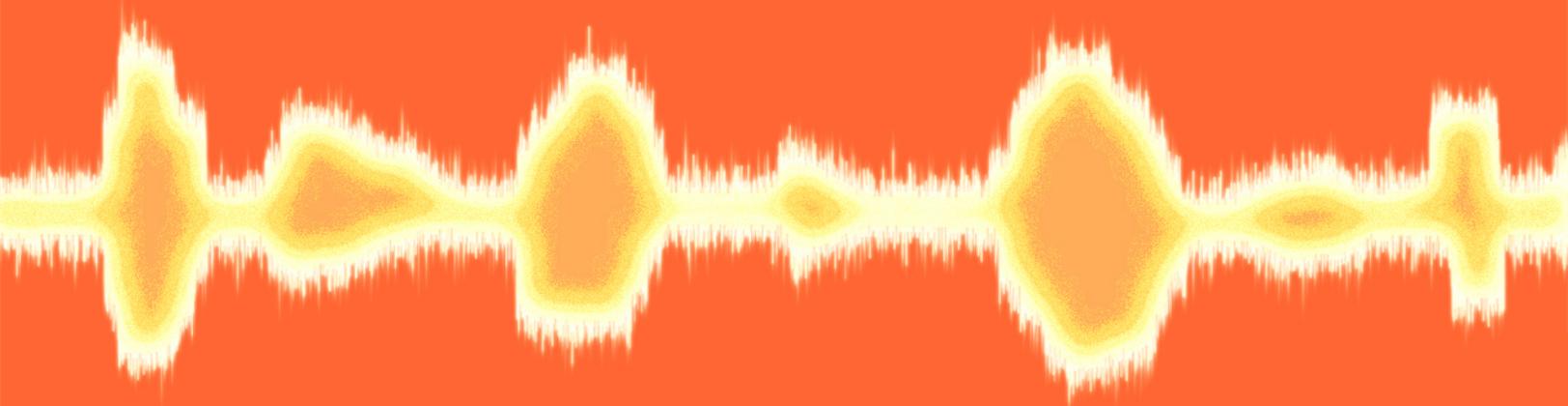


# BRIEFING BOOK



# Signal/Noise 2k5

creative revolution?



Committee on  
*Sports &  
Entertainment*  
L A W

Gartner | G2



4.08.05

## **Signal or Noise 2k5: Creative Revolution? Briefing Materials**

Welcome to Signal or Noise 2k5: Creative Revolution?, co-hosted by the Berkman Center for Internet & Society at Harvard Law School, the Harvard Journal of Law and Technology, the Harvard Committee on Sports and Entertainment Law, and Gartner | G2.

Signal or Noise 2k5: Creative Revolution? will examine the audience creativity that is enabled by digital technologies and its legal, ethical, cultural, and business implications. These briefing materials provide background and overview readings for some of the core legal and ethical questions that will be raised at the conference. Briefing materials are organized below by conference themes and are intended to expound upon various aspects of each theme.

Law school students and Berkman staff prepared these conference briefings. We welcome your comments and input. Please direct comments to Meg Smith at [mesmith@cyber.law.harvard.edu](mailto:mesmith@cyber.law.harvard.edu).

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# **A Practical Guide to the Fair Use Doctrine in American Copyright Law**

**By Christina Olson, Harvard Law School Student '06**

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*Defining the nature and scope of the fair use doctrine has become an issue of great concern not just to artists, but to the industries that produce and distribute their creative works, and to the public, which consumes and uses these works in ways both fair and not. This essay provides an overview of the controversial fair use doctrine.*

*The essays that follow, meanwhile, examine many of the debates over the future of the doctrine and of copyright law in general — both of which evolved in an analog world, and whose basic assumptions have been challenged by the emergence of digital technologies.*

In the battleground that is American copyright law, one of the most hotly contested skirmishes revolves around the concept of “fair use,” and with good reason: despite the gradual marginalization of this doctrine, it continues to stand as “the oldest, broadest, and most important” limitation on the rights held by copyright owners.<sup>1</sup> Even when an artist has clearly copied another artist’s work, violating the original artist’s copyright, the fair use doctrine allows this violation to go wholly unpunished if the copying constitutes a use that has been deemed fair or reasonable by the courts.

In practice, a finding of fair use can mean the difference between millions of dollars in damages and no legal repercussions whatsoever. As a result, defining the nature and scope of this doctrine has become an issue of great concern not just to artists themselves, but to the industries that produce and distribute their creative works, and to the general public, which consumes and uses these works in ways both fair and not.

This essay seeks to describe, from a practical point of view, the nature of the fair use doctrine by examining the state of the law and examples of its use.

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<sup>1</sup> WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT, 43 (2004).

## The Fair Use Doctrine

Say a dramatist detests a popular play and wishes to expose its faults by creating a parody of it — can he do so without infringing the copyright of the original? Or imagine a literary critic who reviews a new novel — should she be forced to seek a license from the author for every quote or excerpt she chooses to include?

As these scenarios suggest, there are certain situations in which a literal application of copyright law would eliminate, or at least severely undermine, certain traditional modes of expression, ranging from parody to criticism to news reporting to scholarship. Almost since the beginning of copyright law itself, courts have been sympathetic to these otherwise infringing uses of copyrighted works, finding them fair and reasonable, and therefore exempt from punishment under the law. The fair use doctrine, long used by the courts in copyright cases, was formally adopted and codified by the U.S. legislature in the 1976 Copyright Act.

Section 107 of the 1976 Act carved out an exception to copyright infringement for “fair use[s].”<sup>2</sup> These uses include reproduction of a work for the purpose of “criticism, comment, news reporting, teaching..., scholarship, or research.”<sup>3</sup> For example, quoting short passages in a review or scholarly work for the purposes of illustration or comment would generally constitute a fair use, as would using some of the content of an original work in a parody derived from it.<sup>4</sup> However, as the courts and Congress have repeatedly emphasized, there is no definitive list of which types of works are and are not covered by fair use. Instead, each case must be determined on its own merits. Over time, the courts came to recognize certain factors that were useful in determining whether fair use existed in any particular case. Four of these factors were enumerated in §107 of the 1976 Act, which requires courts to consider:

- 1) The purpose and nature of the infringing use, including whether the use is commercial in nature, or for nonprofit educational purposes;
- 2) The nature of the copyrighted work;

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<sup>2</sup> 17 U.S.C. § 107.

<sup>3</sup> 17 U.S.C. § 107.

<sup>4</sup> See H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. 65–66 (1976) (providing examples of fair uses).

- 3) The amount of the copied 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.

The remainder of this essay examines the ways in which courts have analyzed these four factors, both in isolation and as they interrelate, in order to evaluate whether normally infringing works are in fact fair uses. It should be noted, however, that what follows cannot be a definitive statement of the law; many aspects of fair use are still being debated and defined, and the increasing importance of the Internet and digital technologies has only heightened this debate.

### **Purpose and Nature of the Infringing Use**

The first of these factors examines whether a work containing unauthorized copyrighted material nonetheless contributes to copyright law's core goal of encouraging artistic creation for the benefit and enrichment of the public. In practice, this factor generally boils down to two interrelated issues: (1) whether the new, infringing use is commercial or nonprofit in nature, and (2) whether the new use is transformative. The commercial/nonprofit distinction is crucial, because commercial uses of copyrighted material are generally considered to be unfair and exploitative. Such commercial uses can include offering copyrighted material (or new creations made from copyrighted material) for sale, using it in an advertising campaign, or simply displaying it on a website to attract more page hits. Moreover, even if copies are not offered for sale — as was the case with the songs shared on Napster — “repeated and exploitative copying” of copyrighted works may constitute a commercial use.<sup>5</sup>

Noncommercial uses of copyrighted material, on the other hand, are more likely to be found acceptable under fair use, as they generally do not detract from the original artist's profits (the fourth factor of the test), his incentive to create. The crux of this profit/nonprofit distinction is often not whether the sole motive of the new use is monetary gain, but whether the infringing user stands to profit from exploiting the copyrighted material without paying the customary price. For example, just because a

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<sup>5</sup> See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

website offers Los Angeles Times articles for free, that does not mean that it can avoid paying (and allow others to avoid paying) the usual price for the articles since providing this alternative will likely decrease sales by the Los Angeles Times.<sup>6</sup> Such a use, although not strictly commercial, is generally not a fair use. There is continuing debate, however, over what constitutes a commercial versus a noncommercial use, and the law in this area is not uniform across the federal circuits.

In addition to examining whether a derivative work is commercial or not, courts look at whether the purpose and nature of a work is transformative or merely superceding. A work is more likely to be protected as fair use if it transforms the original from which it borrows “by adding something new, with a further purpose or different character, or altering it with new expression, meaning, or message.”<sup>7</sup> On the other hand, if the new work functions as a simple replacement for the original, then it is less likely to fall under the ambit of fair use. Thus, merely recoding works (e.g., Metallica songs on CDs) in a different medium (e.g., MP3s) is not transformative, since the “new” work simply supercedes the old. Likewise, “there is little transformative about copying the entirety or large portions of a work verbatim.”<sup>8</sup>

Parodies, in contrast, appropriate elements of copyrighted works in order to “make war against them” and are generally considered transformative.<sup>9</sup> They provide social benefits by shedding light on the earlier work and creating a new one in the process. However, to be fair use, parodies must use the borrowed elements in order to create a new, transformative work that comments on the original, not just to attract attention to the newer work. In addition, audiences must be able to reasonably perceive the parodic character of the new work. If a parody is both transformative and reasonably perceived to be a parody, then it likely will be held to be a fair use, even if it is sold for its own sake (and hence is commercial in nature).

Thus, *The Wind Done Gone*, a novel which borrows and transforms characters and events from *Gone with the Wind* in order to critique the latter’s romanticized

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<sup>6</sup> See *Los Angeles Times v. Free Republic*, 2000 U.S. Dist. LEXIS 5669, \* (C.D. Cal. Apr. 4, 2000).

<sup>7</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>8</sup> *Los Angeles Times*, 2000 U.S. Dist. LEXIS at \*24.

<sup>9</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1271 (11th Cir. 2001).

depiction of the American South and slavery, is covered by fair use.<sup>10</sup> Although the novel is commercial in nature, the elements it borrows from the original are radically transformed and incorporated into a completely new story.

### **Nature of the Copyrighted Work**

The second factor which courts consider is the nature of the copyrighted work. Copyright protection is only available for creative expressions, not for ideas or bare facts. As a result, if a copyrighted work is predominantly factual in nature (such as news articles or official reports), then the reuse of the work is more likely to be considered fair use. This is not always the case, however, particularly if the work has not yet been published, since authors have the right to control the first public appearance of their expressions. In addition, while bare facts may need to be disseminated for the public benefit, copyrighted works generally contain expressive elements that cannot be used beyond what is needed to disseminate the bare facts.

Thus, the facts in a news story may reasonably be copied to create a separate article, but the expressive manner in which the first author conveys those facts generally may not be copied wholesale by the second. On the other end of the spectrum, works which are entirely fictional or highly creative in nature form the core purview of copyright protection (think science fiction novels, pop music, and Disney animation). Due to the higher level of protection afforded these works under copyright law, their unauthorized use is less likely to be considered fair.

### **The Portion Used**

Courts then look at a third factor: the amount of the original work which has been incorporated into the new work. In general, the more that is copied from the original, the less likely its use is fair. Hence, posting an exact copy of a photograph on a website is generally not considered fair use, although there are cases in which such duplication is reasonable (e.g., an Internet database for photos that copies whole photographs as thumbnails, since it would be hard for viewers to identify the photos otherwise and the

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<sup>10</sup> *See id.*

duplicate is only a poor alternative to the original). On the other hand, quoting a few lines from a movie for a review is almost certainly fair use.

