

COMMENT

SHADES OF GREY: CAN THE COPYRIGHT
FAIR USE DEFENSE ADAPT TO NEW
RE-CONTEXTUALIZED FORMS
OF MUSIC AND ART?

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TABLE OF CONTENTS

Introduction	268
I. The Fair Use Doctrine & the Issue of Transformativeness.....	272
A. The Fair Use Defense	272
B. The Issue of Transformativeness.....	274
1. Parodies as transformative works	276
2. Satire and transformativeness	277
3. Transformativeness in other contexts	278
II. New Forms of Re-contextualized Art.....	280
III. <i>The Grey Album</i>	284
A. Background to Dispute	284
B. Fair Use Analysis	286
1. Purpose and character of the use.....	288
2. Nature of the copyrighted work	294
3. Amount and substantiality of the portion used	295
4. Effect of the use on the market	297
5. Other factors—The amount added and new expression	301
Conclusion....	302

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INTRODUCTION

Copyright law has a problem. Copyright protections must tow a fine line by providing incentives for authors to create new works of art, literature, music, and other protectable forms of expression without constricting the public's access to those new works.¹ Partly in response to this dualistic purpose, courts created the fair use defense to copyright infringement actions,² and Congress eventually codified it within the Copyright Act.³

Fair use has grown to become a valuable defense, but it is currently unpredictable in terms of its application.⁴ In particular, judges have failed to reach a consensus as to what constitutes transformativeness—a key and potentially decisive element under fair use analysis.⁵ Essentially, courts

1. See, e.g., U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (emphasis added)); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (discussing how copyright protection’s grant of a limited monopoly serves to eventually allow the public full access to products of genius); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (emphasizing how the copyright’s limited monopoly must ultimately promote the availability of protectable works to the public).

2. In 1841, Justice Story set forth the fair use defense as a means of determining whether there could ever be a justifiable use of copyrighted materials. See *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901) (stating that judges should “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work”); see also *Campbell v. Acuff-Rose Music, Inc.* (*Acuff-Rose*), 510 U.S. 569, 576 (1994) (discussing Justice Story’s expression of fair use factors in *Folsom* as the foundation for the continued judicial interpretation of the fair use defense until its eventual codification by Congress in 1976).

3. See 17 U.S.C. § 107 (2000). Congress recognized that courts had adopted the fair use defense as a means of allowing people in certain situations, such as in news reporting or within educational settings, to use copyrighted materials without permission. See *id.* pmbl. (listing news reporting, teaching, scholarship, and research, amongst others, as instances where unauthorized use of copyrighted materials may be found fair use, and therefore, not an infringement); see also *Notes of Committee on the Judiciary*, H.R. REP. NO. 94-1476, at 65-70 (1976) (discussing the emergence of the fair use defense as a prevalent defense in copyright infringement actions, its increasing adoption by the courts as a legitimate defense, and describing some examples of potential fair use, such as use of excerpts in commentary and scholarship).

4. See H.R. REP. NO. 94-1476, at 65 (stating, “since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts”); see also *Acuff-Rose*, 510 U.S. at 577 (suggesting the inappropriateness of bright line rules in evaluating fair use defenses, and affirming the need for case by case analysis); *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (referring to fair use as “the most troublesome in the whole law of copyright”); Pierre N. Leval, J., *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990) (arguing that the frequency of reversals and divided courts in fair use cases demonstrates the lack of consistent principles regarding fair use analysis, a problem which makes it difficult to predict the outcome of new fair use cases).

5. For example, courts have now generally accepted the notion that parodies can qualify as transformative, but that satires, though they may seem transformative, will most likely not pass a fair use analysis. See *infra* Part I.B (comparing how courts have generally been accepting of parodies as transformative works, due in large part to the artists’ need to use the copyrighted material in order to mock that material itself, while courts have been far less favorable to satires, which some courts argue are non-transformative because artists do

will be more likely to find fair use if the new user has transformed, or clearly added something new to the copyrighted material that the artist has taken without permission.⁶

The crux of the issue is this—when does a new work transform an old one, and when does it merely steal the work of another? Critics and commentators in the music field have raised these questions with increasing frequency when it comes to the practice of digital sampling⁷ in music.⁸ Musicians have turned digital sampling into a staple of the music production industry, especially within the hip-hop genre.⁹ For the most part, courts have not been kind to musicians who have sampled copyright holders' works without authorization. Some courts have even found unfair infringement based on taking just a few notes.¹⁰

not need to use the copyrighted material to convey their message).

6. For Leval, the issue comes down to whether the new user has added new value to the original work. See Leval, *supra* note 4, at 1111 (arguing that the use of copyrighted material as raw material should be allowed when it creates “new information, new aesthetics, new insights and understandings,” and that such use is, in fact, “the very type of activity that the fair use doctrine intends to protect for the enrichment of society”).

7. Sampling involves the digital reproduction and play back of previously recorded materials. See Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 275 (1996) (providing in-depth background on the history of sampling); *id.* at 275-78 (discussing how modern sampling technology allows artists—DJs, sound engineers, programmers, *etc.*—to record music, digitally manipulate it, change characteristics of the music such as the pitch or tempo, loop it, and drop it into a new work).

8. See generally A. Dean Johnson, Comment, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Suits*, 21 FLA. ST. U. L. REV. 135, 147-49 (1993) (arguing that musicians who use unauthorized samples should be able to assert a fair use defense, yet suggesting that the simple addition of lyrics to a digital sampling of copyrighted music would be unlikely to amount to transformativeness); Szymanski, *supra* note 7, at 313-15 (evaluating whether sampling amounts to transformative use, and suggesting that Justice Kennedy's concurrence in *Acuff-Rose* indicates that the Supreme Court would be unlikely to find the re-contextualization of a sample as sufficiently transformative).

9. See David Sanjek, “Don't Have to DJ No More”: *Sampling and the “Autonomous” Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 610 (1992) (stating that most people commonly associate sampling with hip-hop, but that musicians in all genres have begun to use sampling); Szymanski, *supra* note 7, at 277-78 (discussing the history of sampling, and arguing that sampling is pervasive throughout the music industry).

10. See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398-99 (6th Cir. 2004) (finding that holders of copyrighted sound recordings have the exclusive right to sample their own works, and refusing to allow infringers to assert that their samples amount to *de minimis* uses); *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987) (holding that a sample of even a small portion of a work may be infringing if it is “qualitatively important”). *But see* *Newton v. Diamond*, 349 F.3d 591, 598 (9th Cir. 2003) (holding that defendant's sample consisting of three notes was *de minimis*, and therefore non-infringing).

Overall, the issue of *de minimis* uses of sampled music remains unsettled. While *Newton* allowed such a use, that case involved specific facts, including that the defendants had obtained a license for the sound recording at issue, just not for the underlying composition. *Id.* at 593. Meanwhile, *Bridgeport's* categorical denial of *de minimis* uses has been strongly criticized. See, e.g., Brief of Amici Curiae Brennan Center for Justice at N.Y.U. School of Law and Electronic Frontier Foundation 3-18, *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647 (6th Cir. 2004) (No. 03-5738) (arguing that the Sixth Circuit, upon rehearing of the *Bridgeport* case, should acknowledge the long history of courts permitting *de minimis*

Most musicians have learned by now that they must license samples from copyright owners prior to using them; however, sometimes this is not so easily accomplished. Some copyright owners will demand exorbitant fees, and others will simply refuse to allow their music to be sampled by another artist.¹¹ Many new artists feel that these high fees and refusals stifle creativity and allow the big music labels (who own most of the copyrights) to limit the development of music by new, unsigned artists who do not have the resources to license from numerous rights' holders.¹²

To many artists, sampling represents a way to express new ideas by using older material as a foundation for a new work that expresses something wholly different from the original material.¹³ Based on this type of re-contextualization, some commentators have placed the practice of sampling squarely within the realm of the postmodern art form.¹⁴ Sampling allows an artist to create juxtapositions between seemingly different materials in shocking and profound ways.¹⁵

amounts of copying, and requesting that the Court reverse its decision to forbid *de minimis* uses of material from sound recordings); Marjorie Heins, Free Expression Policy Project, Commentary, *Trashing the Copyright Balance*, Sept. 21, 2004, <http://www.fepproject.org/commentaries/bridgeport.html> (criticizing the *Bridgeport* decision because the court failed to consider either of the two copyright mechanisms which allow for some creative use of copyrighted work since it declined to apply the *de minimis* rule, and completely ignored the possibility of a fair use defense); Gary Young, *6th Circuit Clamps Down on 'Sampling'*, NAT'L L. J., Sept. 30, 2004, <http://www.law.com/jsp/article.jsp?id=1096473910640> (noting that even the Recording Industry Association of America filed an amicus brief calling on the Sixth Circuit to reconsider *Bridgeport* out of its belief that the decision would disrupt over a decade of music industry acceptance of the *de minimis* standard).

11. See generally Katie Dean, *Grey Album Fans Protest Clampdown*, WIRED NEWS, Feb. 24, 2004, <http://www.wired.com/news/digiwood/0,1412,62372,00.html> (relating the concerns of artists who feel that sampling fees are prohibitively expensive); Noah Shachtman, *Copyright Enters a Gray Area*, WIRED NEWS, Feb. 14, 2004, <http://www.wired.com/news/digiwood/0,1412,62276,00.html> (discussing the absence of set licensing fees, the prohibition against beat-matching, and noting that The Beatles' music in particular is off limits to samplers).

12. See Elizabeth Armstrong, *Suppressed Album Finds Voice on Web*, CHRISTIAN SCI. MONITOR, Mar. 1, 2004, at 11 (offering the view of Glenn Otis Brown, executive director of Creative Commons, that labels who charge high fees restrict growth and experimentation by new artists); Dean, *supra* note 11 (presenting the view of DJ Variable, a DJ and music producer, who believes that artists signed by major music labels are the only ones who can afford to sample, because the labels will put up the money for the high fees).

13. See Szymanski, *supra* note 7, at 278-79 (comparing the use of samples by artists who want the listener to think about the sample within its new context with musicians who pack their works with many samples to convey a larger theme); see also Sanjek, *supra* note 9, at 612-15 (discussing the possible uses of sampling, including "quilt-pop" where multiple samples can be used to "create a new aesthetic").

14. See Szymanski, *supra* note 7, at 281-89 (presenting the view that music which features samples amounts to a form of postmodern art, based on its similarity to some aspects of collage, and its inclusion of divergent forms and genres of music within the same work).

15. See *id.* at 283 (relaying how the sampler may use wildly different types of music to "weave together otherwise irreconcilable references," resulting in a product that "often bewilders traditional musical meaning").

This Comment explores whether the fair use defense to copyright infringement has the flexibility to adapt to new re-combinative or re-contextualized forms of music and art, particularly in the context of sampling.¹⁶ Based on the increasing prevalence of re-contextualized forms of art, and the public's desire for them, this Comment argues that the fair use defense can and should accommodate these emerging art forms.

This Comment begins in Part I with a brief definition and history of the fair use defense. Part II demonstrates how the failure to adapt the fair use defense to re-contextualized works of art may undermine the viability of the postmodern artistic movement.¹⁷ Part II then briefly examines the postmodern movement by focusing on the rise of digital sampling in music, and more specifically, on a new form of music known as "Bastard Pop" or "Mash-ups."¹⁸ Part III examines one such work, DJ Danger Mouse's *The Grey Album*, to explore whether the fair use defense could save such an artist from a copyright infringement action, based on the theory that his work is transformative.¹⁹ It uses the four factor fair use analysis to

16. Much has been written about sampling and its relation to fair use, however, this Comment focuses more on whether an artist may seek shelter under the fair use defense when he or she takes quantitatively large pieces of different copyrighted material and fuses them together to create a truly transformative and therefore qualitatively new work. Therefore, this Comment focuses on potential judicial solutions to problems of an artist's use of copyrighted material. At least one commentator has put forth an interesting and compelling argument calling for a legislative solution to the problem of digital sampling. See generally Kenneth M. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J. L. & TECH. 187 (2004) (citing the situation surrounding Danger Mouse's *The Grey Album* as an example of the tension between ambitious but unfunded music producers and the copyright holders who decline to license their music for sampling, and arguing for amendment to the Copyright Act that would require compulsory licensing for digital music sampling).

17. Postmodern artists who create re-contextualized works of art often rely on older works as the source material for works that demonstrate new perspectives on existing ideas. See, e.g., Szymanski, *supra* note 7, at 319 n.216 (stating that through reconceptualization the newer work will often appeal to an entirely different market than the previous work). This type of use necessarily conflicts with current copyright interpretations which bar the unauthorized use of copyrighted material. 17 U.S.C. § 501 (2000). The fair use defense therefore becomes these artists' best hope to fight for legal allowance of what they feel to be a valid, and increasingly acknowledged, form of art. *Infra* Part II.

18. Bastard Pop (also known as mash-ups) reflects music where new artists take the background music of one song, and lay the lyrics of a very different type of song over that music to create a surprising new work. See WordIQ.com, *Definition of Bastard Pop*, http://www.wordiq.com/definition/Bastard_Pop (last visited Sept. 5, 2005) (providing a host of information about the term "bastard pop," including synonyms, history, subgenres, and external links).

