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Audio Mash-Ups and Fair Use: The Nature of the Genre, Recontextualization, and the Degree of Transformation

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Introduction

A mash-up is defined as, “an audio recording that is a composite of samples from other recordings, usually from different musical styles.”¹ This recontextualization of pre-existing audio recordings may incorporate copyrighted material. If the mash-up is comprised of entirely pre-existing material, and if such material is protected and used without permission of the rights holder(s), a fundamental question regarding unauthorized use of intellectual property emerges: is the nature of the use in the new context (i.e., the mash-up), per se, sufficiently transformative to rely on the Fair Use doctrine?² Stated another way, would the mash-up context require a different legal treatment of sampling than a single sample incorporated into the recording of an original song? This article will argue that the nature of the mash-up genre is not, by the mere recontextualizing of samples, necessarily sufficiently transformative to treat its use any differently from other unauthorized uses. That is not to say that the use of samples in a mash-up could not be sufficiently transformed to qualify for such consideration. It does hold, however, that recontextualization alone does not automatically earn a label of “sufficiently transformed.” Further rationales for not treating sampling for use in mash-up any differently than a singular unauthorized sample include the facts that the mash-up relies almost entirely on the creative works of others (other than the “selection and arrangement” along with some processing of the samples) and that the scope of infringement is much greater (i.e., many more rights holders are involved). Perhaps a higher level of scrutiny is needed, not less. Such a holding could subject the mash-up “artist” to multiple copyright infringement claims for a single work.

Background

Remixing is traced back to Jamaica in the 1960s, “when disc jockeys (DJs) used portable sound systems to mix segments of prior recordings into new mixes, which they would overlay with chanted or ‘scatted’ vo-

cals.”³³ These remixes were created employing available analog technology, including tape and turntables. With the rising popularity of rap in the 1980s, DJs began creating mix tapes, which can, “consist of remixes of hit songs...[o]r it can feature a rapper ‘freestyling’ or improvising raps, over the beat of another artist’s song”.⁴ The DJ’s use of the original songs is usually without permission of the copyright owner(s).⁵ The development of technology for audio recording in the early 1980s brought us digital sampling, which “allowed artists digitally to manipulate and combine sampled sounds, expanding the range of possibilities for the use of pre-recorded music.”⁶ One application of sampling is described as, “similar to taping the original composition and reusing it in another context.”⁷ Mash-ups are an extension of remixing, but are distinguished by the characteristic of not adding new material, such as vocals or instrumental overdubs, but rather are created entirely of existing sources.

Recent developments in software tools for processing audio, coupled with falling laptop prices, have put nearly unlimited editing power in the hands of amateur and professional DJs, remixers, and mash-up artists. Programs like Audacity® (which is free), and Sony ACID Pro® (US\$299.95 MSRP) can match tempos of separate audio samples, easily facilitating the sequencing, layering, and looping of multiple audio sources. While many performers use these tools only for live performance as DJs in clubs, some archive their performances and release them as downloads or physical CDs. Most notably, two mash-up artists have gained much attention over the past few years due to the source material they used without permission, and the resulting copyright issues that are implicated. They are known as Danger Mouse and Girl Talk.

In 2004, Danger Mouse (a.k.a. Brian Burton) created *The Grey Album* which incorporated samples from the *a cappella* version of rapper Jay-Z’s *The Black Album* and The Beatles’ 1968 release known as *The White Album*.⁸ While the *a cappella* release of Jay-Z’s album was intended for DJs, remixers, and mash-up artists to use as they pleased, similar use of The Beatles’ material was met with cease-and-desist letters from EMI.⁹ Burton complied, but many web sites, in protest, made *The Grey Album* available for free download, prompting threats of legal action from EMI and Sony/ATV.¹⁰ Both eventually dropped the case.¹¹

In June 2008, Gregg Gillis, under the moniker “Girl Talk,” digitally released his fourth album, *Feed The Animals*, which appropriates over three hundred unauthorized samples.¹² Delivery was initially made via the

label's web site, offered as a "pay-what-you-like" Radiohead model.¹³ For a purchase price of \$10.00 (plus shipping), the buyer could elect to receive a physical CD in addition to the download.¹⁴ The physical CD is also currently distributed by Carrot Top Distribution (CTD).¹⁵ *Feed The Animals* was rated one of the top ten albums of 2008 by *Time* magazine.¹⁶ Given the large number of samples used (the actual count is 322, according to the liner notes included with the physical CD)¹⁷, the commercial nature of the use, and the number of record labels and music publishers as potential plaintiffs in an infringement suit, *Feed The Animals* will serve as the case study for this inquiry into sampling, recontextualization, and fair use in audio mash-ups.

Copyright, Music, and Sound Recordings

The U.S. Copyright Act draws a clear distinction between musical works and sound recordings.¹⁸ When a composer or songwriter creates an original piece of music, the work is subject to copyright protection.¹⁹ Control of the musical work is the domain of the music publisher (which may be the composer, assuming she has not assigned the rights, or that it is not a "work made for hire"²⁰). Once the work is recorded, another copyright exists in the sound recording.²¹ Record labels typically control the copyright for their sound recordings, or "masters." The rights of the copyright holder include the exclusive right "to reproduce the copyrighted work in copies or phonorecords," and the exclusive right "to prepare derivative works based upon the copyrighted work."²² The owner of a sound recording also holds the exclusive right to "duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording."²³ Further, the Copyright Act gives the owner of the sound recording the exclusive right "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."²⁴ Under these statutory provisions, sampling for mash-ups involves the copying of original sound recordings and the creation of derivative works. Because sampling from a sound recording is a taking of the underlying work (or "song") and the sound recording, it requires one to obtain two licenses: one from the publisher(s) and one from the label. There is no compulsory license for creating derivative works.²⁵

Infringement

The use of copyrighted material without permission may constitute infringement.²⁶ In sampling cases, each sample may invoke two infringement claims: one for the use of the underlying musical work and one for the use of the sound recording.²⁷ Viewing this in the context of Girl Talk's use of 322 samples in *Feed The Animals*, the one album could bring well over 600 separate claims. (Note that a single song may have multiple publishers, pushing the potential number of claims even higher.) Suits could originate from individual publishers and labels, or from collective industry groups, such as the Recording Industry Association of America (RIAA)²⁸ and the National Music Publishers Association (NMPA)²⁹. The issue is whether Girl Talk's unauthorized use of samples constitutes infringement.

