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Mashing up the Copyright Act: How to Mitigate the Deadweight Loss Created by the Audio Mashup

**MASHING UP THE COPYRIGHT ACT: HOW TO MITIGATE THE
DEADWEIGHT LOSS CREATED BY THE AUDIO MASHUP**

By: Alexander C. Krueger-Wyman¹

INTRODUCTION

In the past decade, the music industry has welcomed a new art form to its center stage: the audio mashup. Mashups, which involve digital sampling from multiple songs combined to create a form of “recycled art,”² have officially become mainstream with the rise in popularity of artists like Girl Talk.³ While some artists who sample do so legally by obtaining the appropriate licenses, the vast majority of mashup artists sample without a license, sometimes from upwards of two hundred artists on a single album.⁴ This practice of unlicensed sampling deprives the original artists of valuable licensing fees and the mashup artists of the ability to sell their music through music vendors such as iTunes. Instead, mashup artists rely on public performances for revenue, and the original artists and production companies are left to sue under an uncertain legal framework to recover licensing fees. Currently, there is no consensus among copyright scholars for how to remedy this problem. It is clear, however, that this increasingly popular and innovative form of music demands protection under the Copyright Act. The inability of copyright law to address the tension between mashup artists and the artists from whom they sample creates a deadweight loss that is increasing with the rise in popularity of mashups.

¹ I would like to thank my fiancée, Lindsey Dodge, and her family for supporting me through the composition of this paper. Thank you also to my family, who has been there for me through it all. Finally, thank you to the Entertainment Law Initiative for its recognition of this paper.

² Michael Allyn Pote, Comment, *Mashed-Up in Between: The Delicate Balance of Artists’ Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 640 (2010).

³ For a chronological account of the development of audio mashups, see Jeff Leeds, *Mix and Mash*, N.Y. TIMES, Jan. 9, 2005, http://www.nytimes.com/2005/01/09/arts/music/09leed.html?_r=0.

⁴ See Elina Lae, *Mashups – A Protected Form of Appropriation Art or Blatant Copyright Infringement?*, 12 VA. SPORTS & ENT. L.J. 31, 32 (2012) (describing how Girl Talk sampled from 167 artists on his third album titled “Night Ripper”).

PART I: WHY MASHUPS DESERVE PROTECTION UNDER THE COPYRIGHT ACT

Despite its designation as “recycled art,” mashups further the purpose of the Copyright Act by “promot[ing] the Progress of Science and useful Arts”⁵ in several important ways. First, the audio mashup is a new form of music. As one commentator noted, “[A] sampler is a musical instrument. Producers who sample use pieces of existing songs to make new works of music.”⁶ A mashup thus qualifies as an “original work[] of authorship” as required by the Copyright Act.⁷ Moreover, these new works provide listeners with a new and innovative way of experiencing music. By layering together samples from multiple songs by a variety of artists, the mashup allows listeners to experience popular songs through a new lens, highlighting aspects of each song in a way that enables listeners to appreciate different nuances of their favorite songs. Copyright law, which seeks “to provide incentive to create,”⁸ should thus seek to incentivize innovative forms of music such as the audio mashup, rather than inhibiting their creation through overly protective laws.⁹

Second, extending copyright protection to mashups promotes progress in music by incentivizing a wider base of artists to create. Thanks to widely available technology such as Musical Instrument Digital Interface and programs like Audiomulch, virtually anyone with a laptop can create mashups, making them easier and less expensive to create. Similarly, due in large part to their digital origin, mashups are easy to promote digitally through websites such as Remix.vg, which allow users to upload their mashups (or remixes or covers) and share them with

⁵ U.S. CONST. art. I, § 8, cl. 8.

⁶ Jonathan D. Evans, *Solving the Sampling Riddle*, 29 ENT. & SPORTS LAW. 16, 16 (2012).