This factor concerns not only the quantity of the copied material, but also its quality and importance. Even if the borrowed portion is small in absolute terms, the use may still be exploitative if the portion is a key component of the original work. Thus, copying 300 words from President Ford's memoir was found to not be fair use, in part because the words that were copied constituted the heart of the work. One exception to this general rule lies in the realm of parody. Parody's ability to comment on its intended target depends on a "recognizable allusion to its object through distorted imitation," so some copying of "the original's most distinctive or memorable features" is both inevitable and permissible. In order to criticize *Gone with the Wind*, for example, *The Wind Done Gone* had to clearly evoke the characters, events, and essence of the original; otherwise it would be just another novel about the South, not a parody. Although parodists must have persuasive reasons for the copying they do, such copying is not excessive just because they borrow from the original's heart.

### **Market Harm**

The impact of the new use on the market for both the original work and licenses to creative derivative works from it is the fourth factor considered by courts. Although this has been called the most important element of fair use, in truth its importance depends on the amount of harm suffered and the relative strength of the other factors. If a new use actually damages the value of the original copyrighted work, then the use is most likely not fair. The same is usually true if the new use would harm the potential market for the original work if it became widespread, or if it would harm the market for licensing derivatives of the original.<sup>11</sup>

When a reuse is for commercial gain (under the first factor), then this harm to the original and its derivatives can often be presumed. On the other hand, when the second use is transformative, it is less likely to supercede the original, and market harm cannot be as readily inferred. This is especially true of parodies, since they are not likely to

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<sup>11</sup> There has been some disagreement over what constitutes an adverse impact on a potential market: some courts define adverse as anything that prevents a copyright owner from charging whatever a potential market would pay, others only examine impairments of existing markets.

serve as market replacements for the works they mock. Nor do they cause market harm of the sort that is protected under §107: although they may suppress demand for the original by criticizing it, they do not usurp demand by imitating it.

In addition, authors are unlikely to license their works for parodies or critical reviews, so such second uses do not detract from the pool of potential licensees. Thus, photographs that use images of Barbie dolls to “critique the objectification of women” constitute a fair use of the doll: not only do they serve a parodic function, but it is highly unlikely that Mattel would grant a license for the creation of such critical photographs.<sup>12</sup>

### **Conclusion**

Even in its statutory form, the fair use doctrine basically consists of a number of general factors that must be balanced and evaluated on a case-by-case basis. There is no bright-line rule that courts or individuals can look at to easily determine whether a use is fair. Instead, each infringing use must be examined based on its nature and purpose, the nature of the work it infringes, the portion of the work it uses, and the market harm it causes. By balancing these various factors, courts decide whether a use should be categorized as fair or not. As may be surmised, there exist a number of ambiguities and divisions in how these factors are interpreted and applied.

In addition, the doctrine of fair use evolved in an analog world, and the emergence of digital technologies has called into question some of the basic assumptions underlying this doctrine. The essays that follow will examine many of these debates over the future of fair use, and of copyright in general.

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<sup>12</sup> Mattel v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003).

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# **Borrowing Privileges: How Does (or Should) Copyright Law Define a Derivative Work?**

**By Rehana Gubin, Harvard Law School Student '07**

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*A more-definitive copyright law would be beneficial to both copyright holders and producers of derivative works. Not only would it encourage such works by enabling greater certainty and generating far less dispute over what constitutes infringing material, but the public would benefit from this increased activity.*

Public perception of one the most commonly known and unquestionably derivative art forms, the adapted film screenplay, demonstrates the tensions inherent in finding originality and creativity in these particular kinds of works. In 1976, the same year in which the current Copyright Act was enacted, the Motion Picture Academy's award for best adapted screenplay was changed to "Screenplay Based on Material From Another Medium" from its previous name, "Screenplay Adapted From Other Material."<sup>13</sup> The new title offered a more precise definition of "adapted" and highlighted that these adaptations were created in a different medium, possibly to emphasize their originality. Regardless of the motivations behind the title change, the award itself (today simply entitled "Adapted Screenplay") recognizes that these derivative works have significant independent value.

This essay will probe the limited extent to which that value is rewarded and protected by copyright law and will evaluate the effects of the law's current treatment of derivative works on the primary goal of the copyright system: promoting creativity.

## **Inevitability of Derivation in Art**

In every artistic creation, prior work undoubtedly influences the artist and appears to varying degrees in the new piece. In most cases, however, the artist either borrows neither obviously nor intentionally from preexisting works or makes such an outright

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<sup>13</sup> See Answers.com, *Academy Award for Writing Adapted Screenplay*, at <http://www.answers.com/topic/academy-award-for-writing-adapted-screenplay>.

copy that the new work directly infringes copyright, unless an affirmative defense (e.g., fair use) applies. Derivative works, on the other hand, ranging from book translations to photomontages to alternative musical arrangements, constitute an entirely separate category somewhere in between original works and copies. These derivative works necessarily borrow from previously copyrightable works yet constitute “original work(s) of authorship”<sup>14</sup> from a legal standpoint because of the creative act of transformation.<sup>15</sup>

Perhaps in recognition of the inevitability and ubiquity of derivative works, the U.S. copyright statute has accorded these works a unique legal status, defining them as any forms which “recast, transform[], or adapt[]” preexisting works.<sup>16</sup> The statute grants copyright holders the exclusive right to “prepare derivative works,”<sup>17</sup> an authority similar in its exclusivity to that of preparing exact copies. Notably, derivative works must borrow either in whole or substantial part from the original piece; using snippets of magazine photographs to create a collage is arguably less derivative than using the entire images but representing them in another form.

Persons other than the copyright holder who produce derivative works can obtain a copyright for any “substantially different”<sup>18</sup> contributions they make (e.g., a copyright in the precise arrangement of the photographs), but they cannot use any borrowed material without obtaining the express consent of the copyright holder.<sup>19</sup> Since by definition all derivative works borrow, this leads to the complicated business of licensing when, for example, books are translated or songs are remixed for use as the background soundtrack in TV commercials.

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<sup>14</sup> 17 U.S.C. § 102. This term identifies which works receive statutory copyright protection, according to the current controlling law, 1976 Copyright Act. The statute explicitly leaves “original works of authorship” undefined, however, in order to allow flexibility in the courts.

<sup>15</sup> Nimmer on Copyright, § 3.06 (2004).

<sup>16</sup> 17 U.S.C. § 101. The full statutory definition of a derivative work follows: “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, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

<sup>17</sup> 17 U.S.C. § 106(2).

<sup>18</sup> Nimmer on Copyright, § 3.03 (2004).

<sup>19</sup> *Id.*, § 3.06.

## Copyright Law's Broad Sweep

By its structure, the law expressly seeks to protect foremost the boundaries of the original copyright; the copyright in a derivative work “does not extend to any part of the work in which such [pre-existing] material has been used unlawfully.”<sup>20</sup> Certainly, the law would strip copyright of meaning if it extended copyright protections in the derivative work to those parts which had already been copyrighted in another work,<sup>21</sup> but by broadly granting an exclusive right to copyright holders over the production of adaptations and excluding any unconsented borrowed material as infringing, the statute imposes potentially prohibitive limits on the creation of these works by a non-copyright holder. The courts are left to decide the critical question of whether a work is in fact derivative and subject to these restrictions.

## Copyright Violation or a “Photo Frame”?

The principal issue for the courts in classifying derivative works is determining the point at which the new work substantially transforms a preexisting work; implicit in that finding is the amount that the contended derivative work borrows from the preexisting work and for which it must obtain the copyright holder’s consent. Two similar cases in different circuits, both involving mounted artwork, reveal the distinct statutory interpretations the courts can make about the same kind of production. The Ninth Circuit has held that pages cut from books and mounted on ceramic tiles were derivative works and in violation of the copyright holder’s exclusive right to control their preparation (and, practically, to make profits from their sale).<sup>22</sup>

In a later case, the Seventh Circuit consciously contradicted the Ninth Circuit and held that the mounting of an artist’s note cards on ceramic tiles were not derivative works because they did not “recast, transform, or adapt” the preexisting work, instead being the functional equivalent of photo frames.<sup>23</sup> In addition, in this particular instance the court found the mounted works covered by the doctrine of first sale — that the legal purchaser of a specific physical copy of a work can transfer his interest in that copy without

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<sup>20</sup> 17 U.S.C. 103(a).

<sup>21</sup> Nimmer on Copyright, § 3.03 (2004).

<sup>22</sup> *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1344 (9th Cir. 1988).

<sup>23</sup> *Lee v. A.R.T. Co.*, 125 F.3d 580, 580–582 (7th Cir. 1997). The opinion notes “widespread” scholarly disapproval of the *Mirage* decision. *Id.* at 582.

permission — so that in selling the tiles the seller owed nothing more to the copyright holder.<sup>24</sup>

### **New Technology and the Courts**

Especially in the face of newer, technologically enhanced artistic endeavors, the courts have had difficulty arriving at a consistent definition of the scope of derivative works. The Ninth Circuit, the same court that held in favor of the derivative status of the ceramic tiles, reached an essentially opposite conclusion when considering video game systems. The court found that a video-game device, the Game Genie, that enabled users to enhance the display settings of their Nintendo games, created no substantial modifications to Nintendo’s proprietary program.<sup>25</sup> Because the Game Genie’s displays were temporary, and not “fixed” in form, the court reasoned that, as with other computer applications that enhance preexisting hardware functions, the device did not possess an independent value to be captured in copyright.<sup>26</sup> The analysis in this case is hard to distinguish from the Seventh Circuit’s in its ceramic tile case, which argued the independence and temporality of the mounting process and presented the following standard for a non-derivative work: “[The preexisting work] still depicts exactly what it depicted when it left [the artist’s] studio.”<sup>27</sup>

As the range of artistic creation changes in the wake of new technologies, the courts’ seemingly incompatible decisions in different artistic media raises serious concerns that the statutory requirements are overly broad and hence antithetical to protecting copyright interests.

### **Challenges Due to the Law’s Ambiguity**

While there may be valid reasons for maintaining ambiguous legal standards in general, including the ability of the law to adapt to the different circumstances of individual cases, such flexible motivations do not apply as neatly to the law of derivative works because the creativity behind them — the act of transformation — is itself so

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<sup>24</sup> *Id.* at 581.

<sup>25</sup> *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 967 (9th Cir. 1992).

<sup>26</sup> *Id.* at 968–969.

<sup>27</sup> *Lee v. A.R.T. Co.*, 125 F.3d 580, 582.

subjective. Copyright law, on the whole, balances the competing goals of copyright holders in maintaining control over their work, and of the public in receiving access to those works. In the extreme, either goal can actually stifle creative impulses; the former because of overwhelming restrictions on access to copyrighted works, and the latter because of the lack of an ownership incentive to the artists to publish the works. The purpose of copyright law, in weighing these goals, is simply to encourage individuals *to create*, without meticulous consideration of the nature, importance, or utility of an artist's new work.

The law must therefore be extremely careful in defining derivative works, for as soon as an artist is deemed to have produced one, he will incur a host of obligations to the original copyright holder, including to seek permission to make his work available to the public at all, and will have his own potential for obtaining a copyright in any novel contributions significantly diminished.

### **Establishing a More-Definitive Law**

The current statute does enumerate a number of types of derivative works, but it may be even more helpful, especially in this technological age with previously unfathomed media, to establish a narrow set of qualities by legislation rather than the courts' case-by-case rules that illustrate the most material elements of derivative works.