19. In *The Grey Album*, Danger Mouse combined the lyrics of the rapper Jay-Z's *The Black Album* with music taken exclusively from The Beatles' *The White Album* to create his new work, without first receiving permission from either the owners of the rights to Jay-Z's songs or The Beatles' songs. See generally Elec. Frontier Found., *Grey Tuesday: A Quick Overview of the Legal Terrain*, http://www.eff.org/IP/grey_tuesday.php (last visited Sept. 5, 2005) (providing the background to the Grey Album dispute and the subsequent decision of hundreds of on-line activists to post *The Grey Album* on their websites in protest of EMI's actions, along with some legal analysis as to the rights of those websites to post the album);

elucidate the current uncertainty of the fair use defense in general, and the issue of transformativeness in particular. After analyzing *The Grey Album*, this Comment concludes that, in light of the relation between the goals of copyright and the increasing influence of postmodern expression, fair use can and should adapt to new re-contextualized works of art.

I. THE FAIR USE DOCTRINE & THE ISSUE OF TRANSFORMATIVENESS

A. *The Fair Use Defense*

Copyright protection involves the power of Congress to grant a limited monopoly of certain rights, such as reproduction and distribution, to artists as an incentive for them to create new works, which will ultimately be vested in the public domain.²⁰ Congress's power to grant such rights stems directly from the Constitution.²¹ Pursuant to this right, artists may obtain copyrights as soon as they create an original work in a tangible medium of expression.²²

Since the creation of the copyright, courts have questioned whether or not particular instances of infringement should be allowed. In the 1841 case *Folsom v. Marsh*,²³ Justice Story began to craft the fair use doctrine by outlining some of the key factors to consider in such a situation.²⁴ He

Shachtman, *supra* note 11 (presenting the background to *The Grey Album* dispute).

A recent article discussing the lack of clarity surrounding copyright laws and how they relate to the practice of sampling also seizes upon Danger Mouse's work as a focal point. See Bryan Bergman, *Into the Grey: The Unclear Laws of Digital Sampling*, 27 HASTINGS COMM. & ENT. L.J. 619 (2005). The author focuses largely on the need for legislative changes, such as a compulsory licensing scheme for sampling, yet seems skeptical about the possibility of expanding the fair use doctrine to cover works like *The Grey Album*. See *id.* at 642.

In contrast, this Comment focuses more broadly on whether re-contextualized works featuring large amounts of copyrighted material (be it a music sample or some other form of artistic expression) should fall under the fair use doctrine via the transformative doctrine. This Comment, therefore, examines Danger Mouse's work under the fair use analysis in order to demonstrate the potential success, not failure, of a fair use claim.

20. The copyright confers five exclusive rights to the copyright holder: the right to reproduce the work; the right to prepare a derivative work; the right to distribute the original work; the right to perform the work; and the right to publicly display the work. 17 U.S.C. § 106 (2000). Currently, works created after January 1, 1978 enjoy these rights for a period lasting the lifetime of the author, plus seventy years. 17 U.S.C. § 302(a) (2000).

21. See U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

22. See 17 U.S.C. § 102 (2000) (stating that a tangible medium of expression can be any medium "now known or later developed, from which [the work] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

23. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

24. Justice Story had to determine whether or not an alleged infringer should have been able to use portions of George Washington's letters, which had previously been published in another volume by the plaintiff. *Id.* at 345. Justice Story considered whether this use could be considered an abridgement, and if so, whether it should be allowed despite the use of

indicated that there might be fair uses of copyrighted materials, and that when evaluating such a defense, judges should “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”²⁵

The fair use doctrine helps to ensure that a copyright does not unfairly restrict the public’s access to protected works.²⁶ Partly for this reason, Congress eventually codified the fair use defense, along with the essence of Justice Story’s proposed factors, within the Copyright Act of 1976 (“Copyright Act”).²⁷ The preamble to the fair use defense section of the Copyright Act describes a few of the areas where Congress felt the fair use defense might apply: “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”²⁸ The fair use section goes on to list four key factors for the court to consider when an alleged infringer asserts a fair use defense: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁹ This list of factors is non-exclusive;³⁰ however, they are the only factors

copyrighted materials. *Id.* at 348. In this case, Justice Story ultimately felt that that the defendant had taken too much. *See id.* at 349 (establishing the foundations of the fair use defense, but finding defendant’s use to be unfair based on the fact that he appropriated three hundred and nineteen of plaintiff’s letters, and that the letters comprised a full one-third of defendant’s work).

25. *Id.* at 348.

26. *See* Leval, *supra* note 4, at 1107-08 (arguing that copyright should increase and not impede knowledge available to the public, and also noting that the stipulation in the Constitution that the right be granted “for limited [t]imes” indicates that it was not meant to be an absolute or moral right); *see also* Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 307-08 (2d Cir. 1966) (emphasizing that the fair use defense serves the public interest by ensuring the distribution of important works like biographies, historical works, or works that advance science or the arts). *But see* John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 481-86 (2005) (criticizing Justice Story’s formulation of the fair use test in *Folsom* as a drastic move from the utilitarian view of copyright—which considered transformative works to be entirely non-infringing—to a stricter, natural rights vision of copyright, which finds infringement based on substantial similarity and shifts the burden to the secondary user to prove fair use, even if the new work transforms the old one).

27. *See* 17 U.S.C. § 107 (2000)(presenting the four-factor fair use analysis). Although the statutory language appears quite similar to Justice Story’s presentation of key factors, some changes were made. For instance, Congress specifically noted within the first factor (the purpose and character of the use) that courts should consider whether the alleged infringer’s work “is of a commercial nature or is for non-profit educational purposes.” *Id.*

28. *Id.* § 107 pmbl.

29. *Id.* § 107.

30. *See id.* (“In determining whether the use made of a work in any particular case is a

listed in the statute itself.³¹

B. The Issue of Transformativeness

Judge Pierre Leval³² has argued that the issue of transformativeness is one of the most important, if not the most important, considerations in a fair use analysis.³³ According to Leval, for the work to be considered transformative enough to essentially create a new work, “the use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”³⁴ In terms of the types of uses that could be considered transformative, Leval suggests that excerpts used for criticism, parody, symbolism, and aesthetic declarations, amongst others, may qualify.³⁵

During their evaluation of a fair use claim, courts often will consider whether the alleged infringer has sufficiently transformed the original

fair use the factors to be considered *shall include . . .*” (emphasis added).

31. Commentators have debated whether there are any non-statutorily defined factors that courts either regularly consider or should consider. Some commentators find these supposed other factors to be “false factors.” See, e.g., Leval, *supra* note 4, at 1125-30 (arguing that a consideration of factors such as good faith, artistic integrity, and privacy rights unnecessarily diverts attention from the court’s proper consideration of the statutory factors).

In the context of digital music sampling cases, which will be further discussed in Part II, some commentators have argued that the courts should consider some specialized factors not mentioned in the Copyright Act. See, e.g., Johnson, *supra* note 8, at 156-61 (proposing that within digital sampling cases, courts consider such additional factors as “the importance of the sampled material both to the original recording and the allegedly infringing work,” “the frequency with which the sample is used in the allegedly infringing work,” and the “alteration of the sampled material,” amongst others).

32. Judge Leval is a United States Appellate Court Judge for the Second Circuit Court of Appeals.

33. See Leval, *supra* note 4, at 1110-13 (positing that the first factor of the fair use defense (purpose and character of the use) seeks to consider the justification of the work by questioning whether it “fulfill[s] the objective of copyright law to stimulate creativity for public illumination,” and suggesting that “the answer . . . turns primarily on whether, and to what extent, the challenged use is transformative.”).

Various courts, including the Supreme Court, have cited, approved, or adopted Leval’s characterizations of “transformativeness” and its importance. See, e.g., *Campbell v. Acuff-Rose Music, Inc. (Acuff-Rose)*, 510 U.S. 569, 579 (1994) (citing Leval, *supra* note 4, at 1111) (claiming the central purpose of the first factor is to determine whether the new work “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’”); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 112 (2d Cir. 1998) (noting and approving of the Supreme Court’s adoption of “Judge Leval’s helpful adjective ‘transformative’” in *Acuff-Rose*).

34. See Leval, *supra* note 4, at 1111 (arguing that the fair use doctrine is intended to promote the type of secondary use which “adds value to the original,” and which leads to “the creation of new information, new aesthetics, new insights and understandings” because the promotion of such uses will ensure the enrichment of society based on its free access to new works).

35. See *id.* (including as well works “criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original work in order to defend or rebut it”).

copyrighted material by adding some new value, or whether the infringer has simply copied the copyrighted material.³⁶ Despite the perceived importance of transformativeness and judicial attention to the aspect of fair use, courts have offered few concrete principles to help predict whether future courts will find a use to be sufficiently transformative. However, several guidelines have emerged.

1. *Parodies as transformative works*

In *Campbell v. Acuff-Rose Music, Inc.*,³⁷ the Supreme Court held that artists who create parodies may be allowed to use portions of copyrighted material in order to provide their audience with enough similarity to the original as to make the parody readily apparent.³⁸ The Court reasoned that parodies represent a desired form of social commentary,³⁹ and noted that few artists or copyright holders would license portions of their work to those who ridicule them.⁴⁰ In terms of transformativeness, the parodist takes an element of the original material and uses it in such a way that changes the original expression.⁴¹ When considering how much of the

36. See *Acuff-Rose*, 510 U.S. at 579 (stating that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works,” and that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use”). Some courts and commentators will be far more likely to approve of a use as fair if the end result is something new, based on the theory that the public should benefit from new works. See *id.* at 569 (finding that the defendants’ use of copyrighted material within a parody would most likely constitute a fair use based on the transformative nature of the work). If, however, the alleged infringer has merely copied the materials and added nothing of value, then the public clearly has not benefited from any new work, and the holder of the copyright has, in fact, been deprived of the copyright reward. See, e.g., *Castle Rock Entm’t, Inc. v. Carol Publ’g Group*, 150 F.3d 132, 142-43 (2d Cir. 1998) (denying a finding of fair use to an infringer who took pieces of dialogue from a hit television show and inserted them into a trivia book because the few questions framed around the excerpts added no real value and failed to transform the original material); Leval, *supra* note 4, at 1116 (arguing that if secondary use of copyrighted material fails to be transformative, then the fair use defense should be rejected).

37. 510 U.S. 569 (1994).

38. *Id.* at 588. In *Acuff-Rose*, the rap group 2 Live Crew had sampled portions of Roy Orbison’s “Oh, Pretty Woman” for their song “Pretty Woman.” *Id.* at 572-73. The Court found that 2 Live Crew’s song amounted to a parody on the naiveté of the Orbison song, and that the infringing use was a fair use. See *id.* (remanding the case to a lower court to determine only whether 2 Live Crew had substantially affected Orbison’s market for derivative rights).

39. See *id.* at 579 (noting that “[l]ike less ostensibly humorous forms of criticism, [parody] can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one”).

40. See *id.* at 592 (suggesting that there is no derivative market for parodies, since authors are highly unlikely to license critical reviews or parodies).

41. See *id.* at 579 (proclaiming that “parody has an obvious claim to transformative value” due to its ability to simultaneously criticize an old work while creating a new one). In this case, 2 Live Crew’s use of the Orbison bass riff and opening line create a familiar reaction in the audience, one which is quickly changed once the song turns into a rap that describes a whole different world than Orbison’s. See *id.* at 588-89 (discussing how 2 Live Crew used enough of the Orbison material to conjure up the tune for the audience, but then

copyrighted material an artist may use, the Court noted that the parodist must be able to use enough for the audience to recognize the reference, but cannot take so much that it will become a market substitute for the original.⁴² The Court, in considering the effect that the parody would have on the market for the original artist's work, stated that when "the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred."⁴³

Essentially, the Court suggested in *Acuff-Rose* that a use is transformative if (1) the artist has infused the old material with new expression or meaning (*i.e.*, parody uses the copyrighted material to criticize that material, but also creates a new work), and (2) that the use alters the original in such a way that the market for the original will not be affected (noting, of course, that the greater the amount of the original used, the more likely it will supersede the original, and thus affect the original's market).⁴⁴ In terms of the fair use analysis, if the court finds the work to be transformative within the first factor, and that such transformation makes market harm unlikely under the fourth factor, then the commercial or non-commercial aspect of the alleged infringing work will become far less important.⁴⁵ *Acuff-Rose* illustrates that parodies constitute valid transformative works by meeting these very criteria.

2. *Satire and transformativeness*

Though courts seem to have adopted the idea that an artist may fairly use copyrighted materials to parody the original, courts have thus far been less forgiving when it comes to satire. In *Dr. Seuss Enterprises v. Penguin*

added new lyrics and new sounds, thus keeping the use of the copyrighted material to the minimum amount necessary to achieve the parody).

42. *See id.* at 588 (noting that when considering the reasonableness of a parodist's use of copyrighted material beyond that which is necessary to conjure up the original work, courts must remain aware of the possibility that allowing too much to be taken will increase the likelihood of the new work serving as a market substitute for the old one).

43. *Id.* at 591. The Court went so far as to claim that "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." *Id.*

44. While *Acuff-Rose* dealt primarily with parodies, the Court's fair use analysis and its consideration of the issue of transformativeness is relevant beyond the context of parodies. *See Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 112 (2d Cir. 1998) (claiming that *Acuff-Rose* "clarified the fair use defense in general").

Outside the realm of parodies, for instance, courts have similarly concluded that a work should be considered transformative if new material has been added to create new meaning, and that such addition is sufficient to make market harm unlikely. *See, e.g., Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 518 (7th Cir. 2002) (stating that "[b]ook reviews and parodies are merely examples of types of work that quote or otherwise copy from copyrighted works yet constitute fair use because they are complements of . . . rather than substitutes for the copyrighted original").