⁷ 17 U.S.C. § 102(a) (2006). This standard for originality has been interpreted as requiring only a minimal level of creativity. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

⁸ Katie Simpson-Jones, Comment, *Unlawful Infringement or Just Creative Expression? Why DJ Girl Talk May Inspire Congress to “Recast, Transform, or Adapt” Copyright*, 43 J. MARSHALL L. REV. 1067, 1088 (2010).

⁹ See, e.g., Noah Balch, Comment, *The Grey Note*, 24 REV. LITIG. 581, 581 (2005) (arguing that “time and exclusivity” copyright protection can “stifle progress” for other innovators such as mashup artists).

other artists, who can then download them from the website.¹⁰ Mashups, by facilitating both creation and dissemination of music, clearly further the purpose of the Copyright Act by promoting the progress of music.

Finally, mashups help promote music due to their wild popularity. Thousands of people attend mashup artists' concerts, sometimes paying up to \$400 for a ticket,¹¹ and even more download their albums on a daily basis. As a result, more and more people have expanded their love for music to include mashups, making their protection a necessary step for copyright law to keep up with emerging music trends. Copyright protection for mashups would thus serve the underlying purpose of copyright law of incentivizing innovation and maximizing production.

PART II: THE PROBLEM: WHY CURRENT COPYRIGHT LAWS GIVE INADEQUATE PROTECTION TO MASHUPS

Despite the importance of this new art form to the music industry, the current copyright framework fails to provide protection for mashups. Instead, mashup artists may be liable for infringement if they sell their music, sometimes without even a viable defense.¹² Moreover, copyright laws fail to offer a suitable approach to dealing with the issue of digital sampling, as each potential approach is rendered unworkable in the context of mashups.

Digital Sampling in Mashups is Legally Actionable

As a preliminary matter, mashup artists who fail to obtain a license are potentially liable under two provisions of the Copyright Act. First, a mashup may violate the copyright holders'

¹⁰ See *Mashups*, REMIX.VG, <http://remix.vg/category/mashups/> (last visited Jan. 2, 2013). Other similar websites include Soundcloud, Turntable, and Hype Machine.

¹¹ See Lae, *supra* note 4, at 32 & n.16.

¹² See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005) (applying a "per se" liability test to anyone who samples without obtaining a license).

exclusive rights to the underlying musical compositions in the sampled songs.¹³ Second, a mashup may violate the sound recording copyrights of the sampled songs.¹⁴ “The musical composition copyright holder and sound recording copyright holder may be, and often are, different.”¹⁵ As a result, a mashup artist who does not obtain a license may potentially be liable to two sources for *each song sampled* in a single mashup.

Section 115 of the Copyright Act, which dictates a compulsory license for musical compositions, mitigates this enormous threat of liability.¹⁶ Under this framework, an artist who wants to use another song’s musical notes and words can simply pay the musical composition’s copyright holder a statutorily defined rate to use it legally.¹⁷ Although it may prove cost prohibitive for mashups that use a high number of songs, this compulsory license system generally enables cheap and efficient use of musical compositions. The real problem thus lies with the sound recording copyrights, which do not have a compulsory licensing system. Instead, artists who wish to use a sound recording must negotiate with the sound recording copyright holder to obtain a license. Because of the significant transaction costs that inevitably accompany such negotiations,¹⁸ obtaining a license to use a sound recording is almost always cost prohibitive, particularly when a song includes multiple samples, as mashups do.

¹³ A musical composition copyright extends to the musical notes and accompanying words of a song. 17 U.S.C. § 102(a)(2) (2006).

¹⁴ A sound recording copyright gives the copyright holder the narrow right to reproduce the actual recorded sounds. *Id.* § 102(a)(7).

¹⁵ Pote, *supra* note 2, at 666.

¹⁶ 17 U.S.C. § 115.

¹⁷ The current rate for the license is “either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.” *Id.* § 115(c)(2). In reality, however, the artist who wishes to use the musical composition will often negotiate with a mechanical licensing agent such as the Harry Fox Agency for a lower price. See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1311 (1996).

