Parody in the Age of Remix

Mashup Creativity vs. the Takedown

By: Ragnhild Brøvig

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By: Ragnhild Brøvig
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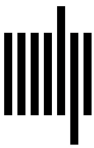

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5 Sampling Ethics and Mashups' Legality

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>
> —Adriana A (personal interview)

> People say: "Oh, you can evoke the fair use doctrine," or "you can evoke that it's a parody" or so, but I don't know what works or what doesn't work. . . . I was thinking, maybe at some point there should be some legal counseling.
>
> —DJ Faroff (personal interview)

Mashup producers work in the legal margins. Someone sampling from a copyright-protected sound recording (where a copyright exception does not permit the use) must generally seek permission from the rights holders of both the sound recording and the musical work.[1] If what is sampled is an audiovisual recording, the footage in that recording may qualify for copyright separate from both the musical work and the sound recording, and permission must be granted for this use as well. Among the survey respondents, 89 percent said that they did not have permission from the copyright holder or creator of the sound recordings they had sampled in their most recent mashup, as opposed to 8 percent who had cleared some or all of the samples.

Drawing on this survey as well as the interviews, in the first part of this chapter, I elaborate on the reasons the producers gave for why they did not license their samples when creating their mashups, which encompass various practical and economic hurdles. In practice, they insisted, the principal alternative to using unlicensed samples was to stop making mashups. In the second part, I show that mashup sampling is nevertheless governed by

its own set of internal ethical guidelines.[2] Several artists also thought that they did not need to license because permission is already granted to them by copyright law exceptions, and in the third part of the chapter I consider whether this might in fact be the case. Considering the fact that mashups have not been tested in court and that legal evaluations of exceptions are case specific and based on nuanced analysis in which various features are taken into account, I argue that mashup music resides in the legal gray area. I further point out that the internal ethical guidelines of mashup producers, together with the fact that mashups' legality remains untested, clearly disrupt the narrative that has been established about the act of sampling without authorization—that it is synonymous with stealing and erodes both the revenues and the recognition of other hard-working musicians.

Why Mashup Producers Do Not License

If one has obtained permission from the copyright holder to use the protected work in a particular way, the use is lawful under the negotiated conditions. Writing in 2011 and in a US context, Kembrew McLeod and Peter DiCola (2011) demonstrate through their many interviews with sampling musicians and sample-clearance professionals that the process of proactively seeking copyright licensing may not be as straightforward as it seems. They explain that producers of sample-based music sometimes refrain from seeking permission to use copyright-protected material because of the hurdles it involves; for example, they consider it to be too hard or time-consuming to learn the copyright licensing system and track down the relevant copyright holders, or they assume that their request will be rejected or that the fees will be too high. Although the interviews and survey we conducted took place a decade later and in a European as well as a US context, several of these hurdles were seconded by the mashup producers as well.

The first hurdle to licensing samples, the producers explained, is to find out who the copyright holders are, which requires an understanding of how copyright works, including that copyright can be transferred from an author to a corporation, for example. There are at least two types of copyright that apply when one is sampling a recording: that of the musical work and that of the sound recording. The copyright holder in either case is not necessarily the author (here understood as the songwriter or performer/recordist) since the author can transfer these rights to other parties. Often,

all or some of the rights related to the musical work are transferred to a publisher, whereas all or some of the rights related to the sound recording are transferred to a record label as part of the contract with that label. This likelihood is not apparent to all mashup producers, some of whom simply assume that the musician or band in question is able to grant permission to use the music. For example, some of the interviewees lamented that they had received permission from an artist whose label later claimed copyright infringement. The challenges in navigating who owns a given track's rights are further complicated by the fact that the two basic rights can be split among multiple parties as well, each of which owns a different percentage of the rights themselves. For example, McLeod and DiCola refer to a sample clearance professional working for Motown who recalled a song that had fifteen copyright coholders, each of whom had a different percentage of the rights (2011, 153). But even when the correct copyright holders have been identified, it is not always clear how to proceed or how to negotiate the conditions for the use.

McLeod and DiCola conclude that a detailed knowledge of the copyright licensing system is basically essential: "Sample clearance often requires an understanding of copyright law; familiarity with record contracts, publishing contracts, and sample-licensing; knowledge of music-industry institutions and relationships with particular individuals within those institutions; and, perhaps most important, common sense about how to conduct licensing negotiations" (2011, 155). Consequently, major labels or artists typically hire an intermediary (such as an experienced music manager or music lawyer). Mashup producers, who generally are not affiliated with a record label, do not have the resources (or are unwilling to commit them) to hire such an intermediary. And they would be hard pressed to acquire all the relevant knowledge and pursue the licensing process for all of those individual samples, especially if they want their mashups to be posted while their sampled sources are (for various reasons) most relevant. One of the anonymous mashup interviewees pointed out, "Younger and younger generations are doing these mashups, and they don't have any sense of how to do things legally. That compass, that legal compass, it's hard to come by. And even when you get older, when you make these mashups, you still have to figure out how you're going to access the people who created the samples and the publishers. They still don't make it easy to find. But we need to get to a point in the future that samples can get

approved instantly." The complexity of navigating the system and the large time commitment required are therefore among the reasons that mashup producers do not attempt to license the samples they use.

It is also true that the producers had little faith in striking a reasonable licensing agreement, or any agreement at all. Among the surveyed producers, 7 percent said that they did in fact seek permission to use the samples they mashed but did not receive a response, and some even added that they did not seek permission because they expected to be rejected. Such a sense of resignation was also reflected in some of the interviews. For example, concerning whether he had sought permission to use samples, DJ Faroff stated bluntly: "It's not gonna work. The artists aren't gonna respond. There are many more mashup producers than artists—I mean, you know, Radiohead is not gonna reply to every request for a mashup." This assumption about a lack of response or a rejection is not completely wrong (and it is often not the artist who is the copyright holder in any case). A publisher or a label may reasonably conclude that the process of negotiating a license with a mashup producer does not justify the resources needed if the mashup producer is not willing to pay much. Publishers and record labels are mostly interested only in agreements with significant financial benefits, in terms of either a big buyout or, if the sampling artist has commercial potential, strong royalties.[3] The revenues realized from mashups are negligible, after all, and the licensing fee would presumably be prohibitive given the numerous samples in a single mashup that can be subject to potential licensing. As McLeod and DiCola pointed out, if the sampling artist does not know the right people or have relationships at the companies in question, and if they do not have representatives within the right network, they have little chance of success (2011, 164).

McLeod and DiCola (2011, 153) estimated that typical buyouts for the use of a sample from a sound recording at the time they wrote were ranging from $500 to $1,500, though they also pointed to instances of sample buyouts of $50,000 to $100,000. Several musicians and sample-clearance experts have noted that buyout fees for using samples have increased markedly since the early 1990s, when hip-hop sampling first attracted the attention of the major labels.[4] High licensing fees related to a particular instance of sampling can act as a hindrance to future licensing but can also have a chilling effect in terms of discouraging sampling artists from applying for permission to use samples. The fee is decided on a case-by-case basis,

after all, and because this process is inherently unpredictable, people tend to refer to prior instances of licensing and settlements. An example of the latter was one of the first lawsuits in the 1990s hip-hop scene, when De La Soul was sued by the Turtles for using a sample from "You Showed Me" (1968) in the rap group's "Transmitting Live from Mars" (*3 Feet High and Rising*, 1989). The dispute was settled outside of court in favor of the Turtles for a reported $1.7 million (Sanjek 1992, 618). This settlement attracted much attention and caused much moral panic, all the while emboldening copyright holders to demand higher fees for samples and higher settlements. Not unexpectedly, then, 39 percent of the survey respondents said that they did not seek permission because they assumed it would be too expensive. Others added that they had sought permission, but the fee was too high so they gave up. Happy Cat Disco was among the few interviewees who had reached out to a record label for a license, in this case for a Justin Bieber song: "But when I called the record company and they sent me to the PR, they thought I was joking . . . and they told me it was gonna be $5,000 for the [sample] copy. And I said, 'That's the last time I'm gonna call you.' So yeah, it was ridiculous." DJ Prince said that he actually did license a sample that he used in a mashup in 2001 for $22,000. He did not pay the fee himself, since the mashup was already signed to a record label that paid the license fee as well. He added that he otherwise could not have managed to clear the sample.

DJ Poulpi captures the general resignation of the mashup producers: "I never ask [for a license]. Why? Because I don't know where to ask. I don't know how to ask. And my understanding is that if I ask, there are two options: one is, no one will answer; two, they will say no. So, it's better for me to just make it, put it online, and see what happens. I think it's what most people do." As Alan Hui points out, when traditional licensing models do not "provide sampling artists with efficient or effective means to seek permission . . . 'Thou shalt not steal' loses its biblical virtues and morphs into 'thou shalt not use'" (2017, 166).[5] He further argues that a licensing system that is so protective of works that it does not allow for appropriations is counter to one of the purposes of copyright—that is, to promote the creation and distribution of original works (66). The current licensing system is complex and slow but also, more important, reserved in practice for those with commercial success, those who are willing to (and capable of) paying a considerable fee, or those who have representatives who can

pay it for them. McLeod and DiCola note that the current licensing system as such pushes other potential applicants into another line of work, the noncommercial sector, or the underground economy (2011, 188). Due to a combination of practical reasons and ethical objections (see below), the latter is not an alternative for mashup producers, who have therefore relocated to the noncommercial marketplace instead. Unfortunately, the platforms' algorithmically driven content moderation means that the noncommercial sector has turned out to be unsafe as well, and perhaps even existentially threatened.

