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From Turntables to Digital Technologies: Striking a Balance Between Disc Jockey Performances and Moral Rights of Musicians

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I. INTRODUCTION

Every night of the week club-goers wait in line for hours to get into the hottest clubs in some of the hottest cities in the world. If they are lucky enough to get past the velvet ropes and through the club doors, in a matter of minutes, they could hear the music of as many as ten different artists ranging from the likes of Madonna, the Rolling Stones, and Nirvana to Christina Aguilera, Kanye West, and Snoop Dogg blended into one musical track.² This unique phenomenon in the music industry is the work of celebrity disc jockeys ("DJs"), who splice, scratch, and mix classic and popular songs together to create an entertaining musical work of their own.³ These creations are so entertaining, in fact, that celebrity DJs have developed a new

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² See, e.g., DJ AM, http://www.myspace.com/djamone (last visited Nov. 26, 2007); DJ Splyce, http://djsplyce.com/ (last visited Nov. 26, 2007) (both websites provide examples of eclectic mixes of music).

³ Splicing refers to the combination of two elements, here songs, to create a final product. *See Larry King Live: DJ Splyce Hollywood's Disc Jockey to the Stars* (CNN television broadcast Nov. 12, 2005), transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/0511/12/lkl.01.html (last visited Nov. 26, 2007). "Scratching is a technique by which the performer uses vinyl and moves the record back and forth against the needle to produce sounds of varying degree." *See* Jam 2 Dis, Scratching, http://www.jam2dis.com/j2ddjdef.htm (last visited Nov. 26, 2007). Mixing refers to a combination of typically two or more musical tracks blended together "to produce a composite audio recording." *See* Yahoo! Education, Mix, http://education.yahoo.com/reference/dictionary/entry/mix (last visited Nov. 26, 2007).

music industry phenomenon that club-goers, club owners, and even radio stations have come to depend on night after night.⁴

Celebrity DJs have created such a demand for their services that they are able to earn up to \$1,000 per hour.⁵ Most celebrity DJs have "residences" at various nightclubs, often performing a few nights a week.⁶ However, due to their popularity and demand, there are times when celebrity DJs may perform at different events every night of the week in different cities across the country.⁷ In many cases, DJ performances at nightclubs are even broadcast live on radio stations or over the Internet allowing millions of listeners to enjoy their music.⁸ In addition, celebrity DJs pull in profits by hosting private celebrity parties and corporate events.⁹

⁴ See, e.g., Clubplanet.com, http://www.clubplanet.com/ (last visited Nov. 26, 2007) (provides a listing of nightclubs, DJ performances, and more); Sheckys Media, Inc., http://sheckys.com/ (last visited Nov. 26, 2007) (lists most bars and nightclubs in major cities); Clear Channel Broadcasting, Z100 - New York's Hit Music Station, http://www.z100.com/main.html (last visited Nov. 26, 2007) (the radio station regularly broadcasts live from various nightclubs in the New York area); Emmis Communications, Hot 97, http://www.hot97.com/ (last visited Nov. 26, 2007) (the radio station regularly broadcasts live from various nightclubs in the New York area).

⁵ See, e.g., Larry King Live: DJ Splyce Hollywood's Disc Jockey to the Stars (CNN television broadcast Nov. 12, 2005), transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/0511/12/lkl.01.html (last visited Nov. 26, 2007).

⁶ A residency refers to a nightclub(s) or venue(s) where a disc jockey regularly performs. *See generally* MusicLegalFroms.com, Artist Residency Contract, http://www.musiclegalforms.com/cat-djresidency.html (last visited Nov. 26, 2007).

⁷ See, e.g., MySpace.com, DJ AM, http://myspace.com/djamone (last visited Nov. 26, 2007); DJ Splyce, http://djsplyce.com/ (last visited Nov. 26, 2007). DJ AM and DJ Splyce's websites provide typical examples of a celebrity DJ's performance schedule.

⁸ See, e.g., Clear Channel Broadcasting, Z100 - New York's Hit Music Station, http://www.z100.com/main.html (last visited Nov. 26, 2007) (Z100, one of New York's most popular radio stations, broadcasts live over the radio from various venues every weekend).

⁹ See, e.g., DJ AM, http://www.djam.com/names.html (last visited Nov. 26, 2007) (Jim Carrey, Jessica Simpson, Jennifer Lopez, Ben Stiller, and Leonardo DiCaprio are among the celebrities who have employed DJ AM to play at their private gatherings); DJ Splyce.com, http://djsplyce.com/ (last visited Nov. 26, 2007) (DJ Splyce has performed at Janet Jackson's fortieth birthday party, Kelly Osbourne's twenty-first birthday party, and spun at corporate events including Xbox 360 and the Miller Brewing Company).

allows not only professionals, but amateurs to remix and package music in their homes with increasing ease and clarity.¹⁰ But is this new age of the celebrity DJ all it is cracked up to be?

"If hip hop should die before I wake I'll put an extended clip and body 'em all day! Roll to every station, wreck the DJ!"¹¹ Commentators suggest that these lyrics to Nas' latest hit single refer to the rapper's growing disdain for the commercialization of the hip hop industry.¹² Perhaps, however, his sentiments foreshadow the future of the music industry as a whole in light of changing technologies that threaten to compromise artists' rights in their musical works. While listeners enjoy reveling in the musical works of celebrity DJs, what do these newly created works mean for the artists whose songs are used to create them?

When DJs perform at nightclubs or create mixes available for listening over the radio or Internet, there is a possibility that they are infringing on the rights of artists whose songs they are using. Under the 1976 Copyright Act ("Copyright Act"), musicians can gain protection in their works by fixing them in a tangible medium.¹³ Once copyright protection is established, artists' rights may be infringed through others' reproduction of copyrighted works, preparation of derivative works using copyrighted works, distribution of copyrighted works, and public

¹⁰ See Lucille M. Ponte, Article, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 515-16 (2006). *See also* M-Audio, Troq Conectiv,

http://www.m-audio.com/index.php?do=products.main&ID=05ce27402d408d9dd700fe0afe495ad1 (last visited Nov. 26, 2007) (the company's product description stands for the proposition that digital technology used by DJs today makes it easier than ever before to repackage music).

¹¹ Popularlyrics.com, Nas – Hip Hop is Dead Lyrics, http://www.popular-lyrics.com/lyrics/nas/hip-hop-is-dead-17194.html (last visited Nov. 26, 2007).

¹² See Isabelle Esling, Nas "Hip Hop is Dead" Album Review,

http://www.yoursdaily.com/culture_media/music/nas_hip_hop_is_dead (last visited Nov. 26, 2007) (as the review points out, and Nas eludes to in his lyrics, "Hip hop is dying, because of the commercial influences, the fake players with huge cars who [want to] act like hustlers while real, lyrical hip hop from the hood is literally [choking]."). *See also* Michael Fraiman, *CD Review: Nas – Hip Hop is Dead*, http://www.cinemablend.com/music/CD-Review-Nas-Hip-Hop-Is-Dead-2260.html (last visited Nov. 26, 2007).

¹³ See 17 U.S.C. § 102(a) (2007).

performances of copyrighted works.¹⁴ However, DJs may gain protection from accusations of infringement by raising defenses such as fair use, de minimis sampling, and compulsory and permissive licenses.¹⁵ Nonetheless, there are broader concerns for artists whose songs are being wrongfully distorted by DJs as a result of the splicing and remixing of their musical works with those of others. Did AC/DC ever envision that their classic hits would one day be remixed and played simultaneously with a Jay-Z track?¹⁶ Perhaps this new age of the celebrity DJ creates the need, once and for all, for a balance between DJs' use of musical works a moral rights regime in the United States.

Part II of this note discusses the advent of digital technologies which have allowed DJs to remix copyrighted music to create and distribute their own artistic works. This section examines technology that makes it easy even for amateurs to create their own musical mixes, increasing the potential for even more widespread copyright infringements. Part III of this note examines relevant copyright law and moral rights issues that arise in the context of music splicing, including arguments both for and against continued DJ splicing in our current legal landscape. Part IV analyzes the issues discussed in Part III and sets out a recommendation for how copyright law should address the problems raised by the advent of this new age of digital music. This section also addresses whether or not changes need to be made to the copyright law to better protect artists' rights. Part V concludes this note.

II. DIGITAL TECHNOLOGIES USED BY DJS AND AMATEURS

¹⁴ See 17 U.S.C.§ 106 (2007).

