate Online, Glossary: Appropriation, http://www.tate.org.uk/collections/glossary/definition.jsp?entryId=23 (last visited Apr. 19, 2006).

21. Rogers v. Koons, 960 F. 2d 301 (2d Cir. 1992); United Features Syndicated v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993).

22. *United Features Syndicated*, 817 F. Supp. at 372.

23. *Id.*

24. *Rogers*, 960 F.2d at 304-05.

25. *Id.* at 305.

removed the copyright notice on the postcard prior to sending it for fabrication.[26] Similarly, in *United Feature Syndicate,* Koons created a sculpture from an image of Odie, the canine foil to Garfield the cat in a long running comic strip.[27] Koons claimed that he was not aware of the identity of the image when he selected it, and that "[i]f [he] thought that there would have been a strong public reaction to the Puppy as 'Odie' [he] would not have selected it for the piece."[28] The court relied on this evidence to conclude that the goal of the piece was in no way related to the selection of the particular images and therefore could not receive the greater protection afforded parodies.[29]

Mash-ups are significantly different from the works in the Koons cases in ways that better align with fair use. First, where Koons's targets for commentary are broad and social in scope, more akin to satire,[30] mash-ups have direct targets, similar to parody. Also, Koons was primarily interested in the underlying ideas instead of one particular expression of those ideas,[31] but for a mash-up, the expression is inextricably intertwined with the idea. Koons appropriated with the intent to make the underlying works anonymous and claim them as his own,[32] whereas mash-ups do the exact opposite. In order for a mash-up to be effective, the listener must immediately recognize the underlying works and not associate those earlier works with the mash-up producer.[33]

In conclusion, Koons did not appropriate in a way that commented on the expression itself, and therefore could not bring his work under the umbrella of parody. Furthermore, Koons's decision to remove the copyright notice made his conduct improper under fair use. Conversely, mash-ups directly target the works that they appropriate and give proper attribution.

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26. *Id.* at 305, 309.
27. *United Features Syndicated,* 817 F. Supp. at 373.
28. *Id.* at 384 (quoting Koons Aff. ¶ 19).
29. *Id.*
30. *Rogers,* 960 F.2d at 310.
31. *Id.* at 308.
32. *Id.* at 305.
33. Rojas, *supra* note 6, at 2.

III. FAIR USE ANALYSIS

A. Preamble to Section 107: Mash-ups as a Type of Comment or Criticism that Should be Analyzed as "quasi-parody"

The preamble to Section 107 of the Copyright Act lists several types of fair use, including criticism or commentary.[34] This list is merely illustrative, and not exclusive.[35] Notably, parody does not appear in the list. Rather, parody is a subset of criticism that requires a more liberal analysis.[36] For a parody to bring a targeted work within the crosshairs of criticism, the author is allowed to mimic the original.[37] Satire, on the other hand, has not been extended this extra protection, because it is making a comment, not about the original work, but instead is using that work to comment on a larger social issue.[38] Under the rubric of comment or criticism, mash-ups should be analyzed as a "quasi-parody" expression, because they share the necessity of using a preexisting work for the purpose of commenting on that work.

Kane v. Comedy Partners[39] is one example of a court adopting this post-modern view of criticism that expands the protection given parodies to other formats. Sandra Kane was the host of a public access TV show.[40] *The Daily Show*, a "fake news program" on Comedy Central, aired an unlicensed clip from her show as a part of a segment called "Public Excess," which was a collection of snippets of poor quality public access programs followed by some sly remarks.[41] The court recognized that this was not a traditional parody, because it "did not involve an altered imitation of a famous work in a mocking context."[42]

However, the court decided to apply the standards of parody, because "[t]he only significance of deeming a work a parody is the concomitant determination that the work contains elements of commentary and criticism . . . . '[T]he heart of any parodist's claim to quote from existing material, is the use of some elements of a prior

34. 17 U.S.C. § 107 (2000).
35. Pac. & S. Co. v. Duncan, 744 F.2d 1490, 1495 (11th Cir. 1984).
36. Campbell v. Acuff-Rose, 510 U.S. 569, 580-81 (1994).
37. *Id.*
38. *Id.* at 581.
39. Kane v. Comedy Partners, No. 00 Civ. 158 (GBD), 2003 U.S. Dist. LEXIS 18513 (S.D.N.Y. Oct. 16, 2003), *aff'd*, 98 Fed. Appx. 73 (2d Cir. 2004).
40. *Id.* at 2.
41. *Id.* at 3.
42. *Id.* at 10.

author's composition to create a new one that, at least in part, *comments* on that author's work[].' "[43] In the same way that the constraints of *The Daily Show* format necessitated a wholesale taking of a fragmented part of Kane's program in order to make its commentary, the limits of a mash-up allow it to claim that copying is necessary to achieve the desired type of criticism. Therefore, when analyzing the fair use factors, the parody line of cases should be applied to mash-ups, despite the fact that they do not strictly meet the definition of parody.

B. Purpose and Character of Use

The first factor listed in § 107 is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[44] Analyzing this factor requires three considerations: whether the use was transformative or merely superseded the market for the original,[45] whether the use was commercial in nature and the propriety of the defendant's conduct.[46] The more transformative the use is, the less likely it will be to supersede the market for the original, and therefore the more protection it deserves.[47] Most musical parodies involve the alteration of lyrics, but not the melody.[48] A mash-up producer could argue that both works are being transformed simultaneously, in the same manner of a traditional parody. One work alters the lyrics while keeping the melody, and the other alters the melody while keeping the lyrics. Therefore, mash-ups have at least an equal claim of transformative use as a parody.