Mashup producers, then, shy away from licensing samples because they assume that it is too expensive and too time-consuming and because they find the licensing system to be too complex. What most of the producers said was that they really wanted a more convenient, efficient, and feasible licensing system that would make licensing both quick and affordable (particularly in light of the large number of samples they needed to clear): "I think what's lacking is being able to convince the labels to really get the sampling [licensing] done quickly. Like, that convenience. Because usually we have convenience for streaming, we have convenience for everything else, but what's missing for us is the labels really giving the 'okay, go' as quickly as possible. And as inexpensively as possible" (anonymous mashup producer). Some of the producers had concrete suggestions for what such a system could look like, but as with the current situation, they felt that except for the option of being monetized on platforms, they were only offered two alternatives: quit making mashups or make them with unlicensed samples.

Sampling Ethics

In fact, 66 percent of the surveyed producers responded that they believed that the posting of mashups at platforms was legal based on the exceptions, or at least that it was in a legal gray area, compared to only 23 percent who responded that they saw it as illegal (11 percent answered that they did not know or checked "other"). Among those who believed that mashups were defensible under copyright law exceptions, the actual knowledge of copyright varied considerably. Many of them referred to the fair use doctrine of the US Copyright Act (including several who were not US residents), but few appeared to understand the complexity of copyright, including the fact

that the US Copyright Act may not necessarily apply to their use. Some, such as DJ Earworm, argued for the legality of mashups by mentioning factors relevant to several of the fair use doctrine's four factors (the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion taken, and the effect of the use upon the potential market):[6] "I do think it's fair use. It's definitely transformative, it's often a parody, the fragments are so short, it does not eat into the appetite for the original."[7] The argument that the fragments are short does not hold true for A+B mashups, of course, and he also acknowledged that some of his mashups would be harder to defend than others. Other producers believed that if the use were transformative or not generating any revenues, it would qualify as fair. DJ Poulpi, for example, said, "I don't know much about copyright, but I understand the concept of fair use. And I really believe that this falls under this category. And I really believe that what I'm doing, as long as I'm not selling it, it's not . . . I'm not feeling like I'm breaking any law, because I'm not doing anything wrong, and I'm not stealing anything from anyone." This quote reflects an observable trend among the producers: the conviction that copyright's fair use doctrine corresponded to their own ethical concept of fairness.

Still, most of the producers found copyright confusing and difficult to understand. DJ Faroff, for example, called for more information regarding the legality of samples and the applicability of the law: "People say, 'Oh, you can evoke the fair use doctrine, or you can evoke that it's a parody,' but I don't know what works or what doesn't work. Maybe that's something you guys are gonna be able to inform us [about]? . . . I was thinking, maybe at some point there should be some legal counseling." Even if it is not fair use, the producers insisted, it is still a fundamentally moral and justifiable practice. Generally they felt that mashup activity was misunderstood and confused with plagiarism or piracy and thus wrongly associated with stealing. As Happy Cat Disco put it, "I'm not going out there just saying, 'Here's the entire catalog of Eminem, please download the whole thing.' No, man, that's not cool. I think we can all agree that it's not cool." DJ Paul V. acknowledged that there are different ways to use samples and argued for limits to what copyright law should protect and, on the flip side, prevent: "I suppose, again, it goes back to, like, do I agree with copyright or whatever. It's like yes, you know, be protective of art, but not to the point where . . . it's just a blanket shutdown of something being presented as art in a different

form." Convinced that copyright enforcement was unfortunately ignorant of the difference between plagiarism or piracy and appropriation, the mashup producers felt that their own ethical standards regarding this situation meant more than the law. Regardless of whether the producers saw their mashup activity as illegal or lawful, they operated by the same ethical guidelines for the treatment of the unauthorized samples. Those guidelines emphasize, in turn, that they should not profit from their mashup, and they should always credit the artists that they sample.

Sampling Ethics Rule 1: Do Not Seek Profit from Your Mashups

Ethical rule number 1 among the mashup producers is that their mashups must be noncommercial—that is, they considered it "dodgy" to seek financial gains from their mashups by selling or otherwise monetizing them. This rule was also confirmed by the survey, which found that 82 percent (n = 72) of the producers reported that they did not generate any income from their mashups (it is unclear whether the remaining 18 percent, who said that they did generate income from their mashups, also counted indirect income, such as club revenues, subscription patent services such as Patreon, or merchandise). Adriana A explained: "It's like a pirates' code of honor, really, that is what it is. I didn't pay for the copyright clearances, therefore you shouldn't [pay me] either." She added, "I've had some people be like, 'Wow. You should really monetize your website.' And 'The Bootie Mashup website is so popular, you should, you know, Google ads!' Whatever, whatever. And I'm like, 'No! I don't want to do that, because I have other people's copyrighted music posted to this website. And therefore I don't want any advertising on it at all.'" Most of the other producers, including DJ Schmolli, also felt an ethical responsibility to the sampled artists not to profit from their copyrighted music: "Speaking as a musician and artist and songwriter myself, I really want the artists to get paid. I don't want to steal any money from artists. I know a lot of artists and I really support them. . . . And I don't wanna be the person who takes parts of these songs and releases them with other songs and makes money off it without getting him or her their credits, the revenue or something like that, you know."

It felt like a sacrifice to some of the producers to operate outside the commercial music market without any hope of income from their creative labor or any prospects of being signed to a label or gaining recognition in the market. And this sacrifice, in turn, justified for them the practice

of sampling without struggling to pay for permission to do so. As BringMeTheMashup put it, "We're not making any money so we shouldn't be spending any money." Nor did they anticipate any improvement to their prospects. As opposed to those few artists whose remixes offered them a way into the commercial music industry, most of the producers remained committed to their commercially renegade work, because mashups were what they wanted to do above all else.

The producers emphasized that mashup music, unlike plagiarism, does not try to trick people into thinking that it is original. They also saw it as an homage of sorts to the sampled artists or, at the very least, as free promotion, as MsMiep pointed out: "I feel that what I'm doing is promoting the other artists. And [the mashup] is another way that makes these artists' work accessible. . . . This is another avenue for someone else to hear the music. So, in a way, 'you're welcome.' Right?" CFLO agreed that it was in the sampled artists' best interests to be mashed and listed a number of old songs that suddenly received a lot of attention thanks to the mashups that sampled them. He then observed that when copyright holders put an end to a mashup that uses their tracks, they do themselves a disservice too: "I think the more [that] people reinterpret your piece, the further your piece spreads, and to discourage that seems counterproductive to business, in my mind. If you're in the music business, you want as many versions out there as possible, I would think. Even if it doesn't stay true to your vision, it still is out there, right?" Mashup producer DJ Farrof, who holds a PhD in economics, agreed with CFLO's economic logic: "It feels like the industry, the labels, are cracking down on mashups because they think it cuts down their profits. Well, that's an empirical question that one can assess. I propose that it actually doesn't, and actually they're losing money by cracking down on mashups, if anything. . . . They always go from the principle that they're just substitutes, right—it's like, 'Oh, we need to prevent mashups.' I'm pretty convinced they're complements. . . . If I listen to . . . [the music of] B-52's mashed with 'Funky Town,' it's like, 'Oh yeah, I haven't heard "Funky Town" for a while, let me just [relisten to it].'" He saw proof that mashups are complementary to their sampled sources in the fact that producers often insert, under the mashup videos, the information about the tracks they have mashed, along with links to the original versions. He then continued his microeconomics analysis: "There are smarter ways to fix this than just to completely strangle and choke and shut down an entire form

of art the way they [copyright holders and platform providers] did . . . First, you need to understand what impact [mashup music] has, whether it's even hurting the industry—I don't think it is—and then try to figure out ways of monetizing, you know. . . . I mean, it's all about making money—it's not about the morality of it for the industry, it's about making money."

What DJ Faroff probably did not know when he suggested that copyright holders evaluate the basic economics of mashups via social experiments was that such an investigation had already been carried out and was published soon after the interview. Mike Schuster, David Mitchell, and Kenneth Brown (2019) set out to determine whether unlicensed sampling has an impact on the market for the original in terms of hampering financial gain that would otherwise have accrued to the copyright holders of the sampled material. This claim has long been a key argument in favor of the copyright holders' cases in court (2019, 193–194; see also Beebe 2020). Using Girl Talk's mashup album *All Day* (2010) as a test case and analyzing the sales of its sampled songs, these researchers produced robust and statistically significant data showing that the sales of the sampled songs actually increased after the mashup album's release. In addition to this quantitative argument, the promotional value of sampling is also demonstrated by empirical data such as the fact that a lot of funk music was rediscovered thanks to its sampling by 1980s hip-hop producers.[8] Thanks to the promotional value they recognized in their mashups, several producers called for more collaboration between record labels and "the many talented mashup producers out there," who, as they put it, could make them money for nothing by mashing up songs from their catalogs.