Among these qualities could be a more precise definition of the quantity of borrowed material, the form in which the new characterization occurs, and the affect that the derivative work may have on the original copyright holder's exclusive rights. Both copyright holders and producers of derivative works would benefit from a stricter structure, encouraging these works by enabling greater certainty and generating far less dispute over what constitutes infringing material. The public would benefit from this increased activity, and if the law indeed provides derivative works with a more concrete status, it is likely that the public will be more inclined to reward their merits, independent of the works on which they are based.

As the Motion Picture Academy has recognized for years, derivative works are art forms unto themselves and offer special creative value that it is important for the law to recognize.

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## Before There Were Samples: Imitation and Reference in Jazz

By Robert Kent, Harvard Law School Student '07

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*Copyright law protects imitative musical performance — jazz’s classical mode of reference. But digital sampling, today’s chosen method of incorporating nods to previous works, is not similarly protected. Whether or not the law will consider these newer techniques the moral equivalent of the old is still an open question.*

When contemporary rap and electronic artists incorporate pieces of previous works into new compositions via “sampling,” they are borrowing a lot more from the past than clips of music: the invocation of older songs, artists, and genres has been part of the American musical experience for over a century.

Jazz music is generally thought to have originated in 1890, developing from “ragtime” piano compositions by Scott Joplin and similar artists. The term “ragtime” was a contraction for “ragged time,” in reference to the syncopated rhythm of the music, a feeling and tempo that would later come to be known as “swing.” But ragtime did not spring forth fully formed from Scott Joplin’s head; there was already a tradition of vocal and banjo “ragged time” music, which musicologists believe formed the basis for Joplin’s compositions.<sup>28</sup> The structure of piano ragtime, unlike its rhythm, was quite compatible with European tradition: a typical rag generally followed the “trio” format of a classical minuet. From its origin, jazz involved a collision of traditions, accomplished through references to earlier works, squeezing American (and specifically African-American) rhythms and melodies into a European song format.

Imitation and inclusion of prior work continued to flourish in jazz throughout its evolution from dance music of the Deep South to worldwide phenomenon. These references were more than an ongoing coincidence; they served important purposes for individual artists and, more broadly, for the art of jazz itself. As music evolved, so did the technology used to create and distribute it; eventually, the law also developed to accommodate these changes. Perhaps in homage to its most famous musical offspring, or

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<sup>28</sup> See JOACHIM E. BERENDT, *THE JAZZ BOOK 5* (H. Bredigkeit et al., trans., 1992).

perhaps for a confluence of other factors, the law still protects imitative performance, jazz's classical mode of reference. But digital sampling, today's chosen method of incorporating nods to previous works, is not similarly protected. It is still an open question whether the law will consider these newer techniques the moral equivalent of the old.

### **The Little Picture: What Quoting Does for the Artist**

Since the release of John Coltrane's *Giant Steps* in 1959, generations of saxophone players have learned their instrument by "woodshedding" Coltrane's solo from the album's title song, practicing it until they could play the solo note for note. Even Ella Fitzgerald, who went on to make major contributions to vocal jazz and the "scat" vocal technique in particular, got her start by imitating Connie Boswell of the Boswell Sisters.<sup>29</sup> Imitation, known as "quoting" in jazz performance, has long had a positive educational impact in music.

Of course this learning technique itself is not unique to jazz; performers in most genres and traditions learn by rehearsing the compositions of others. But the classical tradition imposes a division between composers and "civil service" performers, whose duty consists of executing, not modifying, the composer's aesthetic. In jazz, this division of labor is unthinkable; the genre demands constant improvisation, such that each performer must also fill the role of composer. Years spent training on the compositions of previous artists are formative, and necessarily come through in these improvisatory moments.

But the evocation of one's influences in new compositions was by no means a subconscious practice; it sometimes formed the very backbone of a new piece, or at least the performance of one. In a famous performance at the Museum of Modern Art in New York City, Sonny Rollins included "dozens, perhaps hundreds" of quotes, "from Tin Pan Alley to be-bop, free associating... their nostalgic implications, making them his own."<sup>30</sup> Participating in the same free jazz tradition, avant-garde saxophone player Steve Lacy quoted the jazz standard "On Green Dolphin Street" before diving into an extended

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<sup>29</sup> Charles Hersch, *Ken Burns, Jazz: A Film by Ken Burns 2000*, 34 POLITY 107 (Sept. 22, 2001).

<sup>30</sup> Jon Pareles, *In Pop, Whose Song Is It, Anyway?*, N.Y. TIMES, Aug. 27, 1989, § 2, at 1.

improvisatory solo in a 1989 performance.<sup>31</sup> As Lacy explained in a post-performance interview, this quote signified that he wanted to metaphorically “turn off Green Dolphin Street and explore different musical avenues.” Quoting served the important purpose of placing Lacy’s solo in a musical context, enabling him to make a direct musical “comment” on the tradition to which he referred. This singular act of contextualization reveals the larger purpose to which musicians put musical quotations in the practice of jazz.

### **The Big Picture: What Quoting Does for the Art**

Duke Ellington used the same technique many years earlier in the 1943 Carnegie Hall debut of his seminal composition, “Black, Brown, and Beige,” which incorporated spirituals, work songs, and blues compositions into a new jazz context. Ellington was using the references to other genres as an assertion of connection to those genres — a direct link to other African-American musical traditions, and thus an extension of those traditions. But “Black, Brown, and Beige” is not simply a catalog of allusions to previous compositions; it is a vibrant new piece of art on its own terms. And so the inclusion of quotes from a variety of genres not only connected Ellington to those older works, but also enabled him to comment on them, adding his own voice to the stream of jazz music and thus pulling its evolution in his direction.

Ellington’s approach in “Black, Brown, and Beige,” and indeed any composition which uses allusions as a point of departure for new material, evokes Ralph Ellison’s idea of jazz evolution via a dialectic process.<sup>32</sup> The development of jazz is generally marked from ragtime and through Dixieland, swing, bebop, cool, hard bop, and fusion.<sup>33</sup> The boundaries are not crystal clear, but the essence of each movement is unique and easy to distinguish from previous movements, while still remaining a part of the same overarching tradition. Ellison perceives each new style of jazz as a development stemming from a set of musicians who participated within the bounds of an existing style, but criticized that style through a set of innovations, eventually resulting in an entirely

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<sup>31</sup> Jeffrey H. Brown, Comment, “*They Don’t Make Music The Way They Used To*”: *The Legal Implications of “Sampling” in Contemporary Music*, 1992 WISC. L. REV. 1941 (1992).

<sup>32</sup> Hersch, *supra* note 2.

<sup>33</sup> See generally BERENDT, *supra* note 1 (describing each in detail).

new style. Then a new set of innovative musicians comes along, repeating the process and producing the next musical metamorphosis.

Though the use of musical quotations may not be essential to this dialectic process, it seems clear that their use has indeed served this end. It is impossible to fully engage an old style of music without being steeped in its tradition. The use of traditional styles in new compositions places them in an appropriate context, enabling the musical commentary to speak coherently and with maximum effect on its audience.

### **The Law's Response**

Prior to 1972, no federal copyright protection for musical recordings existed. The Supreme Court noted new federal statutory protections in *Goldstein v. California*,<sup>34</sup> which was pending when Congress expanded the Copyright Act to protect musical recordings made after Feb. 15, 1972.<sup>35</sup> The Court held that, while there was no federal protection for recordings made before that date, the modified federal statute did not preempt state causes of action, and thus did not preclude courts from protecting pre-1972 musical recordings under state common law. Thus, depending on jurisdiction, pre-1972 recordings may retain some level of protection. Though the *Goldstein* case took place in California, which did have its own copyright law because of its extensive music and film industries, state copyright laws are few and far between, and thus older recordings are generally unprotected or protected solely under the common law.

In addition to this exemption for older recordings, which encompasses a good number of essential jazz records, the federal statute includes a provision protecting imitative or “cover” performances of copyrighted songs. Known as the compulsory license provision, Section 115 of the Copyright Act specifies that a song’s original copyright holder must permit later artists 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,” provided that the covering artist pays a nominal license fee.<sup>36</sup> At first blush, this appears to protect the practice of imitative “quoting” in jazz music, though the statute goes on to say that “the arrangement shall not change the basic melody

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<sup>34</sup> 412 U.S. 546 (1973).

<sup>35</sup> 17 U.S.C. §§ 102, 103.

<sup>36</sup> 17 U.S.C. §115.

or fundamental character of the work,” a criterion that many jazz quotations may not meet.

The jazz tradition and the significance of quotations in jazz could have influenced the evolution of American copyright law to some degree, but it is clear that the statute protects some of the most essential tools of jazz’s evolution. As music and technology evolve, however, the mechanisms of reference and allusion change; now, instead of imitating past instrumental performances, new composers in the rap and electronic music genres are much more likely to include older recordings directly into new ones via digital “sampling.” Under the law, this is a crucial distinction; the concept of direct inclusion via sampling is not expressly protected in any provision akin to the §115 compulsory license provision.

Not everyone considers digital sampling the moral equivalent of the jazz tradition of instrumental quotation. In a jazz performance, the artist has mastered her instrument; by playing the quotation herself, she more obviously adds her own interpretive, artistic effects. It can be argued that the same is not true when artists include direct digital samples. But digital samples serve many of the same purposes in rap and electronic music that quotations serve in jazz: placing new compositions in an existing context, and thus facilitating a dialog between old and new music and helping the entire genre to evolve in creative ways.

To this extent, then, sampling should at least be distinguished from other forms of copyright violation like “piracy,” wherein music is copied outright and sold at cut-rate prices or even given away for free. It seems unlikely that, for example, a Dr. Dre rap song using a sample from a Parliament/Funkadelic song would displace any Parliament/Funkadelic sales. In fact, the latter’s band leader, George Clinton, noted that, after extensive sampling of his band by various rappers throughout the 1990s, they were even more popular than during their former heyday in the mid-’70s.<sup>37</sup> Sampling has the capability to serve some of the same functions for rap and electronic music that quoting does in jazz, while at the same time doing no harm.

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<sup>37</sup> Robert A. Green, *George Clinton: Ambassador From the Mothership*, at <http://www.synthesis.net/music/feature.php?fid=70> (discussing an album released in 1996).

Ultimately, listeners will draw their own conclusions about the originality of any new composition, and the artistic effect of any included samples. Hopefully the law will avoid shutting off avenues of expression before they have a chance to make these decisions.

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## Creative or Derivative: Old Techniques, New Technologies

By Jenevieve Maerker, Harvard Law School Student '07

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*Think derivative works are a recent phenomenon? Think again. From Virgil, to Shakespeare, Ella Fitzgerald, Andy Warhol, and Weird Al, the practice of building upon other's art is nothing new in human history. What is new is the democratization of dissemination: anyone with access to a computer and the Web can distribute her own fanfiction, mash-ups, or video remakes on a global scale. And what's so bad about that?*

In elementary school our teachers sometimes assigned writing exercises along the lines of “What do you think Stuart Little did next? Write another chapter to go at the end of the book.” We obediently took the characters and plot lines of E.B. White’s 1945 classic and spun them into original works of imagination. Were our teachers encouraging theft of intellectual property? Were they instilling an ethic of piracy that has led our generation, decades later, to blatantly disregard copyright law through rampant music and film downloading? Or did the lessons teach us to be critical readers and creators in our own right?

Few would deny that classroom assignments such as this can claim the fair use defense due to their nonprofit and educational character, or that such exercises are socially beneficial. But such students works represent one instance of consumer-created derivative works, a phenomenon that has become more visible, and perhaps more prevalent, with the development of technological means of easy, inexpensive, and widespread publication.