To establish infringement of the underlying work (or song), the plaintiff, "must first prove that the defendant has copied the protected work and, second, that there is substantial similarity between the two works."³⁰ Absent direct evidence of copying, these requirements may be determined inferentially, if it can be shown that the defendant had access and "that the allegedly infringing work is substantially similar to the copyrighted work".³¹ Further, the copying must be substantial enough to "constitute improper appropriation, the test being the response of the ordinary lay person."³² Sampling presents a different scenario, in that as long as the sample is recognizable, indirect proof of copying is not necessary, as the sample *is* a digital copy.³³ "[S]ampling is never accidental...When you sample a sound recording, you know you are taking another's work product."³⁴ The remaining issue is "whether the copying amounted to unlawful appropriation."³⁵ Just as in the case of indirect evidence showing copying, "The test to determine substantial similarity is the response of the ordinary lay person."³⁶ Such response is based on either quantitative or qualitative factors.³⁷

Infringement of the sound recording by sampling can apply the same tests as those for the underlying work. As noted above, it is a shorter inquiry, as the sample is an actual digital copy, which obviates the need to establish copying by indirect evidence. This "verbatim similarity" between two works has been termed "fragmented literal similarity."³⁸ Even in fragmented literal similarity cases, most courts recognize a requisite "substantiality" threshold in order for infringement to be found. However, the Court of Appeals, Sixth Circuit, in *Bridgeport Music, Inc. v. Dimension Films*, has adopted a literal interpretation of § 114(b) of the code, establishing a

bright line rule in its Circuit.³⁹ The court does note that infringement of the musical composition by a use of a sample “may require a full substantial similarity analysis....”⁴⁰ But, regarding infringing the sound recording, the court held that, “If the sampler physically copied any portion of another’s copyrighted sound recording, then infringement should be found.”⁴¹

It should be noted that there was no federal copyright protection for sound recordings until the Sound Recording Act of 1971, which took effect on February 15, 1972.⁴² This is relevant only for samples taken from sound recordings released prior to February 15, 1972. Those may have state or common law protection, but no protection from the federal statute. Of the samples used in *Feed The Animals*, this could eliminate claims for unauthorized use of the sound recordings of The Beach Boys’ *God Only Knows*,⁴³ and James Gang’s *Funk #49*.⁴⁴ This does not affect the protection of the underlying work.

If this paper adopted the ruling in *Bridgeport* as controlling regarding Girl Talk’s use of samples infringing the sound recordings, half of the inquiry would be over. Therefore, for the purpose of further discussion, it is imperative to acknowledge a split in the Circuits, and consider a full substantial similarity analysis for infringement claims on the underlying work *and* the sound recording.

Source Material for Girl Talk

It would be prudent to analyze some samples used in *Feed The Animals*, given the aforementioned tests to determine substantial similarity. The purpose of this stage in the inquiry is to determine the likelihood of infringement. While the sheer number of samples used prohibits individual analysis of all samples, most can be separated into one of three main categories: samples lasting ten seconds or more; short samples lasting one or two seconds; and all others, from three to ten seconds.

The parameters of these categories are not arbitrary. In particular, this author’s reasoning for defining the length in the first group is that at 120 beats per minute (bpm), ten seconds would be five measures. (The samples discussed below are originally between 114 and 126 bpm. The slower tempo would cover fewer measures and beats over ten seconds, whereas the faster tempo would cover more measures and beats. Most of the samples in this category are longer than ten seconds; many are over thirty seconds.) A typical structure of a popular song’s chorus is eight measures comprised of four two-measure phrases. If one such phrase from

a song is sampled, it may easily satisfy a substantial similarity inquiry. However, length alone may not be dispositive, if, for example, the section sampled uses a common chord progression taken from the introduction of a song, and lyrics are not present. The second group, based on relatively short samples, may eliminate infringement (assuming *Bridgeport* is not controlling), based on application of the *de minimis* doctrine, which will be addressed in a later section. The third group could go either way. In all three categories, quantitative and qualitative analysis is necessary. However, the shorter the sample, the greater the importance of qualitative factors in determining substantial similarity.

The choice of the four samples to be examined is intentional, as they all fall into group one (all over ten seconds; most are significantly longer), are relatively exposed in the mash-up, and are well known songs. They are: *You Got It* (Roy Orbison); *Lithium* (Nirvana); *September* (Earth, Wind & Fire); and *God Only Knows* (The Beach Boys). (All four samples appear in the mash-up *In Step* on track number ten of *Feed The Animals*.) The purpose for these selections is that if they satisfy the test for substantial similarity, then infringement has occurred, and the examination of possible defenses may be addressed. The issue of how many additional samples (and which ones) are infringing would still require a sample-by-sample analysis.

The opening forty-five seconds of Girl Talk's *In Step* utilizes samples from *You Got It*,⁴⁵ including the entire eight bar chorus (occurring at 30-45 seconds). The melody and lyrics are easily heard, even with the simultaneous layering of other samples. We hear Orbison's voice: "Anything you want, you got it; anything you need, you got it; anything at all, you got it; baby..." The tempo of *In Step* is 127.5 bpm; the original tempo of *You Got It* is 114.5 (note: this author matched tempos in Pro Tools to determine bpm). The pitch of the sample is slightly higher in the mash-up, the likely result of the increased tempo. The guitar introduction from Nirvana's *Lithium* plays from 1:00 to 1:13, when the twelve-bar chorus starts and plays in its entirety for twenty-four seconds, hearing Kurt Cobain's distinctive vocal, "Yeah." As the original recording is 123 bpm, the sample played back in the mash-up is slightly faster and higher in pitch. At 1:45, Gillis loops the four-bar guitar intro from *September* three times, followed by the brass cadence that leads to the first verse in the original recording. This is followed by a full eight-bar chorus. The tempo of the original recording ranges from 119 bpm in the introduction to 126 bpm in the chorus. The

speed and pitch are slightly affected. Starting at 2:53, a complete eight-bar instrumental and vocal section from *God Only Knows* leads into two, two-bar repetitions of the hook sung by Carl Wilson: “God Only Knows what I’d be without.... God Only Knows what I’d be without...” followed by the full phrase, “God Only Knows what I’d be without you.” The original tempos are 118 bpm for the first section and 116 for the hook. As with the other samples, the pitch and tempo are slightly higher when compared with the original.

