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APPLYING THE STATUTORY COVER LICENSE TO MASHUP COVERS AND MEDLEYS

PAULINA LOPEZ*

I. INTRODUCTION

Copyright law is purposely designed to “promote progress in the expressive arts.”¹ Content creators want “freedom to create and fair compensation[,]” and consumers want “easy access to creative original art at a fair price.”² Mashups have emerged over the past few decades as a new genre which reflects cultural evolutions in creativity through generations.³ A mashup cover, alternately referred to as a medley when more than two component works are involved, is a cover of two or more songs blended together to form a new musical arrangement.⁴ The compulsory cover license, under 17 U.S.C.S. § 115, allows anyone to publish their own arrangement and recording of a song of another, by requesting the license and paying the statutory royalty. However, neither case law nor statute has addressed the issue of mashup covers, rendering this massive field of creative arrangements an untapped income source for both the original copyright holder in terms of royalties, and for the cover artist for their recording and arrangement. Technology has outpaced the law, and the legal uncertainty surrounding mashups has lead the modern generation to view the copyright system as archaic, breeding

* J.D. Candidate, North Carolina Central University School of Law. M.A., 2016, University of North Carolina at Chapel Hill. Special thanks to family and friends for moral support, Dean Adrienne Meddock for drawing my attention to moral rights, and to Soundrop which since took a leap and began using the compulsory license for mashup covers via a multiplicative approach as contemplated in this article. *See What Kinds Of Songs Do Our Cover Song Licenses Actually Cover?*, Soundrop Distribution (2018), <https://support.soundrop.com/hc/en-us/articles/115005087223-What-kinds-of-songs-do-our-cover-song-licenses-actually-cover-> [https://perma.cc/AT3T-HBMU] (last visited Jun 14, 2018).

1. Peter S. Menell, *Adapting Copyright for The Mashup Generation*, 164 U. PA. L. REV. 441, 489 (2016) (citing U.S. Const. art. I, § 1, cl. 8.).

2. *Id.* at 444 (citations omitted).

3. *Id.* at 445.

4. Moser further distinguishes within sampling between a remix “taking apart the sounds of a recording and reassembling them to create a new recording” and a mashup as “a collage of multiple sound recordings combined to create a single recording,” while acknowledging that both mashup and remix are also used to refer to alterations of compositions, not just recordings. DAVID J. MOSER AND CHERYL L. SLAY, *MUSIC COPYRIGHT LAW* 97-98 (2012). This note uses the term mashup to refer to both of these types of creations with regard to covers.

a society accustomed to working around and outside of rather than through the system.⁵

To clear up the issues surrounding mashups, the Copyright Office, along with the Patent and Trademark Office, conducted music licensing studies beginning in 2014, addressing “the need for the § 115 compulsory license, music licensing practices, the role [of] the government in facilitating licensing, and the availability and quality of music rights ownership databases.”⁶ At the same time, in 2013, the National Telecommunications Information Administration (NTIA) released a “Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy,” which identified “[t]he legal framework for the creation of remixes[.]” as a “major” issue for study, stating that mashups “are a hallmark of today’s internet, . . . [but] can raise daunting legal and licensing issues.”⁷ In its request for comments, the NTIA stated that many mashups fall under fair use, but still concluded that they are shrouded in “legal uncertainty” and “licenses may not always be easily available[.]” thus, the NTIA sought “public comments” as to whether “the existing legal framework and market realities” constrain mashups and if so, what can be done to solve the problem.⁸ While some of the comments argued that mashups fall under fair use and others argued that they should not, nearly all believed that “government intervention” was not necessary and that the market would resolve mashup issues.⁹ As the following analyses will illustrate, the market has not resolved these issues at all, and imposing a liability-rule license framework is necessary to promote the free development of ideas and innovation which copyright law is designed to protect.

While there is a wealth of legal discussion on sampling mashups, mashup covers are in a different state of uncertainty. Although there is a statutory, compulsory license for making covers of songs, under the current legal framework, a mashup cover would likely be considered a derivative work which an artist must get permission to produce. This note explores the scope of the statutory cover license, the discussion around sampling mashups regarding transformativeness and its effect on classification as fair use or derivative works, the scholarly arguments to extending the cover license to sampling mashups, and how those arguments apply more squarely to mashup covers. Supreme Court holdings and constitutional principles support

5. Menell, *supra* note 1, at 455.

6. *Id.* at 486-87 (citing *Music Licensing Study: Notice and Request for Public Comment*, 78 Fed. Reg. 14,739 (Mar. 17, 2014)).

7. *Id.* at 487 (quoting INTERNET POLICY TASK FORCE, U.S. DEP’T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 101 (2013); *Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy*, 78 Fed. Reg. 61,337, 61,338 (Oct. 3, 2013) [hereinafter *Request for Comments*]).

8. *Id.* at 487-88 (citing *Request for Comments*, *supra* note 6, at 61, 338).

9. *Id.* at 488 (citations to specific public comments omitted).

prioritizing free speech over the limited monopoly which is copyright.¹⁰ All of these elements combine to support extending the statutory cover license in 17 U.S.C.S. § 115 to mashup covers. This note concludes by describing how such a license can best be implemented to respect the rights of copyright owners while also opening the music world to greater creative freedom in a way which allows all to be compensated for their work.

II. THE STATUTORY, MECHANICAL, COMPULSORY COVER LICENSE

“Subject to sections 107 through 122 [17 U.S.C.S. § 107 through 122],” copyright vests six “exclusive rights to do and to authorize” others to (1) reproduce the work “in copies or phonorecords;” (2) create “derivative works based upon the copyrighted work;” (3) distribute “copies or phonorecords of the copyrighted work to the public[;]”¹¹ (4) publicly perform the work; (5) publicly display the work; and (6) publicly perform sound recordings “by means of a digital audio transmission.”¹² Section 115 of U.S. Code title 17 defines the compulsory cover license, which allows the licensee to make and distribute a sound recording of the licensed musical composition.¹³ Traditionally referred to as a mechanical license, because it originally applied to recording a song onto a physical medium, it is designed to prevent monopolies in music.¹⁴ This compulsory license applies only to nondramatic musical works,¹⁵ and confers upon the licensee the 17 U.S.C.S. § 106(1) and 106(3) rights “to make and to distribute phonorecords of such works[.]”¹⁶ Once the copyright owner has distributed or authorized distribution of phonorecords of the work to the public,¹⁷ “any other person . . . [can] obtain a compulsory license to make and distribute phonorecords of the work” for the “primary

10. See AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1626 (4th ed. 2010) (“[C]ourts have recognized a balance between enforcing the monopoly to provide . . . incentive to create, and not enforcing the monopoly, to [enable the] creative efforts [of others to] advance the very Progress sought to be encouraged.”).

11. However, this right is limited by the first sale doctrine, which means the rights owner’s control over the sale of copies only reaches the first sale; the initial purchaser is free to resell the copy he or she owns. See NED SNOW, INTELLECTUAL PROPERTY: A SURVEY OF THE LAW 431 (2017).

12. 17 U.S.C.S. § 106 (2012) (Exclusive rights in copyrighted works).

13. 17 U.S.C.S. § 115 (2012).

14. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.04(A) (2017) (citing H.R. Rep. No. 2222, 60th Cong., 2d Sess. 6 (1909); J.T. MCCARTHY, MCCARTHY’S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY 267 (2d ed. 1995)).

15. 17 U.S.C.S. § 115 (2012); 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(A) n.10-14 (if a song on a soundtrack (which by itself looks like just a song) originated with the movie for the movie, then it is not a non-dramatic work, and cannot be subject to the compulsory license) (citations omitted).

16. 17 U.S.C.S. § 115 (2012).

17. 17 U.S.C.S. § 115(a)(1); 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(C) (Only works that have been publicly distributed in the United States, by or “under the authority of” the copyright owner, in phonorecord form, are subject to the § 115 license to distribute phonorecords) (citing 17 U.S.C. § 115(a)(1)); 2 NIMMER & NIMMER, *supra* note 14, at § 4.05(A).

purpose” of distributing “to the public for private use, including by means of a digital phonorecord delivery.”¹⁸ According to 17 U.S.C.S. § 115(D), “A ‘digital phonorecord delivery’ is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.”¹⁹ This language originated in the Digital Performance Right in Sound Recordings Act of 1995 (DPRA), which also indicated that “mere private copying” does not constitute such delivery.²⁰ This does not include duplicating the sound recording of another unless express license is obtained separately from the compulsory license for the composition, or such “recording was fixed before February 15, 1972[.]”²¹ One obtains a compulsory license by serving notice upon the rights holder and paying royalties as prescribed by the statute.²² Such notice must be served “on the copyright owner,” or filed with the Copyright Office if the copyright owner is not identified in public record beyond an address, either before making or within thirty days of making the phonorecords, but before distribution thereof.²³

Royalty rates are set by the Copyright Royalty Judges and have been periodically adjusted; currently the rates are 9.1 cents per song or 1.75 cents per minute or part thereof, whichever is greater; but a licensee can negotiate with the rights holders for better rates.²⁴ In fact, statutory licenses are rarely used in practice, but rather as an ultimatum which sets a price “ceiling” to which parties would default if no agreement is reached by negotiation.²⁵ The Harry Fox Agency (HFA)²⁶ has the authorization “to issue mechanical licenses on

18. 17 U.S.C.S. § 115(a)(1) (2012).

19. 17 U.S.C.S. § 115(d) (2012).

20. 2 NIMMER & NIMMER, *supra* note 14, at § 8.23(A)(2) (quoting S. Rep. (DPRA), at 37 n.12) (citing H. Rep. (DPRA), at 30; S. Rep. (DPRA), at 44).

21. 17 U.S.C.S. § 115(d) (2012).

22. 17 U.S.C.S. § 115(b) (2012); 17 U.S.C.S. § 115(c) (2012).

23. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(G)(1)(a) (citing *id.* § 8.04(J)(2); 17 U.S.C. § 115(b)(1) (2012)).

24. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(H)(1) (2017) (citing *id.* § 7.27(C); § 8.04(K); § 8.04(I) (2017); Amusement & Music Operators Ass’n v. Copyright Royalty Tribunal, 676 F.2d 1144 (7th Cir. 1982), *cert. denied*, 459 U.S. 907 (1982); 37 C.F.R. § 255.3 (2008); EMI Entm’t World, Inc. v. Karen Records, Inc., 603 F. Supp. 2d 759, 762-763 (S.D.N.Y. 2009)); *see also* PETER MULLER, THE MUSIC BUSINESS A LEGAL PERSPECTIVE: MUSIC AND LIVE PERFORMANCES 139 (1994) (“In the event the composition is to be utilized in a medley, the copyright owner may agree to a different royalty rate.”).

25. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(I) (citing Peer Int’l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1337 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); EMI Entm’t World, Inc., 603 F. Supp. 2d at 764 (Treatise quoted); Recording Indus. Ass’n v. Copyright Royalty Tribunal, 662 F.2d 1, 4 (D.C. Cir. 1981)).

26. The Harry Fox Agency is a division of the National Music Publishers Association, designed to facilitate the compulsory licensing process for music. Jacqueline M. Allshouse-Hutchens, *NOTE: How to*

behalf of the major U.S. publishers.”²⁷ A licensee typically receives “a consensual license from the Harry Fox Agency,” with a royalty that is lower than the statutory rate.²⁸ There are other collective rights organizations which help to facilitate licensing and royalties, particularly for public performance rights, but the HFA is the primary handler of mechanical licenses.²⁹

“[C]ompulsory licensing [functions] as a theoretical equitable remedy for the anticompetitive exploitation of IP rights. [The] 17 U.S.C.S. § 115 [] compulsory cover license . . . balance[s] between exclusive rights for copyright owners and ensur[ing] access to creative works.”³⁰ As illustrated later in this note, courts have historically favored access over exclusivity; however, such access has limitations of its own.