### **History of Derivative Works — From Shakespeare to Weird Al Yankovic**

Derivative works have long been a part of our culture — indeed, a vital ingredient in our culture’s evolution. Virgil’s *Aeneid* is a conspicuous imitation of Homer’s *Odyssey*, aimed at giving Roman civilization a validating founding myth by echoing its Greek predecessor. Much of Shakespeare’s genius lay not in devising original stories but in masterfully retelling old ones. The creators of the American copyright regime

recognized the importance of derivative works when they gave Congress the constitutional power “to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>38</sup> Copyright’s intentionally limited protections leave room for creation that builds on its forebears to bring forth valuable innovations.

Artists have always created derivative works, and they have done so both when the original works were protected by intellectual property laws and when they were not. Jean Rhys’s *Wide Sargasso Sea*, for example, retold the story of Charlotte Brontë’s *Jane Eyre* more than a century after its publication, after the original had entered the public domain. Her 1960s rendition, from the point of view of the “madwoman in the attic,” injected a feminist perspective into the literary classic, casting it in the light of contemporary social commentary and inviting critical discourse about the Western canon. Alice Randall’s 2001 *The Wind Done Gone* accomplished similar goals by retelling *Gone with the Wind* from a slave’s perspective; however, since Margaret Mitchell’s 1936 original is still under copyright, her estate filed suit claiming infringement.<sup>39</sup>

As these examples demonstrate, the derivative works that have traditionally gained public attention are those created by people who are not simply consumers but “artists” in their own right, in the sense that they have been able to gain access to the traditional publication channels to distribute their works. This can also be seen in other media: Andy Warhol’s Campbell’s Soup Can paintings, film adaptations of novels, and Weird Al Yankovic’s pop parodies have all reached a mainstream market through established media distribution. Their use of earlier works has generally escaped liability under copyright law either because they secured permission, because the original owner didn’t mind the free publicity, copyright protection had expired, or because the new creations qualified as fair uses.

### **The Internet as the Great Disseminator of Derivative Literature ...**

But what about adaptation that takes place outside of traditional commercial distribution channels? Instances of consumer-produced derivative works have been

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<sup>38</sup> U.S. Const., Art. I., Sec. 8

<sup>39</sup> After securing a preliminary injunction that was later overturned, the estate settled out of court, allowing Randall’s book to be published by Houghton Mifflin.

percolating to the surface more often in recent years, as Internet-related technologies loosen the grip of traditional publishers on the means of distribution. The literary world has seen an explosion of fanfiction written by enthusiasts of worlds and characters drawn from other authors' published books, television shows, or video games. Fanfiction.net, for example, currently lists over 180,000 Harry Potter-based stories in English alone.<sup>40</sup>

But while fanfiction has undoubtedly become more prevalent, it is arguably not a new phenomenon. Putting aside the coerced extra chapters of *Stuart Little* extracted from elementary school students, one fanfiction site claims a pedigree for the genre dating back to 1421, when John Lydgate wrote "The Seige of Thebes," a poem intended as an additional installment in Chaucer's *Canterbury Tales*.<sup>41</sup> The phenomenon of readers being inspired to add original ideas to a favorite work or character is not new, but the advent of the Internet has allowed these new audiences to find these artists and create thriving communities around derivative works.

### **... and Music ...**

In the musical context, the analogous movement includes, among other techniques, sampling (incorporating bits of earlier songs in a new composition) and mash-ups (blending two existing songs to create an original piece). Unlike the written word, these derivative musical forms have depended on technological developments not only for their distribution but also, to some extent, for their creation. This does not mean, however, that audience embellishment of musical works is a new phenomenon. Jazz musicians, both professional and amateur, have a long tradition of building on one another's pieces without the aid of advanced technology. With the advent of the Internet, however, the amateur dabbler can disseminate his derivative creation to the world. And what problems does this cause?

### **... and Film**

Finally, in the realm of film, artists and consumers have begun creating video mash-ups analogous to the audio variety, and likewise made possible by emerging

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<sup>40</sup> See FanFiction.net, *Books*, at <http://www.fanfiction.net/cat/202/>.

<sup>41</sup> See The FanFic Symposium, *A Very Brief History of Fanfic*, at <http://www.trickster.org/symposium/symp5.htm>.

technology. But again, this is not to say that audience-produced derivative film is new: witness *Raiders of the Lost Ark: The Adaptation*. This labor of love is a shot-for-shot recreation of the original Indiana Jones movie filmed by three Mississippi teenagers in the 1980s, armed with a video camera and a great deal of ingenuity and dedication. The boys accomplished their remake without the benefit of sophisticated technology or the motivation of profit or widespread distribution, and the movie has only recently come to the public attention through Internet-fueled word of mouth. Cyberspace has indeed made it more obvious that audiences produce derivative works, but it has not by itself given birth to the practice.

### **The Democratization of Publishing Potential**

What, then, is the significance of the Internet for the way consumers interact with art, and the way society reacts to that interaction? As we have seen, in some cases new tools have enabled previously impossible forms of derivative creation. But technology in these instances has simply expanded the avenues of expression, providing more outlets for an impulse that already existed. The major change wrought by technology has been the democratization of publishing potential: anyone with a computer can easily and cheaply distribute fanfiction, mash-ups, or video remakes on a global scale.

We know that artists have always drawn on earlier works and disseminated their derivative creations through traditional channels, and it is probable that a certain portion of private consumers have always created derivative works for their personal enjoyment. It seems likely, though, that access to the Internet has turned many more “consumers” into “artists.” Knowing that an audience awaits their work may inspire people to create works they would not have written in an earlier age, increasing the prevalence of derivative works.

### **Challenges and Technological Controls**

However, technology has also increased the capability of copyright owners who dislike derivative works to monitor and prevent infringing uses. When makers of derivative creations distribute them online, the works become more visible not only to the consuming audience but also to the owner of the original copyright, who may then seek

to stop the derivative use. While enforcement has traditionally involved legal measures, new technological methods collectively known as Digital Rights Management (“DRM”) are enabling copyright owners to publish their works in formats that hinder digital copying. This prevents would-be artists from making duplications, alterations, or additions, no matter the benefit such creativity could have for society, or worse, even if the changes would be covered by fair use. Unlike a human judge, technological controls often cannot distinguish between “fair use” and “infringement,” resulting in a total lockdown preventing almost all creative uses. Paradoxically, such controls could also harm the copyright owners, as these derivative works often increase the interest in and the market for originals. However, having won the right to exercise such control through statutes such as the Digital Millennium Copyright Act, copyright owners have shown every intention to make use of it, no matter the detrimental impact on non-infringing uses. Thus, technological innovation may actually harm, not help, incentives to create, contrary to the stated purposes of copyright protection.

For now, though, the number of derivative works continues to grow, and the ease of publication magnifies the impact of such creations. Widespread distribution of infringing works poses more of a threat to the original copyright owner’s profits than does a story shared among a few friends. It may also seem more of an affront to authors’ “moral rights,” as widely published derivative innovations have the potential to dilute the author’s creative control over the product of her imagination. J.K. Rowling, for example, has sanctioned Harry Potter fanfiction as long as it remains noncommercial and kid-friendly and is not misattributed to her, reflecting a concern that she retain the right to determine the content of her own expression.<sup>42</sup> Other artists oppose all derivative use of their works, on both economic and moral grounds.

Proponents argue that new distribution capabilities amplify derivative works’ beneficial effects. Any increase in the volume of creation motivated by access to an audience is, some say, a good in itself. In addition, online publication of derivative works allows art to build on itself at a faster rate, and the communities that form around sharing derivative creations nurture consumers in their development into artists in their

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<sup>42</sup> See BBC News, *Rowling Backs Potter Fan Fiction*, May 27, 2004, at <http://news.bbc.co.uk/1/hi/entertainment/arts/3753001.stm>

own right. Fan art enthusiasts claim that even if derivative works undermine authors' (or, more likely, publishers') monopolies to some extent, society as a whole benefits from fanfiction.

### **Looking Forward**

Twenty years ago, extra chapters to *Stuart Little* written by fourth-graders most likely ended up in the trash. Today, they could just as easily end up on the Internet. Is E.B. White rolling over in his grave any more now, or are his heirs' royalty checks suffering? Though the example seems innocuous, it highlights the questions we must ask ourselves as we confront and shape the technology and laws that determine how consumers can interact with art to create new art.

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## **For Money or for Art: Does It Matter?**

**By David Russcol, Harvard Law School Student '07**

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*Does it matter whether a DJ distributing remixes of a song is acting for commercial or non-commercial motives? Should it? Perhaps most importantly, what is “commercial” — and how will courts define the term in the future?*

Artists build off the work of others by creating derivative works, reusing content, or altering various media in ever more complex and original ways for a wide range of reasons: fame, self-fulfillment, communication, and any number of other tangible and intangible interests. They may keep their works to themselves or broadcast them to the public, for free or for financial gain. Does it matter whether a DJ distributing remixes of a song is acting for commercial or non-commercial motives? Should it? Perhaps most importantly, what *is* commercial anyway?

### **The Goals of Copyright and Fair Use**

Article I, Section 8, Clause 8 of the Constitution, the “Copyright Clause,” represents an intuitive market-based concept of artistic motivation: nobody would invest the time and effort to write books, create music, or invent machines if others could immediately copy and sell them without compensating the original creator or inventor. Congress provided a limited monopoly to copyright holders, allowing creators to recoup any profit arising from their works for a term of years, after which the works enter the public domain. The somewhat contradictory goal of copyright is to serve the public’s interest in the widespread dissemination of knowledge and art by enabling copyright holders to control public use of works for long periods of time. Congress and the courts have found a number of ways to somewhat reconcile these divergent principles, such as providing protection for expression, but not ideas; time limits on copyright terms; and limiting artists’ control over use to the first sale of a physical copy of a copyrighted work. Congress and the courts have also come to consider some uses “fair,” and thus excepted

from copyright protection — and it is here that the commercial/noncommercial distinction comes into play.

Section 107 of the Copyright Act, 17 U.S.C. § 107, provides a test for what qualifies as “fair use” comprising four factors, including:

- 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; and
- 4) The effect of the use upon the potential market for, or value of, the copyrighted work.

Congress intended this section to protect such pursuits as scholarship, parody, and criticism from being silenced by the broad sweep of copyright protections. If a court, applying these factors, deems a person’s use of a copyrighted work to be a fair use, then that person’s use falls outside the realm of copyright and no compensation is owed the original creator.

### **“Commercial” and Fair Use**

Whether a derivative work or other use of a copyrighted work is commercial can have a large impact on the fair use inquiry. Some courts, drawing on the 1984 *Sony* case (which found that VCR manufacturers could not be held responsible for pirated videos because VCRs had substantial uses that did not infringe copyrights), have stated that a non-commercial use enjoys a presumption of fair use, whereas a commercial use is presumptively unfair.

The effect of such a finding is to shift the burden of proof — a commercial user of a copyrighted work would have to prove that his use was exempt from copyright protection to exonerate himself from liability, whereas a noncommercial user would not be liable unless the accuser proved that his or her use was for some other reason unfair. The benefit of the doubt can be important, especially in close cases, to initial decisions about filing, fighting, or settling suits, and to any outcome in the courtroom.

What courts consider commercial for purposes of the fair use inquiry is based to some extent on the statutory factors. The first factor differentiates between “commercial” and “nonprofit educational” purposes, while the fourth focuses on possible harm to the

value of copyrighted works. Contrary to a plain understanding of “commercial,” mere intent to make money is not the focus of the fair use inquiry. In applying the factors, courts often seem to adopt general principles of fairness instead of a predictable, formulaic analysis of the commercial/noncommercial distinction.