45. *See Acuff-Rose*, 510 U.S. at 579 (finding that the more transformative a work is, "the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

Books U.S.A., Inc.,⁴⁶ the Ninth Circuit declined to find that an infringer's use of the characteristic style of Dr. Seuss was fair use when it appeared in a satire.⁴⁷ The court noted that the new work was not transformative, since it merely copied the style of Dr. Seuss and re-told the O.J. Simpson tale.⁴⁸ The work did not use Dr. Seuss' style to make fun of Dr. Seuss; it merely used it as a means of getting attention.⁴⁹ Unlike the parody in *Acuff-Rose*, the court felt that the new authors had demonstrated "no effort to create a transformative work with 'new expression, meaning, or message.'"⁵⁰ The court agreed with *Acuff-Rose's* parody-satire distinction, noting that parodies need to use the copyrighted material to quickly conjure up a reference to the audience, while satires do not. Satires merely use the substance or style of a recognizable work as a means for making fun of something else, and thus should not be allowed to seek shelter under the fair use defense.⁵¹

In *Dr. Seuss Enterprises*, although the infringer altered the material in such a way that there may not have been a market impact,⁵² his use of the material was not valid since it failed to be transformative.⁵³ As in *Acuff-Rose*, the court's conclusion on the issue of transformativeness essentially affected the first and fourth factors of the fair use test. However, because the Dr. Seuss satire failed to be transformative, the commercial aspect of that work weighed more heavily against the infringers, thus tipping the first factor against them and making the presence or absence of market harm less dispositive.⁵⁴

46. 109 F.3d 1394 (9th Cir. 1997).

47. *Id.* at 1401. The defendant wrote a book entitled *The Cat Not in the Hat*, in which he mimicked the style of verse and illustration of Dr. Seuss to provide a humorous take on the O.J. Simpson murder trial. *Id.* at 1396-97.

48. *Id.* at 1401.

49. *Id.*

50. *See id.* (quoting *Campbell v. Acuff-Rose Music, Inc. (Acuff-Rose)*, 510 U.S. 569, 579 (1994)) (describing as well how the absence of "new expression, meaning or message" allows the commercial purpose of the enterprise to weigh more heavily against a finding of fair use).

51. *Id.* at 1400 (citing *Acuff-Rose*, 510 U.S. at 580). *But see* *Tehrani*, *supra* note 26, at 497-501 (suggesting that from a utilitarian perspective, there is no real reason to differentiate satire and parody, since they both may lead to transformative new works, and concluding that the Court's parody-satire distinction "reduces fair use to a test about necessity," which further reflects the continuing move from a copyright based on utilitarian goals to a natural law-based copyright).

52. *See Dr. Seuss Enters.*, 109 F.3d at 1403 (noting that although the defendants claimed there was no market harm, they failed to provide any evidence substantiating that claim, thereby cementing the fourth factor against a finding of fair use).

53. *See Tehrani*, *supra* note 26, at 500 (contending that the court "virtually equated transformative use with parody," leading it to find the satire based on Dr. Seuss's work to be an invalid use).

54. In contrast to a parody, the court found the satirical purpose to be insufficiently transformative under the first factor of the analysis. *See Dr. Seuss Enters.*, 109 F.3d at 1400-01 (arguing that while the presence of a valid transformative purpose, such as parody, will mitigate the negative impact of a commercial purpose, in the context of a fair use

3. *Transformativeness in other contexts*

Aside from the parody-satire distinction, courts have offered few other indications as to when something will be transformative enough to justify a finding of fair use. Other cases surrounding the issue of transformativeness have focused mainly on how much new material or new value has been added to the taken material. In *Castle Rock Entertainment v. Carol Publishing Group*,⁵⁵ for instance, the Second Circuit rejected a fair use defense where the secondary user compiled a large amount of quotations and other materials from the TV show *Seinfeld*, and used that compilation in a trivia book entitled *The Seinfeld Aptitude Test*.⁵⁶ The court found the defendant's claim of transformativeness unconvincing, noting the minimal addition of any new expression in the book, as well as the failure of the new work to criticize or comment in any meaningful way on the show.⁵⁷ Here, the court's focus fell on both the minimal alteration, which reflected an invalid purpose (neither commentary nor parody) under the first factor of the fair use analysis, and on the lack of transformativeness which demonstrated a negative effect on the original's potential derivative market under the fourth factor.⁵⁸

Courts, as evidenced by these cases, consider transformativeness throughout their four factor fair use defense analysis, rather than considering it as a separate factor in itself. Even if a new work exhibits a change in tone or setting, courts will still be hesitant to find it a fair use if they disapprove of the purpose and character of the use.⁵⁹ Furthermore, it

defense, the absence of transformative purpose, combined with a clear commercial purpose, will weigh heavily against the infringer under the first factor). This combination also makes it far more likely that a court will find a significant market detriment under the fourth factor. *Id.*

55. 150 F.3d 132 (2d Cir. 1998).

56. *Id.* at 142-43.

57. *See id.* (concluding that "[a]ny transformative purpose possessed by *The [Seinfeld Aptitude Test]* is slight to non-existent" based largely on the book's failure to offer any real commentary or criticism of *Seinfeld*). The court also noted that while the new authors did in a literal sense transform the materials from one medium to another, they showed little to no transformative purpose in doing so, and that a transformative purpose is what will allow a finding of fair use. *See id.* (rejecting the argument that the defendants created the book to educate *Seinfeld* fans, citing statements by the defendants and the book itself that it is merely meant to entertain fans). Furthermore, the Court found that the new work harmed the original author's right to produce derivative products, noting that the lack of additional expression and the lack of commentary separated this case from ones involving parody and other transformative uses, where the derivative market is less likely to suffer such injury. *Id.* at 145.

58. *See id.* at 145-46 (finding that the new work harmed the original author's right to produce derivative products, and noting that the lack of additional expression and the lack of commentary separated this case from ones involving parody and other transformative uses, where the derivative market is less likely to suffer such injury).

59. *Compare* *Campbell v. Acuff-Rose Music, Inc. (Acuff-Rose)*, 510 U.S. 569, 579 (1994) (finding parody to be a valid transformative use because of its goal of social commentary combined with its inherent need to use copyrighted material to make fun of that copyrighted material), *with* *Dr. Seuss Enters.*, 109 F.3d at 1401 (declining to find satire to

is clear that courts will still evaluate how much was taken and whether there was an impact on the market for the original work.⁶⁰ However, if a new work adds enough new expression or new meaning for courts to determine that it amounts to a proper transformative purpose, it will then be more likely that courts will permit a greater use of copyrighted material (*i.e.*, in the case of parody), and will be less likely to find a negative market impact.⁶¹

Beyond the four factors, courts consistently examine two additional factors when looking at the transformativeness of a new work. The *Castle Rock* case illustrates how courts consider the amount and substantiality of the material that has been added to the old work.⁶² Courts also examine whether the added material has led to a significant change in the tone or expression of the piece.⁶³ These last two factors are particularly important when considering whether artists who take large portions of divergent copyrighted materials and re-contextualize those materials within a new work have sufficiently transformed the copyrighted work enough to succeed in a fair use defense. All of these factors work together: if there is a large amount of new material added, that might increase the chances of a change in tone, which would, in turn, provide evidence of a valid transformative purpose, while also making it more likely that the use will not have a negative market impact.

be fair use because it does not need to use copyrighted material to make fun of that material; rather, it unfairly uses copyrighted material as a means of attracting attention).

60. See, *e.g.*, *Acuff-Rose*, 510 U.S. at 588 (noting that courts must remain aware of the possibility that allowing too much copyrighted material to be taken will increase the likelihood of the new work serving as a market substitute for the old one, regardless of the artistic intent).

61. See *id.* at 579 (discussing how a parody's commentary on existing material essentially creates a new work, thus making it a valid transformative use); see also *Comedy III Prods., Inc. v. Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001) (emphasizing that within a right of publicity case, courts should consider whether the defendant's work was transformative by questioning whether the result is "so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness").

Judge Posner evaluates fair use claims in a similar fashion, although he refers to a complement-substitute distinction, where new works that add new material such that they complement the original are more likely to be fair use than ones that serve as substitutions for the original. See *Ty, Inc. v. Publ'ns Int'l, Ltd.*, 292 F.3d 512, 520 (7th Cir. 2002) (arguing that a Beanie Babies collector's guide has a greater fair use claim than a simple picture book with photos of Beanie Babies, since the former has useful material that helps the book serve as a complement to the original Beanie Babies, while the latter merely reproduces pictures, which violated Ty, Inc.'s right to produce derivative products).

62. See *Castle Rock Entm't, Inc.*, 150 F.3d at 145-46 (arguing that the lack of added expression or new material prevented a finding of a valid transformative purpose); *cf.* *Comedy III Prods., Inc.*, 29 P.3d at 811 (concluding that defendant's depiction of the Three Stooges was a literal depiction, thus evidencing a failure of transformativeness because nothing of note had been added to change their likenesses).

63. See *Acuff-Rose*, 510 U.S. at 589 (emphasizing how in addition to using a small amount of copyrighted work to conjure up the Orbison original, 2 Live Crew went on to significantly depart from the original's lyrics and added new sounds, resulting in new expression).

II. NEW FORMS OF RE-CONTEXTUALIZED ART

Since the goal of copyright is public enrichment, based on providing incentives for artists to create new works,⁶⁴ copyright should be able to adapt to new artistic styles and movements.⁶⁵ New artistic expression reflective of the postmodern movement, however, challenges the flexibility of copyright.⁶⁶

Postmodernism has emerged as a cultural viewpoint that rebels against the ordered, coherent, black or white view of the modern movement.⁶⁷ Postmodern expressive works defy conventional structure, praise irony, and often exhibit the incorporation of a variety of different styles as a means of demonstrating an “accepting of the fragmentation of contemporary existence.”⁶⁸ Many postmodern works rely on pastiche, or the imitation of existing styles, in part to express the postmodern notion that it is no longer possible to create new styles.⁶⁹ Postmodern artists, in short, create re-contextualized works that piece together materials of previously existing, but divergent styles to create new, often ironic expressions reflecting the disjointed nature of life in today’s society.⁷⁰

64. See *supra* note 1 and accompanying text (citing the U.S. Constitution for this principle).

65. As an example, when initially invented and for awhile after, photographs were not thought to be protected by copyright, since critics maintained that they were merely the product of a mechanical reproduction, not any creation by an author. See generally Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385 (2004) (discussing the history behind the Supreme Court decision on whether or not to extend copyright protection to photographs).

66. See Tehranian, *supra* note 26, at 493 (“With the rise of digital technology and the potential for new forms of appropriation (and new forms of art based upon the act of appropriation), the dangers of the modern infringement test are even more significant. Digital technology has enabled a world of new transformative uses in the arts likely to remain unexploited due to the threat of copyrights’ limits on derivative works.”); see also *infra* note 67 and accompanying text (discussing how postmodern works often appropriate existing works to build off of or comment on them); *infra* note 99 and accompanying text (predicting future conflicts between artists who make re-contextualized works of art and the holders of the original copyrights in question).

67. See Szymanski, *supra* note 7, at 280-82 (discussing postmodernism as the product of a decline in the appeal of the modern movement).

68. ALLREFER.COM, *Postmodernism, Architecture*, in ALLREFER REFERENCE & ENCYCLOPEDIA RESOURCE, <http://reference.allrefer.com/encyclopedia/P/postmoder.html> (last visited Sept. 5, 2005).

69. See Szymanski, *supra* note 7, at 280 n.37 (citing Frederic Jameson, *Postmodernism and Consumer Society*, in *THE ANTI-AESTHETIC: ESSAYS ON POST-MODERN CULTURE* 111-15 (Hal Foster ed., 1983)) (characterizing the postmodern experience in terms of pastich and schizophrenia).

70. For example, architecture from the 1960s until today has exhibited strong postmodern influences. ALLREFER.COM, *supra* note 68. Postmodern architecture represents a decisive break from the modernist architectural movement, a movement characterized largely by functional, yet often austere buildings. *Id.* In sharp contrast, “[p]ostmodern architecture is characterized by the incorporation of historical details in a hybrid rather than a pure style, by the use of decorative elements, by a more personal and exaggerated style, and by references to popular modes of building.” *Id.*

Postmodern art also reflects the re-contextualization trend. Szymanski, *supra* note 7, at

The increased use of digital music sampling demonstrates the postmodern influence on current popular music. The invention of new ways to record and manipulate recorded music has led to the development of new forms of expression within music.⁷¹ Techniques for altering music have been increasingly adopted by rap and hip-hop artists, to the point where digital sound sampling has become pervasive throughout the music industry.⁷² The ability to combine and manipulate music has allowed artists to appropriate existing material and alter it to create new expression.⁷³ This re-contextualization seems to fall comfortably within the larger realm of the postmodern movement.⁷⁴

One particular sub-genre of music, Bastard Pop or the Mash-up, closely reflects the postmodern method of re-contextualized expression.⁷⁵ The

284. Artists such as Robert Rauschenberg and Andy Warhol created works by silkscreening images onto canvas. *See id.* (analyzing Rauschenberg's technique); *see also* Comedy III Prods., Inc. v. Saderup, Inc., 21 P.3d 797, 811 (Cal. 2001) (describing the technique and message of Warhol's art). By taking material currently available and reproducing it on the canvas, Rauschenberg demonstrates the postmodern belief in the futility of creating a new work by succumbing to "frank confiscation, quotation, excerption, accumulation, and repetition of already existing [texts]." *See* Szymanski, *supra* note 7, at 284 (quoting David Harvey, *THE CONDITION OF POSTMODERNITY* 54-55 (1989)) (contrasting Rauschenberg's silkscreen of Reben's Venus with Monet's original interpretation of Titan's Venus).