A. Limitations on Applicability

The cover license in 17 U.S.C.S. § 115 has promoted “widespread experimentation in the interpretation of musical compositions.”³¹ The compulsory license only grants the licensee the right to “make and distribute phonorecords of the work[,]” not to make “sheet music” or other types of reproductions of the work.³² It also does not give the licensee a right to publicly perform the underlying work just as a license to publicly perform does not automatically include a license to sell phonorecords of that performance; but it does include an inherent distribution right to the phonorecords

Give an Old Song a New License: A Recently Adopted Alternative to Rodgers and Hammerstein Organization v. UMG Recordings, 94 KY. L.J. 561, 580 n.131 (2006); AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 18 (4th ed. 2010).

27. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(I) (citing *EMI Entm’t World, Inc.*, 603 F. Supp. 2d at 763); see also Harry Fox Agency, *HFA: A Legacy of Trust, A Commitment to New Technology*, https://www.harryfox.com/find_out/aboutus.html [<https://perma.cc/GG3V-J2NG>] (last visited Nov. 16, 2017); Harry Fox Agency, *What does HFA do?*, https://www.harryfox.com/publishers/what_does_hfa_do.html [<https://perma.cc/89YP-78JX>] (last visited Nov. 16, 2017).

28. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(I) (citing Brian T. Yeh, Cong. Research Serv., RL33631, *CRS Report for Congress—Copyright Licensing in Music Distribution, Reproduction, and Public Performance* 6 n.36, 6 (Apr. 15, 2015); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1310 n.39 (1996); 2 NIMMER & NIMMER, *supra* note 14, at § 8.23(E); see also Jiarui Liu, *ARTICLE: Copyright Injunctions After eBay: An Empirical Study*, 16 LEWIS & CLARK L. REV. 215, 268 n.253 (2002) (stating that HFA “charges less than the statutory rate for the cover license[.]”) (citations omitted).

29. Liu, *supra* note 28, at 262 n.224 (2002) (“A few examples of such collecting societies are the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music Incorporated (BMI), Society of European Stage Authors & Composers (SESAC), Harry Fox Agency (HFA), and Copyright Clearance Center (CCC).”) (citing Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1302-11 (1996)); see also 17 U.S.C.S. § 114(d)(3)(e)(ii).

30. Kristelia Garcia, *ARTICLE: Facilitating Competition by Remedial Regulation*, 31 BERKELEY TECH. L.J. 183, 239 (2016).

31. Menell, *supra* note 1, at 453.

32. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(B) (quoting 17 U.S.C. § 115(a)(1); *M. Witmark & Sons v. Standard Music Roll Co.*, 213 F. 532 (D.C.N.J. 1914)).

produced under the license, and a “limited adaptation right[.]”³³ The modern, compulsory, statutory cover license allows the licensee to “mak[e] a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work.”³⁴

The compulsory license applies only to the musical composition, not the sound recording, as that has separate legal protections and would require an additional “consensual license” to use the actual recording of another; to use an existing recording, one needs a license for both the composition and the recording itself.³⁵ The copyrights to the musical composition are separate from the copyrights to a particular sound recording. The compulsory license licenses the distribution of the musical composition; the licensee can then either make his or her own recording of the song (and only pay royalties to the writer) or obtain a license from a performer to distribute that performer’s recording of the song (and pay royalties to both the writer and the performer).³⁶

III. THE LEGAL DISCOURSE ON SAMPLING MASHUPS – APPLYING THESE RATIONALES TO MASHUP COVERS

A. What are Traditional (Sampling) Mashups; What are the Barriers to their Monetization; and How Is a Mashup Cover Legally Different?

Traditional mashups “rely entirely on sampled sources to construct musical collages.”³⁷ Digital technologies, such as Digital Audio Workstations, created a new subset of skilled music-makers who were experts in recording and mixing techniques, and copyright infringement lawsuits for sampling soon followed.³⁸ There are several different types of mashups. An “A vs. B” mashup combines the instrumentals from one song with the lyrics of another song; some creators take this to another level, by splicing sections of multiple songs for the instrumental portion, the lyrics, or both.³⁹ More complex

33. *Id.* (citing *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948); *Foreign & Domestic Music Corp. v. Licht*, 196 F.2d 627 (2d Cir. 1952); *T.B. Harms Co. v. Jem Records, Inc.*, 655 F. Supp. 1575, 1582 (D.N.J. 1987) (Treatise cited)).

34. Menell, *supra* note 1, at 493-94 (citing *An Act to Amend and Consolidate the Acts Respecting Copyright*, ch. 320, § 1(e), 35 Stat. 1075 (1909)) (quoting 17 U.S.C. § 115(a)(1), (a)(2) (2012)).

35. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(A) (citing *id.* § 2.10, § 8C.03; *Conway v. Licata*, 104 F. Supp. 3d 104, 121 (D. Mass. 2015)).

36. *Id.* at § 8.23(B)(1).

37. Menell, *supra* note 1, at 453 (citation omitted).

38. *Id.* at 456, 471-72 (citations omitted).

39. *Id.* at 457-58 (citing Music Downloads, *PARTY BEN*, <http://www.partyben.com/downloads/> [<http://perma.cc/NN65-RFQH>] (last visited Oct. 31, 2017)).

mashups weave together different elements of the instrumentals of two or more songs, and different portions of their lyrics, to form a more integrated hybrid. The resulting works, which range from the mundane to the critically acclaimed, are often given names which are themselves mashups of the source titles.⁴⁰ In 2004, Danger Mouse combined The Beatles' *The White Album* with Jay-Z's *The Black Album* to create *The Grey Album*, a highly successful traditional mashup which, despite a cease and desist letter, is regarded as having accelerated the mashup genre into the mainstream by earning a rave review from Rolling Stone and becoming Entertainment Weekly's Best Album of 2004, leading to the creation of MTV's "Ultimate Mash-Ups" series.⁴¹ The genre grew exponentially; however, since the component works are typically not licensed, traditional distribution channels usually steer clear of mashup artists.⁴² Mashups expose listeners to different songs, genres, and artists which they might not have otherwise discovered,⁴³ making them a prime way for new artists to gain exposure. Although the exact magnitude of the mashup genre is difficult to ascertain due to "uncertain legal status," its "worldwide reach" makes it "one of the most vital and innovative musical forms today."⁴⁴ The uncertainty of not having a set legal framework through which to authorize mashups relegates them to "under the radar" streaming services as the primary method of distribution in "legal and commercial limbo."⁴⁵

A prime example of a prolific sampling mashup artist who has been largely left alone by rights holders is Gregg Gillis, also known as Girl Talk, whose mashups are comprised of samples from between twenty and thirty songs, exposing him to a potential sixty copyright violations (as the music composition and sound recordings would be separate claims); he spends

40. *Id.* at 453-54 (discussing the innovative way in which the instrumentals of "Hard to Explain" by The Strokes complement the vocals of "Genie in a Bottle" as performed by Christina Aguilera, to form "A Stroke of Genius," which Wolk described as a unique combination which completes "'what [each component song] was missing all along.'") (citing Douglas Wolk, *Barely Legal*, VILLAGE VOICE (Feb. 5, 2002), <http://www.villagevoice.com/2002-02-05/music/barely-legal> [<http://perma.cc/63XS-79Y6>]).

41. *Id.* at 454 (citing *The Mouse that Remixed*, NEW YORKER (Feb. 9, 2004), <http://www.newyorker.com/magazine/2004/02/09/the-mouse-that-remixed>]; Kembrew McLeod, *Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist--Academic*, 28 POPULAR MUSIC & SOC'Y 79, 80-81 (2005); Lauren Gitlin, *DJ Makes Jay-Z Meet Beatles*, ROLLING STONE (Feb. 5, 2004), <http://www.rollingstone.com/music/news/dj-makes-jay-z-meet-beatles-20040205> [JUNE SKINNER SAWYERS, READ THE BEATLES: CLASSIC AND NEW WRITINGS ON THE BEATLES, THEIR LEGACY, AND WHY THEY STILL MATTER xlvii (2006) (citations omitted)].

42. *Id.* at 455 (citations omitted).

43. *Id.* at 450.

44. *Id.* at 447.

45. *Id.* at 446.

approximately a day of labor for “each minute” of the final product.⁴⁶ The substantial effort required to deconstruct tracks and combine their elements into new and innovative musical compositions does not in and of itself give the resulting mashups copyrightability nor marketability through legitimate channels.⁴⁷ Thus, the majority of mashups are distributed in noncommercial ways (user-uploaded and accessible for free, sometimes including disclaimers that they are non-commercial), but “some unlicensed mashups [particularly from Girl Talk] are available on YouTube, iTunes, and Amazon[.]”⁴⁸ Although mashups are generally tolerated by the music industry (in that they do not often lead to lawsuits), neither their creators nor the source artists can profit due to looming copyright liability.⁴⁹ This illustrates the need for a system, which can be modeled on the § 115 cover license, to allow mashup artists to preclear their works and share the proceeds.⁵⁰

Websites that distribute mashups are also open to liability; “service providers such as SoundCloud and YouTube, however, are immune from liability for storing infringing files at a user’s direction, so long as they” have, and warn users of, a policy to “terminat[e] service to” infringing users, take steps “to identify and protect copyrighted works[,]” register an agent with the copyright office to receive infringement notifications, “do not have actual or constructive knowledge of the location of specific infringing files” and remove infringing files “expeditiously” when they become aware of them.⁵¹ YouTube requires its users to have permission to use any copyrighted content in their videos in order to monetize them.⁵² Anyone who violates these rules could have their channels taken down; as for the individual videos, depending on the source works’ rights owners’ preferences, they are either removed or allowed to remain live while “divert[ing] the advertising revenue to that

46. *Id.* at 449, 471, 471 n.149, 457 (citing Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES (Aug. 6, 2008), <http://www.nytimes.com/2008/08/07/arts/music/07girl.html> [<http://perma.cc/SL9S-QYK7>]).

47. Works must have sufficient originality and creativity to be copyrightable. It is an underlying principle of copyright law that “sweat of the brow,” meaning the effort invested into creating a work, alone does not constitute sufficient originality. See SNOW, *supra* note 11, at 312.

48. Menell, *supra* note 1, at 461-62 (citations omitted to webpages where Girl Talk’s albums are listed for sale).

49. *Id.* at 492, 484 (citing KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 28 (2011); Peter C. DiCola, *An Economic View of Legal Restrictions on Musical Borrowing and Appropriation*, in MAKING AND UNMAKING INTELLECTUAL PROPERTY 235, 247 (Mario Biagioli et al. eds., 2011)).

50. *Id.* at 492-93 (citing Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CALIF. L. REV. 53, 69-71 (2014); Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 J. LEG. ANALYSIS 1, 23-25 (2013)).

51. *Id.* at 470, 470 n.144 (citing 17 U.S.C. § 512(i)(1)(A); (i)(1)(B); (c)(1); (c)(1); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 32 (2d Cir. 2012)).

52. *Id.* at 460 (citing *What Kind of Content Can I Monetize?*, YOUTUBE, <https://support.google.com/youtube/answer/2490020?hl=en> [<http://perma.cc/E588-6KJX>] (last visited Oct. 31, 2015)).

copyright claimant.”⁵³ This system makes it difficult if not impossible for the mashup artist to see any return on their efforts beyond promoting their live performances⁵⁴ and original works, thus impeding the development of creative works. SoundCloud has been the leading distributor of mashups, but its users have faced difficulties with “copyright notices[.]”⁵⁵ In 2014, SoundCloud sought to add advertising to its platform, and become the YouTube counterpart for online audio; as part of this process, SoundCloud negotiated with major labels to avoid the “takedown and policing costs” which YouTube uses in its content ID measures.⁵⁶ However, despite offering the labels equity in the company to make this happen, the negotiation eventually fell through, and there was a major increase in takedown notices to SoundCloud users.⁵⁷ Furthermore, most download and streaming services do not keep mashups in their catalogs, as there is no set way to distribute payment to “multiple creative claimants” without a contract, and record labels “have been slow to agree on a revenue sharing plan.”⁵⁸ Although the system does not currently allow mashup artists to profit directly from their sampling collages, they gain increased exposure and thus increased income from their

53. *Id.* at 461 (citing *How Content ID Works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en> [<http://perma.cc/G58Q-FVY3>] (last visited Oct. 31, 2015)).