Although the mashup producers seemed to have come to terms with not making any money on mashups, this resignation might be somewhat premature. McLeod and DiCola, for example, are among those who believe that sampling artists should be able to claim compensation for their valuable creative effort: "We believe that the music industry should reward creative labor. . . . To say that copyright owners deserve compensation and that creative labor deserves reward is no answer to the complex issues posed by sampling. Musicians who sample engage in creative labor, too. . . . Samplers and copyright owners alike have legitimate claims to the proceeds from sample-based works. Both groups contribute to the final product. This perspective suggests that a revenue split of 0/100 or 100/0 in all circumstances would be too extreme" (2011, 109). Such an argument is relevant in terms

of not only ethical but also legal standards—that is, if the mashup were to fall under a copyright law exception or be considered a copyrightable work in and of itself, the producers would be fully within their rights to claim revenue from it (even if this is something that they do not request or even want).

Sampling Ethics Rule 2: Always Credit the Sampled Artists

Ethical rule number 2 among the mashup producers is that they must always credit the artists from whom they sample. A common argument was that "mashups are not hurting anyone," in terms of both the economics and the attribution and integrity. The mashup producers generally saw their activity more as a way of showing respect toward rather than mocking the artists of the originals, whom they were careful to acknowledge through attribution and the clear signposting of the mashup as a mashup. Along with the rejection of profit, this attribution represented another important ethical guideline for almost all of the producers, as exemplified by BringMeTheMashup: "I one hundred percent think that you should credit the artist that created the music. I think that's absolutely necessary. Because it's not our music that we created. It's our idea that we mash them up." Put another way, they emphasized that the raw material of the mashups is not their own, but that the music that results from the particular juxtaposition and treatment of that material certainly is.

As MsMiep pointed out, this practice of crediting the artists of the original sources distinguishes mashups from many other forms of sample-based music. She then asked rhetorically: "Someone's developed it and made it, and it's beautiful, but why can't you take that and make it beautiful somewhere else?" Simon Iddols, who had experience with making nonmashup music as well, said that he would respond very differently to being sampled depending on whether the sample had been credited: "We always give credit. . . . If someone were using my originals, photos or music or whatever, and it will be a mashup and it will be a nonprofit thing, and if they would give credit, I would be okay with it, because that's the way it works. If somebody were stealing my work and making money with it, that's a different case, and that's the most important rule." McLeod refers to Freelance Hellraiser, who lamented that his Aguilera/Strokes mashup was released as a legitimate single two years after he made it without any credit or profit to him: "It is an interesting thing for him to complain about—the idea that

someone is ripping off his own rip-offs" (McLeod 2005, 87). But this makes complete sense if one believes that appropriation and plagiarism are two very different things, as several of the interviewees emphasized as well.

According to that logic, it is also more ethical to use a sample that is long enough to be readily recognized than it is to use an insignificant fragment. This is counter to what McLeod and DiCola suggest: "Musicians' understanding of sample licenses—and assessments of their fairness—reflects a distinction between sampling a large part of a song versus sampling a small amount. As Matt Black told us, 'You can't just take big slices of someone else's work. If so, you should pay. However, if you sample one snare drum off a Rolling Stones record and add 99 percent of the song yourself, you shouldn't pay the Rolling Stones 100 percent of the royalties'" (2011, 155). Yet, when one samples one snare drum sound or a very small amount of music, it is less likely that the musical source will be recognized, which in turn associates the use with outright plagiarism.

Although the artists are credited, of course, the ways in which their music is presented in a mashup may not accord with their own musical vision, and the ways in which their performance appears in the mashup video montage may not be how they want their persona to be staged. The producers responded to this point by noting that they always presented the samples as something new or different rather than as a replacement for the original work: "The artists can disagree with your art [but] it's *your* art at that point; their art has become your art the second you changed it," said CFLO. Poolboy agreed: "Like, when you listen to a mashup, you aren't listening to it instead of the original song—it's a completely different piece of art than the original song. It serves a completely different purpose. It's its own piece of art." In practice, as well, they pointed out that they had almost never experienced any instances of artists objecting to their mashups. In fact, the opposite was often the case. The producers gave several examples of artists—including big names from a broad range of genres, such as Fear Factory, Foo Fighters, Franz Ferdinand, Goldfrapp, Le Tigre, Nickelback, Pixies, Puff Daddy, Radiohead, Snow Patrol, Thin Lizzy, and Yoko Ono—who had tweeted or reposted their mashups as a gesture of approval or endorsed them in the comments section under the mashup videos.

This endorsement from artists meant a lot to the mashup producers. DJ Cummerbund recalled the Foo Fighters even playing his mashup at a concert: "The greatest success I've ever had, besides [the mashup] 'Earth,

Wind & Ozzys' [2017], besides any views, besides anything—Dave Grohl performed my mashup live in Sweden. Live! I freaked out. I was on vacation in Colorado when I got the phone call. And I freaked out. There's no better high than that. Nothing. I mean, I don't do drugs, I don't drink, I don't really do anything like that, but that kind of stuff, that gets me going, man." Several others explained that mashups can represent a way to reach out to artists they admire, and if those artists were to disapprove of a mashup they made, they would take it offline immediately. But while a lot of artists love mashups and do not care about copyright as such, they are usually not the ones who decide about its use. The record labels do. And mashup producers generally felt more alignment with and ethical responsibility toward the artists than toward the copyright holders, whom they saw as motivated by profit alone. While they mostly accepted and occasionally even endorsed copyright holders' monetization of their mashups on online platforms, they regretted that it did not primarily benefit the artists of those songs but rather the copyright holders themselves, and sometimes the platforms.

Although they often alter the mashed sources in humorous ways, almost all the interviewed mashup producers, and the ninety-two producers who took the survey, indicated that they generally mash songs they like, not songs to make fun of: "I genuinely quite enjoy all the music that I make mashups with. . . . I'm trying to think of an example where I've used an artist that I don't enjoy. And I think most of those would have to be in the nonstop pop year-end mixes. . . . So, that's pretty much the only time that I would use samples that I don't enjoy" (Isosine); "Ninety percent of the time it'll be a song that I know I love, and that I know I'll listen to after I make it. . . . Every once in a while, there's a new song out there that everyone's trying to do, so I'll give it a shot. It's never the best" (BringMeTheMashup); "It has to be music that I really like. Because I'm going to spend hours working on it. . . . if I don't love the music, I'm going to just stop doing it" (DJ Poulpi); "We're not trying to make fun of you or mock what you've done, you know—we're trying to exalt and glorify it, really" (Peter, DJ Cummerbund's manager). Diverging from the original artists' musical vision is not synonymous with mocking the artists or their songs or impugning their reputations.

These two ethical guideposts for most of the mashup producers—not seeking to profit from their mashups and always crediting the sampled

artists—derive from some combination of personal and collective moral standards and a vague awareness of copyright law exceptions. Interestingly, the producers' convictions about their practice do indeed anticipate several legal rationales for defending certain uses of music as exceptions. These include the facts that their mashups are recognizably different from the original work (there is an absence of confusion); that their sources are credited and otherwise made explicit; that their motive is not harmful and noncommercial; and that their mashups have no substantial effect on the commercial success of the sampled material (their use does not encroach upon the economic prospects of the rights holder).

Copyright Exceptions and Mashup's Legal Status

Several mashup producers believed that mashup sampling needed no justification because they considered their practice to be legal under copyright law exceptions. There are, in fact, several legal exceptions to copyright law exclusive rights that allow for certain uses without authorization in particular circumstances. The exceptions are intended to strike a balance between copyright holders' interests in and rights to intellectual property, on the one hand, and freedom of expression (including freedom of the arts), which no law in a democratic society should curtail, on the other.[9] Together, these rights (copyright itself and the exceptions that safeguard freedom of expression) are intended to foster cultural production and diversity. Copyright is thus understood to represent an economic incentive for the artistic or intellectual creation, while the exceptions allow artists to build on others' expressions within the framework of certain restrictions.

Copyright exceptions are specific to national laws or international treaties and differ somewhat depending on the applicable law. However, there are exceptions that are common to the laws of most countries, which include copying for use that is private; use that is related to teaching or scientific research; quotations for commentary, criticism, or review; and use for the purpose of caricature, parody, or pastiche. With regard to musical sampling in the US and EU contexts, the fair use doctrine of the US Copyright Act and "the purpose of caricature, parody, and pastiche" and "quotation for purposes such as criticism or review" exceptions of the InfoSoc Directive of EU law represent the most relevant content.[10] I elaborate on these exceptions in order to communicate the complexity of the arguments

on both ends of the spectrum—from the position of the mashup producers and other remixers, on the one hand, and the position of the copyright holders and platforms, on the other. This discussion further serves as a backdrop for the following chapter's argument: that platforms often undermine exceptions (that are integral to the legal copyright system) and their complexity.

The question of whether a particular use falls under an exception is not straightforward, for several reasons: (1) it is often unclear which law applies; (2) exceptions can be formulated and interpreted differently by courts in different countries; (3) the exceptions interrelate with other relevant legal factors; and (4) judgments on exceptions are made on a case-by-case basis, with few or no relevant precedents, which makes a potential defense unpredictable. Moreover, as I return to in chapter 6, the lack of sufficient tools and resources to account for exceptions at online platforms can make a robust defense redundant (that is, it simply does not matter due to an inadequate, or sometimes even absent, evaluation process).