Given the length and clear exposure of each of these samples, this author finds it difficult to imagine that the “response of the lay person” would find anything other than substantial similarity when comparing the samples in the mash-up to the original songs and recordings. Such a finding of infringement moves the inquiry to possible defenses.

Fair Use

In the following sections, discussion will focus on defenses to infringement claims, primarily fair use, to which Gillis states his work is subject.⁴⁶ In an online interview conducted by *The Washington Post*, Gillis’s claims of fair use rest on his belief that his work is “transformative,” the samples are short, and it is not a substitute for the original and therefore does not deprive the rights holders of sales.⁴⁷ He states, “There’s a doctrine called Fair Use in United States copyright law that allows people to sample without asking for permission if the work falls under certain subjective criteria, things like whether it’s transformative, how it impacts the sample sources’ potential sales, etc.”⁴⁸ However, as one attorney put it, “There is no such thing as a ‘fair use’ privilege for sampling music in a conventional commercial recording.”⁴⁹ Therefore, the question is whether Gillis’s infringing use of samples can be excused under a fair use defense.

The U.S. Supreme Court noted that fair use is an affirmative defense,⁵⁰ and “requires a case-by-case analysis rather than bright-line rules.”⁵¹ Such analysis is based on the guidelines set forth in the Copyright Act:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (includ-

ing multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁵²

Factor One

In examining the first factor, it is clear that *Feed The Animals* is a commercial endeavor, based on distribution of physical CD units through Illegal Art's web site and Carrot Top Distribution, as well as digital downloads via the web site. Even if no physical product was sold, and all downloads were given away for free, one could argue that the album is a commercial promotional tool for his live performances, which have been successful enough to allow Gillis to "quit his day job."⁵³ (Note: This author contacted Girl Talk's booking agent, Sam Hunt, to inquire about performance fees. In an email from Mr. Hunt on October 19, 2008, he stated that Girl Talk is asking \$15,000.) However, even commercial use does not bar a fair use defense. "[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness."⁵⁴ The commercial nature of the use, "is only one element of the first factor enquiry into its purpose and character."⁵⁵ The use may be "transformative" by adding "something new, with a further purpose or different character, altering the first with new expression, meaning or message."⁵⁶ The greater the degree of transformation, the less weight will be given to other fac-

tors.⁵⁷

Transformative Use and Derivative Works

The statutory definition of 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.” (emphasis added)⁵⁸ Therefore, the creation of a derivative work inherently carries with it some degree of transformation. This does not automatically rise to the level of transformation the U.S. Supreme Court refers to in *Campbell*⁵⁹ in determining fair use. If the mere “recontextualization” of a protected work, whether it is the recasting of a novel into a screenplay, or a sample from a sound recording mixed into a new song, satisfied the transformative factor for fair use determination, the exclusive right to prepare derivative works would be severely impaired. The degree of transformation becomes pivotal.

Relying on the samples examined earlier, and the conclusion that they are substantially similar to the original works, it seems a logical conclusion that the individual samples are not substantially transformed. This also suggests that Gillis misconstrues transformative use with recontextualization. This may beg the question, what, then, could be a transformative use of samples? Examples of substantial transformation of audio might include radical tuning, reversing, manipulation through effects (such as equalization, compression, delay, distortion, formant shifting), and mixing with multiple other sound sources. Considering the lack of transformation and the commercial nature of the use, Girl Talk fails the first factor in determining fair use. But that does not end the examination, as the factors are not to be “treated in isolation,” but “weighed together.”⁶⁰

Factor Two

The second fair use factor is “the nature of the copyrighted work.” The originality requirement for copyright protection does not cover facts or ideas.⁶¹ Rather, it is the expression of those ideas that constitute original works of authorship.⁶² Some types of work may be entitled to more protection than others, based on the amount of originality.⁶³ “Fair use is more difficult to establish” when highly original works are copied.⁶⁴ The songs used by Gillis are indeed original works, and are “closer to the core of

intended copyright protection.”⁶⁵ Therefore, analysis of the second factor does not weigh in favor of Gillis.

Factor Three

This factor requires consideration of, “not only the quantity of the materials used, but about their quality and importance, too.”⁶⁶ The shorter the sample, the greater is the weight of the qualitative factors. Some of the samples, from the short category and from the three-to-ten second category, may not contain “core” elements of the original song or recording, requiring additional quantitative and qualitative analysis. For example, one court held that a three-note, six-second portion of a composition was neither “quantitatively or qualitatively significant” in relation to “the composition as a whole.”⁶⁷ However, this infringement case only involved the underlying work (not the sound recording), and the portion used included only three notes.⁶⁸ This further underscores the issue that each infringement must be analyzed separately.

Certainly, long samples, such as the selected four described above, would be more likely to satisfy the quantitative aspect. If a sample includes the hook or chorus, the relative importance of the material is likely (but not necessarily) to be higher than verses or bridges, as it goes to the heart of the song. Even if an insubstantial amount is taken, if that part goes to the “heart” of the original work, it must weigh against a finding of fair use.⁶⁹ Each of the four selected samples does include the hook or chorus of the song, which, from the qualitative aspect, would weigh against Gillis.

Factor Four

The final factor is an economic inquiry: the effect on the market of the original work. It is unlikely that samples, singular or multiple within a work, become substitutes for the original. For example, a fan of Nirvana is not likely to decide against acquiring *Lithium* after hearing Girl Talk’s use of it in *In Step*. The mash-up, then, does not negatively impact the market for the original recording. (One may argue that such use actually benefits the market for the original by exposing it to new audiences.) However, there is a market for sample licenses, which is undercut by unauthorized use. “[T]hey neglect to understand that there is a well-established market for licensing samples.”⁷⁰ Major labels and publishers have licensing departments that handle sample licenses.⁷¹ Typically, the more successful the song, the higher the license fees the rights holder can command, as there

is no statutory rate for sampling. As most of Gillis's uses are of highly successful songs, the potential license fees are significant (and therefore prohibitive). Hence, there is an economic harm to the rights holders by depriving them of licensing revenues.