### **Cases That Have Helped Define “Commercial Use”**

Examples of cases addressing the commercial use issue reveal that courts often blur the commercial or nonprofit/educational line, rarely finding this distinction dispositive. Courts have distinguished between those who seek to profit from the use of copyrighted works directly and those who use the works as part of a broader enterprise to make money, while not harming the market for the works.

In the for-profit educational context, a party who reproduced copyrighted Medical College Admissions Test questions for a test preparation course was held liable for copyright infringement. On the other hand, for-profit biographies and documentaries have gone both ways in court. A filmmaker who created a biography of Elvis Presley was held liable for infringement when his documentary consisted mostly of clips and footage from Elvis concerts and TV appearances used without permission.<sup>43</sup> In another case, a documentary about B-movie pioneer Peter Graves, using several clips from his movies, posters, and pictures,<sup>44</sup> did not infringe, because it contained a lot of new and original content and used relatively small portions of the copyrighted works (about thirty to sixty seconds from movies of an hour or more). The court noted that this documentary, in addition to serving the public interest in greater knowledge, could create more interest in Graves’ work, raising more revenue in the future. Even though this use was commercial and for-profit (like the Elvis documentary), the judge found this film to be at least a potential fair use, and refused to stop AMC Theatres from showing it.

In another highly publicized case, MasterCard sued Ralph Nader over one of his campaign ads.<sup>45</sup> Nader ran a parody of MasterCard’s famous “priceless” ads intended primarily to criticize the major presidential candidates their ties to special interests, but

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<sup>43</sup> *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003).

<sup>44</sup> *Hofheinz v. AMC Prods. Inc.*, 147 F. Supp. 2d 127 (E.D.N.Y. 2001).

<sup>45</sup> *MasterCard Int’l Inc. v. Nader 2000 Primary Comm., Inc.*, 2004 U.S. Dist. LEXIS 3644, 2004 WL 434404 (S.D.N.Y. 2004).

also allegedly to criticize the MasterCard ads themselves. The court found that Nader's ad was political, and thus not commercial; that it did not affect the market value of MasterCard's copyrights; and that, although MasterCard's ads deserved strong copyright protection, Nader used no more of them than was necessary to effectively parody them.

The limits of parody and fair use were tested in the much-publicized case of *The Wind Done Gone*, a book in which author Alice Randall retold *Gone With the Wind* from the perspective of slaves living on the plantation.<sup>46</sup> A court found Randall's work sufficiently original and creative to constitute a new work, despite its clearly derivative nature. Interestingly, the transformative elements were found to overshadow the commercial nature of the book even though it was written for profit.

There are cases in which an admittedly nonprofit use can be considered unfair because it impairs the original work's market even despite not garnering profits for the reuser. For instance, a handful of movie companies sued BOCES, a not-for-profit corporation backed by New York State, for massively reproducing copyrighted videotapes for nonprofit educational use in public schools.<sup>47</sup> BOCES was held liable for its extensive copying practices, because they admittedly ruined the market for the movies in the New York school system.

### **Looking Forward**

What do all these examples say about the law's treatment of commercial and noncommercial uses of copyrighted works? Non-commercial uses are privileged to some degree. However, the law means at least two things by "commercial": "motivated by profit" under the first fair use factor and "causing harm to the actual or potential market for a copyrighted work" under the fourth factor. The latter definition seems to be more important from the law's point of view; none found fair use with market harm, while all found fair use when market harm was not present. This is, naturally, an overly simplistic summary of the fair use jurisprudence, but market harm generally seems to serve as a good guideline. Yet, the decisions seem driven by a sense of justice and propriety rather

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<sup>46</sup> SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

<sup>47</sup> Encyclopaedia Britannica Educational Corp. v. Crooks, 447 F. Supp. 243 (W.D.N.Y. 1978); Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982).

than predictable analysis, limiting creators' ability to deduce *ex ante* whether courts will hold their actions to be a fair use.

The Internet provides new challenges as well as opportunities for the *ex ante* creator. As more derivative works like the *Grey Album* and the *Grey Video* make it online, some will inevitably make it to court. The traditional concept of market harm, that it is unjust for a derivative creator to profit by cannibalizing an original work's market, seems much less apt in the free-publishing digital context, where many people create in blogs and websites simply because they like creating rather than for expected commercial gain. However, their reuse may still impair the market for the original work, making this conception of commercial use seem less, well, fair — much like how the traditional understanding of “commercial use” in the commercial-nonprofit/educational dichotomy did not fit the courts' outcome-oriented sense of fairness.

The kernel of justice that the commercial/non-commercial distinction protects may very well transform yet again, following the lead of technological change. In the wake of a series of conceptual shifting and ambiguity, one must wonder whether this distinction is substantive, or instead serves as a proxy for something deeper within the fair use exception — leading one to question whether the courts are getting to the real crux of fair use at all.

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## **Playing in Someone Else’s Sandbox: A Legal and Cultural Overview of Fanfiction**

**By Erica George, Staff Member of the Berkman Center for Internet & Society  
at Harvard Law School**

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*The Internet has enabled explosive growth in both the amount of fanfiction and the number of people who read it. But as fanfiction’s presence increases, so does the number of conflicts between the rights-holders of original works and the fanfiction writers who have published their own, derivative creations of those works. Neither side is certain of its rights under the law, and no clear legal precedents exist to guide behavior.*

Imagine that there’s a television series you really love. You try never to miss an episode, and you find yourself filled with questions and speculation about the characters and plots. Each week you wonder whether your theories from the previous week will be proven right, whether the show’s writers’ explanations for events will feel as satisfying as your own. When summer comes and the show goes on hiatus, you have months to fill without new episodes to watch. Then you hear about something called fanfiction, and a whole new world of creativity featuring the characters and storylines you’ve loved and thought about so much opens up. By the time the summer hiatus ends, you’re not only reading fanfiction, but writing and sharing stories of your own.

### **What is Fanfiction?**

Fanfiction is fiction written by ordinary people using the characters, fictional universes, and plotlines of stories originally created and published by others. There is fanfiction about TV series, movies, books, and plays, and even sometimes music.<sup>48</sup>

Often, fanfiction writers choose to use some but not all of the original elements of the one or more stories from which their work derives, leading to fanfiction that is an

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<sup>48</sup> A subgenre of fanfiction is based on the lives of real people, both historical personalities and famous figures alive today. However, fiction using real people as characters is subject to different legal rules than fiction that derives from copyrighted material. More background information on fanfiction and its subgenres can be found at <http://en.wikipedia.org/wiki/Fanfiction>.

inextricable blend of old and new. For example, a fanfiction writer might choose to write about Buffy the Vampire Slayer, but decide to set her story in the universe of a Sherlock Holmes mystery. Fanfiction writers often explore what they see as underdeveloped characters and unexplored themes, turning the bumbling sidekick into the hero of the tale, or focusing on a character's love life instead of his life fighting crime. Some fanfiction writers create entirely new characters, borrowing only the "universe" — the fictional setting — from the original author.

In some ways, fanfiction has been around as long as storytelling itself. Ancient myths and folklore were spread by word of mouth, and each new storyteller had the option to embellish the tale according to her own tastes. In recent decades, the availability of cheap photocopying and the increase in ways for fans to connect to each other through fan clubs and conventions have allowed amateur writers to distribute their fiction to growing groups of fellow fans.

The Internet, however, has allowed fanfiction to flourish as never before. Any fan with Web access can publish his story for the world to see. While there are no concrete statistics on the amount of fanfiction available online today, a Google search for "fanfiction" shows over two million results, from major archives to individual stories and articles about the fanfiction phenomenon. Some large online fanfiction archive sites hold tens and even hundreds of thousands of stories, written by tens of thousands of authors.

The explosive growth of fanfiction and the new audience enabled by the Internet have brought increased scrutiny from copyright holders. A publisher may turn a blind eye to a fringe minority publishing paper fan-"zines" by mimeograph, but many feel threatened when a Web search for a trademarked character name turns up as much fanfiction as it does authorized sites. For example, a Google search for "Frodo Baggins," lead character in *The Lord of the Rings*, returns two fan sites before the official site, and of the top ten search results, two are fanfiction stories and all but the one official site are operated by fans.

### **What Are the Legal Issues?**

The increasing visibility of fanfiction often leads to conflict between the rights-holders of original works and fanfiction writers publishing their own, derivative

creations. Although intellectual property law provides certain exclusive, term-limited rights to original creators of works, their interaction with fanfiction is not clear.

### **Does Fanfiction Violate the Original Work’s Copyright?**

Copyright is the major area of US intellectual property law potentially affecting fanfiction. Some fanfiction draws on sources old enough (like Greek mythology or the novels of Jane Austen) that the elements borrowed from the original works have long since passed into the public domain. But most fanfiction derives from contemporary television shows, books, and movies whose protection under copyright will not expire for decades.

The United States Copyright Act, 17 USC § 106, grants several exclusive rights to creators for a specific term: reproduction, distribution, performance, display, transmission, and the right to prepare derivative works. Because fanfiction authors acknowledge that they are borrowing characters, storylines, and settings from others — “playing in someone else’s sandbox,” as it is often called — most copyright holders and fanfiction writers alike assume that fanfiction is a category of derivative work, necessarily infringing on the copyrights of original works.

However, the lines drawn by the law are not so clear. Copyright law protects whole works — works that are “fixed” in a medium. Elements of those works, such as characters, settings, and storylines, are not themselves necessarily independently eligible for copyright. In fact, most courts hold that an element such as a character must be “distinctly delineated” to be independently copyrightable. Basic descriptions are generally not sufficient, nor are names necessarily enough, despite a name’s separate eligibility for protection by trademark. A distinct character like Superman, with his specific personality, superpowers, and history, is generally considered copyrightable, while the concept of a superhero is not. But what defines Superman? Is a new superhero an impermissible copy of Superman if he has superhuman strength and a red cape? What if he is called Superman, but is a villain who uses his powers to hurt and steal? There is no clear test to determine what aspects of a given work are eligible for the exclusive rights granted by copyright.

Even if this distinction between whole works and their components means that some fanfiction reuses are not infringing, this defense does not protect all fanfiction. Some types of fanfiction, such as those creating “missing scenes,” might fail the test of distinct delineation because of their attention to maintaining the personalities and plot arcs of the original. However, another, even broader defense for fanfiction is potentially available: fair use.

### **Does the Fair Use Exception Apply to Fanfiction?**

Most fanfiction authors believe their reuse should be protected by the fair use doctrine, which permits certain otherwise infringing uses of copyrighted materials due to their circumstances or purposes. The fair use doctrine is not a bright-line test, but rather a set of factors for courts to take into account when determining if a finding of copyright infringement is justified.<sup>49</sup>

The seemingly most relevant factors for fair use as it applies to fanfiction are the level to which the infringing work has commercial impact, and to what degree it is transformative of the original work. An infringing story is more likely to be eligible for the fair use exception if its author does not receive any direct financial benefits, and, likely more importantly, if there is no negative impact on the commercial market for the original work. The more the fanfiction author transforms the borrowed aspects, setting the new work clearly apart from its derivation, the more likely the use will be considered fair.

These factors can only be described as those seemingly most important for fanfiction because the fair use defense for fanfiction has not yet been tested in court. As analyses balancing complex factors, fair use determinations are notoriously hard to predict beforehand, and in the case of fanfiction, this lack of clarity is exacerbated by the absence of judicial precedent. Thus, neither fanfiction writers nor copyright holders can confidently predict whether any given story, or the category of fanfiction as a whole, will qualify for the fair use exception.

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<sup>49</sup> For a more in-depth analysis of the fair use doctrine, see the accompanying piece in this briefing book, “A Practical Guide to the Fair Use Doctrine in American Copyright Law,” by Christina Olson.