Before I discuss the likelihood that mashups are defensible under various copyright exceptions, it is important to note that a particular mashup's legality depends on the applicable law. That is, when considering legal matters, the governing law and the jurisdiction to hear the dispute must be settled first.[11] There is no such thing as one transnational copyright law; each country applies its own. Although different international treaties reconcile certain aspects of copyright law between countries,[12] copyright law and its exceptions are not fully reconciled at the international level. It is therefore critical to know what law applies when considering whether a particular use of copyrighted material can be defended under a copyright exception, but this is not always easy to determine. Imagine the following situation, for example. You live in the United Kingdom and are making a mashup that samples an artist from Belgium who has released her music on a UK record label as well as a duo with members in Sweden and Australia that has released its music on a label based in Sweden. You distribute your mashup on a platform based in the United States and make it available there and in several EU countries. Which of these various countries' copyright laws apply here? We presented a similar scenario to the producers we surveyed and asked them the same question. Despite the fact that only 11 percent of the survey respondents admitted that they did not know which country's copyright law applied, they were all clearly confused—for example, most of

them (80 percent) insisted that it was the copyright law of the country in which the platform was based that mattered. But the law that governs an internet platform's terms of service is not necessarily the one that governs a potential infringement lawsuit against an uploaded mashup. In fact, the applicable law could be the law of any of the countries to which the mashup was made available (Novović 2019).[13] Consequently, this also means that even if the mashup producer believes that the use can be defended under the US fair use doctrine, it may not matter, assuming the mashup has been made available outside the United States. In addition, what is correct in a legal context may not represent the way things work out in practice. It is no wonder, then, that producers find it difficult to navigate the cross-national copyright landscape of mashups and the internet. Moreover, even when the issue of the applicable law is sorted out, the task of identifying the scope of its exceptions to copyright still remains. Rather than starting down this highly complex path, I instead discuss the most common arguments that have been posed with regard to the legal status of sampling in relation to copyright exceptions, limiting my focus to the exceptions that are most relevant to sample-based music in the US and EU contexts.[14]

EU Law: The Quotation Exceptions

All countries that are part of the EU or the European Economic Area (EEA) must adhere to EU law. Some of the legal instruments set out by EU law—including copyright law as manifested in the InfoSoc Directive—are mandatory for the member states to implement into their national laws, whereas others are not. Article 5 of the InfoSoc Directive allows only two exceptions that might be relevant to the reuse of copyright protected material in art: quotations for purposes such as criticism or review" and "use for the purpose of caricature, parody or pastiche"—each of which requires several specific conditions.[15] This narrow scope was confirmed by the recent DSM Directive (2019) of EU law,[16] which Hui and Frédéric Döhl find surprising: "[The DSM-Directive represents a] missed chance to update EU laws for the digital age of retromania, remix culture, user-generated content, and social media, given that the InfoSoc-Directive limitations and exceptions are the result of a legislative process in the 1990s" (2021, 886). In what follows, I explain the legal conditions of this quotation exception and discuss its relevance to mashups before turning to the parody exception.

The quotation exception, as defined in the EU InfoSoc Directive, is limited to "quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose."[17] The sources sampled for mashups are lawfully made available to the public, and the requirement of attribution also seems to be fulfilled by most mashups (but not by all forms of music sampling), as explained in chapters 2 and 3. It is less clear how the requirement of being "in accordance with fair practice, and to the extent required by the specific purpose" might be interpreted in relation to mashups. First, the extent to which the phrase "such as" (in "purposes such as criticism or review") allows for purposes other than criticism or review is highly uncertain. As Hui and Döhl (2021, 871–873) point out, if one interprets it as allowing broader uses (including, for example, artistic expression), it would perhaps not be necessary to mention purposes as a necessary condition since it would potentially be all-inclusive. Second, if review and criticism are meant to be interpreted as the only uses, their respective scopes demand clarification; one might wonder whether art expressing an evaluative or critical stance toward the quoted material or using it to express criticism of some sort would be interpreted in a legal context as a use for the purpose of review or criticism, and furthermore, how much of the material would be justifiable to quote in terms of the requirements of the specific purpose.

The judgments of *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben* (2019) and *Spiegel Online GmbH v. Volker Beck* (2019) narrow the legal concept of quotation even further than the InfoSoc Directive by establishing that (1) the material must be quoted with the "intention of entering into dialogue" with the quoted work, which in turn requires the work to be identified;[18] and (2) that the quoted material "cannot be so extensive as to conflict with a normal exploitation of the work or another subject matter or prejudice unreasonably the legitimate interests of the rightsholder"—in short, the quoted material should not conflict with the quoted work.[19] As I argue below while discussing the legal parody concept, most mashup music appears to fulfill these two requirements, as it (1) clearly enters into a dialogue with its sampled tracks (after all, it is intended to be understood as a

mashup of prior works) and (2) thus functions as a complement to rather than a substitute for those sampled tracks (it does not conflict with them).

However, Hui and Döhl are leery about the application of the EU concept of quotation to art, including music sampling.[20] As they see it, the review requirement "is less relevant to reuse [in the arts]" and that such "reuse for the purpose of criticism is already (at least partly) covered by parody and caricature under InfoSoc Art.5(3)(k)" (2021, 877). They furthermore interpret the concept of quotation as "using something significantly unaltered" (869), which would exclude the transformative reuse that characterizes most appropriations. They find this concerning:

> This is a challenge especially for contemporary music where deliberate appropriation is widespread for diverse important aesthetical, cultural, and social reasons. The new, post-*Pelham* copyright regime does not suit this musical present. Reusers in the arts, other than financially potent superstar artists and corporations that can afford a license, will have to adjust their artistic practices if parody, caricature, and pastiche, unmodified minor quotations and modifications to the point of unrecognisability will be all that is lawful. Such a new status quo would constitute a huge loss of cultural production, aesthetical diversity and social participation to creators in the countries which now lose their free use provisions.[21] (Hui and Döhl 2021, 886)

Still, there may be hope, given that so far, only one particular way of using samples has been evaluated in EU court and related to the legal quotation concept (the *Pelham* case). Here, German rapper Sabrina Setlur and her team had sampled a two-second sequence from the 1977 track "Metall für Metall" by pioneering electronic music group Kraftwerk in their song "Nur Mir" (1997). The sample was looped and not significantly modified. After a protracted legal process, the case was settled in CJEU with a successful claim, in which the court held that recognizable samples must be authorized, even when they are very short. The judgment, however, also states that recognizable samples of sound recordings *may* qualify as quotation:

> In particular, where the creator of a new musical work uses a sound sample taken from a phonogram which is recognisable to the ear in that new work, the use of that sample may, depending on the facts of the case, amount to a "quotation" . . . provided that that use has the intention of entering into dialogue with the work from which the sample was taken, within the meaning referred to in paragraph 71 above, and that the conditions set out in Article 5(3)(d) are satisfied. However, as the Advocate General stated in point 65 of his Opinion, there can be no such dialogue where it is not possible to identify the work concerned by the quotation

> at issue . . . the concept of "quotations," referred to in that provision, does not extend to a situation in which it is not possible to identify the work concerned by the quotation in question.[22]

If recognizable (in the legal sense; see note 23) samples of sound recordings that enter into dialogue with the work from which they were taken may qualify as quotation, there is still hope for mashups.

Surprisingly, the court nevertheless concluded by dismissing the potential legality of virtually any form of sampling: "The phonogram producer's exclusive right under that provision to reproduce and distribute his or her phonogram allows him to prevent another person from taking a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in the phonogram in a modified form unrecognizable to the ear."[23] This conclusion, that a sample can be used only if it is "in a modified form unrecognizable to the ear," seems to contradict the notion made in the same judgment that a sample can be considered a quotation, and that in order to do so it must enter into dialogue with the quoted work.[24]

Since the case was settled only recently, its ramifications for the future are still unclear. On the one hand, it may end up establishing that any recognizable samples are denied legality in the EU, given its emphasis on the harmonization of copyright exceptions among the EU member states.[25] On the other hand, this judgment that denies samples may only apply to future cases that are sufficiently similar to this case with regard to sampling, especially since it counterintuitively establishes that a sound sample may in fact be a "quotation" if it has the intention of entering into dialogue with the sampled work. What is considered to be sufficiently similar, including between the *Pelham* case and mashups, is for the EU and EU national courts to decide. Perhaps these courts will eventually come to understand that sampling is far from unitary in nature, in both disposition or form and in function or purpose, and that in several instances of sampling, including mashup sampling, the samples do indeed enter into dialogue with their sources.

EU Law: The Parody Exceptions

An alternative to relying on the legal quotation concept of EU law is to rely on its exception for the purpose of caricature, parody, or pastiche. The InfoSoc Directive does not provide a definition or any constraints for these concepts, though "parody" was clarified by the CJEU in its decision

in the *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vanersteen and Others* (2014) case.[26] The CJEU judgment in *Deckmyn* established that a legal parody must have the following essential characteristics: it must "evoke an existing work, while being noticeably different from it," and it must "constitute an expression of humour or mockery."[27] Furthermore, the application of this exception must be sure to "strike a fair balance between, on the one hand, the interests and rights of the [author or copyright holder of the parodied work], and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody,"[28] and "all the circumstances of the case must be taken into account."[29] In what follows, I first discuss the two main requirements of parody in EU law, then consider the legal requirement that it strike a fair balance between interests with regard to both economic exploitation and the interests and rights of the author or copyright holder.