¹⁸ See, e.g., Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music is Scratching More than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 894 (2011) (discussing the high transaction costs inherent in obtaining a sound recording license).

The Current Legal Framework for Sound Recording Infringement is Inadequate

If a mashup artist is sued for infringing a sound recording copyright, the artist can typically raise two defenses. First, the artist can claim that the unlicensed use of the sound recording was not actionable. To prove a prima facie case of infringement, a plaintiff must establish not only that he or she owns a valid copyright and that the defendant in fact copied the original material, but that the copying was *actionable*.¹⁹ Musical composition infringement claims universally include a de minimis inquiry, in which the court determines whether the copied portion was substantially similar enough to be actionable or whether it constituted only de minimis copying.²⁰ With regard to sound recordings, however, there is a split among courts regarding how to determine actionable copying. In 2005, the Sixth Circuit held in *Bridgeport Music v. Dimension Films* that any sampling whatsoever violates the sound recording copyright, and that any de minimis inquiry is thus inappropriate.²¹ The court reasoned that the language of Section 114(b) of the Copyright Act²² exhibits a clear intent by Congress to restrict the right to sample a recording, regardless of its size, to the copyright holder.²³ This reasoning was subsequently criticized by a district court in *Saregama India Ltd. v. Mosley*, which declined to follow *Bridgeport*'s "per se infringement" approach.²⁴ Instead, the *Saregama* court found the traditional de minimis inquiry appropriate to sound recordings.²⁵

There remains no consensus as to which of these approaches should be applied to cases of digital sampling. Although *Bridgeport* represents the only opinion by a circuit court on the issue, its reasoning has been widely criticized since its holding, both by courts such as in

¹⁹ See, e.g., *Castle Rock Entm't, Inc. v. Carol Publ'g Grp.*, 150 F.3d 132, 137–38 (2d Cir. 1998).

²⁰ See, e.g., *Newton v. Diamond*, 388 F.3d 1189, 1192–93 (9th Cir. 2003).

²¹ 410 F.3d 792, 798 (6th Cir. 2005).

²² Section 114 gives the scope of a copyright holder's exclusive rights in sound recordings. 17 U.S.C. § 114 (2006).

²³ *Bridgeport*, 410 F.3d at 799–800.

²⁴ 687 F. Supp. 2d 1325, 1338–41 (S.D. Fla. 2009).

²⁵ *Id.* at 1341.

Saregama and by prominent copyright scholars such as Melville and David Nimmer.²⁶ Moreover, courts throughout the country have a long history of requiring substantial similarity in copyright claims to constitute actionable copying. It is thus unlikely that the *Bridgeport* “per se infringement” approach will replace substantial similarity as the primary inquiry for determining actionable copying. Given this lack of clarity in the area, however, artists who wish to sample sound recordings have little guidance for what level of sampling, if any, is allowable. A court may find a sampling de minimis, or it may tell the defendant simply, “Get a license or do not sample.”²⁷ The artist must therefore obtain licenses to ensure that he or she will not be found liable. Because negotiating for a license for every sound recording used in a mashup makes producing the song cost-prohibitive, this uncertainty among the courts effectively prohibits mashup artists from selling their music without risking potentially enormous liability.²⁸

The second defense that a mashup artist can raise is the fair use doctrine.²⁹ This doctrine, which purports to protect “reasonable and customary use” of copyrighted material,³⁰ provides a copier with an affirmative defense to a prima facie case of copyright infringement based on (1) “the purpose and character of the use,” (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)

²⁶ See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b] (2007); see also Michael Jude Galvin, *A Bright Line at Any Cost: The Sixth Circuit Unjustifiably Weakens the Protection for Musical Composition Copyrights in Bridgeport Music v. Dimension Films*, 9 VAND. J. ENT. & TECH. L. 529, 538 (2007); Matthew R. Brodin, Comment, *Bridgeport Music, Inc. v. Dimension Films: The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims – The Sixth Circuit’s Flawed Attempt at a Bright-Line Rule*, 6 MINN. J.L. SCI. & TECH. 825 (2005). But see Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court’s Attempt to Afford “Sound” Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355 (2008) (defending *Bridgeport*’s analysis).