¹⁵ See 17 U.S.C. §§ 107, 110, 115 (2007).

¹⁶ See DJ Splyce, http://djsplyce.com/ (last visited Nov. 26, 2007).

Prior to the introduction of digital technology in the 1980s and 1990s, DJs and others in the music industry used analog devices¹⁷ to "record, distort or manipulate the pitch, tempo, and tone" of music.¹⁸ One of the first American nightclub DJs was Francis Grasso, who popularized slip-cueing and beatmatching.¹⁹

The advent of rap and hip-hop music inspired many DJs and amateurs to remix music and sample artists' works.²⁰ In 1973, Bronx, New York DJ, DJ Kool Herc, dubbed "the Godfather of Hip-Hop," began to mix back and forth between two identical records to extend the instrumental segments of the music.²¹ DJ Kool Herc is considered to be the first DJ in the United States to use equipment to play and manipulate music and create new sounds using existing artistic works.²² Many other DJs and amateurs have since followed DJ Kool Herc's techniques to create new works to remix and repackage music.²³ In the late 1990s, computer software programs

¹⁹ See BIGpedia.org, Francis Grasso - http://www.bigpedia.com/encyclopedia/Francis_Grasso (last visited Nov. 27, 2007). Slip-cueing is a technique used by DJs where one temporarily "hold[s] a record still with his thumb and forefinger while a protective slipmat and the steel platter of the turntable revolved underneath. He then released the vinyl at the exact right moment he wanted to come in with the new song, creating a sudden segue from the previous track, similar in the beats-per-minute range and orchestration." *See* BIGpedia.org, Slip-cueing, http://www.bigpedia.com/encyclopedia/Slip-cueing (last visited Nov. 27, 2007). Beatmatching is another DJ technique where a DJ attempts to seamlessly match the beat of the song that is playing with that of another song he plans to play next to create a continuous stream of music. *See* Hubpages.com, DJ Beatmatching, http://hubpages.com/hub/DJ-Beat-Matching (last visited Nov. 27, 2007).

²⁰ See Stephen R. Wilson, Article, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 182 (2002).

²¹ Id. at 182. See DJ Kool Herc, Biography, http://www.jahsonic.com/KoolHerc.html (last visited Nov. 27, 2007).

²²See DJ Kool Herc, Biography, http://www.jahsonic.com/KoolHerc.html (last visited Nov. 27, 2007).

¹⁷ Analog devices are electronic systems that use a continuous variable signal. Analog devices represent and process information different from digital electronic devices. However, digital equipment continues to replace devices that once used solely analog signals because of their smaller size, cheaper cost, and easier design. *See* Answers.com, Electronics, http://www.answers.com/topic/electronics?cat=technology (last visited Nov. 27, 2007).

¹⁸ See Ponte, supra note 10, at 516; Melissa Hahn, Note, Digital Music Sampling and Copyright Policy-A Bittersweet Symphony? Assessing the Continued Legality of Music Sampling in the United Kingdom, the Netherlands, and the United States, 34 GA. J. INT'L & COMP. L. 713, 719 (2006).

²³ See, e.g., The DJ List, http://www.thedjlist.com/ (last visited Nov. 27, 2007) (listing many of the most popular DJs is multiple genres of music today).

designed to allow individuals to splice, sample, or otherwise distort original music became available to DJs and amateurs alike.²⁴ As digital technology software and hardware solutions continue to evolve, more individuals will have the opportunity to remix and repackage musicians' original works.

A. Pitch 'n Time Shifters

Serato Audio Research ("Serato") created "high quality time-stretching and pitch-shifting AudioSuite software" used typically by DJs and professionals in the business of mixing music.²⁵ Amateurs are not as likely to purchase this digital technology due to its cost, which is approximately \$800.²⁶ However, those who can afford Serato's Pitch 'n Time Pro 2.4 can mix up to forty-eight tracks together, while the songs maintain complete coherency of their original sound.²⁷ Users can modify the tempo of songs by condensing or stretching out notes by taking advantage of the technology's time compression and expansion algorithms.²⁸ Additionally, the technology allows users to change the pitch of individual notes and add a realistic record scratch sound to a mix.²⁹ Moreover, this technology enables modifications made to copyrighted music

²⁸ *Id*.

²⁹ Id.

²⁴ See, e.g., The unofficial FinalScratch Forum / Final Scratch History,

http://www.finalscratchforum.com/viewtopic.php?id=5 (last visited Nov. 27, 2007) (FinalScratch was one of the first programs to emerge which allowed DJs to manipulate recorded music).

²⁵ See Serato Audio Research, Products Pitch 'n Time Pro, http://www.serato.com/products/pnt/ (last visited Nov. 27, 2007).

²⁶ See Serato Audio Research, Purchasing Scratch LIVE, http://www.serato.com/purchase/ (last visited Nov. 27, 2007).

²⁷ See Serato Audio Research, Products Pitch 'n Time Pro F.A.Q., http://serato.com/products/pnt/faq/ (last visited Nov. 27, 2007).

to be recorded for later use.³⁰ Thus, by using Pitch 'n Time Pro 2.4, DJs can splice multiple songs together for use at nightclubs and create and distribute what are, arguably, "new" artistic works.

B. Scratching and Splicing Technology

Created through a collaboration between Serato and the Rane Corporation, Scratch LIVE provides a software and hardware solution that bridges the gap between the "analog world of vinyl [records] and the digital world of computer audio files."³¹ Similar to Serato's Pitch 'n Pro 2.4, the technology can cost more than \$700, making it less likely amateurs will purchase Scratch LIVE.³² The technology's hardware is housed in a small box, which is connected to two turntables or two compact disc ("CD") players, a mixer, and a computer.³³ Thus, Scratch LIVE allows DJs to use traditional performance equipment to scratch and mix digital sound files from their computer.³⁴ Thanks to this unique technology, one popular celebrity DJ notes that his computer has evolved into his "musical library."³⁵ Scratch LIVE's software tracks a user's movement by means of control records,³⁶ which are then applied to digital audio files on an

³⁴ *Id*.

³⁰ *Id*.

³¹ See Rane Corporation, Scratch LIVE, http://rane.com/scratch.html (last visited Nov. 27 2007). See also Serato, Scratch Live, http://serato.com/products/scratchlive/ (last visited Nov. 27, 2007).

³² See, e.g., GuitarCenter.com, Rane Serato Scratch Live, http://www.guitarcenter.com/Rane-Serato-Scratch-Live-102588050-i1153929.gc (last visited Nov. 27, 2007).

³³ See Jason Blum, *RANE/SERATO SCRATCH LIVE*, REMIX MAGAZINE, Sept. 1, 2004, *available at* http://remixmag.com/dj_and_performance/remix_raneserato_scratch_live/.

³⁵ See CNN Larry King Live: DJ SPYLCE (CNN television broadcast Nov. 12, 2005), available at http://transcripts.cnn.com/TRANSCRIPTS/0511/12/lkl.01.html (last visited Nov. 26, 2007).

³⁶ See Jason Blum, *RANE/SERATO SCRATCH LIVE*, REMIX MAGAZINE, Sept. 1, 2004, *available at* http://remixmag.com/dj_and_performance/remix_raneserato_scratch_live/ (explaining that control records are coated vinyl records that enables DJs to be able to select songs without the need to use a computer).

associated computer.³⁷ The software allows DJs to simulate the same sound in a digital audio file, which is indistinguishable from traditional scratching on vinyl records.³⁸ Tracks created by DJs employing the technology can be used for playback at a later time.³⁹ Thus, Scratch LIVE offers DJs another option to splice, record, and repackage music.

Similar to Scratch LIVE, Stanton Magnetics created FinalScratch, which combines "digital technology with the analog control of the past."⁴⁰ By combining turntables or CD players, a mixer, and a computer, FinalScratch allows DJs to manipulate digital audio files by mixing, modifying pitches, and scratching songs.⁴¹ The technology enables DJs to splice artists' music and record their mixes on special vinyl records or CDs called "timecode"⁴² for use and playback at nightclubs.⁴³ DJs can also mix songs using the technology extemporaneously at nightclubs without prerecording digital files.⁴⁴

Analogously, M-AUDIO created Torq Conectiv which has many of the same features of both Scratch LIVE and FinalScratch, providing DJs with another technology to distort artists' musical works.⁴⁵

⁴¹ *Id*.

⁴³ *Id*.

⁴⁴ Id.