While YouTube has negotiated “blanket synchronization licenses” for user-created cover videos, when user-created videos “[c]ombine [e]lements of [s]everal [s]ongs[.]” Kohn argues that “the legislature or [] some institutional agreement” is needed to determine whether such content needs to be approved. AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 1153-54 (4th ed. 2010).

54. Menell, *supra* note 1, at 461.

55. *Id.* at 458 (citations omitted).

56. *Id.* at 484-85 (citing Douglas MacMillan, *Music-Sharing Service SoundCloud Raises New Funds at \$ 700 Million Valuation*, WALL ST. J. (Jan. 24, 2014), <http://blogs.wsj.com/digits/2014/01/24/music-sharing-service-sound-cloud-raises-new-funds-at-700-million-valuation>); *see also Id.* at 485 n.251 (“SoundCloud will begin incorporating advertising and for the first time let artists and record labels collect royalties.”) (quoting Ben Sisario, *Popular and Free, SoundCloud Is Now Ready for Ads*, N.Y. TIMES (Aug. 21, 2014), <http://www.nytimes.com/2014/08/21/business/media/popular-and-free-soundcloud-is-now-ready-for-ads.html>).

57. *Id.* at 485-86 (citing Tom Pakinkis, *SoundCloud Holding Licensing Talks with Labels--Report*, MUSICWK. (Mar. 28, 2014, 10:31 AM), <http://www.musicweek.com/news/read/soundcloud-holding-licensing-talks-withlabels-report/058049>); Coral Williamson, *SoundCloud Close to Finalizing Major Label Deals--Report*, MUSIC WK. (July 11, 2014, 10:29 AM), <http://www.musicweek.com/news/read/soundcloud-close-to-finalisingmajor-label-deals/058993>; Adam Satariano, *SoundCloud Said to Near Deals with Record Labels*, BLOOMBERG (July 20, 2014, 6:54 PM), <http://www.bloomberg.com/news/2014-07-10/soundcloud-said-to-near-deals-with-record-labels.html>; Nappy, *Soundcloud Boldly Releases New App, Allows Universal to Flag Your Account, and Quietly Announces Data Mining, All in One Month*, COMPLEX (June 27, 2014), <http://www.complex.com/music/2014/06/soundcloud-boldly-releases-new-app-allows-universal-flag-account-quietly-announces-datamining-one-month>; Robert Cookson, *SoundCloud Hits an Impasse with Major Record Labels*, FIN. TIMES (Oct. 9, 2014, 1:23 PM), <http://www.ft.com/intl/cms/s/0/e549661c-4ef6-11e4-b205-00144feab7de.html#axzz3Ff62q4dA>).

58. Menell, *supra* note 1, at 461-62, 461 n.92 (quoting Hannah Karp, *Turning a Profit from Music Mashups*, WALL ST. J. (Mar. 6, 2015, 7:18 PM), <http://www.wsj.com/articles/turning-a-profit-from-music-mashups-1425687517>).

own original and performance work.⁵⁹ However, “[l]egal uncertainty” and potential copyright liability has relegated mashups to platforms “outside of the copyright system and content marketplace,” limiting creative expression and avenues which lead to “financially sustainable careers.”⁶⁰

This illustrates the need for a standard means of monetizing the mashup artist’s creative work in combining the musical compositions as well as providing value for the creators of the source material.⁶¹ While transaction costs alone can be prohibitive for the more “intensive” mashups, the copyright owner of each component could also, under the current system, refuse consent and thus prevent the publication of, or severely restrict the creativity of, the mashup.⁶² A reform would need to strike a balance between the extremes of free reign to mashup anything in any way and copyright owner absolute “veto power[.]”⁶³

Musical compositions and sound recordings are both protected under copyright law, giving “composers and recording artists the exclusive rights to reproduce, adapt,” publicly perform, and distribute their works, subject to fair use exceptions and the statutory cover license.⁶⁴ A mashup cover differs in terms of the legal questions because, being a new recording and not sampling the original, it only concerns the writer’s rights to the lyrics and underlying musical composition and whether it is akin enough to a generic cover to justify extending the § 115 license thereto, or derivative enough such that it should not. Although the portions of the sampling mashup legal discussion which apply specifically to the use of sound recordings do not apply, many of the principles in the legal discourse regarding sampling mashups can be translated well to mashup covers, particularly the fair use and derivative works discussion.

B. Legal Arguments for Mashups: Transformativeness in Fair Use vs. Derivative Works

As fair use is a defense to copyright infringement, it is helpful to begin this discussion with what constitutes infringement. Copyright infringement occurs when there is “(1) factual copying resulting in (2) substantial similarity of protected expression,” but courts often do not treat these as two separate questions.⁶⁵ Copying of expression, not merely ideas, constitutes

59. *Id.* at 463.

60. *Id.* at 464.

61. *Id.* at 452.

62. *Id.*

63. *Id.*

64. *Id.* at 465 (citing 17 U.S.C. § 107 (2012); 17 U.S.C. § 106 (2012)).

65. *Id.* at 465, 465 n.123 (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01(B) (2015)).

infringement whether it is an exact copy or an “imitation or simulation[,]” even if the copy involves a “wide . . . variation[.]”⁶⁶ The substantiality is judged by both the quantitative amount which was copied as well as the “qualitative[] significan[ce]” of the copied portion.⁶⁷ Remedies for infringement include injunctive relief, actual damages, or statutory damages, which are a minimum of \$750 (reduced to \$200 for innocent infringement) and a maximum of \$150,000 (for willful infringement) for each registered work.⁶⁸ When it comes to sampling, courts have a history of deriving substantial similarity from a finding of copying in fact.

Fair use exceptions to copyright protection are unauthorized uses that are not considered infringement; this includes “criticism, comment, new reporting, teaching (including multiple copies for classroom use), scholarship, or research,” as weighed by four factors:

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.⁶⁹

Fair-use is a “case-specific, and often subjective” doctrine.⁷⁰ In assessing whether a work has copied a “substantial” amount of “protected expression,” the *de minimis* doctrine generally permits copying which is so minimal that the harm does not “justify providing a remedy.”⁷¹ Despite this convention, in *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit found that even a two-second sample is subject to liability for infringement; however, the Second Circuit has repeatedly found fair use when the new work has a different “aesthetic” or “purpose” than the original.⁷² The 2005 *Bridgeport* decision indicates that the *de minimis* doctrine is not likely to apply to cases

66. *Id.* at 466 (quoting H.R.REP.NO. 94-1476, at 61 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5675).

67. *Id.* at 466 (quoting *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 162 (2d Cir. 1986)); see also *Harper & Row, Publ'rs. v. Nation Ent'ers.*, 471 U.S. 539 (1985) (wherein Defendant overstepped its license by publishing the heart of the book in a serial, such that consumers were unlikely to purchase the book).

68. Menell, *supra* note 1, at 470, 470 n.148 (citing 17 U.S.C. § 502 (2012); 17 U.S.C. § 504(a)(1), (b), (c)(2)).

69. 17 U.S.C.S. § 107 (2012).

70. Menell, *supra* note 1, at 451.

71. *Id.* at 465 (citing Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1457-58 (1997)).

72. *Id.* at 451 (citing *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005); *Blanch v. Koons* 467 F.3d 244, 252 (2d Cir. 2006)); Menell, *supra* note 1, at 451 n.30 (quoting *Cariou v. Prince*, 714 F.3d 694, 705-06 (2d Cir. 2013)).

of sampling.⁷³ This is a major point where sampling is distinguishable from mashup covers, as the use of sound recordings is not at issue in the latter, and using the underlying musical composition to create a new recording is specifically allowed under the 17 U.S.C.S. § 115 license. Even without *de minimis* considerations, the court determines whether an ordinary observer would deem the amount of expression used substantial by separating the unprotected ideas and unoriginal expression from the plaintiff's work, thus distilling it down to the protected expression, and then comparing "whether the defendant's work is substantially similar" to those protected elements alone; such analysis is vague and often unpredictable.⁷⁴ This uncertainty regarding the § 107 multi-factor test makes it difficult for those "build[ing] on the work of others" to rely on fair use; anything "short of obtaining a license[]" risks statutory damages; this risk results in self-censorship of creative works.⁷⁵ The Second Circuit, however, has been more open to findings of fair use in sampling cases where the use is sufficiently "'transformative[.]'"⁷⁶ Additionally, the Supreme Court application of Judge Leval's transformativeness in *Campbell v. Acuff-Rose Music, Inc.*, as a defining factor for fair use led these cases to cite to Leval and *Campbell* in support of their decisions, as part of a wider trend in federal courts to factor transformativeness into assessments of fair use.⁷⁷ This shift in the standard fair use analysis reduces the likelihood that mashups would be subject to liability as derivative works.⁷⁸ "The expansion of fair use over time" has increased "overall creative output" and "does not

73. *Id.* at 465-66 (citing *Bridgeport*, 410 F.3d at 799-801).

74. *Id.* at 466 (citing *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930); 17 U.S.C. § 102(b) (2012); 17 U.S.C. § 102(a) (2012); *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (copyright is based on originality; if the element in question is unoriginal, then it is not protectable by copyright)).

75. *Id.* at 467-68 (citing Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 574-78 (2008); David Nimmer, "*Fairest of Them All*" and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 281 (2003); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 1978-2005, 156 U. PA. L. REV. 549 (2008); Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CALIF. L. REV. 53, 69-71 (2014) (citations omitted).

76. *Id.* at 476 (citing *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (all three of which involve usage of portions or entire works of visual art to make new works)).

77. *Id.* at 476 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990); *Cariou*, 714 F.3d at 706; *Blanch*, 467 F.3d at 251-52; *Bill Graham Archives*, 448 F.3d at 607; Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 755 (2011) (an empirical study which found that 95.83% of all unreversed district court decisions between 2006 and 2010 factored in the transformativeness of the new work)); *see also* Daniel Gervais, *ARTICLE: The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs*, 15 VAND. J. ENT. & TECH. L. 785, 843 (2013) ("[T]ransformative works . . . lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright.") (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

78. *See, e.g.*, Mary W.S. Wong, *Article: "Transformative" User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1127 (2009) ("[T]ransformative use for fair use purposes does not automatically or necessarily mean the defendant's work is also transformative for derivative work purposes.").

adversely affect the market for underlying works[.]”⁷⁹ However, it is not a unanimous shift; some judges believe that using transformativeness as a major factor for fair use undermines derivative work rights and the statutory standards for fair use.⁸⁰ With ambiguous fair use application, mashup artists can either go through unfeasible expenses to license their creations or face exorbitant liability risks, or rights owners would be deprived of an equitable share of the profits; thus, it would benefit all to create a set licensing scheme to monetize mashups.⁸¹

Additionally, another court decision expanded the applicable scope of fair use when free speech is concerned. Although, in the past, courts have used a rejected license request against a claim of fair use, the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* found that ““being denied”” a license or ““permission to use a work[.] does not weigh against a finding of fair use.””⁸² Such determination is consistent with the rationale behind Federal Rule of Evidence 409, which prohibits the admission into evidence of offers to pay for medical care as evidence of liability⁸³ (in tort); not allowing evidence of offers to pay to be used to prove liability encourages parties to approach peaceful, equitable solutions prior to resorting to litigation. By not holding a request for a license against a finding of fair use, it encourages content creators to seek licenses without fear that a denial could prevent them from publishing a work which would actually qualify as fair use.