²⁷ *Bridgeport*, 410 F.3d at 801.

²⁸ It is this risk, in fact, that has kept music vendors such as iTunes from carrying most mashup albums. See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 12 (2008).

²⁹ The fair use doctrine is a statutorily defined “equitable rule of reason,” see H.R. REP. NO. 94-1476, at 65 (1976), that allows use of copyrighted material “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,” 17 U.S.C. § 107 (2006).

³⁰ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985) (internal quotation marks omitted).

“the effect of the use upon the potential market for or value of the copyrighted work.”³¹ While these four factors seem to imply a wide range of potential fair uses, “Congress and the courts have narrowed the scope of the fair use privilege, converting it from a standard that left considerable room for copying as part of an effort to create a new work to a standard that permits such reuse only in isolated cases.”³² Moreover, the Digital Millennium Copyright Act may also prohibit a fair use defense for mashups by failing to list fair use as an exception to its prohibition of circumventing access control measures to copyrighted material.³³ “This impedes the creation of new technology and erases the possibility that fair use would protect works created through the [circumventing] software.”³⁴ As a result, fair use typically only protects work that is either productive or “reasonable and customary” under an implied consent theory or a more general theory of socially acceptable conduct.³⁵

Nevertheless, some commentators have argued that mashups qualify for the fair use defense.³⁶ Indeed, the prominent digital rights organization, Electronic Frontier Foundation, has stated that it believes mashups are “classic examples of fair use.”³⁷ Even if fair use provides a viable defense for mashup artists, however, it is not a practical solution to the problem presented by the uncertainty of liability discussed above. In theory, if artists could rely on fair use as a defense, this would significantly lower the transaction costs inherent in negotiating for licenses in sampling. The problem is that artists cannot rely on it precisely because it is a defense.

³¹ 17 U.S.C. § 107. Some commentators have argued that a fifth factor—good faith—is also considered by courts in the fair use context. See Lae, *supra* note 4, at 50–51.

³² Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 304–05 (1996).

³³ Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 527 (2004).

³⁴ Simpson-Jones, *supra* note 8, at 1087.

³⁵ For a more thorough account of the availability of the fair use defense, see generally Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

³⁶ See, e.g., Lae, *supra* note 4, at 56 (arguing that mashups involving multiple samples—“audio collages”—should be entitled to fair use).

³⁷ Julie Samuels, *RIP MCA: A Tribute to Paul’s Boutique and Music Sampling*, ELEC. FRONTIER FOUND. (May 4, 2012), <https://www.eff.org/deeplinks/2012/05/rip-mca-tribute-pauls-boutique-and-music-sampling>.

Copyright damages can be so large, sometimes even without a showing of harm,³⁸ that artists would be foolish to rely on fair use as an ironclad protection from liability, particularly when the material (mashups) involves so many potential plaintiffs (i.e., the number of artists from whom the mashup artist sampled). As Professor Christopher Sprigman commented about the problem, “The risks of failure are too great.”³⁹ As a result, fair use does little to alleviate the liability concerns of mashup artists (or the music vendors who refuse to carry their music).⁴⁰

Not only do these two approaches fail to give mashup artists an adequate framework for determining the legality of their actions, they do not make sense in the context of mashups. It is ironic that under both approaches, the more the artist samples in a given song, the more likely that song is protected from liability. Under the substantial similarity inquiry for actionable copying, for instance, a mashup that samples snippets from numerous songs is much less likely to be “substantially similar” to any of the sampled songs than is a mashup that samples from one or two songs only. Similarly under a fair use analysis, the more songs used in a mashup, the more likely a court will find the use of those songs to be “transformative,” a factor weighing heavily in favor of fair use.⁴¹ Each of these approaches thus incentivizes mashup artists to sample from more artists in each mashup in the hope that it will be less similar to the original songs or that it will constitute a transformative use of the songs. As mashup artists sample from more songs without obtaining valid licenses, the loss in potential licensing fees increases. As a result, these approaches not only fail to give adequate protection and guidance to mashup artists, they actually encourage the very practice that is causing the problem.