³⁷ See Serato Audio Research, Pitch 'n Time Pro F.A.Q.'s, http://serato.com/products/pnt/faq/ (last visited Nov 27, 2007).

³⁸ See Rane Corporation, Scratch LIVE, http://rane.com/scratch.html (last visited Nov. 27, 2007).

³⁹ *Id*.

⁴⁰ See Stanton Magnetics, FinalScratch, http://www.stantondj.com/v2/fs/whatisfs.asp (last visited Nov. 27, 2007).

⁴² *Id.* (defining "Timecode" as "special vinyl records and CDs used with FinalScratch [that] contain digital information.").

⁴⁵ See M-AUDIO, Torq Conectiv, http://www.m-audio.com/products/en_us/TorqConectiv-main.html (last visited Nov. 27, 2007).

C. iDJ2 Mixing Technology

Numark Industries, LLC's iDJ2 allows DJs and non-professionals alike to mix songs using digital music files downloaded onto iPods to create and distribute musical compilations using copyrighted works of others.⁴⁶ Using music downloaded to a single iPod, the technology enables users to scratch, change pitch, modify tempo, and loop electronic musical files.⁴⁷ DJs and amateurs can record musical mixes of multiple songs for later playback.⁴⁸ Due to the widespread use of iPods, the technology offers an opportunity for almost anyone to remix a musician's work.

D. Other Technologies

Alternatively, by using just a computer, Native Instruments Incorporated's TRAKTOR 3 allows DJs and amateurs to mix up to four digital music files at once.⁴⁹ Users can also scratch songs, modify pitches, and take advantage of the technology's other advanced effects.⁵⁰ Similarly, Pioneer Electronics Incorporated's DJS software also allows professional and amateur DJs to create mixes using only a computer.⁵¹ As is the case with other digital technologies

⁵⁰ *Id*.

⁴⁶ See Numark Industries, LLC, Numark Premiers Idj2 with Color Screen at DJ Expo, http://www.numark.com/content8687 (last visited Nov. 27, 2007).

⁴⁷ *Id. See also* Melanie Tan, *Numark launches iDJ2 iPod mixer*, MOBILE MAGAZINE, Mar. 28, 2006, http://www.mobilemag.com/content/100/102/C7127/.

⁴⁸ See Numark, Industries, LLC, iDJ2 Mobile DJ Workstation With Universal Dock For iPod, http://www.numark.com/idj2 (last visited Nov. 27, 2007).

⁴⁹ See Native Instruments, Inc., Traktor 3, http://www.native-instruments.com/index.php?id=traktor3 (last visited Nov. 27, 2007).

⁵¹ See Pioneer Electronics, Inc., Pro DJ Software,

http://www.pioneerelectronics.com/PUSA/Products/ProDJ/Pro+DJ+Software/SVJ-DL01 (last visited Nov. 27, 2007).

mentioned, DJs and amateurs can employ both TRAKTOR 3 and DJS to create new works using copyrighted material.

DJs now have the means to take samples from a variety of works and splice them into one track for commercial consumption of a product never envisioned and, perhaps, not welcomed by artists.

III. THE LEGAL LANDSCAPE: LEGAL CONSIDERATIONS DEALING WITH DJS' USES OF MUSICIANS' WORKS

A. Copyright Law Overview and History

The United States Constitution, Article I, Section 8, Clause 8, contains the origins of the United States copyright law, which states "The Congress shall have power To 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."⁵² By "promot[ing] the Progress of Science," the constitutional grant of protection for copyrighted works is designed to "spread" knowledge.⁵³ Ultimately, copyright law aims to stimulate the creation of as many works of art, literature, music, and other pieces of authorship as possible to benefit the public.⁵⁴ Thus, copyright law attempts to reach a balance between creating incentives to produce literary and artistic works and the "use and dissemination of such works."⁵⁵ Generally, for works created

⁵² U.S. CONST. art. I, § 8, cl. 8.

⁵³ Id. See Malla Pollack, Article, What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause, 80 NEB. L. REV. 754, 755 (2001).

⁵⁴ See ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 374-75 (4th ed. 2006) (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

⁵⁵ *Id.* at 375.

after January 1, 1978, copyright protection lasts for the life of the author of the work plus an additional seventy years after the author's death.⁵⁶

Under the Copyright Act, "original works of authorship fixed in any tangible medium of expression" can obtain copyright protection.⁵⁷ For an artist to obtain copyright protection in their work, certain criteria must be satisfied, including: (1) the work must be a "work of authorship"; (2) the work must be "original"; and (3) protection must be for an "expression" of an idea.⁵⁸ The Copyright Act outlines eight categories that constitute works of authorship.⁵⁹ The requirement that a work of authorship be original is a very low standard.⁶⁰ Although a new work must be original and independently created to obtain copyright protection, it does not have to be novel, but rather "a distinguishable creation" from existing works.⁶¹ Copyright protection does not extend merely to an idea, but rather to an "expression" of an idea.⁶² By acquiring copyright protection, artists gain exclusive rights to reproduce their works, prepare derivative works, and distribute their works.⁶³ Under the Copyright Act, protection exists in songs that are used by celebrity DJs.⁶⁴

⁵⁷ See 17 U.S.C. § 102 (2007).

⁵⁶ See 17 U.S.C. § 302(a) (2007). See also U.S. Copyright Office, How Long Does Copyright Protection Last?, http://www.copyright.gov/help/faq/faq-duration.html (last visited Oct. 22, 2007).

⁵⁸ See 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, 240-41 (1993) (discussing digital sampling using new technology and the need to modify the existing copyright law to accommodate digital sampling).

⁵⁹ See 17 U.S.C. § 102 (2007). Under Section 102, works of authorship which may obtain copyright protection include: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. *Id.*

⁶⁰ See Kravis, supra note 58, at 241.

⁶¹ *Id.* at 240-41.

⁶² *Id.* at 241.

⁶³ *Id.* at 241-42. *See also* 17 U.S.C. §§ 106(1)-(3) (2007).

B. Infringement

Copyright infringement occurs when there is a violation of any of the exclusive rights held by the copyright owner or author of the copyrighted work.⁶⁵ To establish a prima facie case of copyright infringement a copyright holder must prove at least three things.⁶⁶ First, a copyright holder must show that the work is original, fixed, complies with the statutory formalities of copyright law, and that the alleged infringing work does not fall within any of the exceptions under Section 102(b) of the Copyright Act.⁶⁷ Second, the copyright owner must prove actual copying by the accused party.⁶⁸ Third, the copyright owner must establish that the defendant improperly appropriated the copyrighted work.⁶⁹ With regard to this note, the alleged infringers would be celebrity DJs. Since it is unlikely there will be direct evidence of copying, a copyright owner can establish proof of actual copying through circumstantial evidence of access and "probative similarities."⁷⁰ DJs and others would have access to copyrighted music through radio

⁶⁷ See William Patry, Article, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 386 (2000) (discussing the originality element); Michael Coblenz, Article, *Intellectual Property Crimes*, 9 ALB. L.J. SCI. & TECH. 235, 246 (1999) (addressing fixation and the statutory filing requirement); 17 U.S.C. § 102(b) (2007).

⁶⁸ See Kravis, supra note 58, at 243-46 (addressing infringement generally).

⁶⁹ Id.

⁶⁴ See 17 U.S.C. § 102(3), (7) (2007) (stating copyright protection in songs exists in the "accompanying music" and "sound recordings").

⁶⁵ See 17 U.S.C. §§ 106(1)-(3), 501(a) (2007). See also Kravis, supra note 58, at 243.

⁶⁶ The first element in proving copyright infringement is regularly assumed or taken for granted. Thus, most scholars and lawyers typically state one must prove actual copying and substantial similarity to establish a prima facie case of copyright infringement. *See, e.g.*, Chris Johnstone, Note, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in Civil Society*, 77 S. CAL. L. REV. 397, 405 (2004) (addressing actual copying and substantial similarity).

⁷⁰ See Nick Gladden, When California Dreamin' Becomes A Hollywood Nightmare; Copyright Infringement and the Motion Picture Screenplay: Toward an Improved Framework, 10 J. INTELL. PROP. L. 359, 366 (2003). See also Johnstone, *supra* note 66, at 405 (addressing "probative similarities").

airplay, the Internet, and distribution in retail stores.⁷¹ In evaluating the probative similarities between a plaintiff and defendant's work, a trier of fact must determine how similar the defendant's work is in relation to the copyrighted work.⁷² Improper appropriation can be established by using circumstantial evidence.⁷³ If all three elements are demonstrated, the plaintiff has made out a prima facie case, and unless the defendant invokes an affirmative defense, a finding by a court of copyright infringement will likely follow.⁷⁴

C. Sound Recordings and Musical Works

When DJs perform at nightclubs or record "mixtapes",⁷⁵ they are using the sound recordings of multiple musical works.⁷⁶ The Copyright Act defines sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."⁷⁷ Sound recordings are included in the six categories of subject matter that copyright law protects

⁷³ Id.