In *Campbell v. Acuff-Rose Music, Inc.*, 2 Live Crew created a parody of Roy Orbison’s “Oh Pretty Woman,” which included sampling and their own “comical lyrics[.]” and sought permission and offered compensation to Acuff-Rose, the rights holder, who denied the request and sued for infringement when 2 Live Crew released the song anyway.⁸⁴ Despite the commercial purpose of the parody, the court found that it qualified as fair use because it in fact parodied the banality of the original, used only so much as was necessary to call the original to mind “in order to parody it,” and was not likely to negatively impact ““the market for the original[;]”” although the court of appeals reversed due primarily to the commercial nature of the work, the Supreme Court found that denied permission does not weigh against fair use, “commercial use” does not automatically “establish[] market harm,” and that more transformative use weighs substantially in favor of a finding of fair

79. Menell, *supra* note 1, at 490 (citing Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 799 (2003)).

80. *Id.* at 477 (citing Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014)).

81. *Id.* at 488-89 (citing Tim Wu, *Tolerated Use*, 31 COLUM. J.L.&ARTS 617, 619 (2008)).

82. *Id.* at 472-73 (citing *Grand Upright Music, Ltd. V. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991)); *id.* at 473 n.163 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994)).

83. FED. R. EVID. 409.

84. Menell, *supra* note 1, at 474 (citing *Campbell*, 510 U.S. at 572-73).

use.⁸⁵ The Supreme Court remanded the case for a lower court to make factual determinations as to the effect of the new work on the market for the original; however, the case was then settled out of court.⁸⁶ Although the *Campbell* case broadened the potential applications of fair use to mashups,⁸⁷ the possibility of copyright litigation, which can be prohibitively expensive, has prevented artists from relying on this ruling.⁸⁸ Record labels may actually stand to gain more from licensing than from this restrictive approach, which also opposes the copyright goals of promoting “expression and . . . creativity.”⁸⁹ Although some record labels are seeing the financial benefit of licensing samples,⁹⁰ it is difficult both financially and in terms of access, to obtain licenses without a label or attorney, so mashup artists largely resort to “self-censorship.”⁹¹ The problems with leaving mashup licenses up to pure negotiation is the lack of standard pricing, rights owners’ desire to have total control over the usage of their works, and the creation of “complex licensing

85. *Id.* at 474-75 (citing *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1155-56, 1159 (M.D. Tenn. 1991); *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992); *Campbell*, 510 U.S. at 579, 585 n.18, 591; Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (asserting that the primary consideration in fair use is how transformative the new work is from the original));

see Campbell, 510 U.S. at 579, 591 (A work need not be so transformative to qualify for fair use, but “the more transformative the new work,” the less significant the other factors, such as commercial purpose, are to an inference of market harm. A work is transformative and does not attempt to replace the market for the original, if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. . . .”) (citing Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451, 455, n.40 (1984); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (1841)).

86. Menell, *supra* note 1, at 475 (citing *Campbell*, 510 U.S. at 594; *Acuff-Rose Settles Suit with Rap Group*, COM. APPEAL (Memphis), June 5, 1996, at A14); *see also* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.10(b) (2017) (stating that issues regarding applying licenses to new uses are largely unlitigated, as they are typically settled in negotiation if copyright owners raise them at all).

87. *See Campbell*, 510 U.S. at 586-87 (The quality and quantity of what is used must be “reasonable in relation to the purpose of the copying;” thus, “the extent of permissible copying varies with the purpose and character of the use.”) This supports a broad interpretation of fair use by using a common legal theme: reasonable under the circumstances.

88. Menell, *supra* note 1, at 478 (citing KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 165-66, 28 (2011); Anthony Ciolli, *Lowering the Stak[es]: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1003 (2008)).

89. *Id.* at 486.

90. *See* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 581 (4th ed. 2010) (arguing that licensing better serves “the long-term interests of the song and the songwriter” by allowing them to “share in the economic success of the [new] work[,]” “maximize the long-term value of the [original] work[,]” and keep the original work in the minds of “the listening public.”).

91. Menell, *supra* note 1, at 478-79 (citing Josh Norek, “*You Can’t Sing Without the Bling*”: *The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 97-98 (2004) (which illustrates that sampling actually has a positive effect on the market for the source works); KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING, 28 (2011)).

terms,” all of which is disadvantageous to new artists without the funds for experienced representation.⁹²

As for the market competition branch of the fair use analysis, some sampling mashups could come close to replacing the market for the original works, but mashup covers would not. “[M]usic is a differentiated product[;] . . . each song is unique[.] . . . [N]o one song is a perfect substitute for another[;]” this leaves the music market open “to anticompetitive concerns[.]” as sellers can charge higher prices according to demand, without concern of being undersold.⁹³ If anything, a generic cover, which replicates the original song in a different style, is more likely to supplant the market for the original song than a mashup cover.⁹⁴

17 U.S.C.S. § 114 delineates the “scope of exclusive rights in sound recordings,” and how such rights are licensed. Blanket licenses from Performing Rights Organizations allow radio stations and DJ’s to publicly perform copyrighted music, even in samples, but once mashups and remixes are *recorded*, then they are open to potential liability for reproducing the sound recordings or creating a derivative work.⁹⁵ A copyright owner in a sound recording has rights as listed in 17 U.S.C.S. § 106 subsections 1, 2, 3, and 6 only; this does not include a right to performance in § 106(4).⁹⁶ These rights

92. *Id.* at 480 (citing MCLEOD & DICOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING*, 155-56 (2011)).

93. Garcia, *supra* note 30, at 240 (citing Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984); In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings, 14-CRB-001-WR, at 4 (U.C.S.R.B. Oct. 6, 2014) (Written Direct Testimony of Carl Shapiro), http://www.loc.gov/crb/rate/14-CRB-0001-WR/statements/Pandora/14_Written_Direct_Testimony_of_Carl_Shapiro_with_Appendices_PUBLIC_pdf.pdf [<http://perma.cc/4RQ6-7Y3L>]).

94. This has in fact happened on multiple occasions throughout history; Soft Cell’s cover of Tainted Love is a prime example. See Jordan Runtagh, *Cover Me: 20 Famous Songs You Had No Idea Were Covers*, VHI, <http://www.vh1.com/news/50651/cover-me-20-famous-songs-you-had-no-idea-were-covers/> [<https://perma.cc/SC68-JKS3>] (last viewed Dec. 17, 2017); see also *Cover Songs More Famous Than Originals: 20 Tunes That Fit The Bill*, Huffington Post, https://www.huffingtonpost.com/2013/04/22/cover-songs-more-famous-than-originals-20-tunes_n_3118557.html [<https://perma.cc/XWG4-GD58>] (last viewed Dec. 17, 2017).

95. Menell, *supra* note 1, at 469-70 (citing GENELLE BELMAS & WAYNE OVERBECK, *MAJOR PRINCIPLES OF MEDIA LAW* 262-63 (2011); James Barron, *Facing the Music: There’s a Bill when Songs Fill the Air*, N.Y. TIMES (Aug. 7, 1993), <http://www.nytimes.com/1993/08/07/nyregion/facing-the-music-there-s-a-bill-when-songs-fill-the-air.html> [<http://perma.cc/62DV-4S9Q>]).

96. 17 U.S.C.S. § 114(A) (2012).

Although the duplication of sound recordings is not at issue for mashup covers, the issue of public performance rights reverses, since artists who create mashup covers may want to perform them live in concert, and the statutory cover license does not authorize public performance of the licensed work.

See 2 NIMMER & NIMMER, *supra* note 14, at § 8.22 (The Digital Performance Right in Sound Recordings Act of 1995 (DPRA) created two new rights: “a public performance right in sound recordings . . . and a compulsory license for ‘digital phonorecord delivery.’” This does not mean the cover artist would have a public performance right stemming from their own new recording of the song, as it may seem at first glance. This is about radio and streaming services. The DPRA created compulsory licensing for

are further limited to the right to duplicate in a fixed medium “the actual sounds fixed in the recording,” and the right to create “a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.”⁹⁷ This provision expressly reserves sampling mashup rights to the copyright holder, unless voluntarily licensed. The exclusive rights in a sound recording do not include the right to make or duplicate “another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”⁹⁸ This separates the right to record a cover from the exclusive rights, as that involves the underlying musical composition, to which separate rights attach than to the recording itself, and the licensing for which is provided in § 115.

Fair use arguments regarding substantiality often turn on whether the use supplants the original in the market such that consumers might purchase the adaptation instead of the original; if it does, it impairs the rights holder and is not fair use. A regular cover, as authorized by the current § 115 compulsory license, would otherwise fail this fair use analysis, as a consumer may very well like the new artist’s rendition of the song more than the original, and purchase it as an alternative. A mashup cover, on the other hand, combines the two songs in a different way, which is much less likely to replace the original. In fact, depending on which songs are incorporated, a mashup cover has the propensity to expose fans of one artist to the work of another artist, giving the component rights holders exposure to wider audiences which can actually increase sales. Thus, a mashup cover satisfies the fair use requirement that it not usurp the market for the original works. However, the percentage of the original work which is used in the mashup cover is where the fair use argument would ultimately fail, as it would not likely be *de minimis*, although this varies for medleys. Although licensing costs can quickly get out of control for medleys which involve a larger number of component works, such that it is no longer financially feasible, the other side to that is that as the number of works increases, the substantiality of the portion used from each work decreases, making fair use more likely to apply.

A mashup could also be construed as a compilation, or a collective work. Those terms are defined as follows: “A ‘compilation’ is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term ‘compilation’

“subscription transmissions, [and] a mandatory scheme of ‘voluntary licensing’ for interactive transmissions. . . .”) (citing H. Rep. (DPRA), at 20)).

97. 17 U.S.C.S. § 114(b) (2017).

98. *Id.*

includes collective works.”⁹⁹ “A ‘collective work’ is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”¹⁰⁰ Due to the integrated nature of the end result, a mashup would not be a collective work, but it does fit the definition of a compilation. Compilations and derivative works are eligible for copyright protection so long as they do not use “preexisting material . . . unlawfully.”¹⁰¹ “The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”¹⁰² Thus, the arrangement would be copyrightable, if the statute for such covers does not include a provision saying that one cannot seek copyright in it, as § 115 states with regard to covers as sound recordings. It stands to reason that one would not be able to copyright the sound recording of a regular cover; however, mashup covers, especially more integrated mashups, inherently have more originality and creativity, such that a good case can be made for the copyrightability of the new arrangement as a derivative work, provided the creation was properly licensed.

This raises another key discussion: whether mashups are in fact, derivative works. “[T]he terms ‘compilations’ and ‘derivative works’” encompass “every copyrightable work that employs preexisting material or data of any kind[;]” they “overlap[;]” but refer to different things.¹⁰³ “A ‘compilation’ results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds[;]” whereas a derivative work “requires a process of recasting, transforming, or adapting ‘one or more preexisting works’” which qualify for copyright protection (whether they were actually copyrighted or not).¹⁰⁴

17 U.S.C.S. § 101 defines derivative works:

A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations,

99. 17 U.S.C.S. § 101 (2012).

100. *Id.*

101. 17 U.S.C.S. § 103(a) (2012).

102. 17 U.S.C.S. § 103(b) (2012).