Given this analysis of the four factors as applied to the selected samples, Girl Talk's fair use claim fails as an affirmative defense.

Other Defenses

"The legal maxim '*de minimis non curat lex*' (sometimes rendered, 'the law does not concern itself with trifles') in the copyright context can mean what it means in most legal contexts: a technical violation of a right so trivial that the law will not impose legal consequences."⁷² If some of Gillis's samples are so short as to be considered "trivial," a *de minimis* defense may reduce the number of samples considered to be infringing. As mentioned earlier, the Sixth Circuit ruled that the *de minimis* doctrine does not apply to sampling of the sound recording.⁷³ This departs from other circuits, as is evident in the Ninth Circuit's holding that "the substantiality requirement applies throughout the law of copyright, including cases of music sampling..."⁷⁴ To give this discussion the broadest latitude, the latter holding will be adopted. The question is: which samples may qualify?

The test to determine if a use is *de minimis* is, "if it is so meager and fragmentary that the average audience would not recognize the appropriation."⁷⁵ The likely category where these may be found is the short samples of two seconds or less. For example, in Girl Talk's *In Step* at 2:51, there is a very short sample of a timbale roll, attributed to Gloria Estefan and the Miami Sound Machine, from the song *1-2-3*.⁷⁶ Evidence suggesting that this sample is *de minimis* could include that when this author commenced research on *Feed The Animals*, an earlier Wikipedia accounting of samples attributed the same sample to Prince, from the song *U Got The Look* (from the *Sign 'O' The Times* album on which this author has production credit).⁷⁷ Certainly one listener could not discern the source. However, as in the fair use analysis, if substantial similarity is found, even in samples of minimal duration, the *de minimis* defense is not available.⁷⁸

It is likely that some of the unauthorized samples in *Feed The Animals* would not be actionable, relying on a *de minimis* defense. However, given the large number of longer samples that are easily recognized, the reduction in the scope of infringement is negligible.

Secondary Liability

“The Copyright Act does not expressly render anyone liable for infringement committed by another.”⁷⁹ However, “The absence of such express language in the copyright statute does not preclude the imposition of such liability of copyright infringements on certain parties who have not themselves engaged in the infringing activity.”⁸⁰ The issue here is whether Illegal Art (the record label), Carrot Top Distribution (the distributor), and the CD duplicator (unknown to the author) may be held liable for vicarious or contributory infringement, *if* Girl Talk’s use is found to be infringing.

Vicarious Liability

“A defendant is liable for vicarious liability for the actions of a primary infringer where the defendant (1) has the right and ability to control the infringer’s acts, and (2) receives a direct financial benefit from the infringement.”⁸¹ Actual knowledge of the infringing activity is not required for a finding of vicarious liability.⁸² “When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired...the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.”⁸³ Protection of copyright would be, “of little value if...insulation from payment of damages could be secured...by merely refraining from making inquiry.”⁸⁴ The “innocent infringer...can guard against the infringement by diligent inquiry, or...by an indemnity agreement...and/or by insurance.”⁸⁵ A record label has the right and ability to control infringing use by making the artists and producers responsible for unauthorized use of samples.⁸⁶ Similarly, the distributor and duplicator can require the client to implement mechanisms to avoid liability. For example, Disc Makers, “the nation’s leading CD and DVD manufacturer for independent artists and businesses...”⁸⁷ requires that the customer be the “true and rightful owner” or is licensed to “reproduce, manufacture and otherwise use the materials.”⁸⁸ If the parties waive or ignore these “rights and abilities to supervise,” they fail the first prong of the test for vicarious liability. All three parties clearly satisfy the second prong, as they receive financial remuneration for their respective services. Therefore, it is possible that they could be found vicariously liable for the infringement.

Contributory Liability

Two requirements must be met to establish contributory liability. First, “One infringes contributorily by intentionally inducing or encouraging direct infringement.”⁸⁹ Second, “Liability for participation in the infringement will be established where the defendant, ‘with *knowledge* of the infringing activity, induces, causes or materially contributes to the infringing conduct of another’” (emphasis added).⁹⁰ Applying these factors to the three aforementioned parties, the duplicator may escape liability, as the second prong of the test is not satisfied. While it may have knowledge of the infringing activity, there is no further inducement, cause or material contribution on its part, as it only manufactures the CDs and delivers them to the label or distributor. However, the label and the distributor may be subject to contributory liability. Girl Talk’s use of unauthorized samples in his CD releases have been controversial for some time, and with more samples on *Feed The Animals* than prior releases, *The New York Times* called it, “a lawsuit waiting to happen.”⁹¹ The owner of the label uses the pseudonym Philo T. Farnsworth to avoid detection.⁹² The tray card on the CD was intentionally printed without a UPC barcode to “lessen the attention to the number of record sales” by avoiding Nielsen SoundScan,⁹³ which tracks and reports music sales.⁹⁴ After the distributor rapidly sold out of the first CD pressing, the label limited the number of physical CDs to Carrot Top to one thousand units per month to “minimize exposure.”⁹⁵ The limited availability is advertised on the distributor’s web site⁹⁶ And, the very name of the label, Illegal Art, while only a rhetorical observation, when viewed along with the above facts, inferentially suggests “knowledge” of infringing use.

The offering of *Feed The Animals* by the label as a pay-what-you-want download (i.e., one could pay nothing) satisfies the “inducement” prong of the test. It is also likely that the online availability of the CD from the label and the distributor, as well as the distributor making the CD available to retailers and other distributors, materially contributes to the infringement. The label causes or contributes to the infringement by copying and distributing the infringing work; the distributor, by distributing the infringing work. From this analysis, the label and distributor may be held contributorily liable.