71. Digital music sampling is a technique used by artists to record music, potentially modify it using a computer, and then play it back, either by itself, or within a new context. Szymanski, *supra* note 7, at 275-77. When artists digitally record sound, they use computer technology, such as the Musical Instrument Digital Interface (MIDI), which converts sounds into signals and stores them on a computer. *See* Sanjek, *supra* note 9, at 608-09 (discussing how the increase in music technology has allowed even regular music fans to participate in music directly, by using computers to manipulate sounds). This allows artists to then use the computer to manipulate the digitally recorded sounds, such as by adjusting the pitch or tempo of the music. Szymanski, *supra* note 7, at 276-77.

72. Szymanski, *supra* note 7, at 278-80; *see also* Sanjek, *supra* note 9, at 610 (noting that although sampling is most prominent in hip hop and rap, it has also been increasingly common to other forms of music).

73. According to one commentator, the increased availability and lowered cost to sampling technology like the MIDI "has led us to enter what some have called an Age of Plunder and Orgy of Pastiche, as the MIDI permits the possibility of deconstructing any available recording or any recordable material into a novel construction." Sanjek, *supra* note 9, at 612. Another commentator has added the view of the sampler as a postmodern artist who essentially builds music out of samples reflecting wildly divergent genres. *See* Szymanski, *supra* note 7, at 283 ("The postmodern sample artist has a nomadic attitude, treating all genres of music as interchangeable building blocks and advocating 'the reversibility of all the languages of the past.' . . . The contiguity of clashing styles that results often bewilders traditional musical meaning.")

74. *See* Szymanski, *supra* note 7, at 283.

75. Bastard Pop, also known as mash-up, is the name given to an increasingly popular genre of music, "which in its purest form, consists of the combination (usually by digital means) of the music from one song, with the a cappella [sic] from another." WordIQ.com, *supra* note 18. Usually mash-up artists will choose music and a cappella lyrics from two different artists, generally from completely different genres. *Id.*; *see also* A. Tacuma Roebuck, *Mash-ups combine music of diverse artists*, *THE TENNESSEAN*, Apr. 17, 2004, at 1D, available at <http://www.tennessean.com/entertainment/music/archives/04/04/50012849.shtml> (discussing how combinations of Eminem and Alan Jackson, or Snoop Dogg and John Coltrane, exemplify the strange fusion of the Bastard Pop genre). These artists attempt to combine (or re-contextualize) the works of

most famous (or infamous) Bastard Pop production belongs to DJ Danger Mouse, a Los Angeles based DJ who created an entire mash-up album by exclusively combining the a cappella lyrics of Jay-Z's *The Black Album* with music taken solely from The Beatles' *The White Album*.⁷⁶

The postmodern movement has led to the creation of re-contextualized music, which "favors eclecticism in form and musical genre, and often combines characteristics from different genres, or employs jump-cut sectionalization."⁷⁷ Many commentators argue that the use of sampling in general reflects the postmodern attitude of using materials of different genres as "building blocks" in the construction of new expressions.⁷⁸ Therefore, it seems only natural to find that Bastard Pop falls directly within the realm of postmodern expression. These Bastard Pop artists who juxtapose two disparate works of music "strive for musical epiphanies that add up to considerably more than the sum of their parts."⁷⁹ In a sense, mash-up songs, and particularly mash-up albums, go beyond what many pop songs that feature samples attempt to do. Within the Bastard Pop realm, artists take qualitatively large chunks exclusively from two sources, and combine them to create a re-contextualized work or a "totally different record."⁸⁰

Bastard Pop songs and albums, perhaps even more than the common practice of digital music sampling, reflect the postmodern goal of creating new expression through the re-contextualization of divergent existing material. The desire to promote the use of existing materials in new ways, filled with new expression, lies at the heart of the copyright fair use defense.⁸¹ Therefore, fair use should accept postmodern re-contextualized

divergent artists to create something new. WordIQ.com, *supra* note 18.

76. See Roebach, *supra* note 75 (describing the background and popularity of *The Grey Album*); see also *infra* Part III (providing more detail on *The Grey Album*).

77. FARLEX, *Postmodern Music*, in ONLINE DICTIONARY, ENCYCLOPEDIA AND THESAURUS, <http://encyclopedia.thefreedictionary.com/Postmodern%20music> (last visited Sept. 5, 2005). The increasing prominence of postmodern influences in music is in part tied to technological advancement in recording technologies. *Id.* For example, the invention of magnetic tape allows artists to edit recordings. *Id.* Later, studio artists (led by The Beatles) started experimenting with multi-track recording and layering, which enabled them to push vocals to the foreground, while setting up the music as a "wall of sound" behind the vocals. *Id.* Sampling was the next logical step—removing, using, or manipulating the background wall of noise. *Id.*

78. See Szymanski, *supra* note 7, at 283 (citations omitted) (arguing that the postmodern sample artist "punctur[es] one sign system in the name of another").

79. WordIQ.com, *supra* note 18.

80. Roebach, *supra* note 75. In contrast, many conventional pop artists will use a familiar sample as a background element to some new music simply to draw attention, while other DJs will create re-mixes of popular dance tracks by adding samples. See Sanjek, *supra* note 9, at 612-13, 615 (listing examples of these re-mixes).

81. See Leval, *supra* note 4, at 1109 (noting that "all intellectual creative activity is in part derivative," and that the fair use defense is therefore necessary to prevent the fact that "[m]onopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process").

expression as a valid transformative use, thus allowing artists who have created re-contextualized works to claim the fair use defense in an infringement action. It remains to be seen, however, whether such uses are sufficiently transformative.

III. THE GREY ALBUM

A. *Background to Dispute*

In January 2004, Brian Burton, who goes by the name DJ Danger Mouse, fused the a capella lyrics of Jay-Z's *The Black Album* with music taken exclusively from The Beatles' *The White Album* to create an entirely new album he called *The Grey Album*.⁸² Danger Mouse pressed 3,000 copies of his album,⁸³ and claimed that he created and distributed the album solely as a promotional item⁸⁴ and did not intend to sell it.⁸⁵ Soon, however, word about the album spread, and enthusiastic file sharers began to distribute the album across the internet.⁸⁶ Music reviewers also took note, with newspapers like *The Boston Globe*⁸⁷ and magazines like *Rolling Stone*⁸⁸ giving the album outstanding reviews.

Danger Mouse, however, had not received permission from the rights

82. Numerous articles provide further background on *The Grey Album*. See generally Renee Graham, *Jay-Z, the Beatles meet in 'Grey' area*, BOSTON GLOBE, Feb. 10, 2004, at E1, available at http://www.boston.com/news/globe/living/articles/2004/02/10/jay_z_the_beatles_meet_in_grey_area (assessing in detail individual songs on *The Grey Album*); Shaheem Reid & Joseph Patel, *Remixers Turn Jay-Z's Black Album Grey, White, and Brown*, MTV NEWS, Jan. 26, 2004, http://www.mtv.com/news/articles/1484608/01262004/jay_z.jhtml (describing the remixes of Jay-Z's a cappella release of *The Black Album*); Shachtman, *supra* note 11 (providing commentary on *The Grey Album* from EMI, music industry groups, copyright critics, DJ Danger Mouse, and others).

83. See Armstrong, *supra* note 12 (exploring different responses to *The Grey Album*'s copyright issues); See Joseph Patel, Producer of The Grey Album, Jay-Z/Beatles Mash-Up, Gets Served, MTV News, at http://www.mtv.com/news/articles/1484938/20040210/jay_z.jhtml?headlines=true (Feb. 10, 2004) (describing legal actions surrounding The Grey Album).

84. See Patel, *supra* note 83 (noting that Danger Mouse intended the album to be a limited edition).

85. Lauren Gitlin, *Jay-Z Meets Beatles, DJ Mixes Two Albums into One Classic*, ROLLING STONE, Feb. 19, 2004, at 18, available at <http://www.rollingstone.com> (click on "News" tab then "Archive" and search for "Danger Mouse" using the drop down "Other" category). In fact, Capitol Records, a division of EMI Group, seems to believe Danger Mouse's claim that he just wanted people to hear his album, and told on-line distributors of his album that they may well be "interfering with the intention of the very artist whose rights you purport to vindicate" by continuing to distribute the album that he agreed to cease distributing himself. Cease and Desist Letter from Capitol Records, to Downhillbattle.org (Feb. 23, 2004), http://www.downhillbattle.org/grey/emi_cd_letter.html [hereinafter Capitol Records].

86. Shachtman, *supra* note 11.

87. See Graham, *supra* note 82 (labeling *The Grey Album* "fascinating" and "the most intriguing hip-hop album in recent memory").

88. See Gitlin, *supra* note 85 (calling *The Grey Album* "an ingenious hip-hop record that sounds oddly ahead of its time").

holders to the music and sound recording copyrights of either The Beatles' music or Jay-Z's album prior to his use of their materials.⁸⁹ After the album spread across the internet, EMI Group (EMI), the owners of the sound recording rights to *The White Album*,⁹⁰ issued a cease and desist letter to Danger Mouse, as well as to retailers, ordering them to cease distribution.⁹¹ Danger Mouse agreed to cease, and has stated that he does not think EMI will take any further legal action against him, due in part to his compliance and the small number of albums that he pressed.⁹²

B. Fair Use Analysis

Although courts have not been entirely consistent in handling the issue of unauthorized *de minimis* sampling,⁹³ they have largely agreed that the unauthorized taking of more than a few notes amounts to copyright infringement, and that such use cannot be saved by the fair use defense.⁹⁴

89. See Elec. Frontier Found., *supra* note 19 (listing five rights-holders potentially involved in *The Grey Album* copyright dispute); Shachtman, *supra* note 11 (noting that Danger Mouse had not even asked permission to use the songs).

90. See Elec. Frontier Found., *supra* note 19 (discussing the relevant rights holders involved in the dispute, including EMI Group, which owns the sound recordings to The Beatles' *The White Album*).

91. See Shachtman, *supra* note 11 (specifying that EMI lawyers also sent cease and desist letters to certain record stores and eBay retailers selling *The Grey Album*).

92. Patel, *supra* note 83; Bill Werde, *Defiant Downloads Rise from Underground*, N.Y. TIMES, Feb. 25, 2004, at E3.

The battle did not end with Danger Mouse's agreement to cease distribution, however, as over 300 websites staged a one-day protest on the internet, which they called *Grey Tuesday*, where the websites either posted copies of *The Grey Album* on their websites for people to download, or they turned their websites grey for the day. *Id.* See Downhillbattle.org, *Grey Tuesday: Free the Grey Album*, Feb. 24, 2004, <http://www.greytuesday.org>, for more background information on both *The Grey Album* and the *Grey Tuesday* protest, as well as links to coverage of both the album and protest by other news organizations. Capitol Records, a division of EMI, sent cease and desist letters to many of these websites, ordering them to stop. Dean, *supra* note 11; see, e.g., Capitol Records, *supra* note 85 (demanding that Downhillbattle.org refrain from distributing *The Grey Album*). Despite the threats of legal action, sites continued to host the album, and some new sites even joined after Capitol Records sent the letters. Armstrong, *supra* note 12. In response to publicity of the event, as well as word of mouth about the album, over 200,000 people downloaded the album on *Grey Tuesday*, and up to 1,000,000 people overall have downloaded the album. See Danger Mouse, Bio, <http://www.djdangermouse.com/index3.html> (follow "Bio" hyperlink) (last visited Sept. 5, 2005) (estimating the total downloads at over 1,000,000); Andrew Unterberger, *Playing God—Jay-Z: The Black Album*, STYLUS MAG., July 20, 2004, <http://www.stylusmagazine.com/feature.php?ID=1121> (listing the number of *Grey Tuesday* downloads).

93. *Compare* Newton v. Diamond, 349 F.3d 591, 592 (9th Cir. 2003) (finding defendants' use of three notes to be *de minimis*), *with* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398-99 (6th Cir. 2004) (setting a bright line rule that the use of any sampled material, even if just a few notes, constitutes unfair infringement).

94. See generally Johnson, *supra* note 8, at 138, 140-56, 161-63 (examining the history of sampling and fair use, and arguing that samplers should be able to claim fair use); Szymanski, *supra* note 7, at 312-28 (providing an overview of sampling, copyright, and fair use, and concluding that most uses of sampled materials will be found unfair infringements, but suggesting that transformed samples may not suffer the same fate).