103. H.R. No. 94-1476, at 57 (1976).

104. *Id.*

elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'.¹⁰⁵

This means that both compilations and derivative works are independently copyrightable, to the extent of their originality, not the borrowed content,¹⁰⁶ so long as the component works are used legally; one work can be both a compilation and a derivative work, but one does not necessitate the other, as they are separate concepts. This raises certain questions. Would a mashup cover be a compilation, a derivative work, or both? Would drawing such distinction have any effect on its legality without a license, or on a licensee's ability to independently copyright the new musical arrangement? The question of whether an unlicensed mashup could reasonably be construed to be a compilation but not an infringing derivative work hinges on how integrated it is. Although compilation refers more to anthologies such as the NOW! That's What I Call Music franchise,¹⁰⁷ which assembles and distributes the actual sound recordings of the season's top 40 hits, the definition of compilation does not necessitate that the material used be the sound recording; in fact, it can be any kind of work, which would include the underlying musical composition. Thus, a mashup cover does select, combine, organize, and arrange the preexisting musical compositions. For it to not also be a derivative work, one would have to argue that the mix does not recast, transform, nor adapt the original works. Such an argument would have more merit for a mashup which simply takes portions of the songs and intersperses them, as opposed to a more integrated mashup which picks apart the elements of the songs and blends them together. However, the fact that 17 U.S.C.S. § 115 specifically provides that the sound recording resulting from the use of the cover license is not copyrightable as a derivative work indicates that a cover recording is generally regarded as a derivative work. In fact, HFA acknowledges this in its default approach for handling medley license requests.

A new version or arrangement of an existing song that alters the melody or character of the song, or a medley of existing songs, is called a derivative work. You need to obtain permission from the publisher directly to create a derivative work, and include that permission when you apply for a mechanical license using HFA's regular licensing form[.]¹⁰⁸

This plainly states that a mashup cover or a medley would be considered a derivative work and requires permission before seeking the license (which would be pro-rated). In practice, however, this opens the door to unilateral

105. 17 U.S.C.S. § 101 (2012).

106. See 17 U.S.C.S. § 103(b) (providing that derivative work copyright only applies to the newly contributed material and does not affect the rights to the "preexisting material").

107. See Now That's What I Call Music, Universal Music Enterprises <http://www.nowthatsmusic.com/>.

108. Harry Fox Agency, *Songfile FAQs*, <https://secure.harryfox.com/songfile/faq.jsp> [<https://perma.cc/TY58-CCUZ>] (last accessed Nov. 16, 2017).

refusals to license, creating the very roadblock which § 115 is designed to prevent. The law's reverence for free speech over moral rights is explored further in section IV of this note.

When asked how they handle licensing requests for mashup covers, specifically, whether they negotiate a license for a derivative work, use the statutory cover license, or a different, individually-contracted license, HFA indicated that they "issue[] mechanical licenses for each individual song used in a medley based on its duration in the medley."¹⁰⁹ The HFA agent did, however, state that, although this is their current procedure, it does not function as legal advice.¹¹⁰ The way Songfile (a subpart of HFA) worded its frequently asked questions seemed to indicate that the per minute statutory license rate applies only to songs which are longer than six minutes. When asked for clarification as to whether such licensing arrangements typically result in multiplicative royalties (the statutory 9.1 cents for each of the songs), or royalties pro-rated as to the proportion that is used (such as 4.55 cents for each of two songs), HFA indicated that the licenses are issued based on the duration of each song in the resulting work, and that if one is making fewer "than 2,500 copies," the license can be obtained through Songfile (an HFA service).¹¹¹ This indicates that the default HFA approach is neither multiplicative nor divides the statutory rate, but rather uses the per minute rate even if the song or portion used is less than six minutes; the "whichever is greater" language in the statute does not seem to apply in HFA's approach to medley licensing. This supports the idea discussed by Allshouse-Hutchens, that HFA licenses may very well not be considered compulsory, statutory licenses, but would instead be treated as negotiated licenses,¹¹² especially in the case of mashup covers and medleys, where HFA's default approach uses the statutory framework, but turns away from a key portion of the language. If a mashup cover contains elements of the component songs throughout, such that the time-based proration doesn't reflect what is actually used (such as

109. E-mail from Sarah P., Client Services, Harry Fox Agency, to author (Oct. 28, 2017, 12:24 EST) (on file with author).

110. *Id.*

111. E-mail from Sarah P., Client Services, Harry Fox Agency, to author (Nov. 1, 2017, 12:55 EST) (on file with author).

112. In *Rodgers and Hammerstein Organization v. UMG Recordings*, the Second Circuit found that since the industry custom is to obtain a new license for new methods of distribution, a pre-existing license issued by HFA would not extend to new digital methods of distribution but would instead be limited to its "explicit terms." However, the court also noted that the second circuit interprets compulsory licenses broadly, to include "any medium that could 'reasonably be read to fall within the scope of the license.'" This indicates that since this broad interpretation did not apply in that case, the court regarded the license in that case, issued by HFA and argued by defendants to be a compulsory license, as a negotiated license, despite the standard HFA licenses' language stating that they are compulsory licenses. Allshouse-Hutchens, *supra* note 26, at 580 (citing *Rodgers and Hammerstein*, 60 U.S.P.Q.2d (BNA) at 1354, 1358-60 (S.D.N.Y. 2001); Harry Fox Agency, *The Harry Fox Agency Mechanical License Agreement*, <http://harryfox.com/public/licenseMechanical.jsp> (last visited May 8, 2006)); *see also infra* note 194.

the lyrical half of one song and instrumental half of the other in an A vs. B mashup), the artist would have to pay the full 9.1 cent statutory rate for both songs. With two component songs, this is pricier but doable. For medleys containing a higher number of songs, however, it quickly adds up and can easily exceed the artist's profits such that it would not be financially feasible to obtain the licenses. Although the more songs which are involved, the time-based amount of each which an artist uses would presumably shrink, that is not necessarily the case if instrumental elements of each song are incorporated throughout.

This is a major barrier to the production of innovative covers, as it may be difficult for a new individual artist to get a response from the rights holder label for their request for permission, or if they do get a response, it may very well be in the negative.¹¹³ As this note later elaborates, the rationale behind the judicial trend of transformative fair use, and behind the cover license itself, supports the inclusion of mashup covers. While it is interesting to contemplate whether the underlying musical arrangement in a mashup cover, not the sound recording thereof, since something can be a compilation without being a derivative work, this distinction will not be dispositive, as infringement claims arise primarily from the sale and distribution of the resulting sound recordings.¹¹⁴ Additionally, as the following analysis will show, since the cover license easily extends to mashup covers in accordance with the principles and values of copyright law in theory and as applied by the Supreme Court,¹¹⁵ whether or not it would be considered an infringing derivative work, although not moot at present since record labels could decide to cease tolerating and start suing at any time, would be moot once licenses are easier to obtain.

The Sixth Circuit in *Bridgeport Music, Inc. v. Dimension Films*, in examining 17 U.S.C.S. § 114(b), noted that the copyright owner's exclusive rights under § 106 regarding derivative works are limited to situations where "the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality;" the exclusive right does not apply to making a new "sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in

113. Rights owners have many concerns when approached for licensing, including "fear of piracy . . . fear of making a bad deal . . . [and] fear of getting sued. . . ." AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 623 (4th ed. 2010).

114. It could be a dispositive question if a musician tries to sell sheet music for his or her mashup cover arrangement (which one could reasonably use to aid them in playing the original work, thus superseding the purchase of sheet music for the original work), but that is an entirely different issue outside of the scope of this note.

115. Copyright protection was never intended to be absolute, as, from its inception it was designed to be "for [a] limited [t]ime[.]" and its stated purpose is "[t]o promote the Progress of Science and useful Arts[.]" U.S. Const. Art. I, § 8, Cl 8. *See also Campbell*, 510 U.S. at 575.

the copyrighted sound recording.”¹¹⁶ This highlights a key distinction in the classification of derivative works for sampling mashups as opposed to mashup covers. Although the statutory language precludes the unauthorized use of any sample, no matter how small, it specifically states that new recordings of the same composition are not derivative works. This language explains the authorization for the statutory cover license. It also, by existing alongside the description of derivative works which “rearrange[], remix[], or otherwise alter[] in sequence or quality” the actual sound recordings,¹¹⁷ implies that a new recording of the underlying composition is not a derivative work even if it rearranges the sequence thereof, since the statute expressly prohibits such use of sound recordings but contains no such prohibition for new recordings, specifically stating that the new recordings are not derivative works. However, a caution in this comparison is that § 114 speaks to rights in sound recordings more so than the underlying composition; to clarify the limits of the § 115 cover license, one must analyze the language of that statute.

The right to create derivative works is an exclusive right vested in the copyright holder in 17 U.S.C.S. § 106. However, the language of § 115 itself explains that:

A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.¹¹⁸

A compulsory cover license includes an inherent right to create a new arrangement to suit the artist’s performance needs.¹¹⁹ The licensee cannot, however, “claim a derivative work copyright in the arrangement” made under the compulsory license.¹²⁰ This language prohibiting protection for the new arrangement as a derivative work indicates that a cover is a derivative work by definition. So, in determining whether the compulsory license can or should encompass mashup covers, it is not necessary to conclude that the result is not a derivative work in order for it to be eligible. New arrangements

116. Menell, *supra* note 1, at 475 (citing *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800-01 (6th Cir. 2005)) (quoting 17 U.S.C. § 114(b)).

117. 17 U.S.C.S. § 114(b) (2012).

118. 17 U.S.C.S. § 115(a)(2) (2012).

119. Such changes include things such as, but not limited to, key signature, style, or even gender pronouns; however, changing “more than a very minor portion of the song’s lyrics [] would be likely to” cross the line into “a change in the fundamental character of the work[,]” making it a derivative work which requires permission. DAVID J. MOSER, *MOSER ON MUSIC COPYRIGHT* 82 (2006).

120. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(F) (first citing *id.* § 3.01; then citing Note, *Jazz Has Got Copyright Law and That Ain’t Good*, 118 HARV. L. REV. 1940, 1945-1946 (2005) (footnote omitted)); 17 U.S.C.S. § 115(a)(2) (2012)).

are derivative works by definition, which is why they warrant express prohibition of seeking independent copyright protection. The mashup cover would have more original ingenuity in its making than merely making an arrangement of one work in a new style, but that becomes a sweat of the brow argument, which does not in itself bestow copyright protection. The express prohibition from seeking copyright protection for the resulting work in this section would apply.

Although the derivative works right may seem to preclude mashups, the courts' prioritization of transformativeness in the fair use discussion, as well as the fact that all "original" work builds on existing ideas and expressions in one form of another, indicates that is not necessarily the case.¹²¹ Since, before comparing works for substantial similarity, courts separate out the unoriginal from the expressive, it is important to distinguish what aspects of a musical work are unoriginal.¹²² *Scenes a faire* (hackneyed, traditional fugues)¹²³ or functional aspects of a work¹²⁴ are not protectable; in music, "basic rhythm patterns, standing alone," and "chord patterns" are considered unoriginal and thus "part of the public domain[;]" they would need to be an original compilation or have something more than simple musical phrases to qualify for protection.¹²⁵ "[C]omplex original rhythm, melodies,[]lyrics[.]" and "original compilations" thereof are, however, protected.¹²⁶

C. Arguments for Extending the Cover License to Mashups

The compulsory licenses (in 17 U.S.C.S. § 114 (for radio and other broadcasting) and § 115 (for distribution and covers)) are necessary to remedy the anticompetitive nature of the music market.¹²⁷ Without a compulsory license, rights owners have no obligation to license their work, or even to use it,¹²⁸ and can thus "unilateral[ly] refus[e] to license[.]" preventing productive use of the intellectual property.¹²⁹ Licensing allows intellectual property to be

121. Menell, *supra* note 1, at 490.

122. *Id.*

123. E.g.: star-crossed lovers defy society and run off together.

124. E.g.: having a hood on a jacket.

125. Menell, *supra* note 1, at 490, 490 n.273 (citing AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 417 (2d ed. 1996)); *Id.* at 490 n.274 (citing COPYRIGHT OFFICE, *COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES* § 406.03 (1984)).

126. *Id.* at 490 (citing AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 417 (2d ed. 1996)).

127. Garcia, *supra* note 30, at 241-42; 17 U.S.C.S. § 115 (2012); 17 U.S.C.S. § 114 (2012).

128. Refers primarily to patent owners who do not practice (use) their patents to make goods, but instead build a portfolio of patents to sue for infringement against anyone who attempts to build upon those ideas with new innovations; such behavior runs contrary to the purposes of intellectual property law to promote innovation.