³⁸ Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. TELECOMM. & HIGH TECH. L. 317, 324 (2009).

³⁹ *Id.* at 329.

⁴⁰ See Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1087 (2007) (“The doctrine’s context sensitivity renders it of little value to those who require reasonable ex ante certainty about the legality of a proposed use.”).

⁴¹ See Lae, *supra* note 4, at 56.

PART III: THE SOLUTION — AMENDING THE COPYRIGHT ACT

It should be obvious from the discussion above that Congress provided no effective method of handling digital sampling at the level employed by the audio mashup in the Copyright Act of 1976.⁴² With advancements in technology and broadening conceptions of intellectual property over the past forty years, the current Copyright Act has become increasingly antiquated. The mashup serves a perfect example. Congress did not envision granting copyright protection to material like the mashup because, in 1976, the mashup did not exist in its current form.⁴³ Since the mashup has become mainstream, courts and commentators have attempted to squeeze the mashup into one of the Copyright Act's available legal frameworks.⁴⁴ Due to their lack of consistency, however, the product is a significant degree of uncertainty regarding the legality of unlicensed sampling in mashups. It is this uncertainty that is preventing mashup artists from paying for licenses at an affordable cost and from earning revenues on their increasingly popular music, creating the mashup deadweight loss. To mitigate future losses, Congress must resolve this uncertainty.

Once Congress decides to take action, it must survey its options for doing so. First, any attempt to fit mashups into either of the two approaches discussed above (actionable copying and fair use) must be dismissed. If, for instance, Congress declared that the substantial similarity test should be applied rather than the *Bridgeport* “per se” test in determining actionable copying, it would violate its constitutional powers by doing so. Congress lacks the power to dictate to

⁴² Pub. L. No. 94-553, 90 Stat. 2541 (1976). As many commentators have acknowledged, reform to the Copyright Act is long overdue. See generally Symposium: *Copyright@300: The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175 (2010).

⁴³ The earliest commercial mashup was first seen in 1983, when Club House created “Do It Again/Billie Jean,” a two-song mashup of Michael Jackson and Steely Dan. Wm. Ferguson et al., *The Recombinant DNA of the Mashup*, N.Y. TIMES, Jan. 9, 2011, at MM38. Some have even argued that the mashup in its modern form was not seen until 1994. See David Tough, *The Mashup Mindset: Will Pop Eat Itself?*, in GEORGE PLASKETES, PLAY IT AGAIN: COVER SONGS IN POPULAR MUSIC 205, 211 (2010).

⁴⁴ See *supra* Section II.B.

federal courts how to resolve a particular case, so by prescribing a particular rule of decision such as the substantial similarity analysis in digital sampling cases, it purports to exercise authority that exceeds its constitutional powers.⁴⁵ With regard to fair use, unless Congress radically transformed its fair use framework, the only way it could address mashups under Section 107 is to say, explicitly, that mashups constitute fair use. Doing so, however, would only fix half the problem. Mashup artists could earn revenue from their music's popularity, but the artists from whom the mashup artist sampled would still receive no licensing fees.

Instead of trying to fit mashups into an existing framework of the Copyright Act, Congress must develop a new system by which mashup artists can efficiently and affordably obtain licenses to sample from other artists. Given the prohibitively high transaction costs inherent in negotiating for licenses, the only effective solution is to eliminate the need for negotiation. The result would therefore have to be a compulsory licensing system akin to Section 115's provision for musical compositions. Indeed, just as a new compulsory licensing system is needed to accommodate mashups, Section 115 was necessary to enable another popular form of music not envisioned by the original Copyright Act: the cover recording.⁴⁶ Cover artists would be liable for infringing the underlying musical composition of their songs if Section 115 did not permit them to license the musical composition at a statutorily defined rate.⁴⁷ Through the rare use of a "liability rule"⁴⁸ in the Copyright Act, Section 115 effectively solved a similar

⁴⁵ See *United States v. Klein*, 80 U.S. 128, 146 (1871).