These courts have found that sampling, even with minor modification, represents the unfair copying of original material, and that such use can diminish the value of the original material, especially when the copied portion lies at the heart of what has been taken.⁹⁵

Nonetheless, courts seem less certain about whether a truly transformative sample should be allowed under the fair use doctrine. As discussed in Part I, the decision usually turns on whether the court finds the work to be transformative enough.⁹⁶ The court asks the following questions: does the work have a valid transformative purpose, has it only taken as much as is necessary to meet that purpose, has the transformation diminished the chance of a negative market impact, has there been a large amount of new material added to the taken material, and does the resultant work feature a different tone or expression? Although the Supreme Court seems to allow the use of copyrighted material in parodies based on the transformative doctrine,⁹⁷ Justice Kennedy has cautioned against over-broadening the doctrine, pointing out in his concurrence in *Acuff-Rose* that “[a]lmost any revamped modern version of a familiar composition can be construed as a ‘comment on the naiveté of the original’ because of the difference in style and because it will be amusing to hear how the old tune sounds in the new genre.”⁹⁸ This concern may weigh heavily against any future sampler who argues that his or her work is transformative enough to qualify under the fair use doctrine.

Although courts have remained averse to finding fair use in normal sampling infringement cases, the transformative doctrine offers a small glimmer of hope for artists who feel that their use of samples does serve a valid transformative purpose. Despite the fact that the issue involving DJ Danger Mouse is moot, the facts of the situation provide an interesting hypothetical. It is likely that a future conflict⁹⁹ will pose the important

95. See, e.g., *Jarvis v. A&M Records*, 827 F. Supp. 282, 291-92 (D. N.J. 1993) (finding copyright infringement where a defendant sampled a key portion of plaintiff’s work without authorization, noting that the portion taken was of great significance to the original, and thus, the infringement was likely to diminish the value of the original work); *United States v. Taxe*, 380 F. Supp. 1010, 1014-15 (C.D. Cal. 1974) (declining to allow a defendant’s re-recording of plaintiff’s work, despite some minor modifications, and holding that a finding of infringement would be proper as long as the material was still recognizable), *aff’d in part, vacated in part*, 540 F.2d 961 (9th Cir. 1976).

96. See *supra* Part I (discussing how courts will likely find uses that add new material or expression to be valid fair uses because of their transformative value, but will likely reject non-transformative uses).

97. See *supra* Part I.B.1 (explaining that the transformative doctrine applies where the artist has infused the old material with new expression or meaning and the use alters the original in a way that does not affect the market for the original).

98. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994) (*Acuff-Rose*) (Kennedy, J., concurring) (quoting *id.* at 583).

99. Although Danger Mouse complied with the cease and desist order and it is unlikely that EMI will pursue further legal action, see Patel, *supra* note 83 and accompanying text, the emerging trend of this genre will likely give rise to legal disputes. The success of *The*

question of whether re-contextualized works of art that combine quantitatively large amounts of copyrighted material to create qualitatively new works qualify as valid transformative uses under the fair use doctrine.¹⁰⁰

As discussed in Part I, when considering whether an alleged infringer's use is fair, courts will apply the four-factor fair use balancing test set out in the Copyright Act.¹⁰¹ Like most claims of fair use, Danger Mouse's would likely turn on whether a court would find his use to be sufficiently transformative.¹⁰² All four factors of the fair use test consider the transformativeness of a new work, with each factor's consideration of transformativeness affecting another factor's consideration. A finding of a transformative purpose would diminish the importance of the fact that the original work was an expressive work, allow for a greater amount of taking, and make a finding of market harm less likely. This finding of a transformative purpose likely would stem from the addition of new material that creates a new tone or expression.¹⁰³

1. Purpose and character of the use

Courts begin their consideration of the fair use defense by first examining "the purpose and character of the use, including whether such

Grey Album, the numerous other mash-ups featuring *The Black Album*, and the increasing popularity of the mash-up genre in general strongly suggests that artists will continue to create these works. See Reid & Patel, *supra* note 82 (describing at least four remixes of Jay-Z's a cappella version of *The Black Album*). On the other hand, EMI's initial response to Danger Mouse and its issuance of cease and desist letters to those posting *The Grey Album* on-line suggests that copyright holders will continue to fight these works. See, e.g., Roeback, *supra* note 75 (discussing the increasing popularity of mash-ups, and describing the wide range of artists used as source material, including artists from Eminem to Christina Aguilera to Alan Jackson); Shachtman, *supra* note 11 (comparing the views of activists who argue that artists like Danger Mouse should have the right to build off of copyrighted works with the policy of corporate music companies, like EMI, to use cease and desist letters "as a matter of course" whenever they suspect copyright violations); Unterberger, *supra* note 92 (discussing how a number of artists have now made their own mash-up albums featuring *The Black Album* as source material, including Danger Mouse's *The Grey Album*, *The Double Black Album* featuring Jay-Z on top of Metallica's *Black Album*, and *The Blue Album*, which combines Jay-Z with Weezer).

100. This Comment examines *The Grey Album* under the fair use test only, and will not discuss whether the *Grey Tuesday* protestors have a fair use defense to their posting of the album online. Also, given the rather substantial amounts of copyrighted material that Danger Mouse used, it is clear that his actions were infringing, so this section will only consider the fair use defense to copyright infringement.

101. The fair use factors include: (1) "the purpose and character of the use"; (2) the nature of the copyrighted material; (3) "the amount and substantiality of the portion used"; and (4) the effect of the use on the market for the original. 17 U.S.C. § 107 (2000).

102. See Leval, *supra* note 4, at 1110-13 (arguing that transformativeness is the most important element of the fair use analysis).

103. See *supra* notes 59-61 and accompanying text (arguing that if a new work adds enough new expression or meaning, factors such as the work's character or use and the impact on the market for the original work can be overcome).

use is of a commercial nature or is for nonprofit educational purposes.”¹⁰⁴ The Supreme Court has noted that, within this first factor, courts should evaluate whether the new work would merely supersede the original material, or whether it reflects a transformative purpose.¹⁰⁵ The question is whether the new work adds some new expression, meaning, or message that demonstrates a further purpose, such as commentary or criticism.¹⁰⁶ In addition, the more transformative the work is, the less likely that any commercial intent or other factor will weigh against it.¹⁰⁷

Courts have not been entirely clear in determining what constitutes a valid transformative purpose.¹⁰⁸ Most modern courts have adopted the Supreme Court’s parody-satire distinction, accepting the use of copyrighted material only if that material is used to convey a specific transformative message about the original work itself.¹⁰⁹ In outlining why parody is a valid transformative use, the Court in *Acuff-Rose* relied largely on Judge Leval’s discussions on transformativeness, combined with the idea that parody has redeeming social value.¹¹⁰ Leval argued that if the secondary use “merely repackages or republishes the original,” it would effectively duplicate or “supersede” the original, and that such a use is invalid.¹¹¹ The

104. 17 U.S.C. § 107(1) (2000).

105. See *Campbell v. Acuff-Rose Music, Inc. (Acuff-Rose)*, 510 U.S. 569, 579 (1994) (citing Leval, *supra* note 4, at 1111) (emphasizing that the primary issue is whether the work is transformative).

106. *Id.*; see also *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1217 (C.D. Cal. 1998) (declining to find defendant’s use of plaintiff’s Godzilla pictures and plot summaries to be fair, but noting that if the defendant’s book had been “dominated by commentary and critique, then it would most likely fall into the realm of fair use”).

107. *Acuff-Rose*, 510 U.S. at 579.

108. See *supra* Part I.B (comparing the treatment by courts of fair use and transformativeness in parodies, satires, and other contexts).

109. In drawing the parody-satire distinction, the *Acuff-Rose* Court argued that parody requires the use of material that is at least reminiscent of the targeted work because parody aims to imitate and manipulate the form, style, or content of a work so as to criticize or make fun of the work itself. *Acuff-Rose*, 510 U.S. at 580-81; see also *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (holding that “the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work”). In contrast, satire uses the form, style, or content of a familiar work in order to make fun of something else. *Acuff-Rose*, 510 U.S. at 580-81; cf. *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 137-38 (E.D.N.Y. 2001) (claiming that documentaries should be allowed to use samples of copyrighted expression belonging to the subjects they document in the same way that parodies require using portions of the original work to make their point).

110. *Acuff-Rose*, 510 U.S. at 579 (citing Leval, *supra* note 4, at 1111).

111. Leval, *supra* note 4, at 1111; see, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (declining to find the alteration of music into MP3 format as an adequate transformation); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108-09 (2d Cir. 1998) (holding that the mere retransmission of a work in a new medium (over a phone line) was not fair use since the character of the original broadcast was left intact). *But see Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 941-42 (9th Cir. 2002) (concluding that a secondary user has a valid fair use claim to the exact reproduction of material in a different format if that format is used for a different purpose, such as when an image is rescaled into a smaller size for use on an internet search engine because the thumbnail image would not be (nor could it be) used for the same purpose as the larger image).

Supreme Court adopted Leval's characterization of transformativeness, and similarly tied the creation of transformative works to the goals of copyright itself: "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."¹¹²

Even beyond parodies, if the secondary user builds on the original work by adding new value, insights, expressions, or information, then that transformative use reflects the goal of the fair use doctrine.¹¹³ For instance, courts have accepted non-parodies as transformative uses when the secondary user has added new material that sufficiently criticizes or alters the original,¹¹⁴ while rejecting claims of transformativeness when there has not been a sufficient change in expression.¹¹⁵

112. *Acuff-Rose*, 510 U.S. at 579 (citing Leval, *supra* note 4, at 1111). Leval suggests that criticism, commentary, parody, symbolism, and aesthetic declarations are among the potential transformative uses. Leval, *supra* note 4, at 1111; *see also* Comedy III Prods., Inc. v. Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001) (arguing that because copyright and the First Amendment both encourage creativity and expression, transformative works are "especially worthy of First Amendment protection" because, although a state's interest in rewarding the original author will outweigh the rights of an infringer who makes literal copies, the state's interest will be less in cases where the secondary user distorts the original to the point where market harm is unlikely).

113. Leval, *supra* note 4, at 1111. In fact, while *Acuff-Rose* adopted Leval's discussion of transformativeness within the context of parodies, *see supra* note 112 and accompanying text, Leval himself lists parody as only one of many possible transformational uses, *see* Leval, *supra* note 4, at 1111 (listing symbolism and aesthetic declarations as potentially transformative uses).

114. *See, e.g.,* NXIVM Corp. v. Ross Inst., 364 F.3d 471, 477 (2d Cir. 2004) (holding that defendant's addition of criticism and commentary to quotations of copyrighted material in a report meant to expose the plaintiff's organization as a cult sufficiently transformed the work); Ty, Inc. v. Publ'ns Int'l, Ltd., 292 F.3d 512, 519-21 (7th Cir. 2002) (arguing that a Beanie Babies collector's guide had a fair use claim because the addition of useful material on pricing to the copyrighted pictures of the toys created a complementary instead of a substitute product); *Hofheinz*, 147 F. Supp. 2d at 137 (allowing defendant's use of clips of plaintiff's monster films within a documentary which examined the genre, noting that "[t]he documentary appears intended to add something of value rather than simply copying the copyrighted expression that it documents").

115. *See, e.g.,* Ty, Inc., 292 F.3d at 519 (rejecting the fair use claim of a secondary user who merely reprinted copyrighted pictures of Beanie Babies in a picture book because it was a substitute product); Castle Rock Entm't, Inc. v. Carol Publ'g Group, 150 F.3d 132, 142-43 (2d Cir. 1998) (denying a fair use claim by secondary users who copied large amounts of quotations, pictures, and other materials from the television show *Seinfeld* for use in a trivia book on the show, noting that "[a]ny transformative purpose . . . is slight to non-existent" because the authors failed meaningfully to comment on or criticize the show); Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 78-79 (2d Cir. 1997) (declining to find defendant's use of a copyrighted poster in the backdrop of a television show to be transformative because the poster was used for the same decorative purpose as the original); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1375 (2d Cir. 1993) (finding that the defendant's use of copyrighted material in extensive plot summaries more closely amounted to an abridgment than a validly transformative use, but noting that discussions of plot may be allowed as long as the author builds off of it and adds criticism or commentary).

Courts have consistently rejected claims of transformativeness when the infringer merely reproduces the material in another format. *See, e.g.,* *A&M Records*, 239 F.3d at 1015 (declining to find the alteration of music into MP3 format as an adequate transformation); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 923 (2d Cir. 1994) (rejecting defendant's claim that photocopying of copyrighted articles constituted a transformative

In addition to transformativeness, however, courts must also consider the commercial or non-commercial purpose of the secondary use.¹¹⁶ According to the Supreme Court, a commercial use will generally weigh against the secondary use.¹¹⁷ In *Acuff-Rose*, however, the Court pointed out that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”¹¹⁸ The Court explained that the commercial nature of the work is merely one factor and not dispositive, especially considering that the uses listed in the fair use statute itself could be deemed commercial.¹¹⁹ In this way, the Court established a balancing test within the first fair use factor itself: heavily transformative works will likely weigh in favor of the defendant (despite a commercial purpose), while weak or non-transformative uses will weigh against the defendant (even if educational).

To succeed in the first factor, an artist like Danger Mouse would have to argue that the use of copyrighted material constitutes a valid transformative use.¹²⁰ This argument is based on the theory that re-contextualized works, as forms of postmodern art, convey a social benefit and infuse new expressions and meanings into the works that are taken, and that the new works critique or comment directly on the materials taken through the

purpose).

116. See 17 U.S.C. § 107(1) (2000) (stating that courts should consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes” (emphasis added)).

117. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (stating that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright”).

118. *Campbell v. Acuff-Rose Music, Inc. (Acuff-Rose)*, 510 U.S. 569, 579 (1994).