The first requirement—that it must "evoke an existing work, while being noticeably different from it"—resonates with how parody is defined in the field of art (see chapter 2). In both contexts, parody sets out to evoke the original work on which it is based while also displaying a critical distance toward that work. It is an acknowledged appropriation in the sense that it is intended to be experienced on two levels at once—that is, as a new text but one that builds on a prior text. There is thus no confusion about the parody being either an independent original or a mere reproduction of the underlying work (since the concept of parody implies that the underlying work has been significantly transformed). This aspect of parody—the absence of this kind of confusion—is clearly evident in mashup music, especially in that the meaning of the mashup relies on the recognition of the work as a mashup. The A+B mashups explicitly evoke existing work in their use of durable samples from familiar recordings that are edited only subtly, but they are also clearly different from those sources because they significantly transform them by means of their new (musical, lyrical, and social) context and content (certain elements are taken away and others slightly altered). Mashups usually also signal that they are mashups and refer to their sources in their titles and in the information included below the videos. Megamix mashups too evoke existing works through their use of multiple, relatively short samples by keeping those samples long enough to be recognizable and by framing the mashups in a way that reveals the concept and construction behind them (including calling it a "megamix mashup" or "end

of year mix," listing all the sources below the video, or adding a disclaimer stating that the track is recreational). Mashups thus seem to meet what legal scholar Sabine Jacques refers to as "the crux" of this requirement: "that the public must be aware they are not being exposed to the original work" (Jacques 2019, 106).

The second requirement—that is must "constitute an expression of humour or mockery"—is more ambiguous. The observation that parody may or may not be mockery, as indicated by the "or" in "humor or mockery," corresponds somewhat to the field of art's understanding of parody as multifunctional.[30] Still, while the CJEU definition limits parody's mockery alternatives to humor, the field of art extends its possibilities beyond both mockery/satire and humor to a broad range of functions, including biting or benign critical commentary (see chapters 2 and 4). As several legal scholars have pointed out, the CJEU judgment in fact fails to clarify what it means by humor, such as whether a parody must possess a humorous intent or produce a humorous effect.[31] If the wording in the judgment implies the former, it is also unclear how this would be measured and validated. If it implies the latter, it is unclear whose experience would be weighted. Would it be, for example, the experience of the relevant judge or an "average consumer," legal scholar Eleonora Rosati wonders (2015, 519). In either case, it would be a highly subjective and unpredictable assessment, complicated by the fact that any experience of humor depends on a wide range of factors, as discussed in chapter 4. Moreover, the lack of clarity concerning what kind of humor is required may lead to ambiguity and inconsistency in the interpretation of the concept. If, for example, humor were to be equated with laughter alone (scornful or otherwise), the parodist might reject their work's association with a humorous intent, having instead intended to evoke a broader spectrum of responses, such as that knowing smile when you are in on the joke or perhaps simply inward, unexpressed amusement. (As mentioned in chapters 2 and 4, this broad spectrum reflects, in fact, how humor is understood by humor scholars, especially when it is a result of the combination of expectancy violation and sense making.)[32] Jacques argues for a more generous understanding of humor in relation to the legal parody concept, one that ranges from "provoking laughter, being playful, paying tribute, to providing positive or negative criticism" (2019, 98–99). She mentions that in legal cases in Australia and Canada, equal weight is already given to humor as critical expression (37), and in several parody

cases in France, humor has been interpreted especially broadly—sometimes critical commentary has weighed more heavily than humor,[33] and sometimes humor has been understood as emerging from incongruous juxtaposition and a playful subversion of expectation (although it has not been so broad as to be equated with reworking or transformation; 97–98).[34] Jacques also points out that in recent legal decisions, the humor requirement has primarily served as a supporting rather than a determining factor. She notes that judges tend to be mostly concerned with whether the use in question harms the original author of the work (99).[35]

If the aim is to shrink the gap between the definitions of parody in the fields of law and art, respectively, Jacques's observation is hopeful, since—as several parody scholars pointed out and some of the mashup interviewees confirmed[36]—parody in the field of art is not necessarily intended to be humorous. A liberal understanding of humor would allow for better correspondence between parody in the fields of law and art. Furthermore, mashups may then also be considered an expression of humor, since they generally endorse what humor scholars identify as the key triggers of humor: a combination of incongruity and sense making. Jacques seems to agree with these premises: "It is pertinent that 'humour' in music might not always take the form of traditional ridicule, but may take the form of playful or unexpected juxtapositions, or changes in rhythm or style which break traditional musical rules. Thus, it seems reasonable to presume that there is humour in at least some digital sampling, which derives from the combination of excerpts from earlier recordings which will surprise the audience listening to the sampler's track" (Jacques 2016, 6).

But even if a specific use meets these essential characteristics, it must furthermore strike a fair balance between the author or copyright holder's interests and rights and the freedom of expression of the user of a protected work.[37] Furthermore, "all the circumstances of the case must be taken into account,"[38] which makes the outcome of a particular case unpredictable. Among these additional qualifications, Jacques emphasizes that a parody must not conflict with the normal exploitation of the original work, and it must not harm the moral rights of the author. With regard to the first criterion, she argues that case law has established that what is at stake in the evaluation of exceptions is not so much the commercial nature of the parody but the questions of whether it seeks profit without fair remuneration to the copyright holder, or whether it has a detrimental effect on the

economic market for the original—for example, by acting as a substitute for it (114–121). According to Jacques, a parody that generates profit, including by means of platform monetization, may be legally acceptable if it does not in some way replace the original or otherwise either threaten or harm its market (115). On the other hand, any use that gets a "free ride" from the original for the purpose of generating profit will probably not be defensible under a copyright exception (115).

As we saw earlier in this chapter, the interviewed and surveyed mashup producers emphasized that they did not seek profit from their mashups but, on the contrary, considered this an unfair treatment of the artists they sampled. Unlike plagiarism, parody does not narrow the market for the originals on which it is based, because it makes explicit that it is a parodic comment on those works—this absence of confusion also means an absence of competition. Amy Lai maintains that "parodies should be allowed as long as they do not defeat the purpose of the copyright system by harming the incentives of authors" (2019, 46). She further insists that when the work functions as a complement, not a substitution, it does not defeat the purpose of the copyright system. In line with this quality of parody, the mashup producers were always careful to acknowledge the sources of their mashups and saw their music as promoting those original works and potentially increasing their market instead of taking something away from them. This assumption is also supported by the research of Schuster, Mitchell, and Brown (2009), who found that sales of the sampled songs increased after a mashup album's release.

The second relevant criterion Jacques specified concerns moral rights, which are distinct from economic rights: whereas the latter provide the author with exclusive rights to make a copy, make the expression available to the public, and distribute copies of it, the former seek to protect the author's interests with respect to artistic reputation, honor, and dignity (in contrast to the economic rights, the moral rights cannot be transferred to others; Jacques 2019, 167–195). Jacques argues that while the relation between copyright exceptions and moral rights remains largely unexplored, moral rights may, especially in the EU context,[39] be considered additional conditions that the parody must meet (178). The following moral rights are most relevant to parodies: (1) the right of attribution (the paternity right), (2) the right against false attribution, and (3) the integrity right. The first concerns the acknowledgment of an author's claim to authorship (175).

In mashups, as well as parodies more generally, the authors of the original works are acknowledged in terms of both content (establishing recognition) and disclaimers (exposing the track/video as a mashup of prior sources and mentioning the sources in the titles and/or information below the video). In the same way, mashups safeguard the second right; it is very unlikely that the authors of the original works from which the mashups sample would be identified as the authors of the mashups themselves. There is, in other words, no confusion concerning attribution of authorship. As Jacques points out, the integrity right—that is, the requirement that the use in question does not harm the original author's honor or reputation—may appear difficult to reconcile with parody, given that the heart of parody lies in its playful distortion or transformation of prior works (184). Nevertheless, she is able to point to a French parody case (*Tarzoon* [1978]) in which the court held that as long as there was no confusion between the two works, the integrity of the author was not harmed (189).[40] In line with this, Jacques argues, "It seems unlikely that most parodies, even those which are 'near the knuckle,' will undermine the standing of the underlying work, or the original author, because any reasonable observer is aware of how parody operates. [Jacques's explanatory note: 'The parody evolves in a fantasy world separate from the original.'] There is no presumption, for example, that the author of that work has endorsed the parody or countenanced its message" (2019, 191). Of course, she admits, there are limits to this reasoning, for example, if the parody triggers associations with pornography or discrimination (193).

In the end, if the parody were not allowed to transform or comment on a work unless its author approved of the way in which it was done, then the parody exception would be redundant. Still, freedom of expression has its limits, and parody must therefore refrain from serving as an instrument of malevolence. Mashups can certainly present their sources in a manner that their authors and performers would not have endorsed, even though many of the producers expressed respect for those artists and viewed their perhaps transgressive mashups as a kind of playful homage. But distortion beyond the intentions and desires of the authors or performers is not the same as prejudice with regard to their honor, reputation, or dignity.[41] Although mashups, like any other parodies, can cause their audiences to experience the original works differently—perhaps even dismissively—the decisive factor is that they do not do so in the name of the authors or performers

but rather as independent comments and interpretations. In this sense, of course, the integrity right is closely related to the rights of attribution and against false attribution.