Another party that may be scrutinized under the inducement theory is Gillis himself. *Feed The Animals* was released under a Creative Commons Attribution–Noncommercial license.⁹⁷ This alternative license

scheme allows for others to use the work without permission, as long as any subsequent use is noncommercial and the use is attributed to Gillis.⁹⁸ Such use could include copying and sharing the work. Even if the use is noncommercial, the statutory rights of the original rights holders trump the Creative Commons license. In particular, the right to reproduce the work, to create derivative works, and to distribute the work is not limited to commercial uses under the statute, as the statute does not define “commercial use.” Creative Commons defines “noncommercial” as, “You let others copy, distribute, display, and perform your work—and derivative works based upon it—but for noncommercial purposes only.”⁹⁹ The record labels and publishers would consider this infringing use. The allowing of such use by attaching a Creative Commons license would likely be considered inducement. Regarding the “knowledge” requirement to find contributory liability, as stated earlier, fair use is an affirmative defense. Gillis is claiming fair use, which is admittance of actual knowledge. If his fair use defense fails, Gillis could be held liable for contributory infringement.

Additional Comments on Girl Talk’s Use of Creative Commons

The application of the Creative Commons license in this instance is problematic for two reasons. First, as Gillis’s use creates derivative works, the only part of the newly created work that is protectable, “extends only to the material contributed by the author of such work” and “does not imply any exclusive right in the preexisting material.”¹⁰⁰ Second, the only original contribution by Gillis is arguably the “selection and arrangement” of samples or “compilation,” which may be protectable.¹⁰¹ However, if his use is infringing, his copyright “does not extend to any part of the work in which such material has been used unlawfully.”¹⁰² Absent licenses from the original rights holders for such use, and possibly lacking copyright protection for his newly created work, he is unable to use a Creative Commons license, which requires the author to be a valid rights holder.¹⁰³

The Constitution and Creativity

One concern over strict adherence to the U.S. Copyright Act is that it stifles the creativity that the Constitution of the United States sought to encourage.¹⁰⁴ If Girl Talk attempted to secure licenses for all samples used, the sheer number of licenses, the time it would take to negotiate, and the cost of those licenses, would most likely far exceed revenues generated by sales of the album. To illustrate, each sample requires at least two permis-

sions: use of the underlying work, and use of the sound recording (unless the work is in the public domain, or if the recording was released prior to 1972). The latter exception for sound recordings only applies to two of the recordings, The Beach Boys and James Gang, and common law copyright or state laws may still apply to those works. Further, many underlying works are controlled by more than one publisher, and permission must be obtained from each one. Thus, to clear 322 samples would entail the acquisition of at least 644 licenses. While there are “clearance houses,” companies that provide the service of contacting rights holders to clear the use of music and obtain licenses for such use, fees for the service are, on average, \$250 per inquiry, which does not include the license fee.¹⁰⁵ And, as there is no compulsory license or statutory rate for such use, the rights holders can refuse permission or name their price. In addition, when granting such a license, many publishers demand a percentage of the copyright in the newly created work based on the derivative work, which would include that percentage of mechanical and performance royalties.¹⁰⁶ Given these obstacles, it seems economically impossible for a mash-up such as *Feed The Animals* to make money.

It appears this would “stifle” Girl Talk’s creativity. However, it is not Girl Talk’s “creativity” that the Constitution sought to protect, if the work is based entirely on the works of others. Even a music compilation, such as a greatest hits collection, requires licenses from all the original rights holders. The underlying purpose of protection for patents and copyrights is, “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁰⁷ The incentive created by this limited monopoly encourages the author to write and the songwriter to compose. It is not intended to encourage others to use those works without permission or compensation. If Congress determined that not permitting use of samples stifled creativity such that the Constitutional aim (to promote the useful arts) was thwarted, it could enact legislation creating a compulsory license and a statutory rate for sampling. “[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”¹⁰⁸ Fair use is intended to balance the creator’s monopoly with society’s rights (such as First Amendment rights to free speech) under certain conditions. If copyright protection for original works is eroded, the benefit to society that the Constitution promotes may dwindle or cease.

Girl Talk is still free to create. His live performances as a mash-

up artist are not at issue. It is likely that the venues where he performs pay for performance licenses from ASCAP, BMI, and SESAC. There is no infringement (unless the venues are unlicensed, where the infringement is by the venue, not the performer). As for releasing recordings of his mash-ups, Gillis can create his own samples. There are many sources of samples and loops that are inexpensive or license-free, such as Apple's GarageBand Jam Packs® and Freesounds from Creative Commons.¹⁰⁹ He can more substantially transform the samples he uses, if he intends to rely on the fair use defense (which still does not necessarily make it fair use, but may give his defense greater weight). He can sample all he wants for non-commercial use. Clearly, Gillis has alternative sources of samples and avenues of creativity. Perhaps the appeal to his audience is lessened, as it is the use of recognizable high-profile hits that attracts them. However, that does not rise to a legal right or excuse to use the protected works of others; rather, it suggests that his recontextualization rides on the coat-tails of the success of others' works.

The Likelihood of Litigation

There are two compelling reasons to bring a claim of copyright infringement of a musical work or sound recording: economic and deterrence. The former is purely monetary, in that the rights holder has been damaged by the copying and seeks financial remuneration. The latter could be either financially motivated, such as a label suing for unauthorized sampling to deter future unauthorized uses, or the motivation could be the desire to maintain artistic and creative control, such as Prince's efforts to "reclaim his art on the internet."¹¹⁰ With the above analysis of Girl Talk's use of protected works, this author believes that infringement has occurred on a large scale. The next logical question is: what is the likelihood of Gillis being sued?