⁷¹ See, e.g., Apple.com, iTunes, http://www.apple.com/itunes/ (last visited Nov. 27, 2007); Z100 – New York's Hit Music Station, http://www.z100.com/main.html (last visited Nov. 27, 2007); Bestbuy.com, Music, http://www.bestbuy.com/site/olspage.jsp?id=cat02001&type=category&categoryRep=cat02000 (last visited Nov. 27, 2007).

⁷² See Johnstone, *supra* note 66, at 405.

⁷⁴ See Dane S. Ciolino, Article, *Reconsidering Restitution in Copyright*, 48 EMORY L.J. 1, 7 (1999) (addressing liability upon making out a prima facie case of copyright infringement).

⁷⁵ A mixtape refers to "a compilation of songs and or tracks…recorded in a specific order." Using advances in digital technology, DJs can produce "seamless" mixtapes splicing tracks together to create a continuous compilation of music. Although mixtapes today are commonly made using digital audio such as CDs or MP3s, the term "mixtape" is still commonly used. Reference.com, Mixtape, http://www.reference.com/search?r=13&q=Mixtape (last visited Nov. 27, 2007).

⁷⁶ See 17 U.S.C. § 102(a)(7) (2007).

⁷⁷ See 17 U.S.C. § 101 (2007).

in Section 106 of the Copyright Act.⁷⁸ Also protected under Section 106 are musical works.⁷⁹ However, unlike a sound recording which protects "the actual recorded version of a song," including "the artist's individual expression of a song through instruments and voice," a musical work protects "notes, arrangement (sheet music), and lyrics of a song" and, therefore, does not pertain to DJs.⁸⁰ Section 106(6) prevents others from making and distributing sound recordings of a copyright owner.⁸¹ Sound recordings may be assigned to the artist, but are typically owned by record companies that help to record, produce, and distribute artists' musical works.⁸² Thus, by creating a continuous stream of music, DJs infringe upon copyrighted sound recordings when they distort artists' songs publicly or through recorded mixes that can be downloaded over the Internet.

D. Exceptions to Infringement of Exclusive Rights

Even though, at first glance, a DJ's use of a copyrighted musical work is an infringement of a song's sound recording, some exceptions exist in copyright law.⁸³ These exceptions, which include compulsory licenses, performance licenses, de minimis sampling, and fair use, allow for

⁸¹ *Id.* at 302.

⁸³ See 17 U.S.C. §§ 107, 110, 115 (2007).

⁷⁸ See 17 U.S.C. § 106(6) (2007).

⁷⁹ See 17 U.S.C. § 106(4) (2007).

⁸⁰ See Ryan C. Grelecki, Comment, Can Law and Economics Bring the Funk ... Or Efficiency? A Law and Economics Analysis of Digital Sampling, 33 FLA. ST. U. L. REV. 297, 302 (2005).

⁸² See Christopher D. Abramson, Note, Digital Sampling and the Recording Musician: A proposal for Legislative Protection, 74 N.Y.U. L. REV. 1660, 1669-70 (1999). See also Rajan Desai, Article, Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights, 10 U. BALT. INTELL. PROP. L. J. 1, 18-19 (2001).

the use of an artist's work without infringement.⁸⁴ As affirmative defenses, DJs could present some of these arguments and others to defend against a charge of copyright infringement.

1. Compulsory Licensing

Compulsory licenses provide an exception to exclusive rights of copyrighted musical works.⁸⁵ Once a compulsory license is obtained, under Section 115 of the Copyright Act, the copyright holder cannot prevent another from using the copyrighted mechanical recording to reproduce and distribute recordings to members of the public.⁸⁶ Under the statute, anyone can reproduce their own version of a sound recording and distribute it as long as they provide notice, pay royalties, and comply with the statute's provisions.⁸⁷ Royalties are typically handled by licensing, collection, and distribution agencies, such as The Harry Fox Agency, which represent copyright owners.⁸⁸ However, acquisition of a compulsory license does not allow for the performance of the work, or for any "change [to] the basic melody or fundamental character of the work."⁸⁹ Thus, moral rights of an author's original musical compilation are implicated under the statute by not allowing alterations to the work's "melody or fundamental character" for commercial use.⁹⁰

⁸⁹ See Desai, supra note 82, at 5; 17 U.S.C. § 115(a)(1)-(a)(2) (2007).

⁹⁰ See Desai, supra note 82, at 5 (addressing the intent to maintain the copyright holder's original creation).

⁸⁴ Id.

⁸⁵ See Grelecki, supra note 80, at 303.

⁸⁶ See Desai, supra note 82, at 5.

⁸⁷ See Ponte, supra note 10, at 547-48.

⁸⁸ See Desai, supra note 82, at 6; The Harry Fox Agency, Inc., http://harryfox.com/index.jsp (last visited Nov. 27, 2007).

Based on the language of the statute, the infringement exception is not applicable to DJ performances at nightclubs or even to DJs that record spliced music to later perform or distribute. By not allowing for a right of public performance under Section 115, DJs would be unsuccessful in obtaining a compulsory license to perform at nightclubs and other events.⁹¹ Furthermore, DJs who create mixes for later use or distribution are not protected under the statute since they essentially mutilate copyrighted works in creating their compilations, which is also a violation under the statute.⁹²

2. Performance Licensing

Under a performance license, someone other than the copyright holder can perform a copyrighted musical work publicly.⁹³ The reason for obtaining a public performance license is "to perform a work in a place [open] to the public, outside of family or social gatherings, or to transmit a performance to such a place."⁹⁴ Performing Rights Societies, including The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Incorporated (BMI), and the Society of European Stage Authors & Composers, Incorporated (SESAC), help monitor and enforce against unlawful public performances and allow establishments to obtain licenses to publicly perform.⁹⁵ Nightclubs and other venues typically acquire public performance licenses granting DJs the right to play music.⁹⁶ However, the license is only a "performance" license and

⁹¹ *Id.* at 5-6.

⁹² *Id.* at 5.

⁹³ *Id.* at 7. *See* 17 U.S.C. § 110 (2007).

⁹⁴ See Desai, supra note 82, at 7.

⁹⁵ *Id. See also* American Society of Composers, Authors and Publishers, http://www.ascap.com/index.html (last visited Mar. 16, 2007); Broadcast Music, Inc., http://www.bmi.com/ (last visited Nov. 27, 2007); Society of European Stage Authors & Composers, Inc., http://www.sesac.com/index.aspx?flash=1 (last visited Nov. 27, 2007).

⁹⁶ Desai, *supra* note 82, at 7.

does not authorize a DJ to distort an artist's work as is common with most DJ performances.⁹⁷ Therefore, protection under the statute merely allows a DJ to perform a song in its entirety prior to playing a subsequent song and, thus, most DJ performances are not covered under this limited license.

3. Comparing DJs Use of Musical Works to Sampling

Although many have argued that sampling a short section of a musical composition should be allowed without the need to acquire a license, the arguments in favor of sampling by DJs are relatively weak. This is because of the nature of a DJ's craft requires DJs to sample another's work when they splice multiple songs together during a performance.⁹⁸ DJs' use of artists' songs is typically more substantial than the use by a musician that samples another artist's work.⁹⁹ Thus, although each federal circuit may have different limits regarding the amount of an artist's song that may legally be used by another without a license, it is probable that a DJs' unauthorized use of an artist's work would be impermissible in all jurisdictions.¹⁰⁰

In 2003, the Ninth Circuit acknowledged in *Newton v. Diamond* that an artist's work can be sampled and used in another's work without the need to acquire a license as long as the use of

⁹⁷ See 17 U.S.C. § 110 (2007).

⁹⁸ See generally Kravis, supra note 58; Julie D. Cromer, Article, Harry Potter and the Three-Second Crime: Are We Vanishing The De Minimis Defense From Copyright Law?, 36 N.M. L. REV. 261 (2006) (arguing de minimis use of material should be allowed in regards to sampling).