## The Question of Moral Rights

In many cases where copyright holders request or demand that fanfiction writers stop their reuse, the core complaint seems to be less about the technicality of copyright infringements, and more about a desire to maintain control over the public image of a creation. In some countries, this concern is written into the law as “moral rights” that grant original creators the right to prevent others from distorting their works in ways that might tarnish the image and good name of the creator. US copyright law does not recognize a moral right to prevent distortion,<sup>50</sup> and even if it did, the right might not easily be enforceable. Most fanfiction writers place disclaimer notices on their stories to ensure that their unauthorized transformations cannot be mistaken for work by the original author.

Nonetheless, moral rights arguments have strong appeal for copyright holders concerned about the dilution of the valuable brands associated with their creative works or about preserving the purity and values of their original artistic vision. Many cease-and-desist orders received by fanfiction sites specifically target stories that change the character of a work by adding erotic, violent, or other socially controversial themes. In cease-and-desist letters sent in 2003 to several online publishers of adult-oriented fanfiction derived from a series of children’s books, for example, lawyers for the copyright owners expressed displeasure specifically with the content of the fanfiction in question while at the same time explicitly condoning fanfiction with unobjectionable content.<sup>51</sup>

Even those fanfiction writers who are aware that they cannot be threatened with legal liability on the basis of moral rights alone often seek compromises with rights holders issuing cease-and-desist orders so that they can avoid formal proceedings in which copyright infringement would be adjudicated. The implicit threat of a lawsuit on copyright grounds provides a *de facto* enforcement of otherwise unprotectable moral rights.

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<sup>50</sup> A limited exception for certain forms of art is made in the Visual Artists Rights Act, 17 USC § 106A.

<sup>51</sup> See Chilling Effects, Harry Potter in the Restricted Section, at <http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=522> (Jan. 13, 2002) (“For the avoidance of doubt, our clients make no complaint about innocent fan fiction....”).

### **Where Does This Leave Fanfiction?**

Although both copyright holders and fanfiction authors can find potential legal arguments to serve their purposes, both groups have strong incentives to avoid litigation. Potentially powerful defenses for fanfiction exist in the areas of infringement and fair use, but few fanfiction writers want to go through the risks and financial burdens of a lawsuit when simple concessions like requiring a password for access to an online archive are often enough to satisfy a copyright holder. No fanfiction writer wants to be the test case that could result in clarified laws that might restrict fanfiction. Few creative-rights holders want the negative publicity of a legal battle with fans on top of the expense and uncertainty of filing suit.

Thus, fanfiction writers and creators and copyright holders of the inspiring original works remain in *détente*. Neither side is certain of its rights under the law, and no clear legal precedents exist to guide behavior. Meanwhile, ordinary people like you keep reading and writing fanfiction sure of at least one thing: whatever the law might say, playing in other people's sandboxes can be a whole lot of fun!

#### **Further Reading :**

- Chilling Effects Clearinghouse, Frequently Asked Questions about Fan Fiction, at <http://www.chillingeffects.org/fanfic/faq.cgi> (last visited Apr. 4, 2005).
- United States Copyright Act, 17 USC § 106, § 101, *available at* <http://www.copyright.gov/title17/92chap1.html>.
- Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).
- Meredith McCardle, Fandom, *Fan Fiction and Fanfare: What's All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 443 (2003).
- HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE* (1992).

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# Music Sampling, Congress, and the Courts: Time for a Remix?

By Jacqueline Harlow, Harvard Law School Student '06

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*Unless Congress or other courts take action, musicians will have to acquire licenses to reuse any portion of another artist's sound recording — a move that may drastically stifle creativity and innovation in music.*

“Get a license or do not sample.”<sup>52</sup> This admonition from a federal appeals court is the latest word on the legality of music sampling. Unless Congress or other courts take action, musicians will have to acquire licenses to sample any portion of another artist's sound recording — no matter how few notes are taken, or how much the sampled work is transformed. Such a strict licensing requirement protects the interests of individual copyright holders but risks stifling creativity in sample-based musical genres such as rap, hip hop, and R&B. This essay examines sampling as a creative technique, the legislative and judicial treatment of that technique, and alternatives to the current system that protect both copyright owners and the musicians who create by infusing new music with old sounds.

## Sampling 101

Understanding the law of sampling requires familiarity with the evolution and power of this technique. Sampling is a method for creating new music by mixing sounds from an existing recording — usually made by another artist — with another existing recording or the sampling musician's own tracks. The amount of a recording that is sampled can vary from even less than the three notes sampled by NWA in “100 Miles and Runnin'” to complete instrument or vocal lines, like those used by DJ Danger Mouse in the *Grey Album*. The tremendous success of sampling-based genres, including rap, hip hop, and R&B, has fueled the popularity of this technique. A simple glance at the

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<sup>52</sup> Bridgeport Music v. Dimension Films, 383 F.3d 390 (6th Cir. 2004).

Billboard top music charts demonstrates the current commercial dominance of sampling-based genres.

Technological advancements have dramatically changed the nature of sampling. This technique has evolved from the use of analog turntables and mixers to digital techniques that can separate and transform individual sounds from an original work. For example, using digital sampling techniques, a musician can isolate a specific guitar riff and alter its properties, including key, tempo, and the number of repetitions, to suit the new work. The modifications enabled by digital sampling are so powerful that sometimes it is nearly impossible for a listener to identify the altered sample as having come from the original song. One reason for transforming a sample rather than recording the desired sound is that sampling allows artists to avoid the expense of hiring studio musicians to re-record sounds already available to be sampled. Thus, sampling both expands the creative resources available to artists and makes music production possible for many who could not otherwise afford to create.

### **The Copyright Act: Protecting Producers or Crushing Creativity?**

The Copyright Act attempts to promote creativity and innovation by granting artists limited rights, which allow them to make money from their creative efforts. However, Congress recognized that securing broad rights to artists in the short term could stifle future creativity by preventing new artists from taking advantage of their predecessor's progress, and endeavored to balance these interests in the Copyright Act. In striking this balance for derivative works — works, such as music samples, which arise from the transformation, adaptation, or modification of an original work of authorship — Congress bestowed time-limited exclusive creative rights upon copyright owners.

Recorded music is eligible for two distinct copyrights: one for the underlying musical composition, and another for the actual sound recording of that composition.<sup>53</sup> To understand the difference between these two copyrights, consider DJ Danger Mouse's *Grey Album*. When listening to that album, the actual sounds that one hears are remixed versions of the sounds originally recorded by The Beatles on their *White Album*, and by

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<sup>53</sup> 17 U.S.C. §§ 106, 114 (2005).

Jay-Z on his *Black Album*. Those sounds are protected by sound-recording copyrights. In contrast, the musical scores that The Beatles and Jay-Z performed to make their recordings are protected by musical composition copyrights. To frame the difference another way, a CD contains both sound recordings and musical compositions, while sheet music purchased from a music shop contains only musical compositions. These two forms of copyright are entirely distinct and are often owned by separate entities. For instance, while EMI owns the sound-recording copyrights for the *White Album*, Sony/ATV owns the musical composition copyrights for that album.

The Copyright Act permits copyright owners to sue artists who sample without permission. The exclusive rights that musical composition and sound recording copyrights secure for their owners include the right to prevent others from sampling copyrighted works.<sup>54</sup> The Act limits protection to sampled sound recordings in which “the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality” and specifically excludes independently recorded sounds even if they intentionally imitate sounds in the original recording.<sup>55</sup> Thus, while Danger Mouse’s sampling of the *White Album* and the *Black Album* without a license violated the sound recording copyrights for those works, he could have attempted to independently recreate the same sounds contained in those sound recordings, recorded those sounds on a CD, and sampled those independently fixed, aurally identical sounds on the *Grey Album* without violating any sound-recording copyrights. However, there is no corresponding exception permitting the recreation and use of a copyrighted musical composition. Consequently, since the *White Album* was based on a copyrighted composition, Danger Mouse violated the musical composition copyrights for the album by sampling it, and would have done so even had he independently recorded the sampled sounds.

A sampling artist must choose between two potentially expensive options under this system: she must either license both the musical-composition and sound-recording copyrights from their owners, or license only the composition and hire studio musicians to recreate the sounds. Many aspiring musicians cannot afford either of these options. In addition, licensing both the musical composition and sound recording copyrights is often

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<sup>54</sup> *Id.*

<sup>55</sup> 17 U.S.C. § 114.

complicated and time consuming, because, as discussed above, in many instances different entities own the musical composition and sound recording copyrights. For example, to avoid violating any copyrights, Danger Mouse would have had to license the musical compositions from the *White Album* from Sony/ATV, and the sound recordings from that album from EMI, in addition to obtaining both types of licenses for Jay-Z's works. On the other hand, the time and money it takes to independently recreate desired sounds can significantly increase the investment required to produce the new work. Accordingly, many people think that the current copyright system hampers creativity by placing onerous burdens on artists who seek to create with the musical works of others.

### **Accompaniment: Judicial Interpretation of the Copyright Act**

The Copyright Act's dissimilar treatment of musical compositions and sound recordings is reflected in the Judiciary's interpretation of the Act. Although the unauthorized sampling of any significant portion of either a musical composition or sound recording constitutes copyright infringement, the courts have applied different standards for determining whether short music samples infringe these copyrights.<sup>56</sup> Specifically, unauthorized sampling of only a few generic notes from a musical composition is permitted under certain circumstances, while any unauthorized sampling of a sound recording is forbidden without exception.<sup>57</sup>

For musical compositions, "trivial copying does not constitute actionable infringement."<sup>58</sup> Recently, a federal appeals court found that a generic three-note sample from a musical composition was non-infringing. The fact that the three notes used in the sample were identical to notes in the copyrighted song was not enough for infringement, since "if the similarity is only as to nonessential matters, then a finding of no substantial similarity should result."<sup>59</sup> The law takes account of the importance of the sampled segment to the copyrighted composition as a whole, focusing on the degree of qualitative and quantitative similarity between the sample and the composition. Since the three-note sample constituted roughly two percent of the whole composition and was not more

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<sup>56</sup> See *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003); *Bridgeport Music*, 383 F.3d at 398.

<sup>57</sup> See *Newton*, 349 F.3d at 598; *Bridgeport Music*, 383 F.3d at 398.

<sup>58</sup> *Newton*, 349 F.3d at 595.

<sup>59</sup> *Id.* at 596.

important than any other portion of the work, the court found that the sample was neither quantitatively nor qualitatively significant. Thus, the court determined that use of the sample did not infringe the musical composition copyright. Other federal courts have accepted this rule permitting the unauthorized sampling of short, generic sections of copyrighted musical compositions.<sup>60</sup>

However, courts have drawn a bright line between sampling a musical composition and sampling a sound recording. The law recognizes the differential treatment of musical compositions and sound recordings by the Copyright Act. In particular, the language in the Act securing “the exclusive right of the owner of copyright in a sound recording ... to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality”<sup>61</sup> has been cited as reserving to a sound recording owner “the exclusive right to ‘sample’ his own recording.”<sup>62</sup>

The Judiciary has pointed to several policy reasons supporting dissimilar treatment of musical compositions and sound recordings by the law. First, unlike the sampling of a musical composition, “even when a small part of a sound recording is sampled, the part taken is something of value.... It is a physical taking rather than an intellectual one.”<sup>63</sup> Further, according to the courts, the music industry has interest in and capacity for conducting efficient licensing negotiations. Finally, the current practice in the music industry is to negotiate licenses for sampling, and the industry, not the Judiciary, is best suited to value copyrighted recordings and “work out guidelines, including a fixed schedule of licensing fees” for sampling.<sup>64</sup> Despite the seemingly pro-copyright owner stance of the Judiciary, however, the law still acknowledges the right of an artist who wishes to incorporate a sound from another work into her own recording to duplicate that sound in the studio.<sup>65</sup>

The judicial interpretation of the Copyright Act gives artists another option for legally sampling copyrighted works. If an artist only wishes to sample a few generic

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<sup>60</sup> See, e.g., *Bridgeport Music*, 383 F.3d at 396.