While it is likely the rights holders would prevail if litigated, following are some reasons why it may never happen. First, the result of a favorable judgment in individual suits or a class-action suit would leave little for the individual rights holder(s). The maximum award of statutory damages for each willful infringement, assuming the plaintiff can show the "infringement was committed willfully," is US\$150,000.¹¹¹ Such damages are rarely awarded. In three recent willful infringement suits (for illegal file sharing), juries have awarded \$9,250, \$22,500, and \$80,000 per infringement.¹¹² While these may appear to be high awards (certainly to

the defendant), this still creates little incentive to litigate, given the large cost of going to trial. Next, the record labels have not been “substantially harmed” by only a few successful mash-up artists, and certainly not to the extent that they have been harmed by rampant global P2P file sharing. If mash-ups became highly profitable and widespread, the large rights holders may choose to do battle. However, only when they see it as a “threat to their business” would they take legal action.¹¹³ In addition, with the negative impact the RIAA’s lawsuits for illegal downloading have had on the industry’s image,¹¹⁴ suing a popular act may further erode customer loyalty. Last, while the labels and publishers would most likely prevail, it is not a certainty. They have to weigh the risk of failure. The cost of losing a sampling case? The licensing of sampling could be over, or at least greatly diminished. As there is a sizable market for sampling licensing, labels and publishers may well be satisfied with maintaining the *status quo*, and keeping the existing revenue stream intact. Individually or in the aggregate, these reasons are likely to keep the lawsuit(s) at bay. The only remaining possibility is the “artistic control” scenario, where the rights holder refuses to allow such use. Perhaps the aforementioned litigious artist Prince will lead the charge. In *Play Your Part (Pt. 1)*, the first track on *Feed The Animals*, Gillis uses fifty seconds of Sinead O’Connor singing *Nothing Compares 2 U*. Prince wrote the song.¹¹⁵ There is also a very short sample from Prince’s *Kiss* on track number nine, *Give Me A Beat*.¹¹⁶

Conclusion

Girl Talk’s *Feed The Animals* audio mash-up served as the case study for the inquiry into whether the genre, by its very nature, is sufficiently transformative to invoke fair use to excuse copyright infringement. Following a detailed analysis of the fair use factors, the defense did not pass muster. Not a single factor would weigh in Girl Talk’s favor. While examining the *de minimis* defense, it was concluded that some of the samples used could be discharged as non-infringing, yet the majority would not qualify as “trifles” and therefore still be actionable. It was also concluded that conditions for secondary liability are present. In particular, the label, the distributor, and Gillis met the requisite factors for vicarious and contributory infringement, while the duplicator may be vicariously infringing. Additional discussion held that while Gillis’s creativity is stifled by this interpretation of the U.S. copyright code, he still has numerous reasonable creative options, and by maintaining the protection of the rights holders’

work, the Constitutional purpose of copyright is served. Finally, even with all fingers pointing toward infringement, the likelihood that Girl Talk will be sued appears slim. He's pushed the envelope and been brazen in his claims. In broad daylight, while everyone looked on, he walked into the safe and walked out with the loot. It may be perfect timing, or just not worth it. He might just get away with it.

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10. "In Step" - 3:23

0:00 - 0:45 Roy Orbison - "You Got It"
0:00 - 0:56 Drama - "Left Right Left"
0:00 - 0:30 Jermaine Stewart - "We Don't Have to Take Our
Clothes Off"
0:30 - 0:45 Arts & Crafts - "What a Feeling" (which samples "Jam
on the Groove" by Ralph MacDonald)
0:47 - 1:30 Salt-n-Pepa - "Push It"
0:57 - 1:15 Deee-Lite - "Groove Is in the Heart" (which samples
"Get Up" by Vernon Burch)
1:02 - 1:38 Nirvana - "Lithium" (starts at 1:00 – ed. TH)
1:15 - 1:42 Thurston Moore - "See-Through Playmate"
1:38 - 1:44 The Gap Band - "You Dropped a Bomb on Me"
1:42 - 3:08 Fergie featuring Ludacris - "Glamorous"
1:44 - 1:44 Michael Jackson - "P.Y.T. (Pretty Young Thing)"
1:44 - 1:44 The Spinners - "Could It Be I'm Falling in Love"
1:45 - 2:45 Earth, Wind & Fire - "September"
1:53 - 2:15 INXS - "Need You Tonight"
2:00 - 2:52 Kraftwerk - "Tour de France"
2:51 - 2:52 Gloria Estefan and Miami Sound Machine - "1-2-3"
2:53 - 3:16 Diddy featuring Keyshia Cole - "Last Night"
2:53 - 3:21 The Beach Boys - "God Only Knows"
3:16 - 3:23 Snoop Dogg - "Sexual Eruption"
3:21 - 3:23 Bizarre Inc. - "I'm Gonna Get You"

Figure 2. Timings of source material for track 10, *Feed The Animals* (as of March 1, 2009). See: http://en.wikipedia.org/wiki/Feed_the_Animals

10. "In Step" - 3:23

0:00	Roy Orbison	"You Got It"
0:00	Drama (http://www.atlanticrecords.com/drama/bio)	"Left, Right"
0:00	Jermaine Stewart	"We Don't Have To Take Our Clothes Off"
0:30	Ralph MacDonald	"Jam On The Groove"
0:47	Salt-N-Pepa	"Push It"
0:57	Deee-Lite	"Groove Is in the Heart" (which samples "Get Up" by Vernon Burch)
1:02	Nirvana	"Lithium"
1:38	The Gap Band	"You Dropped a Bomb on Me"
1:43	Fergie featuring Ludacris	"Glamorous"
1:44	Michael Jackson	"P.Y.T. (Pretty Young Thing)"
1:45	Earth, Wind, & Fire	"September"
1:53	INXS	"Need You Tonight"
2:46	Kraftwerk	"Tour de France"
2:51	Prince	"U Got the Look"
2:53	P Diddy featuring Keyshia Cole	"Last Night"
2:53	The Beach Boys	"God Only Knows"
3:16	Snoop Dogg	"Sexual Eruption"
3:21	Bizarre Inc.	"I'm Gonna Get You"

Figure 3. Timings of source material for track 10, *Feed The Animals* (as of October 1, 2008).