⁹⁹ See generally Newton v. Diamond, 349 F.3d 591, 592 (9th Cir. 2003) (stating that a six second sample by the Beastie Boys was de minimis). DJs are not as likely to only use six seconds or less of an artist's song when they are splicing tracks together and matching beats to create a continuous stream of music.

¹⁰⁰ *Compare Newton*, 349 F.3d at 591-93 (holding that a six second sample was de minimis and, thus, permissible), *with* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005) (holding regardless of the length of a sample, sampling is not permissible without a license).

the copyrighted work is de minimis.¹⁰¹ In *Newton*, the Beastie Boys sampled six seconds of a three-note sequence from jazz musician James W. Newton's song Choir constituting "roughly two percent of the four-and-a-half-minute[s]" of their rap song *Pass the Mic*.¹⁰² The court concluded that the Beastie Boys' use of the sample was de minimis and thus acceptable, reasoning "the sample was neither qualitatively nor quantitatively important" and would not be recognizable by the average audience.¹⁰³ However, unlike the Beastie Boys who sampled only a small portion of Newton's work, DJs typically use substantial, recognizable portions of artists' works during their performances. For example, when DJ AM, a well-known celebrity DJ, splices songs during a performance, he uses more than a few seconds of The Police's *Roxanne* before playing rapper Sean Paul's Give Me the Light.¹⁰⁴ Rather, DJ AM uses up to a few minutes of each song.¹⁰⁵ However, there are times when DJs, including DJ AM, use only a few seconds of a song to create a continuous stream of music, bridging the gap between two entirely different songs.¹⁰⁶ In the view of *Newton*, the use of a particular song for only a few seconds could arguably be considered de minimis and permissible, while several minutes could very well constitute infringement.¹⁰⁷

¹⁰⁵ *Id*.

¹⁰¹ See Newton, 349 F.3d at 592. See also Grelecki, supra note 80, at 307.

¹⁰² See Newton, 349 F.3d at 597. See also Grelecki, supra note 80, at 307.

¹⁰³ See Ponte, supra note 10, at 535.

¹⁰⁴ See MySpace.com, DJ AM, http://www.myspace.com/djamone (last visited Nov. 26, 2007) (some of his mixes exemplify the extended use of multiple songs to create one seamless musical track).

¹⁰⁶ *Id.* (various compilations show minimal use of some songs). *See also* DJ Splyce, http://djsplyce.com/ (last visited Nov. 26, 2007) (some mixes use only small portions of artists' works).

¹⁰⁷ See Newton, 349 F.3d at 597.

Soon after the Ninth Circuit decided Newton, the Sixth Circuit, in Bridgeport Music, Inc. v. Dimension Film, held that any use of another's work without a license constituted an infringement.¹⁰⁸ By essentially stating "get a license or do not sample," the court removed any defenses, such as a de minimis analysis, making them "unavailable to even the most quantitatively trifling or qualitatively transformative sample."¹⁰⁹ Bridgeport Music involved a claim that a sound recording by George Clinton, Jr. and the Funkadelics, Get Off Your Ass and Jam, was digitally sampled by the defendant in a rap song 100 Miles and Runnin by taking "a two-second sample from the guitar solo...[where] the pitch was lowered, and the copied piece was "looped" and extended to 16 beats."¹¹⁰ Under the court's holding, without a license, even DJs who splice only a few seconds of various songs together would infringe upon copyrighted works.¹¹¹ Thus, although most DJs' uses of artists' works are typically more than de minimis, the Sixth Circuit's ruling in Bridgeport Music holds even more strongly against DJs than the Ninth Circuit's holding in *Newton*.¹¹² Although the holdings by both courts apply to digital sampling and not live performances, the holdings are analogous and prove DJs have even less of an argument to use another's work than a recording artist since their use of another's work can usually be considered substantial.

¹⁰⁸ See Bridgeport Music, Inc., 410 F.3d 792, 798 (affirming in part the lower court's holding regarding de minimis use). See also Matthew S. Garnett, *The Downhill Battle to Copyright Sonic Ideas in Bridgeport Music*, 7 VAND. J. ENT. L. & PRAC. 509, 509 (2005). The "license" is both a performance and musical composition license.

¹⁰⁹ See Garnett, supra note 108, at 509.

¹¹⁰ See Bridgeport Music, Inc., 410 F.3d at 795-96. See also Ponte, supra note 10, at 532; Grelecki, supra note 80, at 308.

¹¹¹ See Bridgeport Music, Inc., 410 F.3d at 801.

¹¹² *Id. See Newton*, 349 F.3d at 595.

4. Derivative Works

A copyright owner has the exclusive right "to prepare derivative works."¹¹³ 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."¹¹⁴ Moreover, a derivative work also constitutes "a work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship."¹¹⁵ As long as a copyright owner's derivative work is original and meets the fixation requirement, it qualifies for protection under Section 103(a) of the Copyright Act.¹¹⁶ In relation to DJs, depending on which federal circuit in which a lawsuit is filed on behalf of an artist whose work was allegedly infringed by a DJ, the DJ's use of an artist's work may or may not constitute a derivative work.¹¹⁷ A finding of copyright infringement occurs when a court determines a defendant, here a DJ, created a derivative work.¹¹⁸

¹¹⁵ *Id*.

¹¹³ See 17 U.S.C. § 106(2) (2007).

¹¹⁴ 17 U.S.C. § 101 (2007).

¹¹⁶ See L. Ray Patterson & Craig Joyce, Article, *Monopolizing the Law: The Scope of Copyright Protection For Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 763 (1989).

¹¹⁷ *Compare* Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997) (where the court held the defendant's use of the plaintiff's work was not a derivative work and, therefore, the defendant did not infringe), *with* Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988) (where the court held the defendant's use of the plaintiff's work was a derivative work and, therefore, the defendant infringed). Similar facts in both cases led to opposite outcomes.

¹¹⁸ See, e.g., *Mirage Editions, Inc.*, 856 F.2d at 1343 (the court held the defendant's use of the plaintiff's work constituted a derivative work).

For example, in *Lee v. A.R.T. Co.*, the Seventh Circuit concluded that mounting art work onto a tile was not an original work of authorship and did not constitute a derivative work.¹¹⁹ The court reasoned the copyrighted works were not "transformed" when they were bonded by the defendant onto a tile because nothing "changed in the process;" the work of art still depicted the same thing it did when it was originally created.¹²⁰ The court held the defendant's use of the artist's work was not a derivative work and, therefore, not an infringement.¹²¹ The court noted alterations of an artist's work should be allowed.¹²² Analogously, under the Seventh Circuit's holding, a DJ's use of an artist's work is deserving of protection from copyright infringement on the grounds that DJs do not change anything in the process; the original works still represent artists' original works. Thus, even though a DJs' ability to match beats and splice songs together is different from musicians' artistic creations as vocalists, DJs' creations are unique nonetheless.

However, under the reasoning in the Ninth Circuit's decision in *Mirage v. Albuquerque A.R.T.*, where the court addressed the same scenario laid out in *Lee*, a DJ's use of an artist's work would likely constitute copyright infringement.¹²³ The Ninth Circuit viewed the defendant's use of the artist's work as transformative and as an original work of authorship infringing upon the

¹¹⁹ Lee, 125 F.3d at 581. See also Michael A. Stoker, Comment, Framed Web Pages: Framing the Derivative Works Doctrine on the World Wide Web, 67 U. CIN. L. REV. 1301, 1320 (1999).

¹²⁰ See Stoker, supra note 119, at 1320.

¹²¹ *Id*.

¹²² *Id*.

¹²³ See Mirage Editions, Inc., 856 F.2d at 1341.

artists right to prepare derivative works.¹²⁴ Under the Ninth Circuit's holding, a DJ's use of an artist's musical work would likely be transformative, constituting copyright infringement.

Thus, depending on which federal circuit a copyright holder files a lawsuit in, the law will be applied differently, and a DJ's use of an artist's work may or may not constitute an infringement of the artist's right to prepare a derivative work.

4.1 Temporary Modification and Distortion

Although circuit courts have different opinions on what constitutes a derivative work and whether or not a work is transformative, the Copyright Act recognizes permanent distortion of an artist's work as an infringement.¹²⁵ As *Clean Flicks of Colorado v. Soderbergh* was being decided, Congress passed the Family Entertainment and Copyright Act of 2005, which allows, in part, the use of editing equipment to temporarily modify movies, removing offensive content such as nudity, sex, profanity, and violence, for private viewing as long as permanent altered versions were not created.¹²⁶ The court in *Clean Flicks*, acknowledged that the copyright owners had exclusive rights and rejected a fair use defense by mechanical editing companies.¹²⁷

In *Clean Flicks*, multiple companies that specialize in editing and/or distributing edited versions of movies brought a lawsuit seeking declaratory judgment to allow them to permanently

¹²⁴ *Id.* at 1343.