129. Garcia, *supra* note 30, at 241 (citing HERBERT HOVENKAMP ET AL., IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 13.1, 13.2, 13.2a (2002)); see also Herbert Hovenkamp et al., *Unilateral Refusals to License*, JNL. OF COMPETITION LAW & ECON., March 2006 2(1), at 1-42 (stating that there is no "duty" or requirement to license anything, and

used efficiently to provide new products and increase the monetary returns for rights owners, the prospect of which promotes original creation and innovation; to allow “withdrawals and refusals” to license reduces the value of the underlying intellectual property.¹³⁰ “[T]he compulsory license for cover songs[protects] the societal value [of creating] different versions of a song [despite] the propensity for copyright owners to deny the realization of this value . . . by limiting the copyright holder’s ability to refuse to license in exchange for money[.]”¹³¹ It is a built in means to prevent “copyright holdup” by using a liability framework as opposed to a property structure.¹³² The codification “of a compulsory license” illustrates that when a market is not competitive, it must be regulated; as such, copyright regulation “can be fairly readily augmented to make up for [its shortcomings] in the music context[.]” and thus encourage competition.¹³³ Garcia suggests that “a governmentally authorized collective” can manage any new compulsory licenses.¹³⁴

Professor Menell posits that creating a compulsory license system for sampling mashups, modeled on the existing compulsory mechanical “cover license[.]” would update “the copyright system” in a way which does not detract from fair use, but rather allows modern artists to work within legitimate “marketplaces” so that “both mashup artists and owners of sampled works [can] profit equitably from the public’s enjoyment of the resulting work.”¹³⁵ Menell proposes that a sampling mashup license would operate by the mashup artist registering a list of the component songs, how much and what is used, and a copy of the resulting work, with the copyright office, and paying a fee; the copyright office would determine that the work does not violate any regulations, and then issue a certificate indicating “ownership shares,” which would be used to allocate royalties in distribution.¹³⁶ As for exactly how the royalties should be divided, Professor Menell suggests a split of one third to the mashup artist, one third to the owners of the compositions, and one third to the owners of the sound recordings, and further splitting the third

unilateral refusal to license is only actionable under antitrust law if the rights owner may get monopoly power from said refusal).

130. Garcia, *supra* note 30, at 241 (citing U.S. DOJ & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property*, Justice.gov, § 2.3 (Apr. 6, 1995), <http://www.justice.gov/atr/antitrust-guidelines-licensing-intellectual-property> [<http://perma.cc/ZL8A-GXGV>]; *In re Napster, Inc. Copyright Litigation*, 191 F. Supp. 2d 1087, 1102 (2002) (indicating that misuse of copyrights is an “equitable defense of unclean hands” for infringement just as it is in patent law)).

131. *Id.* at 242.

132. Liu, *supra* note 28, at 261-62.

133. Garcia, *supra* note 30, at 242.

134. *Id.* at 248.

135. MENELL, *supra* note 1, at 445-46, 446 n.14 (citing ARAM SINNREICH, MASHED UP: MUSIC, TECHNOLOGY AND THE RISE OF CONFIGURABLE CULTURE 194-95, 208 (2010)) (contending that mashups indicate a cultural shift that necessitates a change in the system).

136. *Id.* at 496.

proportionally according to the number of works involved.¹³⁷ This actually gives far less of the revenue to the sampling artist than the cover license gives to a cover artist, which makes sense given that they are borrowing much more and more rights holders have a stake in the resulting work. Such a license should only apply to mashups where multiple samples are mixed or the samples are intermixed in a more “intensive” way, to avoid people seeking licenses for samples which are mere copies of the original with almost no changes (such as copying an entire song as-is and only adding one drum-beat).¹³⁸ He advocates using a “time-based” approach to divide the royalties, as “factoring in the intensity of the remix or the market popularity of the sampled works” would make it needlessly complicated.¹³⁹ Keeping the approach simple makes situations where a remix samples a “prior remix” easier to handle, as the royalties can be split and then sub-split according to the existing framework.¹⁴⁰ The whole process would be simplified and more “workable” if there is a “de minimis” level of usage for which no royalty is required, such as two-seconds or less, provided that it is not repeated or looped, unless those two-seconds are “sufficiently iconic[.]”¹⁴¹ A collateral concern of extending the cover license to mashups is that it could preclude a finding of fair use, or narrow the scope thereof, since a factor in the fair use analysis is whether there are licensing schemes available; however, the uses under the licenses will be commercial in nature, and not so much the free-speech uses which fair use ultimately seeks to protect; additionally, with the licensing in place, there would be no need to seek the fair use defense for the mashups.¹⁴² “Prohibitive transaction costs” and “subjective legal standards” lead to a lack of fair compensation for mashup artists’ work; adapting the cover license to mashups would lead to “fairer compensation” for all parties involved, and allow this genre to move “into authorized markets[.]”¹⁴³

It is helpful to understand additional aspects of the rationale which supports the existence of the 17 U.S.C.S. § 115 compulsory license to see how they apply to the extending thereof. To properly contextualize Menell’s proposal and the rebuttal and distinctions which follow, it is important to note

137. *Id.*

138. *Id.* at 497.

139. *Id.* at 498.

140. *Id.*

Such a situation could apply to Rihanna’s SOS sampling the instrumentals of Soft Cell’s cover of Tainted Love / Where Did Our Love Go, for example. See Soft Cell, Tainted Love (Warner Bros. Records, 1981); Rihanna, SOS (Def Jam Records, 2006).

141. Menell, *supra* note 1, at 498-99 (citing Bridgeport Music, Inc. v. SmelzGood Entm’t, Inc., No. 3:01-0780, 2006 WL 2432126, at *2 (M.D. Tenn. Aug. 22, 2006)).

142. *Id.* at 505 (citing Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1932 (2007); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1657 (1982)).

143. *Id.* at 442.

the debate in copyright law between liability and property rules. A property framework more strongly restricts innovation in favor of the exclusivity of the copyright owner's rights, whereas a liability framework encourages creativity and prioritizes compensation for the use of existing works over the need to seek permission. A strict property rule system would be more effective if economics and "free expression" were not key factors in the equation but since they are, the rules surrounding music copyright need to be more nuanced to promote both "primary and secondary creativity."¹⁴⁴ "[O]pen-ended liability rule[s,]" alternatively, allow for a "flexib[le]" balance between both interests.¹⁴⁵ Although compulsory licenses are liability-based rules, the concern that set values lead to undervaluing of creative works does not apply to cover licenses, as "parties frequently choose to contract around these liability rules," indicating that there is no need to debate whether prices should be set by a compulsory license or left up to "private bargaining around property rules[,]" because "parties are just as likely to bargain around compulsory licenses."¹⁴⁶ In fact, the current statutory rate of 9.1 cents per song resulted from negotiations over time.¹⁴⁷ While negotiations are important, without compulsory licensing, leaving it purely up to individual bargaining can result in holdups and lacks the accuracy of set liability rules.¹⁴⁸ Furthermore, leaving it to property rules frames negotiations in a perspective which may make an IP owner "more reluctant to part with something they think of as 'theirs,'" and could result in "overcompensate[ing] IP owners," or hindering "efficient transactions."¹⁴⁹ Having liability rules under which one can sue for damages, if the statutory rate is not paid, does not have this inhibiting

144. *Id.* at 491 (citing Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29, 37-39 (1991); R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 15-19 (1960); Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 553-55 (2010)).

145. *Id.* at 491.

146. Mark A. Lemley, *CENTENNIAL TRIBUTE ISSUE: Contracting Around Liability Rules*, 100 CALIF. L. REV. 463, 483-84 (2012).

147. *Id.* at 478-79 (citing Mechanical License Royalty Rates, U.S. Copyright Office (Oct. 18, 2010), <http://www.copyright.gov/carp/m200a.html>; *Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 5 (2004), at 11-13, available at <http://www.copyright.gov/docs/regstat031104.html>).

148. *Id.* at 484-85 (citing Einer Elhauge, *Do Patent Holdup and Royalty Stacking Lead to Systematically Excessive Royalties?*, 4 J. COMPETITION L. & ECON. 535, 557 (2008); Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091 (1997); Richard A. Epstein & F. Scott Kieff, *Questioning the Frequency and Wisdom of Compulsory Licensing for Pharmaceutical Patents*, 78 U. CHI. L. REV. 71, 80 (2011); John M. Golden, *Intellectual Liability in Context*, 88 TEX. L. REV. 211, 217 (2010); John M. Golden, *Principles for Patent Remedies*, 88 TEX. L. REV. 505, 568-69 (2010), <http://www.texasrev.com/sites/default/files/seealso/vol88/pdf/88TexasLRevSeeAlso211.pdf>; Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783 (2007)).

149. *Id.* at 485.

effect on bargaining and creativity.¹⁵⁰ Striking a deal is typically a more utilitarian outcome than an injunction in a copyright case.¹⁵¹ Regarding derivative works, even the Supreme Court has said that courts should consider policy surrounding freedom of speech before resorting to injunctive relief.¹⁵² Having a set value serves, at the very least, as a fair starting point for negotiation.¹⁵³

With this increased understanding of the importance of liability rules within an intellectual property context (to prevent unilateral refusals to license and set a baseline around which parties can still choose to contract), it is easy to see the issues with the following rebuttal to Menell's proposal to extend the compulsory license. While an economic or liability perspective focuses on equity between the copyright owner and user, placing greater weight on efficiency and thus justifying the expansion of a compulsory license,¹⁵⁴ when analyzed through Merges' strong property interest framework, which balances the interests of the copyright owner and of the public, such expansion is not as justified.¹⁵⁵ Some entertainment law attorneys argue that, when analyzed through the Merges' strong property interest approach to copyright law, extending the license in this way would devalue the copyright interest, and that there is "no legal, economic[,] or creative justification for creating such a compulsory license."¹⁵⁶ Their primary reasons for this conclusion are that a compulsory license "eliminates a creator's right" to approve or to "say 'no'" to the use; "undervalue[s]" the works due to below-market statutory rates; and does not correct a market failure as there is a free market for sampling.¹⁵⁷ Many of the points in this rebuttal are moot when applied to mashup covers.

To the first point, as the entertainment lawyers acknowledged in their own article, Professor Menell argued that copyright is not a property interest to the same degree as real property; in fact, the majority of the technology industry and academia have adopted this view favoring a compulsory license

150. *Id.* at 486.

151. *Id.* at 485.

152. Liu, *supra* note 28, at 219, 224 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).

153. Lemley, *supra* note 146, at 485.

154. Dina LaPolt et al., *ARTICLE: A Response to Professor Menell: A Remix Compulsory License Is Not Justified*, 38 COLUM. J.L. & ARTS 365, 366 (2015) (citing William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989)).

155. *Id.* (citing ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 4-9, 139-41, 228-29 (2011)). See also Robert P. Merges, *ARTICLE: Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293 (1996) (asserting the importance of contracting in entitlement theory and "the economic advantages" of strong intellectual property rights).

156. LaPolt, *supra* note 154, at 366-67.

157. *Id.* at 368.

which fosters efficiency over a “creator’s right to say ‘no[.]’”¹⁵⁸ Copyright is a system of qualified rights in favor of innovation. To the second point, since the compulsory license is actually seldom used, with rights owners voluntarily contracting for lower rates than the statutory rates, arguing that statutory rates undervalue the work is a weak argument. Although Nimmer states the statutory rate is often thought of as a ceiling in negotiations, when it comes to mashups, the negotiation power shifts and such issues are more likely to be settled for a rate that is fair to both parties according to the relinquishment of control and the degree of use. As to the third point, the compulsory license itself exists to correct the market failure of monopolies derived from a unilateral refusal to license. By arguing that some content creators’ voluntary participation in creative commons cures the need for compulsory licensing,¹⁵⁹ the entertainment lawyers ignore the monopoly that would be held by the majority of copyright holders, who choose not to participate in a creative commons. The compulsory license steps in there, to ensure the expression is monopolized but not the ideas, such that others can make recordings of the works in their own styles. Likewise, a unilateral refusal to license a mashup cover, with no meritorious objection to the resulting content, would run contrary to the rationale behind the compulsory license. Additionally, refusal to license is a multi-layered issue in works which use “a large number of copyrighted works[.]” as the rights owners can “strategically withhold permission in order to increase their shares in the total package of licensing royalties, which could cause negotiation breakdown.”¹⁶⁰ Just like the compulsory license as it currently exists, the extended license would facilitate the licensing of compositions by limiting the rights owner’s ability to unilaterally refuse (avoiding a monopoly), and setting a standard rate and procedure for the licensing around which the market can contract.