Endnotes

- ¹ *The American Heritage Dictionary of the English Language*, 4th ed., s.v. “mash-up.”
- ² Fair Use was not codified until its inclusion into the Copyright Act of 1976. The origins of the doctrine are attributed to Justice Story in his decision in *Folsom v. Marsh*, 9 F. Cas. 342, 344-345 (C.C.D. Mass. 1841). He opines, “no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.” At issue was the copying of George Washington’s private letters. Robert P. Merges, Peter S. Menell, and Mark A. Lemley, *Intellectual Property in the New Technological Age* (New York: Aspen Publishers, 2006), 506.
- ³ *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004), citing Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 U.C.L.A. Ent. L. Rev. 271, 277 (Spring 1996).
- ⁴ Samantha M. Shapiro, “Hip-Hop Outlaw,” *New York Times Magazine*, February 18, 2007, 28.
- ⁵ *Ibid.*
- ⁶ *Newton*, 388 F.3d at 1192.
- ⁷ *Jarvis v. A & M Records*, 827 F.Supp. 282, 286 (D.N.J. 1993).
- ⁸ Lauren Gitlin, “DJ Makes Jay-Z Meet Beatles: Danger Mouse makes ‘Black’ and ‘White’ equal ‘Grey,’” *Rolling Stone*, February 5, 2004. http://www.rollingstone.com/artists/dangermouse/articles/story/5937152/dj_makes_jayz_meet_beatles
- ⁹ Bill Werde, “Defiant Downloads Rise From Underground,” *New York Times*, Arts, March 10, 2004. <http://query.nytimes.com/gst/fullpage.html?res=9D02E5DF153CF936A15751C0A9629C8B63>. Note: in this article, the author states that EMI, “owns the publishing rights to the *White Album*.” EMI owns the master recording; Sony/ATV administers the publishing for the 25 Lennon/McCartney songs on the album.
- ¹⁰ <http://www.illegal-art.org/audio/grey.html>
- ¹¹ *Ibid.*

- ¹² Watercutter, sup. n. 5.
- ¹³ Daniel Kreps, “Thousands Grab Girl Talk’s ‘Feed the Animals’ For Free, Creating Doubts About Pay What You Want,” *Rolling Stone*, July 8, 2008. <http://www.rollingstone.com/rockdaily/index.php/2008/07/08/thousands-grab-girl-talks-feed-the-animals-for-free-creating-doubts-about-pay-what-you-want/>
- ¹⁴ <http://www.illegal-art.net/shop-release117>
- ¹⁵ <http://www.ctdltd.com/>
- ¹⁶ Josh Tyrangiel, “The Top Ten Everything of 2008: Top 10 Albums,” *Time*, 2008. http://www.time.com/time/specials/2008/top10/article/0,30583,1855948_1864324_1864335,00.html
- ¹⁷ Girl Talk, *Feed The Animals*, Illegal Art, CD (2008), liner notes. See Figure 1.
- ¹⁸ *Jarvis*, 827 F.Supp. at 292.
- ¹⁹ U.S. Code 17 (1976), § 102(a)(2). The subject matter of copyright; musical works.
- ²⁰ A “work made for hire” is expressly defined in the Copyright Act as “a work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” U.S. Code 17 (1976), § 101. Definitions.
- ²¹ U.S. Code 17 (1976), § 102(a)(7). The subject matter of copyright; sound recordings.
- ²² U.S. Code 17 (1976), § 106(1), (2). Exclusive rights in copyrighted works: to reproduce the copyrighted work in copies or phonorecords; and to prepare derivative works based on the copyrighted work.
- ²³ U.S. Code 17 (1976), § 114(b).
- ²⁴ *Ibid.*
- ²⁵ U.S. Code 17 (1976), § 115(a)(2). Compulsory license for making and distributing phonorecords.
- ²⁶ M. William Krasilovsky and Sidney Shemel, *This Business of Music*, 10th ed. (New York: Watson-Guptill Publications, 2007), 197.
- ²⁷ *Ibid.*, 207.

- ²⁸ <http://riaa.com/whatwedo.php>
- ²⁹ <http://www.nmpa.org/home/index.asp>
- ³⁰ *Jarvis*, 827 F.Supp. at 288, citing *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 290 (3rd Cir. 1991).
- ³¹ *Ibid.*
- ³² *Ibid.*, 288, citing *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3rd Cir. 1975).
- ³³ *Ibid.*, 289.
- ³⁴ *Bridgeport*, 410 F.3d at 801.
- ³⁵ *Jarvis*, 827 F.Supp. at 289.
- ³⁶ *Ibid.*, 290.
- ³⁷ *Ibid.*
- ³⁸ *Ibid.*, 289, citing *Nimmer on Copyright*, § 13.03[A][2] at 13-46.
- ³⁹ *Bridgeport*, 410 F.3d at 804.
- ⁴⁰ *Ibid.*
- ⁴¹ *Ibid.*
- ⁴² Public Law 92-140, *U.S. Statutes at Large* 85 (1971): 391. “To amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes.” Repealed in 1976 Copyright Act and codified in § 102.
- ⁴³ The Beach Boys, *Pet Sounds*, Capitol Records, 33 rpm L.P. (1966).
- ⁴⁴ James Gang, *Rides Again*, ABC Records, 33 rpm L.P. (1970).
- ⁴⁵ See Figure 2 for timings of samples used in “In Step” (Track 10).
Source: http://en.wikipedia.org/wiki/Feed_the_Animals
- ⁴⁶ Robert Levine, “Steal This Hook? D.J. Skirts Copyright Law,” *New York Times*, Music, August 8, 2008 <http://www.nytimes.com/2008/08/07/arts/music/07girl.html>
- ⁴⁷ Gregg Gillis, “Girl Talk/Gregg Gillis On New Album, Music Industry,” *The Washington Post*, July 29, 2008. <http://www.washingtonpost.com/wp-dyn/content/discussion/2008/07/16/DI2008071601445.html>.
- ⁴⁸ *Ibid.*
- ⁴⁹ Krasilovsky and Shemel, sup. 69, n. 31.
- ⁵⁰ *Campbell*, 510 U.S. at 590.
- ⁵¹ *Ibid.*, 577.
- ⁵² U.S. Code 17 (1976), § 107. Limitations on exclusive rights: Fair use.