¹²⁵ See 17 U.S.C. § 106(2) (2007). Compare Lee, 125 F.3d at 581 (where the court held the defendant's use of the plaintiff's work was not a derivative work and, therefore, the defendant did not infringe); with Mirage Editions, Inc., 856 F.2d at 1344 (where the court held the defendant's use of the plaintiff's work was a derivative work and, therefore, the defendant infringed). Similar facts in both cases led to opposite outcomes.

¹²⁶ See Clean Flicks of Colo. LLC v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006); U.S. Copyright Office, Family Entertainment and Copyright Act of 2005, http://www.copyright.gov/legislation/pl109-9.html (last visited Oct. 19, 2007) (reporting the text of The Family Entertainment and Copyright Act of 2005). See also Ethan O. Notkin, Note, *Television Remixed: The Controversy Over Commercial-Skipping*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 899, 918 (2006).

¹²⁷ Clean Flicks of Colo. LLC, 433 F. Supp. 2d at 1239-43.

alter the content of movies protected under copyright by several motion picture studios, their subsidiaries, and affiliates.¹²⁸ The plaintiffs claimed their use of copyrighted works did not create "derivative works" in violation of copyright law.¹²⁹ The defense counterclaimed for infringement of exclusive rights to prevent harm to movies' "creative artistic expression" in their copyrighted movies.¹³⁰ In defense, the plaintiffs argued their modifications to copyrighted works constituted a "fair use."¹³¹ Upon weighing the four factors of a fair use analysis, the court reasoned the use by the plaintiffs did not constitute a fair use of copyrighted works.¹³² Following the court's holding, the plaintiffs were subsequently forced to stop permanently altering copyrighted movies.¹³³

As a result of *Clean Flicks* and Congress's passage of the Family Entertainment and Copyright Act of 2005, it is clear that permanent alteration of copyrighted movies by those who do not own the copyrights in the works is illegal.¹³⁴ It is probable in cases of DJs that a court would be able to analogize to the portion of the statute relating to modifications of movies when DJs' alterations of copyrighted works are not permanent. However, the statute was designed to allow temporary alteration to protect families, and ultimately children, from viewing content that may be offensive, whereas DJs' alterations have nothing to do with the protection of

¹²⁹ Id. at 1241.

¹³⁰ *Id.* at 1237, 1243.

¹³¹ *Id.* at 1239.

¹³³ *Id.* at 1243-44.

¹²⁸ *Id.* at 1237 (the mechanical editing companies that initiated the lawsuit included CleanFlicks, Family Flix, CleanFilms Corporation, and Play It Clean Video).

¹³² Clean Flicks of Colo. LLC, 433 F. Supp. 2d at 1242.

¹³⁴ See id. at 1236; U.S. Copyright Office, Family Entertainment and Copyright Act of 2005, http://www.copyright.gov/legislation/pl109-9.pdf (last visited Oct. 19, 2007).

consumers.¹³⁵ Although both temporary distortion of a movie and temporary alteration of music may be equally appealing to some consumers, the intent behind Congress's passage of this portion of the Family Entertainment and Copyright Act of 2005 was mainly to protect the youth of America.¹³⁶ Adults who frequent nightclubs have the option to not patronize the clubs should they not want to hear artists' works spliced, scratched or otherwise distorted. However, should a court analogize to the Family Entertainment and Copyright Act of 2005, it should be noted that the length of time DJs distort a song lasts only a few minutes at most, where as the length of time a movie is distorted can last a few hours.¹³⁷

5. Fair Use

Although copyright holders are typically granted exclusive rights in their work, fair use offers an affirmative defense to a plaintiff's prima facie claim for copyright infringement.¹³⁸ Fair use affords a privilege to someone other than the copyright holder, such as DJs, to use the copyrighted material in a reasonable manner without consent, notwithstanding the monopoly granted to the owner of the copyright.¹³⁹ Section 107 of the Copyright Act lists "criticism, comment, news reporting, teaching..., scholarship, or research" among the uses that may be

¹³⁶ *Id*.

¹³⁵ See Center for Democracy and Technology, *Analysis of the Family Entertainment and Copyright Act of 2005* (*S.167*), Apr. 2005, http://www.cdt.org/copyright/20050426s167analysis.pdf (last visited Oct. 19, 2007) (addressing the Senate's bill for the statute).

¹³⁷ See U.S. Copyright Office, Family Entertainment and Copyright Act of 2005, http://www.copyright.gov/legislation/pl109-9.pdf (last visited Oct. 19, 2007).

¹³⁸ See 17 U.S.C. § 107 (2007); Jeremy Beck, Article, *Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1, 8 (2005).

¹³⁹ See 17 U.S.C. § 107 (2007). See also Kravis, supra note 58, at 246.

considered "fair."¹⁴⁰ Although it is probable a court would find DJs' use of copyrighted works does not fall within one of these uses, "it is important to note that this list is illustrative and not restrictive."¹⁴¹ Therefore, DJs' use of copyrighted sound recordings may be considered a fair use as well.

In determining whether or not a use is fair, a court must balance four factors.¹⁴² First, a court must analyze the "purpose and character" of the defendant's use of the plaintiff's work, including whether the work qualifies for fair use protection, whether the work is commercial, and whether the work is transformative.¹⁴³ This factor would likely weigh against DJs' use of a copyrighted work since the purpose of their use is commercial and would not be considered "highly transformative."¹⁴⁴ Second, a court must analyze the "nature of the copyrighted work."¹⁴⁵ This factor would also likely weigh against DJs' use of copyrighted material because DJs arguably are infringing on highly creative and entertaining works of fiction, which are at the core of copyright protection. Third, the court must analyze the "amount and substantiality" of the defendant's use of the plaintiff's work.¹⁴⁶ Again, this factor would weigh against DJs' use of artists' works because DJs regularly use the "hook" or "chorus," which is the most recognizable

¹⁴⁰ 17 U.S.C. § 107 (2007).

¹⁴¹ See Beck, supra note 138, at 11.

¹⁴² See 17 U.S.C. § 107 (2007). See also Kravis, supra note 58, at 246.

¹⁴³ See 17 U.S.C. § 107(1) (2007); Kravis, supra note 58, at 247 (discussing the commercial aspect); Leibovitz v. Paramount Pictures Corp., 948 F. Supp. 1214, 1222 (S.D.N.Y. 1996) (discuss the transformative aspect).

¹⁴⁴ When a work is highly transformative, a court is more forgiving of its commercial nature. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (noting in determining whether the work is transformative, the court will look to whether it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message").

¹⁴⁵ See 17 U.S.C. § 107(2) (2007).

¹⁴⁶ See 17 U.S.C. § 107(3) (2007).

part of a song.¹⁴⁷ Fourth, and most importantly, a court must analyze the "the effect of the use upon the potential market" for the copyrighted work.¹⁴⁸ A court may find this factor weighs in favor or against DJs depending on the facts of the case. Some DJs create mixtapes illegally which may detract from artists' profits.¹⁴⁹ Additionally, many DJs have websites where their remixes can be heard or downloaded, harming sales of the original works.¹⁵⁰ However, many current artists probably appreciate DJs who mix their songs due to the publicity they attract. If their songs were not spliced and played in nightclubs, their music would not likely be as popular. Alternatively, established artists like Led Zeppelin and crooners such as Frank Sinatra are not as apt to appreciate DJs' use of the works. Overall, even though there is not a strong fair use argument for DJs, considering that many factors work against them, the list is not inclusive.¹⁵¹

6. Moral Rights

Moral rights constitute certain inalienable rights held by an author.¹⁵² Moral rights protect an author's work from any derogatory action in relation to their work, "which would be

¹⁵⁰ Id.

¹⁴⁷ A "hook" is "an appealing melodic phrase, orchestral ornament, refrain, etc., often important to a popular song's commercial success." Dictionary.com, Hook, http://dictionary.reference.com/browse/hook (last visited Nov. 27, 2007). The chorus is "a part of a song that recurs at intervals, usually following each verse; refrain." Dictionary.com, Chorus, http://dictionary.reference.com/browse/chorus (last visited Nov. 27, 2007).