119. See *id.* at 584-85 (stating that “[i]f, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of [17 U.S.C.] § 107”); see also *NXIVM Corp.*, 364 F.3d at 478 (approving the lower court’s action in discounting the importance of the secondary work’s commercial nature after finding it to be sufficiently transformative); *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 308-09 (2d Cir. 1966) (citations omitted) (finding that many courts have allowed a fair use claim even where the use was partly motivated by commercial gain, and noting that a finding of commercial gain would be more appropriate if the purpose of the use was purely commercial and there was no possibility to advance the science or the arts). *But see Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (holding that the issue is not whether the sole motive is commercial, but “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price”).

120. The artist would have to be careful to note that the combination of the two sources leads to an altered experience instead of the mere re-transmission of the two sources, since re-transmission of copyrighted material, even within a new format or medium, is not protectable. See *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108-09 (2d Cir. 1998) (finding that defendant’s retransmission of plaintiff’s work was not fair use since the character of the original broadcast was left intact). The reviews of *The Grey Album* seem to indicate that this would not be a problem. See *infra* note 122 and accompanying text (arguing that *The Grey Album* acts like a parody in that it references famous artists and creates new expression by juxtaposing them).

juxtaposition that is created.¹²¹ Artists must establish that re-contextualization more closely resembles valid transformative uses like criticism, commentary, or parody because it uses works to comment on them directly,¹²² as opposed to satire, which conveys a different message and merely uses the material to attract attention.¹²³ In contrast, copyright owners would have to make the artist's effort seem more like that of a conventional sampler. For example, EMI could cite one pair of reviewers who suggested that Danger Mouse's success stemmed from his ability to manipulate The Beatles' music in such a way as to match the sentiments of the original Jay-Z songs.¹²⁴

121. *Infinity Broad. Corp.*, 150 F.3d at 108-09.

122. The Second Circuit has argued that fair use allows parodies because it provides the audience with a clear reference to the separate, underlying work, either because the copied material is famous, or because the secondary user attributes the taking to the original artist. *See Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (arguing that the original work must be the subject of the parody or manipulation so as to fulfill the public recognition of the original work). Although *The Grey Album* is clearly not a parody, this rule of public awareness would seemingly be met, since The Beatles and Jay-Z are both famous, and since Danger Mouse's title of the album is a direct reference to the combination of the names of the two combined albums. *See Graham, supra* note 82 (explaining the genesis of *The Grey Album*). Furthermore, the album demonstrates how re-contextualized works create their new expression by the juxtaposition of different materials—therefore, the re-contextualized works, even more than parodies, must necessarily use elements of the existing works. *See Szymanski, supra* note 7, at 283 (discussing how postmodern artists weave different genres of music together to create novel works).

123. A number of music reviewers have actually discussed the transformative effect of *The Grey Album*. *See, e.g., Eric Seguy, DJ Dangermouse: The Grey Album*, STYLUS MAG., Mar. 9, 2004, <http://www.stylusmagazine.com/review.php?ID=1794> (ascribing the success of the mash-up album to Danger Mouse's ability to break apart melodies by The Beatles, and then to use these pieces in incredibly inventive ways which sometimes "transform stale sentiments" in the original Jay-Z work, and sometimes work with the lyrics by adding new expression or meaning to "Jay-Z's intricate wordplay"). In fact, the reviewer noted that the album seems weakest when Danger Mouse simply loops bass-heavy Beatles' riffs behind the Jay-Z tracks. *Id.* This observation helps demonstrate the difference between the sampler and the artist who attempts a larger re-contextualization. Danger Mouse's success stemmed from his transformation of the music by using it in exciting ways that helped shine new light on both The Beatles' music and Jay-Z's lyrics, and he showed occasional weakness in moments where he seemed most like a sampling artist. *See id.; see also Graham, supra* note 82 (noting how Danger Mouse was able to use The Beatles in ways that give Jay-Z's music "great urgency and energy," and applauding Danger Mouse's ability to bring The Beatles "into the hip hop generation while giving props to the timeless innovation of the band, which through its boundary-breaking musical philosophy may have helped pave the way for the free-flowing deconstruction of rap music."). *But see Reid & Patel, supra* note 82 (explaining how *The Grey Album* succeeded not due to new expression, but to the way in which Danger Mouse was able to engineer The Beatles' music to reflect the personalities of the original Jay-Z songs).

These positive reviews help demonstrate how Danger Mouse's album could be considered validly transformative. *Cf. Leval, supra* note 4, at 1111 (considering a work that adds new value, insights, or expressions to the original work to be transformative). The reviewers focus on the new expression that Danger Mouse created and the new depths of understanding that he discovered by manipulating the works. *Cf. id.* (distinguishing between use that merely "repackages and republishes the original" and use that "adds value to the original" and transforms the work into a "creation of new information, new aesthetics, new insights and understandings," warranting protection by the fair use doctrine).

124. *See Reid & Patel, supra* note 82 (stating how "Danger Mouse renders the same

Secondary users would also have to respond to the first factor's consideration of the commercial or non-commercial nature of the product. This factor, however, may not affect them too negatively. As discussed above, the Supreme Court has noted that this is merely one factor among many, and that the greater amount of transformative value added, the less likely a finding of commercial purpose will weigh against the defendant.¹²⁵

In terms of *The Grey Album*, reviewers have widely praised Danger Mouse's ability to combine artists of different musical genres and eras in such a way as to create a "captivating"¹²⁶ or "ingenious"¹²⁷ new work. Because these reviewers have so often commented on the new expression created, Danger Mouse could have a credible argument that his work should be considered a valid transformative use.¹²⁸ These reviews provide evidence that listeners were able to clearly identify the new expression

sentiment [as the Jay-Z original] by flipping the shuffling drums and mournful piano of [The Beatles'] 'While My Guitar Gently Weeps'").

EMI could also claim that Danger Mouse's actions do not constitute fair use because they reproduce large amounts of materials for the same purpose (entertainment) as the originals. *See Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir. 2000) (finding defendant's copying of plaintiff's book to be unfair since it was for the same purpose of religious practice, noting that the defendant did not engage in any "intellectual labor [or] judgment" in the reproduction of the materials (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841))). In response, Danger Mouse could assert that his combination of the materials was skilled, and did involve such intellectual labor and judgment, as evidenced by the many reviewers who could not tell exactly what music came from which Beatles' song. *See infra* note 157 (describing reviewers' comments on the works' unrecognizable nature).

125. *See supra* note 118-119 and accompanying text (explaining the *Acuff-Rose* Court's view that a work's commercial nature is not dispositive). In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the Court held that the key to the commercial versus non-commercial factor "is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.* at 562. The Court then went on to note, however, that *The Nation* magazine's invalid purpose of copying elements of President Ford's autobiography stemmed from its desire to scoop *Time* magazine. *Id.* This suggests that the Court was concerned with *The Nation*'s creation of a substitute product, and also with its bad faith in doing so. In contrast, Danger Mouse's album, as discussed in the text, does not serve as a substitute for either The Beatles or Jay-Z's music. *Infra* notes 157-158 and accompanying text.

126. Graham, *supra* note 82.

127. Gitlin, *supra* note 85.

128. Although it is uncertain whether courts would consider what critics and commentators have to say about a given new work, the Court in *Acuff-Rose* affirmed Justice Holmes's admonition that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits," suggesting that judges will have to look beyond their own views on a work. *Campbell v. Acuff-Rose Music, Inc. (Acuff-Rose)*, 510 U.S. 569, 582 (1994) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)). Turning to evidence such as criticism and commentary seems a logical step—courts have done so in other contexts. *Cf. Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999) (holding that, in a case under the Visual Artists Rights Act, whether a work is of "recognized stature" is determined via expert testimony, and upholding a lower court decision which considered newspaper articles and letters when assessing the work in question's stature).

created out of the juxtaposition, thus reflecting Leval's conception of what fair use should protect.¹²⁹ If this is the case, then the commercial purpose portion of the first factor becomes less important, and Danger Mouse would have a strong chance of prevailing under the first factor.

2. *Nature of the copyrighted work*

Under the second factor, courts must examine the "nature of the copyrighted work."¹³⁰ Essentially, courts recognize that certain original works more closely reflect the "core of intended copyright protection than others," and that the taking of such works will weigh against the secondary user.¹³¹ Courts have determined that fictional works more closely reflect copyright's intended goals than do factual works, since "the law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."¹³² Fictional works or works of creative expression are therefore afforded more protection under copyright laws, which makes it harder to assert a fair use defense. However, courts must still consider this factor in light of the purpose of the use since some valid uses, like parody, require the use of fictional material.¹³³

The Grey Album takes material from two expressive works; therefore, the second factor would tilt against Danger Mouse. However, applying the Court's caveat from *Acuff-Rose* that parodies will necessarily require the use of expressive works, Danger Mouse could argue that re-contextualized works like mash-ups will also often, if not invariably, take portions of creative, expressive works.¹³⁴ Therefore, if courts would be willing to find re-contextualization to be a valid transformative use, then courts would also limit the extent to which the second factor tends to disfavor the defendant.¹³⁵

129. See Leval, *supra* note 4, at 1111 (arguing that fair use was intended to protect transformative works that exhibit new expressions, insights, or understandings).

130. 17 U.S.C. § 107(2) (2000).

131. See *Acuff-Rose*, 510 U.S. at 586 (holding that it will be harder for defendants to prevail on a fair use claim when they have copied works closer to "the core of intended copyright protection," and that creative expression falls within that category of core works).

132. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (citation omitted); see also *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966) (arguing that secondary users should be able to draw upon prior biographies under the fair use doctrine because there is a great public benefit in ensuring that historical or biographical works are disseminated to the public).

133. For example, in *Acuff-Rose*, despite holding that Orbison's work exhibited the type of creative expression that copyright protects, the Court noted that "[t]his fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works." 510 U.S. at 586.

134. See *WordIQ.com*, *supra* note 18 (defining the mash-up album as one which exclusively uses the a capella lyrics of one album and the music of another).

135. If a court was willing to hold that postmodern artists creating re-contextualized works almost invariably used existing, creative material in the same way that a parodist

3. *Amount and substantiality of the portion used*

Courts next consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”¹³⁶ and determine if that amount is reasonable considering the purpose of the use.¹³⁷ Additionally, courts must be mindful of the Supreme Court’s recognition that the “extent of permissible copying varies with the purpose and the character of the use.”¹³⁸ For instance, the Court has held that a “parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.”¹³⁹ The Court therefore recognizes that a valid transformative purpose like parody will require artists to take a portion of the copyrighted material to express their point. Exactly how much artists are allowed to use will depend on the purpose they assert,¹⁴⁰ but the Court noted that there usually will be some upper limit since the greater the amount used, the more likely there will be market substitution.¹⁴¹ The Supreme Court has noted, however, that in some instances a secondary user may use the entirety of the copyrighted work, such as where a person at home records a television program in order to watch it later.¹⁴²

This factor probably presents the largest obstacle to finding that a re-contextualized work constitutes fair use based on the quantitatively large amount of copyrighted material that will generally be used.¹⁴³ For

almost invariably uses creative, existing material, then the court would likely also extend the *Acuff-Rose* view that the second factor becomes less important because it is something that a potential fair user (re-contextualist or parodist) would be unable to get around. *Supra* note 133 and accompanying text.

136. 17 U.S.C. § 107(3) (2000).

137. *Acuff-Rose*, 510 U.S. at 586.

138. *Id.* at 586-87.

139. *See id.* at 588-89 (noting that 2 Live Crew took the familiar opening bass riff and first line from Orbison’s song to conjure up the original, but that 2 Live Crew went on to make substantial changes from the Orbison lyrics to create its parody).

140. *See id.* at 588 (postulating that reasonable use will depend on “the extent to which the song’s overriding purpose and character is to parody the original”).

141. *See id.* (limiting the allowance of a use where there is a “likelihood that the parody may serve as a market substitute for the original”). The Second Circuit has interpreted *Acuff-Rose* as suggesting that parodies will allow even more than necessary to simply conjure up the original, leading it to comment that such an “approach leaves the third factor with little, if any, weight against fair use so long as the first and fourth factors favor the parodist.” *See Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 (2d Cir. 1998) (holding that defendant’s use of more copyrightable expression than was necessary to conjure up the plaintiff’s picture did not weigh against the defendant, since the defendant also evidenced a valid purpose under the first factor and there was no significant negative market impact under the fourth factor).

142. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984). *But see Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992) (affirming that there are limitations to the extent that even parodies can use copyrighted materials).

143. Even small amounts can be too much. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985) (finding that although the infringers had used only an insubstantial portion of the plaintiff’s book, they had appropriated the heart of the book); *see also Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398-99 (6th Cir. 2004) (setting a bright line rule that the use of any sampled material, even if just a few notes,

example, *The Grey Album* uses almost every lyric of Jay-Z's *The Black Album*, and also uses a fairly large amount of music from *The White Album*,¹⁴⁴ certainly far more than the *de minimis* amount that some courts have allowed.¹⁴⁵ However, courts must consider the amount taken in light of the purpose of the use. Re-contextualized works, like parodies, necessitate the use of copyrighted material to reference and build off of the original source. However, a re-contextualized work like a mash-up album will require the use of almost all of the copyrighted material in question to effectively convey its purpose, since mash-ups by definition use the a capella lyrics from one source over the stylistically different music of another source.¹⁴⁶ Mash-up artists convey their purpose through the forced juxtaposition of seemingly irreconcilable works which, through the creativity and skill of these artists, often end up expressing interesting or compelling new visions.¹⁴⁷ This expressive purpose therefore requires a greater taking than a parody, which must simply conjure up the original work.