<sup>61</sup> *Id.* at 398 (quoting 17 U.S.C. § 114).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 401.

<sup>65</sup> *Id.* at 398.

notes from copyright works, she may not have to obtain a license to sample the musical composition, although she will still be required either to license the sound recording or independently record the sounds contained in that recording. If she desires to sample a more substantial portion of the copyrighted works, then she will have to choose between licensing both works or licensing the composition and independently recording the sounds she wishes to appropriate from the original recording. Even though this set of options is less restrictive for short samples of copyrighted works, it still discourages creativity by forcing artists to choose between two expensive and time-consuming options: negotiating licenses, or independently producing the desired sounds.

### **Remixing Music Sampling Law**

Encouraging artistic creativity and innovation may require that some current impediments to music sampling be eliminated. Two alternatives seek to protect the interests of both copyright owners and sampling artists: First, extending the exemption for short, generic samples to sound recordings, and second, amending the Copyright Act to include a provision requiring compulsory licensing for music samples.

Extending the exemption for short, generic samples to sound recordings will not solve the current system's problems. Many artists sample distinctive, as opposed to generic, portions of sound recordings. In addition, sampling artists often want to use more than three notes from a copyrighted work. Moreover, the current bright-line rule prohibiting all unauthorized sampling of sound recordings reduces wasteful litigation, and lessens the burden on the judicial system. Replacing this bright-line rule with a standard that requires extensive, case-by-case factual analysis will make artists less likely to settle, and so the courts may have to spend more time and resources delving into the particular facts of individual cases. Therefore, the inadequate protection for sampling artists presented by this alternative in combination with the costs it would likely impose would be worse than what we have now.

An amendment of the Copyright Act to require compulsory licensing — mandatory licensing under reasonable and non-discriminatory terms — of musical compositions and sound recordings to sampling artists would reduce the costs and difficulties faced by artists seeking to license a work, while still ensuring that copyright

owners profit from the use of their works. Such an amendment to the Copyright Act could resemble the “mechanical licensing” provision for cover versions of copyrighted music: artists can automatically make cover versions of songs, provided that they pay royalties to the copyright owners. Although significant efforts would be required to determine royalty rates for sampling, a compulsory licensing scheme would foster creativity by simplifying the process of getting a license. In addition, a compulsory licensing system may reduce the amount of litigation over sampling by creating a framework for artists to operate within. Compulsory licensing is a fair alternative to the current system that would foster creativity while still rewarding copyright owners for their contributions.

The promotion of artistic creativity and innovation requires striking an appropriate balance between providing economic rewards to copyright holders and allowing artists access to their predecessors’ works so that they may create new works. Divining this balance has challenged both Congress and the courts. The current system requiring sampling artists to acquire licenses for some uses of musical compositions and all uses of sound recordings approximates this balance. Nonetheless, this system inhibits creativity, and may be inferior to alternatives such as a compulsory licensing system. Perhaps it is time for Congress to remix the protection provided to copyright owners.

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## For Whom Did Grey Tuesday Speak?

By Vipul Patel, Harvard Law School Student '07

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*How can musicians resolve conflicts regarding the creative reuse of their work? One option is to write or modify their recording contracts to permit future artists to create derivative works more freely. But do original artists have the incentives as well as the negotiating power to adopt free-use provisions?*

Grey Tuesday, Feb. 24, 2004, marked a high point in public attention to derivative creative work. Approximately 170 websites staged a protest against major record labels by ignoring EMI's cease-and-desist letters and posting DJ Danger Mouse's *Grey Album* — an unlicensed mash-up of the Beatles' *White Album* and Jay-Z's *Black Album*.<sup>66</sup> Free-culture advocacy groups voiced moral support, law professors explained copyright ramifications, and the public downloaded over one million copies of the contraband album on protest day. Ensuing media coverage portrayed Danger Mouse as an oppressed artist, battling against corporate Goliath EMI's narrow commercialism. However, one relevant party was noticeably absent: Jay-Z himself.

Admittedly, Jay-Z might have inadvertently encouraged downstream derivative usage by releasing an *a cappella* version of the *Black Album*, making it easier to merge his vocals with other source material. However, Jay-Z's likely intention for this *a cappella* version was to encourage free marketing through live mixing on the dance floor, not sampling for mass distribution of new works. In a rare quote about the fracas, Damon Dash, co-founder of Jay-Z's Roc-a-Fella Records, suggested that Danger Mouse should have sought permission beforehand from Roc-a-Fella. But Dash added, "I think it's hot. It's the Beatles. It's two great legends together."<sup>67</sup> And so, Jay-Z, and the label he co-owns, refrained from litigating.

Jay-Z's restrained response raises several questions. First, was his restraint motivated by benign altruism towards a fellow artist, sound commercial recognition of

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<sup>66</sup> See *Grey Tuesday*, at <http://www.greytuesday.org>.

<sup>67</sup> *Beatles Remix Was 'Art Project'*, BBC News, at <http://news.bbc.co.uk/1/hi/entertainment/music/3488670.stm>.

the mash-up's marketing benefit, or a desire to avoid the public-relations nightmare of a hip-hop artist/producer/label owner, and heavy sampler of other artist's works, enforcing copyright law against a fellow sampler? Second, would these motivations drive the broad community of recording artists to react similarly and, if so, create a voluntary expansion of the right to creative reuse? Third, can these motivations be expressed in artists' contracts with their publishers?

This essay explores whether original artists can resolve conflicts about creative reuse by writing or modifying their recording contracts to permit future artists to freely create derivative works. It also examines whether the original artists have the incentives as well as the negotiating power to do so.

### **Altruism, Reciprocity, and Self-Interest**

In November 2004, approximately eight months after Grey Tuesday, *Wired* Magazine released a free CD subtitled "Rip. Sample. Mash. Share."<sup>68</sup> It featured tracks from sixteen prominent artists, including the Beastie Boys, David Byrne, Chuck D, and Danger Mouse. Each track was licensed under the Creative Commons copyright regime, authorizing free online downloading, distribution through file-sharing networks, and unrestricted non-commercial sampling. The licensing on thirteen of the tracks went even further, allowing derivative commercial works to incorporate samples from those tracks. With initial distribution of 750,000 copies,<sup>69</sup> the *Wired* CD was intended as a grand statement that artists recognize the social value of unhindered cultural reuse.

Yet, the accompanying article in *Wired* recognized the challenges faced by prominent, major-label artists trying to offer content under free-use terms. "After reaching out to twenty acts, then thirty, and finally fifty, navigating the dicey obstacles of label politics, legal exposure, and lost revenue, only the bravest coughed up a song (we're still waiting for that track, Mr. Moby)."<sup>70</sup> Given the difficulties, what would motivate artists to modify contractual terms away from the entrenched boilerplate pushed on them by record labels?

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<sup>68</sup> See Thomas Goetz, *Sample the Future*, *WIRED*, Nov. 2004, available at <http://wired.com/wired/archive/12.11/sample.html>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

One possible motivation is an altruistic concern for the creative freedom of other artists, or the social value of derivative works themselves. Artists may want to enable reuse because they hold a moral preference for the free exchange of ideas. Given the anti-establishmentarian and anti-commercial inclinations of many artists, such altruistic motivations may be quite prevalent.

Another possible motivation is reciprocity. Artists may be willing to make their source material freely available because they are often on the other side of the free-use conflict. Such reciprocity could be spurred by either a normative belief in sharing or a practical concern with the challenges of clearing licenses. As a hip-hop artist and producer, Jay-Z has used countless samples. He has likely encountered difficulties in securing some of them — albeit less difficulties than most downstream artists, given his financial resources and industry clout. Similarly, the majority of the Wired CD's featured artists are heavy users of samples, including hip-hop artists (e.g., Beastie Boys, Chuck D) and DJs (e.g., Dan the Automator, Thievery Corporation, Cornelius).<sup>71</sup>

However, in a free-market culture, the motivation that would make artists most willing to grant derivative sampling rights is, of course, self-interest. For Jay-Z, the use of his vocal tracks in a derivative work could serve as a marketing tool, increasing awareness and prompting listeners to buy his original album. Unfortunately, the marketing benefit of sampling likely moves in direct proportion to the risk of market cannibalization — that is, the broader and more direct the sample used in the derivative work, the greater the recognition of the source material by listeners, but sampling that is too broad and too direct could replace demand for the original work altogether. On the other hand, a small, highly modified sample of a beat or two may pose no risk of reducing demand for the original work, but a listener will be unlikely to recognize and want to buy the original work.

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<sup>71</sup> *See id.* One commentator has suggested that the techno music producers, as heavy users of sampling, have also been more willing to employ free-use Creative Commons licensing, at least as represented in the online Netlabels community. See Björn Hartman, Netlabels and the Adoption of Creative Commons Licensing in the Online Electronic Music Community, at <http://fr.creativecommons.org/articles/hartmann.htm>.

### **Artists on Top, Artists on Guard, Artists Oppressed**

When media coverage of the free-use controversy focuses on the downstream artist as creator and the record label as rights-holder, it not only ignores the interests of the upstream artists, but also their economic and creative diversity. Reciprocity would hardly motivate an artist to support free use if he uses no samples in his own work. Similarly, altruism would not assure modified terms in a recording contract unless an artist has the bargaining power to overcome the label's resistance. By comparing a hypothetical multi-platinum pop star, an up-and-coming hip-hop act, and an unknown indie rock band, we can get a better sense of their interests in releasing their work for derivative use.

A commercially dominant pop star has the most leverage with the record companies, but he may be the most likely to restrict sampling. The pop star's work is the most recognizable, and would therefore attract more interest in creative reuse. If the sampling is too similar to the source material, it might diminish the commercial appeal of his own work. Furthermore, the attractiveness of the original song makes it a valuable property, so the pop star might equate free sampling with lost revenues from sampling licenses. Conceivably he might be willing to forgo such sampling revenue, but since a standard recording contract assigns the master recording copyright to the label, the label may demand a reduction in his normal royalties in exchange for granting a free-use term for derivative usage. On the other hand, as a major recording star, the pop star also has more leverage in contracting with a record label (or may even have his own). If he has no qualms about sampling costing him some money, the pop star could more easily dictate his own terms. Consequently, our hypothetical pop star may have the means to allow free use, but may lack the interest in doing so.

The up-and-coming hip-hop act lacks the bargaining leverage of the prominent pop star, but given the dominance of sample-based production in hip hop, the hip-hop artist may be motivated by reciprocity to allow sampling freely. Though sampling is by no means absent in pop, hip hop has used sampling from its start, for example in Afrika Bambaataa's sampling of Kraftwerk's *Trans-Europe Express*.<sup>72</sup> Hip-hop also tends to use more recognizable samples, unlike the minor samples added into pop tracks by

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<sup>72</sup> MICHAEL ASHBUREN, SAMPLING IN THE MUSIC INDUSTRY 2 (1994).

producers working in the studio. Therefore the hip hop artist, given both the history of the genre and the value of sampling to his work, may be more willing to allow free reuse than a pop star whose use of sampling is more superficial. So in contrast to the hypothetical pop star, the hip-hop act might have the interest in allowing free reuse, but might lack the leverage to do so.