¹⁴⁸ See 17 U.S.C. § 107(4) (2007).

¹⁴⁹ See, e.g., Kelefa Sanneh, *With Arrest of DJ Drama, the Law Takes Aim at Mixtapes*, N.Y. TIMES, Jan. 18, 2007, *available at* http://www.nytimes.com/2007/01/18/arts/music/18dram.html?ex=1326776400&en=cddd16afa0e8ce0b &ei=5088&partner=rssnyt&emc=rss# (detailing the arrest of DJ Drama for the creation of unlicensed musical compilations known as mixtapes).

¹⁵¹ See Nicholas B. Lewis, Comment, Shades of Grey: Can The Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art?, 55 AM. U. L. REV. 267, 274 (2005).

¹⁵² See Patrick G. Zabatta, Note, *Moral Rights and Musical Works: Are Composers Getting Burned?*, 43 SYRACUSE L. REV. 1095, 1102 (1992) (eluding to the premise moral rights are not affected "by the transfer of the underlying work").

prejudicial to [their] honor and reputation."¹⁵³ However, the United States does not provide the same level of moral rights protection that many foreign nations grant to artists.¹⁵⁴ Thus, the emotions or feelings of musicians whose works are mutilated at the hands of DJs are not presently protected in the United States.¹⁵⁵

6.1 Moral Rights Abroad

Under many foreign regimes, musicians would be granted protection from DJs mutilating, distorting, or otherwise destroying their works.¹⁵⁶ The basis of Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") obligates signatories to protect authors' moral rights even after their works are sold off.¹⁵⁷ Thus, protection granted under the Berne Convention for moral rights is independent of any economic considerations.¹⁵⁸ Under Article 6bis, artists are afforded moral rights protection of "attribution, integrity, disclosure, withdrawal, and resale royalties."¹⁵⁹ The tradition of moral rights is very

¹⁵⁵ *Id.* at 1107.

¹⁵⁶ See Copyright Aid, Signatories to the Berne Convention, http://www.copyrightaid.co.uk/copyright_information/berne_convention_signatories (listing the countries that are signatories of Berne) (last visited Nov. 27, 2007). See also Zabatta, supra note 152 at 1104-05 (discussing moral rights in France).

¹⁵⁸ *Id*.

¹⁵³ See The Legal Information Institute Cornell University Law School, Berne Convention for the Protection of Literary and Artistic Works, http://www.law.cornell.edu/treaties/berne/6bis.html (last visited Nov. 27, 2007).

¹⁵⁴ See Zabatta, supra note 152, at 1108 (discussing how United States law focuses on economic concerns and neglects artist's emotions).

¹⁵⁷ Zabatta, *supra* note 152, at 1102.

¹⁵⁹ Sarah C. Anderson, Note, *Decontextualization of Musical Works: Should the Doctrine of Moral Rights be Extended?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 872 (2006). The right to attribution acknowledges the right to be named as the creator of the work, the right to prevent others from being named as the creator of the work, and the right to have one's name removed from the work if it is mutilated. The right of integrity acknowledges the right to prevent mutilation, distortion, or destruction of a creator's work. *Id.* The right to disclosure grants the creator the right to determine when they want to release their work to the public. The right to withdrawal allows creators the right to remove their work. The right to resale royalties entitles the creator a portion

strong in Europe.¹⁶⁰ Notable European signatory countries to the Berne Convention include France, Great Britain, Germany, and Switzerland, with France at the forefront.¹⁶¹ However, several other countries in Europe, as well as Asia, Africa, and South America are also signatories.¹⁶² Although the level of moral rights granted to creators varies from country to country, moral rights in France literally echo the natural right of the author under their doctrine of "le droit moral."¹⁶³

6.3 Moral Rights in the United States

In 1988, the United States finally joined the Berne Convention after 100 years of the treaty's existence.¹⁶⁴ The main reason it took so long was because of contention over the moral rights provision, Article 6bis.¹⁶⁵ United States copyright law primarily focuses on economics; considerations of how potential infringements affect an author's soul are disregarded.¹⁶⁶ However, to satisfy the requirement of moral rights protection of the Berne Convention, the

¹⁶⁰ See Desai, supra note 82, at 12-13 (discussing the evolution of moral rights in Europe).

¹⁶¹ See Copyright Aid, Signatories to the Berne Convention,

http://www.copyrightaid.co.uk/copyright_information/berne_convention_signatories (listing the countries that are signatories of Berne) (last visited Nov. 27, 2007). *See also* Anderson, *supra* note 159, at 872 (discussing the evolution of moral rights in France).

¹⁶² See Copyright Aid, Signatories to the Berne Convention, http://www.copyrightaid.co.uk/copyright_information/berne_convention_signatories (listing the countries that are signatories of Berne) (last visited Nov. 27, 2007). See also Desai, supra note 82, at 12.

¹⁶³ See Desai, *supra* note 82, at 12. See also Zabatta, *supra* note 152, at 1104 (discussing le droit moral and noting the term implicates the idea that an artist has a "natural right" in their work which cannot be conveyed away by any means).

¹⁶⁴ See Anderson, supra note 159, at 876.

¹⁶⁵ *Id*.

¹⁶⁶ See Zabatta, supra note 152, at 1108 (addressing United State's economic concerns, which overshadow moral rights concerns such as the rights of attribution and integrity).

of the proceeds from the resale of their original work. *See also* Susan P. Liemer, Article, *Understanding Artists' oral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 45-55 (1998) (discussing moral rights protection of attribution, integrity, disclosure, withdrawal, and resale royalties).

United States utilizes a combination of the Copyright Act, federal trademark law, and state law.¹⁶⁷ Thus, the "moral rights" protection offered by the United States is very limited and does not protect factors such as a musician's feelings.

6.4 Moral Rights in Copyright Law: The Visual Artists Rights Act of 1990 ("VARA")

Codified in Section 106A of the Copyright Act, VARA grants extremely limited moral rights protection to visual works of art.¹⁶⁸ The rights of attribution and integrity are provided to visual works through VARA.¹⁶⁹ Although VARA grants some artists' moral rights protection, sound recording and musical works are not protected because the statute only applies to visual works.¹⁷⁰ Thus, due to the limited nature of the statute, musicians would not be able to protect their works from DJs under this statute.

6.5 Moral Rights in Trademark Law: Section 43(a) of the Lanham Act

Under Section 43(a) of the Lanham Act, some courts have recognized a form of moral rights protection in civil actions regarding false designations, false descriptions, and forbidden dilution of goods or services.¹⁷¹ Courts that have interpreted the statute in this manner, interpret

¹⁶⁷ *Id.* at 1111-12. *See also* Anderson, *supra* note 159, at 877-79; Desai, *supra* note 82, at 14 (both addressing how the United States fulfilled the requirements of the Berne Convention).

¹⁶⁸ See 17 U.S.C. § 106A (2007). As applied under the statute, a "work of visual art" only includes "a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer." Additionally, the works must be "signed and consecutively numbered by the author…" Regarding a "still photographic image," it must be "produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. *See* 17 U.S.C. § 101 (2007). As seen from the definition of visual works, the works protected under VARA are very limited.

¹⁶⁹ See 17 U.S.C. § 106A (2007); Desai, supra note 82, at 14.

¹⁷⁰ See 17 U.S.C. § 106A(b) (2007).

¹⁷¹ See The Trademark Act of 1946 (The Lanham Act) § 43(a), 15 U.S.C. § 1125 (2007); Desai, supra note 82, at 15.

Section 43(a) to protect the moral rights of attribution and integrity.¹⁷² Exemplifying this view is *Gilliam v. American Broadcasting Companies*.¹⁷³ In *Gilliam*, the Second Circuit prohibited the defendant from continuing to broadcast a mutilated version of the work of a British comedy group, Monty Python.¹⁷⁴ Though the court made mention of the moral rights of the authors, the court's holding was based solely on contract law.¹⁷⁵ Therefore, analogous to VARA, Section 43(a) of the Lanham Act provides limited moral rights protection, neither reflective of, nor applicable to, moral rights dealing with musicians.¹⁷⁶ Consequently, under the statute, a musician could not successfully bring a claim of infringement in the context of moral rights against DJs who used their work during a performance or to create a repackaged mix.