⁴⁶ "[A] 'cover recording' is a later recording of a song that was previously recorded by another recording artist or group." Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 244 n.144 (2010).

⁴⁷ Section 115 was introduced in the 1909 Copyright Act due to the rise in popularity of player pianos and recorded music. Out of fear that music publishers could exercise monopoly power over recorded music, Congress passed what is now Section 115 to enable artists "to reproduce mechanically the musical work." An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 1(e), 35 Stat. 1075 (Mar. 4, 1909, effective July 1, 1909). For a thorough description of the Section's origins, see Abrams, *supra* note 46, at 217–21.

⁴⁸ A "liability rule" is one "which allow[s] access at a price set by a court or agency." Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 784 (2007).

problem by “guaranteeing public access to works through compulsory licensing, while insuring copyright owner royalty payments.”⁴⁹

While this new system should be analogous to Section 115, it must be broader in scope. Because digital sampling potentially infringes upon both the musical composition and sound recording copyrights, any effective system must provide an opportunity to license from both copyright holders without having to negotiate with either. Moreover, because of the high number of songs and the varying lengths of samples used in mashups, this licensing provision must also be more elaborate than Section 115.⁵⁰ Congress must develop a system that provides for greater compensation based on the length and frequency of the samples, the popularity of the song sampled, and the importance of the portion sampled to the original song. Assessing prices based on these factors would enable artists to receive due compensation for their success while not prohibiting access to mashup artists who wish to sample. If Congress provided for such a licensing system, it would pave the way for music vendors or other business to develop efficient and inexpensive ways of obtaining these licenses,⁵¹ just as the Harry Fox Agency and other mechanical licensing agents do for musical composition licenses. This system would enable mashup artists to produce their music legally and affordably,⁵² while simultaneously providing the compensation to the artists that they deserve.

⁴⁹ Randy S. Kravis, Comment, *Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231, 273 n.259 (1993).

⁵⁰ Section 115 does, however, account for the amount of time the original song is used in the new song. See *supra* note 17.

⁵¹ For an interesting approach to designing such a distribution system, see Evans, *supra* note 6, at 17–18 (describing an “integrated clearinghouse approach” to licensing digital samples).

⁵² As the industry’s experience with musical composition licenses has shown, the emergence of licensing agents actually makes licensing cheaper for licensees, as the copyright holders through their agents are “bargaining in the shadow of the compulsory license.” Merges, *supra* note 17, at 1310.

CONCLUSION

As the world has entered into an increasingly digital era, the music industry has been drastically affected by changes in technology. Most prominent among these effects is the ease with which consumers and artists can copy, sample, and reproduce existing work. Copyright laws have tried, in vain, to keep up with these advances, but they have consistently been one step behind. The time has come to adapt and embrace these changes to the benefit of the industry.⁵³ As exhibited by the rising popularity of audio mashups, digital sampling and other forms of copying can be beneficial for the music industry. The key is to capitalize on their popularity by designing a method of incentivizing their creation through copyright protection while rewarding the original artists for use of their music. As this paper has shown, current copyright laws fail to achieve this balance. By introducing a compulsory licensing system to regulate digital sampling, Congress can ensure both that mashup artists receive revenue for their popular music and that the original artists can obtain royalties for use of their songs, thus eliminating the deadweight loss currently caused by the audio mashup.

⁵³ In their recent influential book *The Knockoff Economy*, prominent copyright scholars Kal Raustiala and Chris Sprigman laid out a number of ways in which the music industry can do so, perhaps the most important of which was to return to an emphasis on performance. KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 214–33 (2012). Although these suggestions are sensible with regard to the majority of musicians, they seem less applicable to mashup artists, whose performances often consist only of an artist playing a pre-recorded mix.