Mashups appear to meet the criteria set out in relation to the parody exception as defined and treated in EU law, which appears hopeful for a successful defense along these lines if mashups were to be tested in court. Lai (2019) argues that a broad legal definition of parody properly balances the interests of rights holders and users, whereas a narrow definition is harmful to users' freedom of speech while also being unhelpful to those rights holders whose markets remain unharmed. Jacques, however, warns about conflating the parody exception with all forms of appropriation, since this might jeopardize the balance struck between rights holders and users' interests (2019, 18, 25). In an earlier article (2016), she argues that the EU exceptions of quotation and parody are unlikely to apply to most forms of digital sampling. Throughout the article, however, she treats sampling as a single thing instead of acknowledging that while it is one *technique*, it involves a plethora of applications, in terms of both disposition or form and function or purpose (as I demonstrated in chapter 2). This conflation of different sampling practices is symptomatic of much of the literature discussing sampling in relation to copyright law, and it characterizes the CJEU's final conclusion in the *Pelham* case as well. It also perpetuates the unfortunate gap between art and law. Sampling, however, has become the current generation's new language, which is obvious not only from sample-based music but also from the numerous audio-, audiovisual-, and visual remixes, memes, and gifs that flourish on the internet.[42] Consequently, legislators and judges should be encouraged to pay attention to the vocabulary of sampling. With respect to mashup music, I maintain that it should be regarded as a lawful parody (and potentially also a quotation) under EU law and also under the US fair use doctrine, as we shall see.

US Law: The Fair Use Doctrine

Article 107 of the US Copyright Act establishes that the fair use of a copyrighted work is not an infringement of copyright and lists four factors that should be considered when determining whether the use is fair: (1) the "purpose and character of the use" (that is, whether the purpose is nonprofit and noncommercial; whether the use involves criticism, commentary, teaching, and so forth; and whether the use is transformative); (2)

the "nature of the copyrighted work" (that is, whether the used work is published, and whether it is a work of "fiction or fantasy" or factual information [note 56]); (3) the "amount and substantiality of the portion used"; and (4) the "effect of the use upon the potential market for or value of the copyrighted work" (that is, whether it affects the existing or future market of the used work).[43] These four factors should be considered on a case-by-case basis and be balanced against one another. They represent guidance rather than absolute requirements or guarantees, and other factors relevant to the case may also be considered (Beebe 2020, 6–7). This means that a use that does not fulfill all the requirements can still be found to qualify, just as a use that does fulfill all the requirements can fail to qualify (Beebe 2008, 2020). Although the doctrine's openness allows for some flexibility in an ever-changing society, it has also been criticized by several scholars for making legal decisions unpredictable.[44] Happily, case law is clarifying the application of these factors, as well as guiding people as to how they should be weighed against one another; accordingly, as Barton Beebe (2008, 2020), Matthew Sag (2012), and Pamela Samuelson (2009), among others, have pointed out, the fair use doctrine is more coherent and predictable than is often assumed. I next discuss the four factors in relation to case law and academic interpretations, as well as to mashups.

Factor 1: The "Purpose and Character of the Use" In his empirical study of US fair use decisions, Beebe (2020) argues that the first fair use factor—the purpose and character of the use—is itself almost decisive for the court's ultimate determination. He therefore divides it into three subcriteria: (1) the transformativeness inquiry, (2) the commercial/noncommercial inquiry, and (3) the good or bad faith inquiry.[45]

The first subcriterion, transformativeness, has been a key issue in legal fair use cases in recent decades (Beebe 2020; Netanel 2011) and has also been at the core of scholarly arguments about the scope of fair use.[46] In an influential article from 1990, Judge Pierre N. Leval argued that the transformativeness of a work should weigh heaviest in a fair use analysis and encouraged courts to make it so:

> I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's

> words,[47] it would merely "supersede the objects" of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society. (Leval 1990, 1111; italics in original)

This emphasis on transformativeness is later reflected in several fair use cases, including *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991), *Castle Rock Entertainment v. Carol Publishing Group* (1998), and *Campbell v. Acuff-Rose Music* (1994).[48] The opinion in *Campbell* states that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works," and that "the central purpose of this investigation is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. It asks, in other words, whether and to what extent the new work is 'transformative.'"[49] Beebe (2020) finds that of the seventy-eight core legal opinions after *Campbell* that found transformativeness, fair use was supported in all but three of them.[50] Throughout the previous chapters, I have demonstrated the various ways in which mashups are transformative in terms of textual content and meaning. Mashups always alter the tracks by filtering out certain elements, modifying others, and changing their musical and social context. Though the portions taken can be substantial and the alterations can be (apparently) subtle, they are never verbatim copies of the original.

Also related to the "purpose" factor is parody, which has long been established by case law as a legitimate fair use purpose. Beebe (2020) refers to parody as a subset of fair use. He found that of the twenty-six cases that the court explicitly defined as parody, all but three were determined to be fair use (he adds that the last time a legally defined parody failed to be considered fair use in US court was in 1988). Whereas parody had in previous cases been defined quite broadly, the 1994 *Campbell* case set a new precedent for defining parody: as "the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[51] As such, "a parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination."[52] This definition is quite similar to that

of EU law, in the sense that the parody has to evoke a work while remaining different from it, but the *Campbell* definition, in contrast to the EU *Deckmyn* case, does not limit the comment requirement to one expressing humor or mockery. According to these criteria, there should be no doubt that mashups qualify as parody, and Beebe (2020) observes that although transformative uses nearly always qualify as fair uses, parodies, more than transformative works more generally, "are especially privileged under factor one and the overall four-factor fair use analysis," which should be good news for mashups.

The second subcriterion of the first fair use factor (the purpose and character of the use) concerns whether the use is commercial in nature, so that, as stated by case law,[53] an affirmative answer to this question would be harder to defend than a negative one. This notion was nuanced by the *Campbell* case, which held that the commercial factor is not necessarily determinative and may weigh less if the use is transformative.[54] Relatedly, in the *Blanch v. Koons* (2006) case, the appropriator, Jeff Koons, made a substantial profit from his use, but it was still found to qualify as fair.[55] While acknowledging that the issue of commerciality is often invoked in courts' fair use analyses, Beebe points out that several commentators and courts (including the US Supreme Court in *Campbell*) have been dismissive of this inquiry "primarily on the ground that nearly all expression in our culture is produced for profit or is otherwise income-producing in some sense" (2008, 602–603). Regardless of the weight given to this subcriterion, mashups generally do not bring in any income, except in the sense that some of the producers also work as DJs and a few maintain separate crowdfunding sites (such as Patreon), either of which might earn income. Law professor Rebecca Tushnet argues that since freely shared remixes do not participate in the "money economy" but are instead created with no hope of monetary compensation, they should have a "special fair use treatment" (Tushnet 2010, 3).

The third subcriterion of the first fair use factor is what Beebe calls the "bad faith inquiry," and it refers to issues such as fairness, propriety, and an equitable rule of reason. According to Beebe's empirical analysis of US fair use court cases, this subfactor has not played a significant role in comparison to the other factors, except in cases where the court explicitly found that the use was undertaken in bad faith (2008, 607–608; 2020). Mashups would likely not be recognized as such.

Factor 2: The "Nature of the Copyrighted Work" The second factor of the fair use doctrine—the nature of the copyrighted work—concerns whether the given use copies from a published or unpublished work and whether it is a creative work "of fiction or fantasy" or a "factual" work.[56] According to Beebe's empirical analysis, this factor has a minimal effect on the overall fair use test. It consists of two subcriteria, the first of which was clarified in *Harper & Row v. Nation* (1985), which held simply that "the scope of fair use is narrower with respect to unpublished works."[57] The second was clarified in *Campbell*, which explained that creative works of "fiction or fantasy" are "closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."[58] Still, several uses of the former (which I understand to mean cultural expressions) have been considered fair.[59] While mashups indeed do sample from creative works, then, this second fair use factor does not pose much of a challenge because mashup sources are almost always published.

Factor 3: The "Amount and Substantiality of the Portion Used" The third factor—the amount and substantiality of the source—concerns how much of the copyrighted work is used. When more is used, a fair use defense is less likely. This could mean trouble for mashups, which usually use quite robust samples; even their shorter samples are "substantial" in that they are typically the "heart" of the tracks that contain them. Yet the amount or substantiality of the source portion used is often considered in relation to the requirements of the new work's purpose, and this has also been established by US case law, which has allowed for the use of a considerable amount of copyrighted material based on this reasoning.[60] This inclination to accept relatively substantial use of the source work when the first factor is fulfilled is also confirmed by Beebe's systematic analysis of US case law, which shows several instances of uses involving the copying of entire works that have been determined to be fair, as well as several instances of uses of the heart of the plaintiff's work (2008, 615–616; 2020).[61] As long as the parody is recognized as such, the amount can be justified as necessary for its purpose, which by nature requires some level of copying. As Jacques points out, if too little is used, the parody may fail to evoke the original in question, and if too much is used, it may fail to be recognized as a parody and instead be confused with the original (2019, 102).