- ⁵³ Rob Walker, "Mash-up Model," *New York Times Magazine*, July 20, 2008. http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?_r=1&partner=rssnyt&emc=rss&oref=slogin
- ⁵⁴ *Campbell*, 510 U.S. at 584.
- ⁵⁵ *Ibid.*
- ⁵⁶ *Ibid.*, 579.
- ⁵⁷ *Ibid.*
- ⁵⁸ U.S. Code 17 (1976), § 101. Definitions.
- ⁵⁹ *Campbell*, 510 U.S. at 579.
- ⁶⁰ *Ibid.*, 578.
- ⁶¹ U.S. Code 17 (1976), § 102(b).
- ⁶² U.S. Code 17 (1976), § 102(a).
- ⁶³ *Campbell*, 510 U.S. at 586.
- ⁶⁴ *Ibid.*
- ⁶⁵ *Ibid.*
- ⁶⁶ *Ibid.*, 587.
- ⁶⁷ *Newton*, 388 F.3d at 1195.
- ⁶⁸ *Ibid.*, 1190.
- ⁶⁹ *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564-565 (1985).
- ⁷⁰ Werde, sup. n. 14, quoting Jeanne Meyer, EMI spokeswoman, regarding Danger Mouse's unauthorized use of The Beatles' sound recording.
- ⁷¹ Krasilovsky and Shemel, sup. 207, n. 31.
- ⁷² *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 74 (2nd Cir. 1997).
- ⁷³ *Bridgeport*, 410 F.3d at 801-802.
- ⁷⁴ *Newton*, 388 F.3d at 1195.
- ⁷⁵ *Ibid.*, 1193, citing *Fisher v. Dees*, 794 F.2d 432, 434 (9th Cir. 1986).
- ⁷⁶ See Figure 2 for timings of samples used in "In Step" (Track 10).
Source: http://en.wikipedia.org/wiki/Feed_the_Animals
- ⁷⁷ See Figure 3. Source: Wikipedia, October 1, 2008. No longer current or available online.
- ⁷⁸ *Newton*, 388 F.3d at 1193.
- ⁷⁹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984).
- ⁸⁰ *Ibid.*, 435.
- ⁸¹ *Religious Technology Center v. Netcom On-Line Communication Ser-*

vices, Inc., 907 F.Supp. 1361, 1375 (N.D. Cal. 1995), citing *Shapiro, Berstien & Co. v. H. L. Green Co.*, 316 F.2d 304, 306 (2nd Cir. 1963).

⁸² Ibid.

⁸³ *Shapiro*, 316 F.2d at 307.

⁸⁴ Ibid., 308.

⁸⁵ Ibid., 308, citing Nimmer.

⁸⁶ Krasilovsky and Shemel, sup. 207, n. 31.

⁸⁷ <http://www.discmakers.com/community/about/>

⁸⁸ <http://www.discmakers.com/community/about/Terms.asp>.

⁸⁹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

⁹⁰ *Religious Technology Center*, 907 F.Supp. at 1373, citing *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

⁹¹ Walker, sup. n. 58.

⁹² Ibid. See also: Niall Byrne, "Illegal Art," *State*, March 12, 2008. <http://www.state.ie/blog/illegal-art/>

⁹³ Alison Wasilewski, General Manager, Carrot Top Distribution, email message to author, March. 16, 2009.

⁹⁴ <http://www.soundscan.com/about.html>

⁹⁵ Wasilewski, sup. n. 98.

⁹⁶ http://sakistore.net/product_info.php?products_id=15710&osCsid=835bed421cc4874962e1c1d67a07d3b7

⁹⁷ http://74.124.198.47/illegal-art.net/__girl__talk__feed__the__anima.ls__/

⁹⁸ <http://creativecommons.org/licenses/by/3.0/legalcode>

⁹⁹ <http://creativecommons.org/about/licenses/>

¹⁰⁰ U.S. Code 17 (1976), § 103(b), Subject matter of Copyright: Compilations and derivative works.

¹⁰¹ U.S. Code 17 (1976), § 101, Definitions.

¹⁰² U.S. Code 17 (1976), § 103(a), Subject matter of Copyright: Compilations and derivative works.

¹⁰³ http://wiki.creativecommons.org/Frequently_Asked_Questions

¹⁰⁴ Levine, sup. n. 51.

¹⁰⁵ Krasilovsky and Shemel, sup. 210, n. 31. See also: DMG Clearances at <http://www.dmgclearances.com/services.html> and The Music Bridge at <http://www.themusicbridge.com/clearance-and-license/>

music-sample-clearance.php.

¹⁰⁶ Krasilovsky and Shemel, sup. 208, n. 31.

¹⁰⁷ U.S. Constitution, art. 1, sec. 8, cl. 8.

¹⁰⁸ *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003).

¹⁰⁹ <http://www.apple.com/ilife/garageband/jam-packs.html> and Free-sound: <http://creativecommons.org/audio/freesound>

¹¹⁰ *Lenz v. Universal Music Corp.*, 572 F.Supp.2d 1150, 1152 (N.D. Cal. 2008).

¹¹¹ U.S. Code 17 (1976), § 504(c)(2). Statutory damages for infringement. “Digital Theft Deterrence and Copyright Damage Improvement Act of 1999,” amended § 504(c) to increase willful infringement to up to \$150,000 per infringement. Public Law 106-160, *U.S. Statutes at Large* 115 (1999): 1774.

¹¹² *Capitol Records, Inc. v. Thomas*, 2008 WL 5423133 (D. Minn.). The October, 2007 decision was vacated in September, 2008 and a new trial was granted, based on a faulty jury instruction. The second trial concluded in June, 2009, resulting in a jury verdict against Thomas (now Thomas-Rasset) for \$1.92 million, or \$80,000 per song. See: <http://arstechnica.com/tech-policy/news/2009/06/jammie-thomas-retrial-verdict.ars>. Shortly thereafter, the RIAA prevailed in another highly publicized downloading infringement suit (*Sony BMG Music Entertainment v. Tenenbaum*), when the jury found willful infringement of thirty songs, awarding \$675,000, or \$22,500 per song. See: <http://arstechnica.com/tech-policy/news/2009/07/o-tenenbaum-riaa-wins-675000-or-22500-per-song.ars>

¹¹³ Shapiro, sup. 30, n. 9.

¹¹⁴ Brett Lunceford and Shane Lunceford, “Meh. The Irrelevance of Copyright in the Public Mind,” *The Northwestern Journal of Technology and Intellectual Property* 7, no. 1 (Fall 2008). See: <http://www.law.northwestern.edu/journals/njtip/v7/n1/3/> - note 1

¹¹⁵ A title search on the ASCAP web site revealed that Prince is the author of “Nothing Compares 2 U”. See ASCAP.com.

¹¹⁶ Girl Talk, *Feed The Animals*, Illegal Art, CD (2008), liner notes. See Figure 1.



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