6.6. Moral Rights in State Law

A select number of states have enacted statutes that offer moral rights protection of intellectual property.¹⁷⁷ However, state laws, similar to Section 106A, afford moral rights protection only to "fine arts."¹⁷⁸ Therefore, as is the case under both the Copyright Act and the Lanham Act, musicians will not successfully find protection in the United States for the effect DJs' use of their music may have on their soul.

¹⁷² See Zabatta, supra note 152, at 1116. See also Brandon G. Williams, Note, James Brown v. In-Frin-JR: How Moral Rights Can Steal the Groove, 17 ARIZ. J. INT'L & COMP. L. 651, 671 (2000).

¹⁷³ See Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976).

¹⁷⁴ *Id. See also* Williams, *supra* note 172, at 671; Zabatta, *supra* note 152, at 1116-17.

¹⁷⁵ See Desai, supra note 82, at 15; Williams, supra note 172, at 671; Zabatta, supra note 152, at 1117.

¹⁷⁶ Desai, *supra* note 82, at 15-16.

¹⁷⁷ *Id.* at 16 (addressing moral rights leaders such as New York, California, Maine, Massachusetts, Pennsylvania, and Louisiana which afford artists moral rights protection).

¹⁷⁸ Id. See also 17 U.S.C. § 106A (2007).

IV. ANALYSIS: BALANCING BETWEEN ARTISTS RIGHTS AND DJS USE OF COPYRIGHTED WORKS

As illustrated above, excluding licenses granting DJs' use of artists' works to create mixtapes, most performances by DJs likely infringe upon the exclusive rights of copyright holders. Although DJs may gain protection from accusations of copyright infringement by raising various defenses addressed in Part III of this note, it is probable that most DJs would not be successful in defending their use of artists' works during their performances.¹⁷⁹ However, to protect both DJs and musicians, perhaps the time has come to strike a balance between DJs' use of musical works and musicians' moral rights.

Although compulsory licenses would allow DJs and others to use copyrighted sound recordings to create their own versions of artists' works, DJs would not be allowed to perform their renditions or be allowed to modify the melody or "fundamental character" of artists' works.¹⁸⁰ Therefore, obtaining compulsory licenses to perform at nightclubs or other events would not protect DJs from copyright infringement. Moreover, performance licenses only authorize DJs to perform songs in their entirety, prohibiting distortion of musical works, and thus, would not protect DJs from infringing on copyrighted works.¹⁸¹ Furthermore, although DJs may claim that sampling musical works is permissible, even in jurisdictions that allow sampling, the samples cannot be recognizable to the average audience.¹⁸² Even though patrons may not know the name of the songs being sampled by a DJ, it is highly likely samples used by DJs are recognizable to the average club-goer since DJs typically use the most identifiable elements of

¹⁷⁹ See supra part III of this note.

¹⁸⁰ See Desai, supra note 82, at 5.

¹⁸¹ See 17 U.S.C. § 110 (2007).

¹⁸² See Ponte, supra note 10, at 535.

songs as they blend musical tracks. Additionally, although it may depend on which federal circuit a copyright holder brings suit in, it is likely that a court would find DJs' use of artists' works to constitute a derivate work and, therefore, find infringement on the copyright holder's exclusive right.¹⁸³ Finally, as is illustrated in Part III of this note, it is not likely that DJs would be able to claim fair use of artists' works.¹⁸⁴ Although the list of what constitutes a fair use is not inclusive, it is unlikely a court would find splicing, scratching, or otherwise distorting artists' works to be permissible.¹⁸⁵

A. Granting DJs Limited Copyright Protection

As DJs splice, scratch, and sample songs at nightclubs across the country night after night, they are arguably infringing upon the copyrighted works they are distorting. However, DJs' use of these works deserves limited protection. Protection from infringement would not only benefit DJs, but nightclubs and the public as well. A DJ's ability to blend multiple genres of music into one continuous track is a talent which the public should have the opportunity to enjoy should they choose to patronize the venues where DJs perform.

Analogous to the Family Entertainment and Copyright Act of 2005, which granted, in part, protection for temporary distortion of movies, a statute allowing for temporary distortion of musical works at nightclubs and other events should be added to the Copyright Act as well.¹⁸⁶ The statute would protect DJs from copyright infringement, allowing them to splice multiple

¹⁸³ *Compare Lee*, 125 F.3d at 581 (where the court held the defendant's use of the plaintiff's work was not a derivative work and, therefore, the defendant did not infringe); *with Mirage Editions, Inc.*, 856 F.2d at 1344 (where the court held the defendant's use of the plaintiff's work was a derivative work and, therefore, the defendant infringed). Similar facts in both cases led to opposite outcomes.

¹⁸⁴ See supra part III of this note.

¹⁸⁵ See Beck, supra note 138, at 11.

¹⁸⁶ See U.S. Copyright Office, Family Entertainment and Copyright Act of 2005, http://www.copyright.gov/legislation/pl109-9.pdf (last visited Oct. 19, 2007).

songs together during their performances. Unless a DJ obtained licensing to create permanent copies of their performance, the statute would prohibit permanent recordings of their work. Thus, under this proposed statute, DJs' use of artists' works would be permitted and those who frequent nightclubs could continue to enjoy the unique blending of different genres of music. Although the intent behind a portion of the Family Entertainment and Copyright Act of 2005 was to provide the public with the option of temporarily eliminating potentially offensive material from movies, similar to DJ performances, temporary distortion of movies affects artists' original works.¹⁸⁷ Thus, temporary distortion of musical works should be permitted as well. Distortions of movies under the Family Entertainment and Copyright Act of 2005 can encompass substantial portions of movies; however, temporary distortions of musical works are not as likely to affect the majority of a song.¹⁸⁸ Further, members of the public who choose not to frequent nightclubs where DJs are performing can abstain from doing so and patronize establishments where DJs do not perform.

B. Extending Moral Rights to Musicians

In becoming a signatory to the Berne Convention, the Untied States agreed to grant moral rights protection to artists.¹⁸⁹ However, United States copyright law expressly grants moral rights protection only to visual works of art, neglecting musical works.¹⁹⁰ Moreover, musicians will not find solace in moral rights protection provided to some artists through trademark law or

¹⁸⁷ Id.

¹⁸⁸ Id.

¹⁸⁹ See Anderson, supra note 159, at 876-77.

¹⁹⁰ See 17 U.S.C. § 106A (2007).

state law.¹⁹¹ Thus, with the advent of digital technology making it easier than ever to manipulate and distort musical works, moral rights protection should be extended to musicians. Providing moral rights in musical recorded works through the Copyright Act would allow musicians to decide whether or not to permit DJs to use their songs in their performances. Granting musicians rights such as attribution and integrity would bring the United Stated in unison with much of the rest of the world and enable artists to decide if they would permit their work to be repackaged in a new form. If an artist is deceased, the decision would be left to his or her heirs or assigns, assuming the artist did not specify a preference in his or her will.

Even with such a moral rights regime in place, most, if not all, new artists would likely permit DJs to continue to use their songs as part of DJs' nightly performances. These artists may feel that they benefit from DJs' use of their works, through the added exposure of their works that these DJs are able to provide to their core market. Older, established artists, however, may be more likely to object to DJs' use of their works. These artists are less interested in having their music exposed to club-goers and, perhaps, are more interested in maintaining both the moral integrity of their works and the reputation they have built in their particular musical genre. Therefore, although the United States copyright law is primarily focused on economic concerns and is hesitant to extend moral rights protection to other artists or authors, it is probable that many artists will allow DJs to continue to use their works, enabling DJs to legally distort and repackage existing works.¹⁹²

¹⁹¹ See Zabatta, supra note 152, at 1111-12. See also Anderson, supra note 158, at 877-79 (addressing how the United States fulfilled the requirements of the Berne Convention); Desai, supra note 81, at 14.

¹⁹² See Zabatta, supra note 152, at 1108 (addressing economic concerns, which overshadow moral rights concerns such as the rights of attribution and integrity).

V. CONCLUSION

As new digital technologies continue to be developed, DJs are likely to incorporate these technological features more and more into their nightly performances, allowing for increased use and distortion of existing copyrighted works. These new technologies threaten to shake the current state of copyright law in the music industry. Even if current artists do not object to DJs' use of their copyrighted works, the current lack of protection in the law can have detrimental impacts on artists' rights well into the future. To avoid setting any sweeping precedents for the future, lawmakers need to take action and carve out a specific law which would allow for DJs to legally use these copyrighted works. However, lawmakers need to restrict this use by implementing a moral rights regime for musicians in the United States.