An artist certainly would face an uphill battle in convincing courts, which are quite averse to allowing the use of even minor samples, that they should allow large scale takings. However, if courts are willing to accept re-contextualization as a valid transformative purpose because it is a common postmodern form of expression, then courts must be more lenient about allowing artists to use as much as is necessary to successfully convey their intended expressions.¹⁴⁸

4. *Effect of the use on the market*

The final fair use factor instructs the courts to consider "the effect of the

constitutes unfair infringement).

144. See Capitol Records, *supra* note 85 (stating how *The Grey Album* includes "extensive samples" from *The White Album*, including material from at least fifteen different songs).

145. See *supra* note 93 and accompanying text (comparing the Ninth Circuit's view in *Newton v. Diamond*, that a sample with three notes constituted a *de minimis* use with the Sixth Circuit's bright line rule against sampling of any material, no matter how little in *Bridgeport Music, Inc.*).

146. WordIQ.com, *supra* note 18.

147. See *supra* Part II (outlining the purpose of the mash-up album).

148. See *Campbell v. Acuff-Rose Music, Inc. (Acuff-Rose)*, 510 U.S. 569, 588 (1994) (discussing how the amount that a secondary user may copy will depend on the purpose of the new work). This means that a court would have to extend even greater protection to re-contextualized works than to parodies, based on the recognition that re-contextualized works require the use of greater portions. *Id.* Although courts have set limits on the amount that parodies can take, there is the possibility that certain courts would be amenable to the larger taking, so long as the new work was still referential to the existing one by incorporating and acknowledging the old work within the new one. *Id.*; see also *Rogers v. Koons*, 960 F.2d 301, 310-11 (2d Cir. 1992) (stating that there are limits to the amount parodies can take, but also noting that fair use's allowance of parody derives from the fact that it allows the audience to recognize the original work).

use upon the potential market for or value of the copyrighted work.”¹⁴⁹ Courts must determine “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”¹⁵⁰ Furthermore, courts must also consider not only the direct harm that the use poses to the original’s market, but also any effect that it may have on the market for derivative works by the original author.¹⁵¹ The Supreme Court has considered this to be the most important factor in the fair use test.¹⁵² At one time, the Court suggested that a finding that the new use was commercial would create a presumption that it would have a negative market impact on the original.¹⁵³ However, in *Acuff-Rose*, the Court retreated from this position by concluding that certain transformative uses, although commercial, would likely pose far less harm to the original product’s market, since parodies and the originals they mock “usually serve different market functions.”¹⁵⁴

In terms of the impact on a derivative market, *Acuff-Rose* suggested that courts must consider whether the use is the type that “creators of original works would in general develop or license others to develop.”¹⁵⁵ Since it is highly unlikely that an author would develop or license others to develop works that criticize their original work, the Court concluded that “there is no protectable derivative market for criticism.”¹⁵⁶

An artist like Danger Mouse faces some difficulty with this factor. For example, Danger Mouse’s work potentially affects the primary and derivative markets of The Beatles and Jay-Z. Danger Mouse’s best chance

149. 17 U.S.C. § 107(4) (2000).

150. *Acuff-Rose*, 510 U.S. at 590 (citation omitted).

151. *Id.*; see, e.g., *Castle Rock Entm’t, Inc. v. Carol Publ’g Group*, 150 F.3d 132, 142-43 (2d Cir. 1998) (noting that the defendant’s creation of a trivia book based on material taken from *Seinfeld* violated the plaintiff’s right to produce derivative works).

152. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566-67 (1985) (citing the fourth factor as “undoubtedly the single most important element of fair use,” and agreeing that fair use should be limited to instances where the copying does not impair the market for the original) (citation omitted).

153. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (suggesting that the likelihood of market harm could be presumed if the secondary use had a commercial purpose, while if the secondary use was non-commercial, then the market harm would have to be proved).

154. *Acuff-Rose*, 510 U.S. at 591; see also *Ty, Inc. v. Publ’ns Int’l, Ltd.*, 292 F.3d 512 (7th Cir. 2002) (distinguishing secondary uses between complementary products which feature new materials and are more likely to be fair use, and substitute products that essentially supersede the market for the original and are thus unlikely to be fair use).

155. *Acuff-Rose*, 510 U.S. at 592.

156. See *id.* (finding that there was no derivative market for Roy Orbison parodies, since it was unlikely that Orbison would license his work for parody). However, the Court went on to note that 2 Live Crew’s work was not only a parody, but also contained rap music, that Orbison could have licensed his work for use in derivative rap works, and therefore, 2 Live Crew needed to establish on remand that their work did not significantly affect this derivative market. *Id.* at 592-94.

at succeeding under this factor would be to assert that his work is (1) non-commercial and (2) a highly transformative work, and that the combination of these factors makes market substitution unlikely.

While Danger Mouse seized a large portion of *The White Album*, he chopped it up and rearranged it extensively, leading reviewers to have to guess which samples came from which Beatles' songs.¹⁵⁷ In fact, many reviewers suggested that the beauty of Danger Mouse's work is that it could bring The Beatles into the hip hop generation, suggesting that if anything, there would be a positive impact on the market for *The White Album*.¹⁵⁸

Regarding The Beatles' market for derivative goods, Danger Mouse would stand on less firm ground. The increasing popularity of the mash-up genre suggests that artists may very well desire to license their works in any way that will make them money or bring them added recognition.¹⁵⁹ If this is the case, then Danger Mouse would have to argue that EMI (as owner of the rights to The Beatles' music) foreclosed any potential derivative market by universally rejecting any and all access to The Beatles' music for sampling purposes.¹⁶⁰ Many critics see these types of

157. See, e.g., Graham, *supra* note 82 (noting that Danger Mouse's manipulation of The Beatles' material goes so far at times as to make the original "nearly unrecognizable"); Roebuck, *supra* note 75 (listing only five of *The Grey Album* tracks with their source material under the header "here's what we know").

158. See, e.g., Graham, *supra* note 82 (describing the album as 2004's most captivating album since Danger Mouse was able to bring "[t]he Beatles into the hip hop generation"); Reid & Patel, *supra* note 82 (opining that *The Grey Album* may open up the world of classic rock to "rap fans who didn't know they like the Beatles").

However, even a showing that the new work may benefit the old work is not enough on its own to excuse the secondary use. See *Acuff-Rose*, 510 U.S. at 590 n.21 (citing *Leval*, *supra* note 4, at 1124 n.84) (discussing Judge Leval's example that a film producer's unauthorized use of an unknown song may bring that song fame, but that it does not necessarily mean that the use is fair). Courts must continue to weigh the other factors. *Id.*

159. In fact, Jay-Z paired up with Linkin Park at a live performance to mash-up their respective works on the first episode of "MTV Ultimate Mash-Ups." *MTV Ultimate Mash-Ups: Jay-Z vs. Linkin Park* (MTV television broadcast Nov. 10, 2004). If the recent mainstream success of the mash-up genre can be traced in part to the critical acclaim surrounding Danger Mouse's work, then it seems again like copyright should allow such works to occur. After all, if EMI had been able to prevent the distribution of *The Grey Album* entirely, then perhaps major media sources like *The Boston Globe*, *Rolling Stone*, and *The New York Times* would not have noticed the new trend. See Roebuck, *supra* note 75 (citing *The Grey Album* as the most famous mash-up, and concluding that the circulation of the album over the internet and the subsequent media coverage amounted to "tons of priceless publicity"); see also Jon Wiederhorn, *Jay-Z and Linkin Park Show Danger Mouse How It's Done*, MTV NEWS, Oct. 10, 2004, http://www.mtv.com/news/articles/1491889/20041004/jay_z.jhtml?headlines=true (discussing how Jay-Z developed the idea to do a mash-up with Linkin Park's Mike Shinoda after hearing about Danger Mouse's *The Grey Album*).

160. See, e.g., Patel, *supra* note 83 (noting that despite many re-mixes or mash-ups involving Jay-Z's album, *The Grey Album* was "the only one that dared to use music from the Beatles' guarded catalog"); Shachtman, *supra* note 11 (stating that the Beatles' "song catalog has been notoriously off-limits to hip-hop and dance-music producers' manipulations"); Werde, *supra* note 92 (stating that The Beatles will not allow their music

refusals (or the prohibitively high licensing costs established by other rights holders) as unfairly restrictive of new creative expressions.¹⁶¹ If artists or copyright holders do not allow access to their music, even via licensing, then perhaps there is no viable derivative market for the courts to consider. Courts will have to weigh the right of the original artist to withhold music from the public domain versus the rights of other artists to use that original material in innovative and transformative new ways which will benefit the public.¹⁶² If courts want to stay true to copyright's goal of ensuring that creative new works get to the public, then they may want to allow such uses even in the face of stubborn refusals to license.¹⁶³ One legal commentator has even suggested that the fair use defense should be used to directly address market failures, such as instances when bargaining is

to be sampled).

The Electronic Frontier Foundation goes even further, arguing that EMI does not even own any federal copyrights in *The White Album* at all, since federal copyright does not protect sound recordings made prior to 1972. See Elec. Frontier Found., *supra* note 19 (arguing that if this is the case, EMI may have no valid complaint against Danger Mouse or the Grey Tuesday protestors except under state laws).

161. See, e.g., Dean, *supra* note 11 (offering the view of Downhillbattle.org's co-founder (the website that organized the Grey Tuesday protest) that "[m]usicians have a right to make albums like *The Grey Album*, and when something great and culturally important like this album gets made, the public has a right to hear it."); Shachtman, *supra* note 11 (quoting Harvard Law School professor Jonathan Zittrain as saying that such refusal characterizes "copyright as a means of control, rather than a means of profit," and that copyright is supposed to ensure that artists make money, not that they are able to prevent the creativity of others).

Some critics have wondered why EMI will not retroactively license the rights to Danger Mouse, since his album could clearly bring them a fair amount of money. Dean, *supra* note 11. However, others have noted that licensing fees often run so high; mash-up artists that must split fees amongst the two different artists would essentially have to pay out everything that they made. See Werde, *supra* note 92 (reporting that a copyright holder will often request up to fifty percent of the publishing rights for a new song, so that mash-up artists who use two sources would have to sign away up to one hundred percent of the publishing rights to their new songs).

162. In fact, this balance lies at the heart of the very purpose of copyright protection. See *supra* note 1 and accompanying text (describing that the purpose of copyright law is to promote the expression of new and colorful ideas while protecting original work product). But see Tehrani, *supra* note 26 (arguing that since *Folsom v. Marsh*, courts have begun shifting away from this utilitarian purpose towards one founded in natural law).

163. See *Acuff-Rose*, 510 U.S. at 592 (finding parody to be fair use in part due to the fact that there is no derivative market for criticism, since artists are unlikely to license works to others that want to make fun of them). Similarly, artists may be unlikely to license works to young, unknown artists who may alter their music in ways that they do not want. See Roebuck, *supra* note 75 (citing the Beastie Boys as one example of an artist who has refused to authorize a license to a Belgian DJ duo). If courts adopt the view that re-contextualized works can provide valuable social commentary, then they may allow it despite refusals. See Elec. Frontier Found., *supra* note 19 (suggesting that although a case-by-case consideration is warranted, a credible fair use defense may circumvent a copyright infringement claim). Courts have found a re-contextualized work to be transformative and therefore most likely fair use. See, e.g., *Comedy III Prods., Inc. v. Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001) (citation omitted) (arguing that Andy Warhol's silkscreening of celebrities provided ironic social commentary).

prohibitively expensive.¹⁶⁴ Another commentator addressed this issue specifically in light of the *Acuff-Rose* case, which he felt demonstrated the fact that licensing transactions often fail for a number of reasons, such as times where an old artist declines to license his or her work to a new one simply because he or she does not like what the new artist intends to do.¹⁶⁵

Jay-Z, had he decided to protest Danger Mouse, would stand a better chance than The Beatles at defeating the fair use claim because his work is used almost in its entirety. *The Grey Album*, as a mash-up album, seizes almost all of the original Jay-Z lyrics and lays them over altered music from The Beatles' *The White Album*. Danger Mouse did not transform Jay-Z's lyrics in the same way that he transformed The Beatles' music.¹⁶⁶ However, Danger Mouse could assert that the transformation of Jay-Z's work comes primarily through the re-contextualization itself, that is, that Jay-Z's lyrics are in a sense altered when paired with classic rock instead of the original music.¹⁶⁷ If that were the case, Danger Mouse could further claim that the new sound would in no way impair Jay-Z's primary market, as listeners would not consider the music to be the same.

Jay-Z's derivative market may also have been affected. The increasing popularity of the mash-up movement tends to curtail any argument that there is no derivative market in re-contextualized works.¹⁶⁸ If Jay-Z were to bring a lawsuit, Danger Mouse could only claim that his work was noncommercial. Jay-Z's inaction, however, suggests that many currently

164. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economics Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1614 (1982) (stating that "[f]air use should be awarded to the defendant . . . when (1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner").

165. See Robert P. Merges, *Are You Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305, 309 (1993) (noting, in particular, that the plaintiffs refused the defendants' requests for a license and yet later claimed that the defendants' use was unfair since it undermined their economic rights).