The entertainment law attorneys’ conclusion, that expanding the compulsory license to sampling mashups is not justified, is predicated on the idea that copyright owners hold “a strong property interest[.]”¹⁶¹ This runs counter to the limited monopoly concept upon which copyright principles are based (expression), and the underlying rationale of promoting the free exchange of ideas.¹⁶² In fact, the purpose of the compulsory license is to prevent

158. *Id.* (citing Peter S. Menell, *Intellectual Property and the Property Rights Movement*, 30 REGULATION 36, 36-42 (2007)).

159. *Id.* at 371.

160. Liu, *supra* note 28, at 257 (citing Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998)).

161. LaPolt, *supra* note 154, at 367.

162. See e.g. Garcia, *supra* note 30, at 242 (“[T]he real purpose of a compulsory license is to reduce the extent to which copyright ownership of the covered work conveys monopoly power, so that the

monopolies arising from the notion of strong property rights; the license is, by its very nature, a creature of a liability rules system rather than a property framework. Additionally, the license and rights for sound recordings themselves are different from that regarding musical compositions. Their argument is stronger with regards to sampling but does not apply in the same way to a mashup cover. As discussed in the previous sections, to distribute the sound recording of another would require licenses for both the underlying composition and the specific sound recording. This sets sampling mashups, and the degree of property rights one finds in a sound recording, apart from covers. Other than for radio transmissions and similar online services, the copyright law gives rights holders greater control over their sound recordings (under § 114), than it does for musical compositions, by virtue of the compulsory cover license in § 115. The law explicitly treats these rights differently, conferring a stronger property interest over sound recordings than over the composition behind them, which is in line with protecting expression over ideas.¹⁶³ That is not to say that users have the right to take and twist the works in any way they please, as the statute alludes to a line and *Campbell* established what goes beyond crossing it, as well as considerations for determining at what point to draw it.

IV. APPLYING A MODIFIED STATUTORY LICENSE TO MASHUP COVERS

In order for the compulsory license to function, it includes an inherent, but limited, adaptation right for the licensee to make a new arrangement of the work in his or her style or interpretation, so long as it does not “change the basic melody or fundamental character of the work . . . [.]”¹⁶⁴ and does not “pervert[], distort[], or travest[y]” the original.¹⁶⁵ In *Campbell v. Acuff-Rose Music, Inc.*, wherein 2 Live Crew recorded a version of Roy Orbison’s song *Pretty Woman*, which parodied the meaning of the song in a humorous but distasteful manner,¹⁶⁶ 2 Live Crew acknowledged that its rendition changed too much and crossed the line, making the resulting new composition fall outside of the compulsory license.¹⁶⁷ Due to the perversion of the

copyright owner must make the work available to all who wish to access and exploit it.”)(citing Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865, 1926 (1990)).

163. While both are expressive, the recording with its individual arrangement and performance contains multiple layers of expression, whereas the underlying composition is more conceptual in nature.

164. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(F) (quoting 17 U.S.C. § 115(a)(2)).

165. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).

166. *See generally Campbell*, 510 U.S. at 569.

167. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(F) n.97 (citing *Campbell*, 510 U.S. at 569; *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1432 n.3 (6th Cir. 1992) (reversed by the Supreme Court

original composition, their success in the Supreme Court was not under the compulsory license, but as a parody.¹⁶⁸ The “fundamental character” language indicates a congressional intent to “respect . . . the moral rights of composers.”¹⁶⁹ However, it would obstruct free speech to allow anyone to object to the creation of a work of art because it offends them. “Copyright clearance could be extremely difficult where some authors decline to grant permission simply for non-commercial reasons (e.g., suppressing speech).”¹⁷⁰ In fact, the biggest roadblock under a purely negotiated licensing system is “the high likelihood” that the rights holders would deny a license for some of the component works, rendering the entire composition non-monetizable.¹⁷¹

Courts have recognized that if a licensed composition includes both music and lyrics, the licensee has, “inherent in the compulsory license,” the “latitude . . . to prepare an individual instrumental or vocal arrangement of the composition.”¹⁷² This means that a cover under the compulsory license can be both instrumental and vocal, only vocal, or only instrumental. Thus, if a cover artist obtains a compulsory cover license for two songs and makes his or her own recording of the instrumental portion of one, and a recording of the vocal portion of another, without changing the character beyond performance variations such as tempo and key signature, both components are within the adaptation rights afforded by the compulsory license. This type of mashup cover involves the smallest amount of change; the music and lyrics are themselves unaltered, and thus none of the melody nor meaning would be disturbed. Although this does not explicitly mean that the resulting combination is within the compulsory license, if it does not run afoul of the original’s meaning, spirit, or integrity,¹⁷³ based on the rationale *Campbell*, a court would more likely find such an arrangement to be within the compulsory

opinion). Note that 2 Live Crew’s version had entirely different, parodical, lyrics, and an entirely different musical style and arrangement. *Campbell*, 510 U.S. at 594-96.

168. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(F).

169. *Id.* (citing In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, Docket No. RF 2006-1 at 25 n.103 (Oct. 16, 2006)).

170. Liu, *supra* note 28, at 257 (citing New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp., 904 F.2d 152 (2d Cir. 1990); Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995) (both of which illustrate the problem arising when a religious organization seeks to prevent the distribution of media which speaks ill of the organization)).

171. Menell, *supra* note 1, at 482.

172. 2 NIMMER & NIMMER, *supra* note 14, at § 8.04(F) (citing Marks Music Corp. v. Foullon, 79 F. Supp. 664 (S.D.N.Y. 1948), *aff’d*, 171 F.2d 905 (2d Cir. 1949); Leo Feist, Inc. v. Apollo Records, N.Y. Corp., 300 F. Supp. 32 (S.D.N.Y. 1969), *aff’d*, 418 F.2d 1249 (2d Cir. 1969)).

173. There is unlikely to be a moral objection from the copyright owner in such a case, unless an industrious individual sets abrasive lyrics to the tune of the song, and proposes to combine those words with the melody. However, that crosses into parody, from which Weird Al makes his fortune and on which *Campbell* was ultimately decided in 2 Live Crew’s favor.

license.¹⁷⁴ For the other types of mashup covers, where music and lyrics are used from both songs, either alternatingly, or in a more blended manner, the result is more elusive.¹⁷⁵

The copyright office's determinations regarding ringtones help to shed light on what qualifies for the § 115 compulsory license. In 2006, the copyright office exercised its authority under 17 U.S.C.S. § 802(f)(1)(B)(ii) to decide that a ringtone is in fact a digital phonorecord delivery.¹⁷⁶ The Recording Industry Association of America (RIAA) argued that ringtones were in fact digital phonorecord deliveries and therefore included in the § 115 compulsory license, while copyright owners argued they are not because they are arrangements and they only use part of "the underlying composition, not the entire musical work[.]" meaning that ringtones should therefore be subject to voluntary licenses.¹⁷⁷ The Register of Copyrights found for the RIAA, that ringtones, regardless of whether they sample a portion of the original recording, or are a new arrangement involving a plain melody, or a new arrangement with a melody and harmony, do qualify as phonorecords and that their sale is therefore a digital phonorecord delivery under § 115.¹⁷⁸ In the analysis, the Register of Copyrights determined that a ringtone of a popular song where the artist created alternate lyrics for the purpose of a ringtone would be "copyrightable as a derivative work because it is original" and has inherent creativity, whereas ringtones "that simply copy a portion of the underlying musical work [] cannot be considered derivative works because such excerpts do not contain any originality and are created with rote editing."¹⁷⁹ However, for ringtones which copy a portion of the original song but also contain "additional spoken material" or "the addition of some lyrics[.]" the Register of Copyrights determined that whether or not the result

174. Applying the patent doctrine of equivalents to copyright further supports this, allowing uses that "are equivalent in purpose and function to the claims stated[.]" Such application of this concept would be consistent with the Second Circuit's broad interpretation of compulsory licenses. Allshouse-Hutchens, *supra* note 26, at 577-78 (citations omitted).

175. A highly successful example of this is Israel Kamakawiwo'ole's cover of Somewhere Over the Rainbow/What a Wonderful World. Israel Kamakawiwo'ole, *Somewhere Over the Rainbow* (Sony Music Publishing, LLC 1990). Although the terms and nature of the license are not publicly available, a search of ASCAP's Repertory database indicates that Kamakawiwo'ole had a mechanical license for each of the component songs. ACE Repertory, <https://www.ascap.com/repertory> (last visited Oct. 21, 2017).

176. 2 NIMMER & NIMMER, *supra* note 14, at § 8.23(A)(5) (citing In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, Docket No. RF 2006-1 (Oct. 16, 2006) [hereinafter *Adjustment Proceeding*]).

177. *Id.* (citing *Adjustment Proceeding*, *supra* note 176, at 5).

178. *Id.* (citing *Adjustment Proceeding*, *supra* note 176, at 3).

179. *Id.* at n.38 (quoting *Adjustment Proceeding*, *supra* note 176, at 24). See also Eric C. Surette, Annotation, *What Constitutes Derivative Work Under the Copyright Act of 1976*, 149 A.L.R. FED. 527 (2017) (stating that contributions to the work must be "sufficiently original" and "more than merely trivial[.]" some jurisdictions have required "substantial variation[.]" (citing U.S. Const. art. I, § 8, cl. 8; 18 Am Jur 2d, *Copyright and Literary Property* § 42; L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 189 U.S.P.Q. (BNA) 753 (2d Cir. 1976))).

constitutes “a copyrightable derivative work is a mixed question of fact and law” outside the scope of the controversy that was before it.¹⁸⁰

A good approach for extending the cover license to mashup covers would be “a mandatory scheme of ‘voluntary licensing’” as termed in the legislative history for the DPRA (regarding licensing of transmissions over subscription radio), or alternatively, a compulsory license just like the 17 U.S.C.S. § 115 cover license. The system proposed below is not strictly compulsory, as the rights owner could still have a limited opportunity to object.

Having a set standard for a license which is available to anyone is a fair way to facilitate creativity by eliminating financial and legal barriers.¹⁸¹ Mashup covers can be reasonably treated as either two separate covers of the lyric and instrumental portions of the component works,¹⁸² or for more integrated mashups, as a transformative new arrangement which is within the crossroads of what could qualify as fair use and the limited arrangement right allowed in the statutory cover license.¹⁸³ The extension of fair use by the Supreme Court supports this construction of the law in such a way as to facilitate innovation.¹⁸⁴ Thus, Mashup covers could fall under the compulsory cover license so long as they do not violate the *Campbell* standard.¹⁸⁵

Composers might object to their works being potentially juxtaposed in a mashup with ideas which they find unsavory or “offensive[;]” however, the law and rationale supports the mashup artists on this point, due to the protection of free speech relied upon in the reasoning in *Campbell*; although it

180. 2 NIMMER & NIMMER, *supra* note 14, at § 8.23(B)(1).