Factor 4: The "Effect of the Use upon the Potential Market for or Value of the Copyrighted Work" The fourth factor—the effect of the use upon the potential market for or value of the copyrighted work—is, according to Beebe (2020), the most emphasized factor after the first one. This is an economically oriented factor whose impact is strongly informed by the other three factors (Beebe 2020). For example, the *Sony Corp. of America v. Universal City Studios, Inc.* (1984) case established that commercial use is likely to harm the potential future market of the original work.[62] This conclusion was later referred to in *Campbell*, which also considered its relation to the first fair use factor by clarifying that "no 'presumption' or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes."[63] It thus established that a transformative use is not thought to harm the potential market of the original since it functions as a complement and not a substitution: "[When] the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it ('supersed[ing] [its] objects'). . . . This is so because the parody and the original usually serve different market functions."[64] The case also clarified that what is relevant is not whether the use is commercial per se or whether it might harm the market for its source due to "the very effectiveness of its critical commentary"; what matters is only "the harm of market substitution."[65] The opinion furthermore stated that although the potential market also encompasses that which could be developed by the original work through licensing, the unlikelihood that the use would be granted such license—the most likely scenario for mashups—disassociates the use from the notion of a potential licensing market.[66] Few mashups are commercial, and they do not make direct inroads on the current or potential market of the original works because they function as complements rather than substitutes. Given their exposure of their sources—in terms of content, disclaimers, and accreditation—they are more likely to increase and expand the original works' market than to harm it.[67]

As the four-factor analysis of mashups demonstrated, it would appear that they should be readily defensible under fair use. Yet as Patricia Aufderheide and Peter Jaszi emphasize in their thorough study of fair use, it is not

copyright law that hinders appropriative creativity but rather a misunderstanding of the scope and meaning of the US fair use doctrine (2018, xi). In order to rectify such confusions, they compress the fair use factors into a test consisting of two questions: (1) Was the use of copyrighted material for a different purpose from the original? (2) Was the amount of material taken appropriate to the purpose of the use? (25). They continue: "If the answer to these basic questions is yes, then a court these days—if ever asked—would likely find a use fair. . . . [J]udges and juries have overwhelmingly rejected claims of infringement and supported fair users when they carefully employed this reasoning to make their decisions. This is hardly surprising, given the long history of the fair-use doctrine and its strong constitutional roots" (25). Mashups definitely pass this test. Aufderheide and Jaszi seem to agree, noting that remix and mashup artists on YouTube often believe they are infringing copyright even though most of them are simply exercising their fair use rights without realizing it (20). They further argue that the recombination of copyrighted material to create something new is fair use, and that remixes and mashups have been identified as such in the Code of Best Practice in Fair Use for Online Video (169).

Yet researchers have also remarked on the fact that music sampling seems to represent a notable exception to an otherwise positive trend regarding fair use defenses.[68] And it remains true that only one out of the total of three cases in US courts concerning musical sampling, or, more precisely, the use of a sound recording section, were considered fair use. The first relevant case, *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.*, was settled in 1991 in US district court.[69] Grand Upright Music Limited filed a copyright infringement suit against Biz Markie for having sampled a sequence with the piano riff from the British songwriter Gilbert O'Sullivan's song "Alone Again (Naturally)" from 1972 and using it in his 1991 track with the same name, "Alone Again." Judge Kevin Thomas Duffy famously started his opinion with the biblical admonition, "Thou shalt not steal," before claiming that Biz Markie was liable for theft. The artist was ordered to pay $250,000 in damages and to pull the album from the market (Wang 2013). Fair use was not taken into consideration. The second case, *Bridgeport Music, Inc. v. Dimension Films*, was settled fourteen years later (2005), this time in a court of appeals.[70] The hip-hop group N.W.A. sampled a two-second guitar-riff (consisting of three tones) from Funkadelic's "Get Off Your Ass and Jam" and looped it throughout much of their 1991 track, "100 Miles

and Runnin." Funkadelic's lawsuit was directed toward Dimension Films, which had used N.W.A.'s song in a film. The court of appeals concluded as follows: "Get a license or do not sample."[71] This case established that no de minimis exception would apply to sound recordings; even a small part of a sound recording represents something of value.[72] This ruling contradicted many hip-hop producers' and music lawyers' understandings of copyright law, and McLeod and DiCola cite the music lawyer Dina LaPolt's rueful admission in this regard: "I would advise my clients before *Bridgeport* if they used a little snippet of a recording that was de minimis, 'That's fine; we don't have to clear it.' . . . But now I can't say that anymore" (McLeod and DiCola 2011, 142). Fair use was not considered in this case either.

The only successful defense in a sampling case settled in US court is *VMG Salsoul v. Ciccone* (2016). The Salsoul Orchestra filed a copyright infringement suit against Madonna and others for having sampled a 0.23 second (that is, a quarter of a second long) segment of horns from their "Ooh, I Love It (Love Break)" from 1983 and using it in her 1990 track "Vogue." In contrast to *Bridgeport*, the court held that this use was in fact de minimis—that is, they believed that a general audience would not recognize the brief snippet in "Vogue" as originating from "Love Break," so the use did not constitute infringement.[73] This was, however, a district court decision (that is, a lower court ruling) and thus set no legal precedent. There have been several court cases concerning music infringement more generally, including the recent successful fair use defense involving the hip-hop artist Drake,[74] but these have concerned the use of a musical work and not a recording specifically; for example, Drake was sued for using the musical work and not the sound recording, for which he had obtained a license.[75]

Notably, the two sampling cases that resulted in successful claims of infringement involved hip-hop music, and both uses were remarkably dissimilar to the way mashups work. As such, there remains cause for optimism regarding mashups' potential fair use defense. But since there are currently no precedent cases for mashup music or for sample-based parodies more generally, the situation remains unpredictable.

The Legality of Mashups

The reasons for mashup producers' belief that their mashups could be defended as fair use, parody, or another exception, or that their use of copyrighted samples is otherwise justifiable, were as follows: (1) the mashup is

transformative and thus counts as new work and not piracy (or consuming another's music without paying for it); (2) the sources are made explicit, thus making the use distinct from plagiarism (or stealing other's work and pretending that it is your own); (3) it is noncommercial and generates no direct income for the producer; (4) the producer always credits the originators; and (5) the mashup does not take either profit or integrity away from the mashed artists (because it does not replace the original music) but rather serves to promote them. As demonstrated, there is much correlation between mashup producers' practice and sampling ethics and the requirements of the most relevant exceptions of EU and US law. Still, one cannot leap from this acknowledgment to the conclusion that mashups are legal or most likely so. Although I believe that mashups have a strong defense, their legality remains untested territory, and there is no clear-cut answer to this question in the letters of the law or in legal judgments, given that legal evaluations of exceptions are case specific and based on nuanced analysis in which various features are taken into account. The most accurate answer to the question of whether mashups are legal is that copyright law is complex and the outcome of exception evaluation is highly unpredictable. Mashups thus reside in the contested area of copyright law that is often referred to as the legal gray area.[76]

It is critical that the gray area is not simply assumed to be illegal; the alternative may be just as true. If one eliminates all uses that have not been tested in court as unqualified for defense under copyright exceptions, the intended purpose of those exceptions is lost, as they would no longer serve to balance copyright holders' interests in and rights to intellectual property with the right to freedom of expression. They would instead function only as instruments for fostering certain segments of cultural diversity. Appropriation is historically, culturally, politically, and aesthetically significant. Appropriation is also at the heart of democracy in terms of the cultural participation, dialogue, and critical thinking it involves, and it is thus rooted in the fundamental right of freedom of expression. As Jacques points out, if copyright is applied either too restrictively or too broadly, it will lose its justification (2019, 158). In contrast to scholars who argue for major copyright reform,[77] I believe a more feasible and fruitful avenue for change would be as follows:

- To clarify and modify the general understanding of copyright exceptions to make it both more predictable and more inclusive with regard to acknowledged appropriation without diluting those exceptions;[78]

- To acknowledge that sampling is not one thing in terms of its disposition/form and function/purpose but instead a broad and multifunctional artistic field.

With respect to one's interpretation of the exceptions and one's understanding of sampling, I believe that the benefit of the use in question should be weighed against its disadvantages and that mashups arguably have a good case.[79] Since mashup music does not feed on others' music in a cannibalistic way, I do not find it to harm the original artists economically or in terms of integrity. Instead, it offers a complement: an alternative interpretation that both prolongs and pluralizes the original musical experience.

The efficacy of copyright exceptions depends, of course, on users' inclination to rely on them, and this can be improved with a clearer conception and consensus regarding the scope of the exceptions. However, the efficiency and meaning of the exceptions also depends on users' *ability* to rely on them, which, as I explain in the next chapter, is not a given.

Mashup Producers as Thieves and Copyright Activists?