166. See, e.g., Corey Moss, *Grey Album Producer Danger Mouse Explains How He Did It*, MTV NEWS, Mar. 11, 2004, http://www.mtv.com/news/articles/1485693/20040311/jay_z.jhtml?headlines=true (presenting Danger Mouse's explanation of how he mixed the two albums together, including discussion of how Danger Mouse had to score all thirty songs on *The White Album* and painstakingly create beats from the original materials, which he could then sync to the lyrics he lifted completely from Jay-Z's *The Black Album*).

167. A reviewer commented that Danger Mouse used The Beatles' music in incredibly inventive ways which sometimes "transform stale sentiments" in the original Jay-Z work, and sometimes work with the lyrics by adding new expression or meaning to "Jay-Z's intricate wordplay." Seguy, *supra* note 123.

168. In fact, MTV's new show "MTV Ultimate Mash-Ups" featured a live mash-up of Jay-Z and Linkin Park in its very first episode. Guzman, *supra* note 159; *MTV Ultimate Mash-Ups*, *supra* note 159. Furthermore, Jay-Z fully realized the potential uses of his album, and directly attempted to capitalize on these uses by releasing an a capella version of his album. According to his sound engineer, he released the lyrics-only version so that DJs could "re-mix the hell out of it." Shachtman, *supra* note 11; Reid & Patel, *supra* note 82. This demonstrates that there is a thriving derivative market for re-contextualization, especially for artists like Jay-Z.

popular artists may in fact understand the importance of not inhibiting creativity. Nevertheless, a court would likely find that Jay-Z's derivative market had been negatively affected.

Ultimately, this factor would largely boil down to (1) how transformative a court would find the work and (2) whether a court would accept Danger Mouse's claim that it was meant to be non-commercial.

5. *Other factors—The amount added and new expression*

In addition to the four factors discussed above, courts have also commented on the amount of new material that a secondary user has added to the original material, and the resulting change in tone or expression created by the new additions.¹⁶⁹ Courts are more likely to find a use transformative, thus increasing its chances of being found a valid fair use, when the new artist has added a large amount of new material.¹⁷⁰

Although Danger Mouse exclusively used material from two copyrighted sources, his addition of one work to the other demonstrates a large amount of new (or at least foreign) material that was added to each original. The Beatles' music is altered by the addition of rap lyrics, while Jay-Z's work is altered by the background of classic rock music.¹⁷¹ If courts are to accept mash-ups or other re-contextualized works, they may consider the amount of material that has been added to each copyrighted work, and whether the large additions are what provide the transformative change in tone and expression.

CONCLUSION

The rise of postmodernism has brought surprising and sometimes shocking re-contextualized works of art to the forefront of today's

169. Compare *Campbell v. Acuff-Rose Music, Inc. (Acuff-Rose)*, 510 U.S. 569, 589 (1994) (noting that in addition to taking elements of Orbison's music, 2 Live Crew added scraper effects and new rap lyrics in such a way as to transform the original into a parody), with *Comedy III Prods., Inc. v. Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001) (noting that defendant's work failed to be transformative since it was merely a literal depiction of the Three Stooges).

170. See, e.g., *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132, 145-46 (2d Cir. 1998) (rejecting a fair use claim where defendants used large portions of copyrighted material for a trivia book and failed to add any significant expression, criticism, or commentary to the material they appropriated); *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1217 (C.D. Cal. 1998) (denying defendant's fair use claim where the failure to add criticism or commentary resulted in the new work amounting to mere plot summaries of Godzilla movies).

171. Commentators have noted Danger Mouse's skill in manipulating the works to make them work together, as opposed to simply laying unaltered lyrics over unaltered music. See, e.g., Armstrong, *supra* note 12, at 12 (quoting Stephen Webber, a music production professor, as saying that "[b]y limiting himself to two records, DJ Danger Mouse was challenging himself . . . [i]t requires skill"); Gitlin, *supra* note 85 (arguing that the manipulations and interesting combinations ensure that *The Grey Album* is not simply a straightforward mash-up album).

culture.¹⁷² This new mode of expression has generally been met with approval by the public,¹⁷³ yet has not been so favorably greeted by copyright owners.¹⁷⁴ Postmodern artists often seek to use and combine currently existing materials in order to express their views, yet many of the rights holders to these original materials seem hesitant to license permission to (often unknown) artists who clearly intend to manipulate the meaning of the original work. Even when rights holders are willing to license their works, the licensing fees often exceed what the new artist can afford.¹⁷⁵

Certain courts sympathetic to copyright holders no doubt would suggest a bright line rule,¹⁷⁶ where new artists either have to license the existing material or else create something truly new instead of simply mashing up and capitalizing off of the success of other artists. But all artists build on what comes before them. In the words of Ninth Circuit Court of Appeals Judge Kozinski, “[n]othing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it’s supposed to nurture.”¹⁷⁷ Postmodernism, in a sense, is simply more honest about the appropriation involved. Postmodernism reflects the view that there is nothing new to create, or that everything new already has been created.¹⁷⁸ That is why postmodernism relies so heavily on pastiche, or bits and pieces of existing

172. See, e.g., *Comedy III Prods., Inc.*, 21 P.3d at 811 (describing Warhol’s silkscreened paintings of Marilyn Monroe); Jackie Craven, *Great Buildings: AT&T Headquarters*, <http://architecture.about.com/library/bl-johnson-att.htm> (last visited Sept. 5, 2005) (showing and describing the Philip Johnson Sony Building (formerly the AT&T Building) in New York City, a skyscraper adorned with a baroque pediment); *MTV Ultimate Mash-ups*, *supra* note 159 (featuring a live concert by Linkin Park and Jay-Z).

173. For example, over one million people have now downloaded *The Grey Album*. See *Danger Mouse*, *supra* note 92 (“With one million downloads in just one week . . . the release of the *Grey Album* is considered a watershed moment in music history.”).

174. For example, EMI has sent out cease and desist letters not only to *Danger Mouse*, but also to websites posting the music. *Dean*, *supra* note 11; see, e.g., *Capitol Records*, *supra* note 85 (demanding that *Downhillbattle.org* refrain from distributing *The Grey Album*).

175. See *supra* note 161 and accompanying text (noting that refusal to license the works to a new artist can often sacrifice creativity in an effort to obtain profit).

176. See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398-99 (6th Cir. 2004) (setting a bright line rule that the use of any sampled material, even if just a few notes, constitutes unfair infringement).

177. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting); see also *Leval*, *supra* note 4, at 1109 (“First, all intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention Second, important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural science require continuous re-examination of yesterday’s theses.”).

178. See *Szymanski*, *supra* note 7, at 280-82 n.37 (presenting Frederic Jameson’s view that the disintegration of modern forms and style has lead artists in a state where invention is not really possible).

material.¹⁷⁹

The postmodern assertion that there is nothing truly new is valuable social commentary in itself. The reflection of this idea in re-contextualized works should therefore be allowed if copyright really does promote the sharing of new expressions with the public. The expression of this social commentary, that everything new has already been created, could very well fit within the fair use defense's current allowance of works that amount to commentary. Fair use should adapt to allow truly transformative re-contextualized works of music and art since they are referential (*i.e.*, the audience generally knows what works are involved),¹⁸⁰ they are complementary to the originals,¹⁸¹ and they are transformative because they create a new expression via the juxtaposition of the different works.¹⁸² Like parodies, postmodern works necessarily require the use of the copyrighted material that they seek to reference.¹⁸³ Courts should therefore consider extending the protections afforded to parodies to re-contextualized works as well.

This does not mean, however, that every mash-up album, or even every use of sampling, should qualify for protection. Fair use seeks to allow only the truly transformative, that which adds "new information, new aesthetics, new insights and understandings."¹⁸⁴ As consistent with this policy, postmodern works succeed when they combine seemingly irreconcilable works into a new work that confounds traditional expectations.¹⁸⁵ Therefore, if fair use creates an enclave for re-contextualized works, it should not extend to works that simply amount to re-mixes, or other such works where an artist combines works of similar genres or styles, which result in little change from the tone or expression of the original work.¹⁸⁶

179. *Id.* Szymanski then relates the concept of postmodern pastiche to digital music samples, and concludes that samples are in effect, "bits of pastiche." *Id.*

180. *See* *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (arguing that to be considered fair use, the original work must be the subject of the manipulation so as to fulfill the public recognition of the original work).

181. *See* *Ty, Inc. v. Publ'ns Int'l, Ltd.*, 292 F.3d 512, 523 (7th Cir. 2002) (holding that complementary products which feature new materials are more likely to be fair use than substitute products).

182. *See* *Leval*, *supra* note 4, at 1111 (suggesting that transformative works exhibit new insights).

183. *See supra* note 146 and accompanying text (discussing how, by definition, mash-up songs and albums require the use of almost all the a cappella lyrics of one artist and a substantial amount of music from another artist).

184. *Leval*, *supra* note 4, at 1111.

185. *See* *Szymanski*, *supra* note 7, at 283 (explaining how the postmodern artist constructs one text with the underlying music, but then adds samples of different "cultural temperatures" on top of it, which has the effect of "puncturing one sign system in the name of another").

186. This limitation would follow Justice Kennedy's admonition in *Acuff-Rose* that the defense should not be flexible enough to apply to all new versions of old songs. *See* *Campbell v. Acuff-Rose Music, Inc. (Acuff-Rose)*, 510 U.S. 569, 599 (Kennedy, J.,

The combination of works that span genres and generations, however, should be more likely to gain protection. Danger Mouse's mixture of 1960s pop legends The Beatles, with modern day rap artist Jay-Z, would present a plausible argument for fair use.

The dominance of the Jay-Z lyrics over background music in both Jay-Z's *The Black Album* and Danger Mouse's *The Grey Album*, however, demonstrates that there could be far more transformative works than *The Grey Album*.¹⁸⁷ Works where an artist transforms all source material extensively, and where the result is a truly new expression, would be even more likely to gain protection. Thus, an aspiring artist could build background music and beats with music taken exclusively from one genre (as Danger Mouse did with The Beatles' music), and then take and alter the lyrics from a seemingly different genre (whereas Danger Mouse took, but did not really alter, Jay-Z's lyrics)¹⁸⁸ and mix them together in such a way that the result no longer seems to fit either genre.¹⁸⁹ The possibility of creating a re-contextualized work could easily move beyond the realm of the mash-up or even music. By taking an element of a familiar work, be it music, art, literature, or something else, and combining it with something seemingly irreconcilable to create a new vision, an artist may create an interesting postmodern work that toys with conventional meanings and expressions.¹⁹⁰

The increasing popularity of the mash-up movement may well spur the market to correct the problem of high licensing fees or outright refusals to

concurring) (stating that "[a]lmost any revamped modern version of a familiar composition can be construed as a 'comment on the naiveté of the original' because of the difference in style and because it will be amusing to hear how the old tune sounds in a new genre").

187. For example, a pair of reviewers noted how Danger Mouse's success stemmed from his ability to twist The Beatles' music to fit the same mood as the Jay-Z lyrics. Reid & Patel, *supra* note 82. In addition, reviewers consistently labeled the work a hip-hop album. See, e.g., Gitlin, *supra* note 85 (calling *The Grey Album* "an ingenious hip-hop record"); Graham, *supra* note 82 (referring to *The Grey Album* as "the most intriguing hip-hop album in recent memory"). Considering that one of Danger Mouse's sources, Jay-Z, is a hip-hop artist, it seems as if future artists could create more transformative works by combining two different genres of music in such a way that the result differs from both in terms of style.

188. See *supra* note 166 and accompanying text (explaining how Danger Mouse chopped up, edited, and otherwise altered The Beatles' music to produce the background for *The Grey Album*, while he essentially just used Jay-Z's a cappella lyrics).

189. By contrast, although Danger Mouse altered both The Beatles' music and Jay-Z's lyrics by his skillful combination of the two, the album still sounds like hip hop, the same genre as Jay-Z's *The Black Album*. See *supra* note 187 and accompanying text (presenting the views of various commentators that Danger Mouse's *The Grey Album* sounds or feels like a hip hop album).

190. See, e.g., Transcript, *Virtual Reality, Appropriation, and Property Rights in Art: A Roundtable Discussion*, 13 CARDOZO ARTS & ENT. L.J. 91, 101-02 (1994) (listing a number of examples of instances of commercial appropriation in art, including works by Jasper Johns, Rauschenberg, and Andy Warhol); *id.* at 102 (suggesting that new advancements in photography which allow artists to combine different images may also lead to the creation of new types of expression).

license samples for use in new works.¹⁹¹ However, a fair use enclave for truly transformative re-contextualized works should nevertheless protect those ambitious new artists who aim to use existing materials in ways that no one else would imagine. To allow such uses would re-affirm the copyright's goal of ensuring public enrichment through access to new expression. After all, "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."¹⁹² To deny re-contextualized works from consideration under fair use as transformative works may well be to deny significant amounts of postmodern expression from ever reaching the public¹⁹³—and that hardly seems to promote the arts.

191. Alternately, the increasing popularity of sample-based music may lead to legislative changes calling for compulsory licensing schemes. *See generally* Achenbach, *supra* note 16 (arguing that the growing conflict between artists who want to use samples and the owners of those rights who routinely refuse the use of those samples calls for amendment of the Copyright Act to institute compulsory licensing for digital music samples).

192. *Campbell v. Acuff-Rose Music, Inc. (Acuff-Rose)*, 510 U.S. 569, 579 (1994).

193. *See* Leval, *supra* note 4, at 1109 ("Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process.").