181. Menell, *supra* note 1, at 495.

182. See *supra* note 164 and accompanying text.

183. Although *Campbell* involved a transformative cover cleared as a parody, which would not apply to mashup covers (see *infra* notes 185 and 188 regarding how *Campbell* applies beyond parody), depending on how you look at it, they are either most transformative or no more transformative than a cover generally is; this depends both on one’s perspective as well as the type of mashup in question. An A vs. B mashup would be the least transformative, comprising a non-transformative cover of the lyrics of one song and a non-transformative cover of the instrumentals of another. However, a more integrated mashup would be objectively, comparatively more transformative for at least one of the component songs and would merit further analysis of whether its transformative nature makes it more akin to fair use or to a derivative work. See Gervais, *supra* note 77, at 854 (Art which uses “multiple works or fragments” thereof to create a new “montage or collage” is more “likely to be transformative fair use” than a work which appropriates “a whole, unchanged” work) (citing Johnson Okpaluba, *Appropriation Art: Fair Use or Foul?*, in DEAR IMAGES: ART, COPYRIGHT AND CULTURE 198-99, 200 (Daniel McClean & Karsten Schubert eds., 2002)).

184. See Joseph P. Fishman, *ARTICLE: The Copy Process*, 91 N.Y.U.L. REV. 855 (2016) (arguing that, as is done with trade secrets [wherein copying is permitted so long as it was reverse-engineered], copyright law should consider not only how similar a copy is but also how it was made; stating that although the process sometimes matters in cases, it should officially matter in the law).

185. But note that although the transformative cover in *Campbell* was cleared under the fair use doctrine despite being for commercial purposes, that was primarily due to its parodical nature; for mashup covers, the negation of a fair use defense would not be at issue at all once licensing is available. *Campbell* is applicable to the extent of its rationale for allowing the transformative cover, and discussion of potential for offensiveness.

would not be authorized or condoned by the original artist, courts do not want to engage in censorship.¹⁸⁶ Although mashup covers are typically not parodies, the song in *Campbell* was a cover which the rights owner found offensive, perhaps rightly so, as it entirely upended the meaning behind the original, and was thus not likely to be “authorized[.]”¹⁸⁷ Although it was cleared as a parody, the rationale behind the decision indicates the court’s support for the cover artist’s free speech over any moral rights concerns of the rights owner, such that they were willing to bend the rules of fair use to include a commercial use so long as it was sufficiently transformative.¹⁸⁸ The Supreme Court was loathe to suppress the cover artist’s speech merely because it offended the sensibilities of the original artist, so it found a means to allow the content under the current legal framework. As such, once a licensing scheme is in place for mashup covers, it stands to reasons that courts, or at least, the Supreme Court if and when it grants certiorari to such a case, would hold freedom of speech in higher regard and would allow such mashups despite any moral objections from the rights holder. If the copyright holder had an objection, whether the resulting work violates *Campbell* could be determined by a balancing test weighing facial perversion of the original against freedom of speech. If there is nothing about the new work which runs counter to the message or spirit of the original work (it does not pervert, nor distort the meaning), then it would pass the test and be subject to the compulsory license. However, if the new work does distort the meaning/spirit of the original, or in some way is objectionable to the copyright holder’s religion or core beliefs, it could fail the test and would require a voluntary license or alternate basis (such as parody). This could be a way to potentially allow more leeway for the moral rights of the copyright owner;¹⁸⁹ however, allowing a core beliefs objection would expose artists to censorship if they wish to

186. Menell, *supra* note 1, at 506.

187. *Id.* (citing *Campbell*, 510 U.S. at 592).

188. See RONALD S. ROSEN, MUSIC AND COPYRIGHT 298 (2008) (quoting *Campbell*, 510 U.S. at 583) (“[T]he transformative/superseding [market] test [in *Campbell*] applies to fair uses other than parody . . . that traditionally have had a claim to fair use for protection as transformative works.”).

189. See, e.g., Caroline Kinsey, ARTICLE: *Smashing the Copyright Act to Make Room for the Mashup Artist: How a Four-Tiered Matrix Better Accommodates Evolving Technology and Needs of the Entertainment Industry*, 35 HASTINGS COMM. & ENT. L.J. 303, 304-06 (2013) (Wherein the author argues for a system which protects both mashup artists (First Amendment) and moral rights by establishing a compulsory license with a multi-factor system to determine what does and does not fall under fair use with regard to mashups); see also Joseph P. Liu, *Ownning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1315-1316 (2001) (arguing that an ideal copyright system would “balance incentives for creating original works against incentive for creating follow-on works” in order to “account adequately for the extent to which creative works are based upon, and draw from, prior creative works.” (citations omitted)), *Campbell*, 510 U.S. at 575 (“[I]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”) (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845)).

speaking against organizations.¹⁹⁰ Professor Menell actually came close to recommending something similar, giving “authors the ability to opt out of the compulsory license regime on a transactional basis . . . [to] affirmatively communicate their opposition[,]” but he did not feel such an option would adequately “address the moral concern[,]” and that even the “desire” to limit “hate speech” flies in the face of the core American value of “cultural freedom[,]” as allowing certain speech but prohibiting “other speech [is] a dangerously slippery slope.”¹⁹¹ An alternative possibility is to, when amending the statute to clarify the legal status of mashup covers, make it “expressly” state that the artists whose works are sampled have not specifically consented to the remixes, thus avoiding any misattribution or appearance of endorsing the topics or themes addressed in the resulting works.¹⁹² Additionally, there is no legally enforced moral right in music copyright law; although the United States “reluctantly” created a moral right for visual art, to comply with the Berne Convention, no such measures have been taken for music, as to do so runs counter to our core value of freedom of speech.¹⁹³

Royalties would be best handled pro-rata, as HFA currently processes such requests that way. An alternative royalty calculation is multiplicative; to incentivize rights holders to permit such uses, giving each component rights owner the statutory cover royalty. HFA licenses are already, by their nature, technically negotiated licenses, not compulsory licenses.¹⁹⁴ This would be no different; amending the law to explicitly include mashup cover usage would serve the same purposes as the original cover license—to serve as a starting point for negotiations and set a standard process. When it comes to medleys, involving higher and higher numbers of component works, the pro-rata approach can result in tiny royalties that are not worth the transactional cost. In

190. See *supra* note 170 and accompanying text.

191. Menell, *supra* note 1, at 507-09.

192. *Id.* at 500.

193. *Id.* at 508-09 (citing *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 24 (2d Cir. 1976); The Visual Artists Rights Act of 1990 (VARA), Pub. L. No. 101-650, 104 Stat. 5128, 5132 (codified as amended at 17 U.S.C. § 106A (2012)), added § 106A to the Copyright Act; additional case citations omitted)). See also Liu, *supra* note 28, at 263 n.233 (citing 17 U.S.C. § 106A (2006)). See also note 182 and accompanying text.

194. Allshouse-Hutchens, *supra* note 26, at 580. See generally *id.* (discussing that although the Digital Millennium Copyright Act extended both new and existing compulsory licenses to digital recordings, whether an established license applies to new forms of media depends on whether it is truly a statutory license or is instead negotiated; if negotiated, it is limited to its express terms). See also 3 NIMMER & NIMMER, *supra* note 86, at § 10.10(b) (citations omitted) (There have been two approaches: either limit the license to the “core meaning” of the express terms, or the licensee can “pursue any uses that may reasonably be said to fall within the medium as described in the license;” the latter, preferred approach, includes ambiguous uses, which are by definition reasonable constructions. Courts prefer the latter approach, because courts are capable of construing reasonable meanings of terms, whereas it can be impossible to identify one true meaning which may not actually exist; also, it makes sense to apply a meaning which the licensee reasonably understood rather than to require express clarity on a reasonable understanding.).

the multiplicative approach, the result would be exorbitant royalties which exceed 100% of sales and are thus entirely impractical.¹⁹⁵ Thus, medleys which use higher numbers of songs would be best approached with a fair use argument, as the use of each component work would be *de minimis*.

Unlike Professor Menell's proposal to extend the statutory license to sampling, the royalty splitting system for a mashup cover would be much less complex. Since the only rights at issue are to the underlying musical composition, not to the sound recording, it is just a matter of splitting what has already been deemed an appropriate cover song royalty between the component songs. If such a rate is negotiated, then the "intensity" of the mashup could play a factor (as this affects how much of the resulting work is the mashup artist's own original expression; a more intense blend is less of a copy and can perhaps warrant negotiating a lower royalty). However, for the sake of efficiency and fidelity to the existing cover license, a proportional distribution based on time would be the most effective. A typical mashup cover, consisting of two (or sometimes three) songs intermixed in one way or another, would tend to split cover royalties evenly between the component songs, whether it is an A vs. B mashup or a more integrated mix of the two, provided they are represented in more or less equal measure. For a more integrated mashup with more than two component works, this would be more of a qualitative proportional evaluation rather than a quantitative time measure.¹⁹⁶ For example, an integrated mashup of three songs could still have the cover royalty split close to half and half if it only uses one or two elements of the third song;¹⁹⁷ such a mashup cover could have its cover royalties split 40/40/20 depending on the negotiations. Given the history and culture of contracting around the statutory cover license, it follows that if the cover license were to provide guidelines for mashup covers, rights holders and artists would contract around these terms to suit their individual purposes. As for the amount of royalty which the original composers are to split, that would either be the same as the general cover license royalty (9.1 cents per song or 1.75 cents per minute or part thereof), or it could be increased to better incentivize what composers may view as relinquishing another part of their

195. See Menell, *supra* note 1, at 480-81 (citing MCLEOD & DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING, 205 tbl.2 (2011)) (using calculated examples to illustrate that the costs of licensing make it impractical financially to obtain licenses for "remixes containing multiple samples[.]" The royalties can quickly add up to exceed the proceeds).

196. See KOHN & KOHN, *supra* note 90, at 61 (4th ed. 2010) (suggesting that collectives such as ASCAP and BMI can set the prorated value of works used in a derivative work according to relative value, since they currently set the shares of revenue for different types of performances.); *id.* at 533 (listing "fee structure," value based on "popularity,[.]significance, and overall quality[.]" "importance of the song...to its intended use[.]" and "scope of the intended use[.]" as factors for determining license terms).

197. Such as a moving bassline used throughout the song which complements the two primary songs, and possibly a few lyric lines to conjure up that third song.

control over their works. It would not be practical, however, to simply multiply that current statutory royalty for each component song. Although that would be workable for most mashup covers, involving two component songs, it quickly becomes ridiculous when considering more intense mashups or medleys. This is the same problem which Professor Menell referenced with regard to sampling mashups involving dozens of songs;¹⁹⁸ the royalties would quickly surpass the profits such that the licensing would not be financially feasible. As for administrative concerns, the licenses could be handled online through HFA just like other cover licenses.¹⁹⁹

With legal uncertainty, mashup artists don't have much "motivation to undertake such projects;" potential exposure to statutory damages hinders the production of creative works.²⁰⁰ The ability to split revenue adds value to old works and increases exposure for both the old and new artists.²⁰¹ As the statutory cover license has evolved over time due to contractual arrangements around its terms, adopting a multi-licensing approach as a new industry standard has the potential to lead to the next evolution of the law, either through future litigation settling the issue, or a legislative update to the cover license applicability. Having a voluntary-mandatory, or compulsory license system for mashup covers would improve the market both for the original works and the mashup artists' works, provide just compensation for all involved, increase usership of legitimate distribution channels (including those monetized by advertising), and increase overall licensing revenue.²⁰²

198. See *supra* note 195 and accompanying text.

199. See Menell, *supra* note 1, at 499, 499 n.315 (citing About, SOUNDEXCHANGE, <http://www.soundexchange.com/about> [<http://perma.cc/Z7G5-8HJD>]) (suggesting the sampling licenses could be handled similarly).

200. *Id.* at 501.

201. *Id.* at 489.

202. See *id.* at 501-03 (wherein Menell makes the same argument for having such a license for sampling mashups, although it is a stronger argument when applied to mashup covers, as they involve new recordings, it a natural extension of the statutory cover license).