Society has often framed the act of using nonlicensed samples as stealing. The most cited example is probably the first US court judgment against sampling (*Grand Upright*), in which sampling artist Big Markie received a reprimand for theft ("Thou shalt not steal").[80] The concept of stealing, of course, indicates not only that something is unlawful but also that it is unethical and damaging to those who are being stolen from. Such assumptions are quite common, though they do not reflect how mashup artists regard their own practice. David Sanjek writes, "Samplers should apply for the appropriate licenses, respect the rights of copyright holders, and be respected in turn as equal creators" (1992, 621). He thus represents the common view that sampling feels disingenuous with regard to the artists who are being sampled in the sense that the sampling artists help themselves to musical material into which others have already put so much work, time, and money. As demonstrated, mashup producers do not agree with this position. Taking into consideration the mashup producers' ethical guidelines, emphasis on licensing hurdles, and conviction that their unauthorized use is either legal or otherwise justifiable, I argue that mashup sampling does not fit into the narrative that has often been associated with sampling artists: they are not dismissive of other hard-working artists' efforts and

rights to acknowledgment, and their practices cannot be equated with selfish erosion or subversive stealing. Such assumptions fail to recognize the important differences between, on the one hand, acknowledged appropriation and illegal file sharing, and, on the other hand, acknowledged appropriation and plagiarism. Whereas illegal file sharing is about acquiring and sharing complete files for the purpose of consumption, acknowledged appropriation takes a piece of a file and transforms it to make an artistic commentary. And whereas plagiarism feeds on others' music in a cannibalistic way, acknowledged appropriation offers an addendum of sorts. Moreover, the assumption that sampling is stealing takes for granted that any act of sampling is illegal, a conclusion that is highly uncertain, as we have seen.

Somewhat surprising, the framing of sampling as stealing, as Judge Duffy proclaimed, has been perpetuated by the mashup artists themselves. One of the most vital mashup organizations, Bootie Mashup, fronts itself with the skull and crossbones, and its name, recalling the many "bootie" mashup club nights around the world, indicates not only that these artists initially called their music "bootlegs" but also that the activity might well be illegal.[81] Whereas John Shiga (2007, 95) relates this branding to Dick Hebdige's (1979) notion of the "self-consciously subversive bricolage" of British youth cultures in the 1970s, it can also be seen as a tactic that simply responds to an imposed identity. According to Adriana A, the reason the scene perpetuates the skull and crossbones logo is because the music is banned from the internet and remains largely an underground phenomenon: "I mean, even though sonically there's nothing all that underground about it—it's, like, 'okay, yeah, I got it; I know what a mashup is'—you can't just, like, go on iTunes, or go on Spotify, or go on Pandora or any other platform, and just easily find mashups. . . . And then at other platforms like YouTube, where it's mostly user-generated content, mashup gets [attention]—sometimes there'll be stuff that lasts, and then sometimes it gets pulled down for copyright issues. So, there's still this—there's a skull and crossbones in the Bootie logo for a reason." More than indicating something the producers believe is wrong, then, the skull and crossbones may simply symbolize their endorsement of what others believe is wrong. As to whether mashups are copyright infringement, Adriana A responded, "I mean, I kinda have to say, 'no, I don't believe that.' Otherwise, my entire career has been horrible, right? . . . I mean, what kind of horrible person *steals* music from other people? I believe in fair use. And I believe that all art is derivative in some form or

another. And as long as one isn't, like, really profiting off the backs of other people's work, I think that mashups for the most part should fall under the category of fair use or parody. Especially if, you know, you're not selling these in stores. You know, most mashup producers make the track and put it online, and they're not, like, really making money off of it." As Aufderheide, Tijana Milosevic, and Bryan Bello, among others, have pointed out, the music industry discourse that frames sampling as stealing often leads toward cultural practices self-identifying as illegal or piratical even when they are not (2015, 2016).

The metaphorical language of "stealing," "theft," "piracy," and "killing" has been used in a landslide of campaigns against free file sharing. For example, there have been several "Respect Copyright" campaigns within the sectors of music and film that have framed unauthorized use as a criminal act, such as the "Piracy. It's a Crime." label featured on numerous DVDs internationally from 2004 to 2007. This campaign, developed by the Motion Picture Association in collaboration with the Federation against Copyright Theft and the Intellectual Property Office of Singapore, began with the admonition, "You wouldn't steal a car," then depicted a man committing various kinds of theft, including the unauthorized copying and distribution of films. "Who Makes Movies" was another Motion Picture Association campaign of the early 2000s that featured footage of movie industry workers describing how piracy had affected them personally. The music industry has conducted similar campaigns, including the British Phonographic Industry's 1980s Home Taping Is Killing Music campaign, which featured the image of an audio cassette, crossbones, and "And It's Illegal." In 2007, the Norwegian branch of the International Federation of the Phonographic Industry launched a similar international campaign, Piracy Kills Music, that also featured a skull with eyes made out of headphones and a nose made out of a mini-jack cable. The backdrop of the latter campaign was the threat that the industry faced at the turn of the century when websites such as Napster started to offer free downloading of music via peer-to-peer sharing of MP3 audio files.[82] Putting an end to the piracy of file sharing is, of course, not the same as putting an end to the transformative and often parodic use of unauthorized samples, but the distinction can be lost on the public. As such, several scholars point out that this metaphorical language shapes public perception and policy decisions in a dramatic way.[83] Everyone knows that stealing a car is wrong, and if sampling is like stealing a car, then it is wrong too.

Part of the confusion of illegal file sharing with sampling activity is that mashups have been used in relatively high-profile virtual demonstrations to front the case for free file-sharing, including, most notably, the Grey Tuesday campaign in 2004 organized by the nonprofit activist organization Downhill Battle. As mentioned in chapter 1, this digital protest involved the *Grey Album* (2004), a mashup album by Danger Mouse, which Capitol Records required to be removed from the internet. Downhill Battle took up the case by encouraging websites to make the album available as a free download, which enabled its digital distribution to continue despite the injunction of Capitol Records. As Sam Howard-Spink (2005) points out, Downhill Battle capitalized on the *Grey Album*'s mainstream attention and then consolidated its political relevance by making it an occasion to protest the copyright regime's stifling of musical innovation and endorse file sharing. Howard-Spink therefore persists in describing mashups as "political statements," and in a way they are, but primarily because they have been framed as such by others. Ellis Jones (2021b) points out that while several early mashup scholarship of the mid- to late 2000s frames mashups as a disruption of cultural power (and specifically as a "battle of ICT's [Information and Communications Technology] liberatory potential versus music industries' property hoarding"), the producers themselves were "rarely at the frontline of digital activism in the mid-2000s"—that is, they were not "the emergent techno-dilettantes that online and then mainstream media coverage tended to present them as." Referring to early mashup scholar Philip A. Gunderson (2004), who describes Burton as a "cultural prophet" who promotes "the unrestricted sharing of digital copies without originals," Paul Harkins and I (2012) point out that Burton himself did not express any allegiance to file sharing (see also chapter 1).

Some scholars, including Owen Gallagher, see the remix as a political act: "an anti-establishment statement that defies the law and challenges the exclusive rights of copyright holders" (Gallagher 2018, 5). While this may be the perspective of several remix artists, we did not find this position to be common among mashup producers; the interviewees instead simply saw either copyright law or copyright enforcement as unfortunately ignorant of the difference between plagiarism or piracy and appropriation. The freedom to create and distribute remix appropriations is more specific, and responds to a different argument, than the freedom to borrow or take someone else's music. This conviction was also behind several producers'

belief that their mashups would be defensible via fair use doctrine or other copyright exceptions. As Aufderheide and Jaszi point out, the difference between a belief in free use and a belief in fair use was somewhat obscured in the early 2000s, thanks to scholars and activists (including John Perry Barlow, Lawrence Lessig, and Siva Vaidhyanathan) who presented free use, or a parallel system such as the Creative Commons, as the only feasible pathway for remixes, rather than pointing to fair use as a possible solution to safeguarding the thriving of remix culture (2018, 53–56). Aufderheide and Jaszi warn that such polarized activism, which has propelled the view of appropriating artists as pirates and anarchists, may have the opposite of its intended effect, in the sense that artists who are most likely exercising their right to fair use start to believe that they are acting illegally (70–71), which might in turn lead to self-regulation. The authors regard the current situation as more hopeful than that, however, thanks to the contribution of several scholars and interest groups to the creation of codes of best practices for fair use; to users who exercise these rights respectfully; and to a juridical shift toward more nuanced fair use analysis with more attention to transformativeness (74–75, 80).

Because the producers generally believed that their mashups could be defended under fair use, their impression that their music is treated unfairly informs their argument less against copyright law than against copyright regulation—that is, against the copyright holders' (in most cases, the record labels) enactment of copyright law, including via the online distribution platforms. Most of the producers, including Poolboy, did not express a resistance to the law but lamented instead that the law is often abused: "Copyright law should protect when what somebody is doing with another person's art is preventing that person's art from taking off, or it's in some way damaging that person's art. Mashups don't do that. . . . So, I think that copyright, when it comes to that, is just being abused. It's just being abused by the labels and stuff. . . . We can't do anything to fight the copyright law, so they can just abuse it all they want." But, of course, whereas most of the mashup producers did not regard themselves as activists, their continuous practice of distributing their music can be interpreted as, if not intentional disobedience, at least a subtle act of activism against appropriation restrictions, including what many of them perceived as commercially motivated restrictions enforced in the name of the copyright law.

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