There are two arguments that favor mash-ups under the commerciality analysis. First, because they are primarily offered free on the Internet, mash-ups could claim to be a non-commercial use. Several cases have found a commercial use when the infringing works were being offered as free downloads to the public.[49] Mash-ups are transformative uses and therefore are unlike the facts in *Sega*, *Napster* and *Mp3.com*, where the infringing works were identical to

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43. *Id.* at 11 (quoting *Campbell*, 510 U.S. at 580).

44. 17 U.S.C. § 107(1) (2000).

45. *Campbell*, 510 U.S. at 579.

46. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 562 (1985).

47. Abilene Music v. Sony Music Entm't, 320 F. Supp. 2d. 84, 89 (S.D.N.Y. 2003).

48. *See e.g.*, *Campbell*, 510 U.S. at 569; *Abilene*, 320 F. Supp. 2d at 84; Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986).

49. *See* Sega Enters. Ltd. v. Maphia, 857 F. Supp. 679, 687 (N.D. Cal. 1994); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001); UMG Recordings, Inc., v. MP3.com, Inc., 92 F. Supp. 2d. 349, 351 (S.D.N.Y. 2000).

the originals and their only claim to transformation was changing the channel of delivery. Second, if mash-ups were considered a commercial use, then some mitigation should be available, because the defendant makes only an indirect profit from increased notoriety that may lead to later employment.

The final consideration under this factor is the propriety of the defendant's conduct. The prevailing industry attitude is that since mash-ups circumvent the well-established licensing system, they are improper. However, this fails to recognize that mash-ups cannot conform to the industry model. Many artists will not license new works that are critical or that recontextualize their old works in a manner they find offensive.[50] The time and costs associated with clearing samples can also serve as an absolute bar to the creation of mash-ups.[51] However, some courts have acknowledged the conundrum of asking permission to criticize another person's work and have held that releasing a parody after being denied permission is not bad faith.[52] In conclusion, the three considerations under this first factor weigh in favor of mash-ups.

C. Nature of the Copyrighted Work

The second factor in § 107 is "the nature of the copyrighted work."[53] Generally, creative works are given greater protection from fair uses than factual works, because they are viewed as being part of "the core of intended copyright protection."[54] For parodies, however, the Supreme Court has said that this second factor is nearly irrelevant, because "parodies almost invariably copy publicly known, expressive works."[55] This equally applies to mash-ups, therefore, the second factor should only slightly favor a finding against fair use.[56]

D. Amount and Substantiality of the Portion Used

When analyzing this factor, parodies are given greater leeway, in the form of the "conjure up" test, in both the quantity and quality of

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50. Negativland, *supra* note 12, at 275 ("Allowing source owners to have control over [collages] through payment and permission requirements also prevents collagists from using a clip . . . in a critical or unflattering context which the clip's owner doesn't happen to appreciate and thus refuses to allow.").

51. *Id.*; MCLEOD, *supra* note 2, at 91-96.

52. *See, e.g.*, Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986).

53. 17 U.S.C. § 107(2) (2000).

54. Campbell v. Acuff-Rose, 510 U.S. 569, 586 (1994).

55. *Id.*

56. *See* Mattel Inc. v. Walking Mt. Prods., 353 F.3d 792, 803 (9th Cir. 2003).

the amount taken, because it is a necessity if parodies are going to be tolerated.[57] The "conjure up" test sets a minimum barrier, and a parody could still fail under this factor if it takes a greater amount than is necessary to recall the original.[58] There are three factors for determining when a parody has exceeded its necessary taking: "the degree of public recognition of the original work, the ease of conjuring up the original work in the chosen medium, and the focus of the parody."[59] Mash-ups share the necessity to conjure up preexisting works. The underlying works in mash-ups are always well known to the average listener, and there is no other way to conjure a sound recording for criticism other than appropriating that sound recording. Therefore, if courts apply the "conjure up" test to mash-ups, this factor will not weigh against fair use.

E. Effect on Potential Market Value

Courts generally give this factor the greatest weight,[60] and the market for licensing samples is one potential market considered.[61] As discussed previously, a sample is utilized in a fundamentally different way from mash-ups and because of the different nature of the use they should not reduce the market for licensed samples. The stronger argument is that unlicensed mash-ups will destroy the market for licensed mash-ups. Two songs are involved in every mash-up, so this argument would be valid only insofar as that particular combination of songs is concerned. But this bootleg mash-up of song A with song B should have no effect on the potential market to license song A with song X or song B with song Y. The deleterious effect on the market for licenses of samples and mash-ups under this factor reaches a level barely above de minimis.

IV. CONCLUSION

As evidenced by the popularity of the *Grey Album*, society is willing to accept this new genre as a type of legitimate, creative work, and courts will be forced to deal with the copyright issues raised by mash-ups as long as records labels attempt to silence them. Fair use may provide a defense for mash-ups if courts are willing to

57. *Fisher*, 794 F.2d at 434 ("To 'conjure up' the original work in the audience's mind, the parodist must appropriate a substantial enough portion to evoke recognition.").

58. Walt Disney Prods. v. Air Pirates, 581 F. 2d. 751, 757 (9th Cir. 1978).

59. *Fisher*, 794 F.2d at 438.

60. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 566 (1985).

61. *Id.* at 569.

acknowledge that the genre shares the core elements of parody and apply that line of cases. Mash-ups are transformative uses that do not supplant the market for the original, nor do they harm the market for traditional sample licenses. Like parodies, they must be allowed to use parts of preexisting works to "conjure up" the originals in the listener in order to be created. To quell this new form of cultural feedback would disserve the constitutional goal of copyright by restricting the public's access to free works that do not economically injure the original authors.