The unknown indie band may be most likely to feel a counter-commercial commitment to free sampling, but this commitment is likely undercut by economic necessity and their lack of bargaining leverage. As an unknown commodity, the indie band will likely sign its recording contract on terms that are unfavorable, if not outright exploitative.<sup>73</sup> Furthermore, one of the most prominent sources of revenue for such bands is reuse of their recordings in TV commercials, as advertisers seek hip branding at low prices. The risk of cannibalizing this revenue, even if remote, may inhibit the band from allowing free derivative reuse.

On the other hand, the indie band may be more susceptible to the politics of free use. Unlike mainstream hip hop or pop where artists are more willing to overtly embrace commercialism, indie rock portrays a more anti-commercial image to its audience. Therefore, the indie rock band, whether influenced by a strongly felt norm or to maintain consistency with its image, might feel the tug of a free-use rights regime. Unfortunately, this tug might also conflict with the band's economic necessities and lack of bargaining leverage.

The three examples above are hypothetical simplifications of the considerations affecting upstream artists. Nevertheless, they demonstrate that artists, due to the diverse influences of genre, prominence, and moral considerations, can have a variety of perspectives on the appropriateness of free use and copyright restrictions. Consequently, broad-based voluntary adoption of free-use stipulations is unlikely.

### **Administering Free-Use Contracts**

As Jay-Z's acquiescence to the *Grey Album* and the release of the Wired CD show, some artists are willing and able to allow free reuse of their source material. A critical question remains: can novel free-use provisions in recording contracts adequately

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<sup>73</sup> See, e.g., Steve Albini, *The Problem With Music*, at <http://www.negativland.com/albini.html>.

capture all concerns that an artist might have regarding his work? For example, the Creative Commons license for music has three flavors, but the only relevant distinction in permissions for sampling is whether the derivative work can be commercial or not.<sup>74</sup>

It is very likely that an artist who wishes to encourage sampling under some circumstances may still legitimately desire to restrict usage on other dimensions to preserve his commercial interests. For instance, the artist might want to enforce a “quiet period,” that is, some period of time before the source material can be sampled. Perhaps the artist wants to restrict sampling to a certain length or a particular part of the song, or even restrict sampling to certain genres. For instance, many pop artists release a hip hop or dance remix of their original track, so they may want to keep samplers out of those genres. These considerations could be factored into the master recording contract with the label, but will ultimately require more negotiations, costing the artist time, legal fees, and leverage on other deal points.

The consideration of aesthetic control for its own sake is more difficult to incorporate in a blanket free use provision of a master recording contract. American intellectual property laws are much less willing to enforce artists’ “moral rights” to protect the integrity of their work once ownership of the work has been assigned to another party. Conceivably, restricting sampling is not just about extracting revenue or limiting exposure from derivative works, but also preventing use of a sample for a purpose that the label or artist might find objectionable. The upstream artist’s fear of such use might diminish his willingness to stipulate a free-use exception in a master recording contract; he might instead prefer to clear samples on a one-off basis after reviewing the proposed derivative work.

Additionally, the artist and the label are not the only parties involved in such a decision. Quite often, a separate composer or songwriter owns the underlying composition or lyrics. Since the master recording contract between the artist and label still leaves intact the composer’s mechanical rights, any source material released for free use by the artist and label would still require payment upon sampling to the composer.

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<sup>74</sup> See Creative Commons, at <http://creativecommons.org/license/sampling?format=audio>.

So both logistically and economically, the source artist cannot remove all burdens from creative reuse.

### **Stopgap Solution?**

The difficulties of creating free-use exceptions in recording contracts will likely inhibit upstream artists from seeking such exceptions en masse. Statutory remedies or artist coalitions that aggregate the bargaining leverage and interests of artists may prove better vehicles for broad copyright reform. Within particular genres among particular artists, however, the possibility exists for individual contracts to enable more expansive permissioning. At the least, it is encouraging to see artists' efforts to experiment with novel copyright forms such as the Wired CD. Or, in the alternative, like Jay-Z they can always refrain from exercising their copyright.

## Glossary of Terms

**Common Law Copyright:** Common law copyright is the legal doctrine that contends that copyright is a natural right and creators have the same inherent right to it as they would tangible property. The doctrine has been repudiated by the courts in the United Kingdom (*Donaldson v. Beckett*) and the United States (*Wheaton v. Peters*). In both countries, the courts have held that copyright is a limited right created by the legislature under statutes and subject to conditions and terms as the legislature sees fit. The proponents of this doctrine contended that creators had a perpetual right to control publication of their work. While the legislature could grant such a perpetual right — in the U.K., Parliament has done so in regards to *Peter Pan* — it is under no obligation to and can set a limited term.

– Source: Wikipedia, Common Law Copyright, at [http://en.wikipedia.org/wiki/Common\\_law\\_copyright](http://en.wikipedia.org/wiki/Common_law_copyright).

**Copyright:** A copyright is a form of intellectual property that grants its holder the sole legal right to copy their works of original expression, such as a literary work, movie, musical work or sound recording, painting, or computer program for a defined period of time. Copyrights do not cover *ideas* or *facts*, however, but only the particular *expression* of an idea. A copyright on a Mickey Mouse cartoon, for example, would not prevent others from creating artistic works about talking mice. It would only limit their rights to distribute Disney's original cartoons and their ability to create **derivative works** closely copying that particular talking mouse. Copyrights grant certain exclusive rights over their respective subject matter that are enforceable against everyone (with some exceptions, such as **fair use**). Copyrights are limited to a statutorily defined number of years, during which the copyright owner does not actually have to make use of his work in order to keep others from doing so. After the term is up, the copyrighted work enters the public domain and is available for anyone to freely use because courts in the United States and the United Kingdom have rejected the doctrine of a **common law copyright**.

– Source: Wikipedia, Copyright, at [http://en.wikipedia.org/wiki/Copyright\\_law](http://en.wikipedia.org/wiki/Copyright_law).

**Derivative Work:** A term used in copyright law to refer to an artistic creation that includes aspects of work previously created and protected.

In the United States, "derivative work" is defined in 17 USC 101, section 101:

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

The concept of derivative works is a logical extension of the framework of copyright protection in the United States. It prevents others from misappropriating the original work of a creator and redistributing it with "trivial" changes without permission. If a derivative work is created with the permission of the original creator, the secondary creator maintains a copyright interest in *only* the aspects of the derivative work that are his or her original creations.

– Source: Wikipedia, Derivative Work, at [http://en.wikipedia.org/wiki/Derivative\\_work](http://en.wikipedia.org/wiki/Derivative_work).

**Fair Use Doctrine:** The fair use doctrine refers to an aspect of U.S. **copyright** law that provides for the licit, non-licensed citation or incorporation of copyrighted material in another author's work under certain, specifiable conditions (such as **transformative works**). Fair use makes copyrighted work available to the public as raw material without the need for permission or clearance, so long as such free usage serves the purpose of copyright law, which the U.S. Constitution defines as the promotion of "the Progress of Science and useful Arts" (I.1.8), better than the legal enforcement of claims of infringement. The doctrine hereby attempts to balance the interests of individual copyright holders with the social or cultural benefits that follow from the creation and distribution of **derivative works**. Insofar as this doctrine protects forms of expression that might otherwise be enjoined as copyright infringing, it has been related to First Amendment free speech protections in the U.S. Constitution.

– Source: Wikipedia, Fair Use, at [http://en.wikipedia.org/wiki/Fair\\_use](http://en.wikipedia.org/wiki/Fair_use).

**Fan Fiction (FanFic):** Fan Fiction is a genre of amateur creative expression that features characters from movies, TV shows, and popular culture in new situations or adventures. The vast majority of these stories and poems are written by fans with no commercial interest who disseminate their work over the Internet, email lists, or newsgroups. The word "fan," however, might not be the most appropriate term since not all FanFic is created by people who are truly "fans" of the original work. Regardless of whether FanFic authors are really fans, owners of original works often do not look favorably upon these works. In response, the owners of the rights often try to stop the creation of FanFic through cease and desist letters and the threat of lawsuit on copyright grounds.

– Source: Chilling Effects Clearing House, Frequently Asked Questions (and Answers) About Fan Fiction, at <http://www.chillingeffects.org/fanfic/faq.cgi#QID15>.

**Intellectual property:** In law, particularly in common law jurisdictions, intellectual property, or "IP," refers to a legal entitlement which sometimes attaches to the form of expression of an idea or other intangible subject matter. In general terms this legal entitlement sometimes enables the holder of the IP right to exercise control over the use of the IP. The term intellectual property reflects the idea that the subject matter of IP is the product of the mind or the intellect, and that once established, such entitlements are treated in some ways as equivalent to tangible property, and may be enforced as such by the courts. However, many activists working against expansions of copyright and other forms of intellectual property emphasize its differences from tangible property, such as that it may be shared and used by many simultaneously without diminishing its (non-commercial) utility to any of them. The most well known forms of intellectual property include patents, **copyrights**, trademarks, and trade secrets.

– Source: Wikipedia, Intellectual Property, at [http://en.wikipedia.org/wiki/Intellectual\\_property](http://en.wikipedia.org/wiki/Intellectual_property).

**Machinima:** From the combined words of “machine” + “cinema,” it is the art of creating movies using techniques adopted from 3D modeling and 3D animation, whereby the final product is often built, rendered, animated, and/or recorded within a computer game engine.

– Source: Machinima.com, The Word: Machinima, at <http://www.machinima.com/PHPBB/viewtopic.php?t=3908>.

**Open-Source Software:** Open-source software is required to have its source code freely available; end-users have the right to modify and redistribute the software, as well as the right to package and sell the software. Software with source code in the public domain meets these criteria, as does any software distributed under the popular GNU General Public License. Open-source licenses may have additional restrictions, such as a requirement to preserve the authors' names and copyright statement in the code.

– Source: Wikipedia, Open Source, at <http://en.wikipedia.org/wiki/Open-source>.

**Peer-To-Peer:** A peer-to-peer (or P2P) computer network is a network that relies on computing power at the edges (ends) of a connection rather than in the network itself. The concept has achieved wide prominence among the general public in the context of the absence of central indexing servers in architectures used for exchanging multimedia files. In a peer-to-peer network, any node is able to initiate or complete any supported transaction with any other node. Peer nodes may differ in local configuration, processing speed, and network bandwidth.

– Source: Wikipedia, Peer-to-peer, at <http://en.wikipedia.org/wiki/Peer-to-peer>.

**Sampling (Music):** In music, sampling is the act of taking a portion of one sound recording and reusing it as an instrument or element of a new recording. This is typically done with a sampler, which can be a piece of hardware or a computer program on a digital computer. Sampling is also possible with loops of magnetic tape with a reel-to-reel tape machine. Often "samples" consist of one part of a song used in another, for instance the use of the drum introduction from Led Zeppelin's "When the Levee Breaks" in songs by the Beastie Boys, Mike Oldfield and Erasure, and the guitar riffs from Foreigner's "Hot Blooded" in Tone-Loc's "Funky Cold Medina". "Samples" in this sense occur often in hip hop and R&B, but are becoming more common in other music, as well.

– Source: Wikipedia, Sampling (Music), at [http://en.wikipedia.org/wiki/Music\\_sampling](http://en.wikipedia.org/wiki/Music_sampling).

**Transformative Works:** A work is “transformative” of an earlier work when it uses that earlier work in a manner that gives new meaning to that earlier work, i.e. it enables us to see the earlier work in a different manner than might have been originally intended. One example is a parody. Transformative works receive different treatment under the law than do merely derivative works because of the degree and type of change wrought on the original work and because they generate new ideas in relation to the original work.

– Source: Ivan Hoffman, The Seinfeld and the Wind Done Gone Cases: Studies in Fair Use, at <http://www.ivanhoffman.com/seinfeld.html>.