

SPACE AGE LOVE SONG: THE MIX TAPE IN A DIGITAL UNIVERSE

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ABSTRACT

Mix tapes are the classic, iconic form of music sharing. Mix tape creators of the past believed they were making a piece of art larger than the sum of its parts. And even in the face of technological development so rapid and far-reaching as to remove the literal “tape” from “mix tape,” there are nonetheless modern incarnations that crop up on a regular basis, from mix CDs to mix-sharing websites. The technology is different, but the song remains the same.

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I. SPACE AGE LOVE SONG

“And for a little while, I was falling in love.”

—A Flock of Seagulls¹

With my first stereo on my tenth birthday came a ten-dollar birthday gift certificate to Camelot Music. That piece of paper threatened to burn a hole in my pocket faster than one could say “parachute pants.”² The day after my birthday party, my mom took me to the mall. I wandered the aisles excitedly, aimlessly, frenetically. I couldn’t decide whether to buy the eponymous A

¹ A FLOCK OF SEAGULLS, *Space Age Love Song*, on A FLOCK OF SEAGULLS (Zomba Productions Ltd. 1982).

² For a discussion of the parachute pants of the 1980s, see *Parachute Pants*, WIKIPEDIA, http://en.wikipedia.org/wiki/Parachute_pants (last visited Jan. 4, 2011). To purchase parachute pants, see PARACHUTE-PANTS.COM, <http://www.parachute-pants.com/store/index.php> (last visited Jan. 4, 2011).

Flock of Seagulls album or *H2O* by Hall and Oates. After much indecision, I opted for the A Flock of Seagulls record. I like to think that, on that day, two music-loving roads diverged in a wood, and I followed A Flock of Seagulls, and that has made all the difference. The track “Space Age Love Song” from that album made it on to more than one mix tape³ over time. It was a synthesized encapsulation of an era, of what it meant to be a teenage music fan in the 1980s: hairspray and keyboards. In perfect 1980s fashion, what the song lacked in substantive brilliance it made up for in its title.

Looking back, it occurs to me that “Space Age Love Song” encapsulates the dilemma one faces when applying current copyright law to the mix tape itself. What happens when the base human desire to share music personally meets a digital universe? If copyright law means to promote creativity and proscribe infringement, then the mix tape—in its past and present iterations—is perfectly situated for analytical inquiry. Are mix tape creators—from teenagers of the 1980s making mixes for their friends, to brides and grooms of the new millennium sharing the soundtrack of their weddings—infringers? Should the “Space Age Love Song” be replaced by “Jailhouse Rock?”

One of the most hotly contested issues in contemporary copyright debate is music sharing.⁴ In the digital age, where the global economy is one of information and content, technology advances faster than the law. Consequently, technological advances foster a sense of pioneering while seemingly outdated copyright law has gotten a bad rap. Popular culture often characterizes copyright law as the jailer that keeps information from being “freed.”⁵ In a society where cultural revolutionaries often rail against “the Man,” copyright law itself is portrayed as “the Man.” Jane Ginsburg⁶ attributes the bad name of copyright to the prevalence of both corporate and consumer greed.⁷ Although a multitude of legitimate issues exist surrounding the proprietary nature of information,

³ For purposes of this Article, the term “mix tape” refers to the homemade compilations people create for themselves and others. For an in depth look at the underground world of hip-hop mix tapes, see generally Horace E. Anderson, Jr., “*Criminal Minded?*”: *Mixtape DJs, the Piracy Paradox, and Lessons for the Recording Industry*, 76 TENN. L. REV. 111 (2008); Michael Katz, *Recycling Copyright: Survival & Growth in the Remix Age*, 13 INTELL. PROP. L. BULL. 21 (2008).

⁴ For purposes of this Article, I adopt the common terminology of “music sharing,” but not without acknowledgment of the political nature of vocabulary. To the caches of lexical weaponry, including “pro-life” and “pro-choice,” I will add both “music sharing” and “music stealing.”

⁵ See, e.g., STEWART BRAND, *THE MEDIA LAB: INVENTING THE FUTURE AT MIT 202* (1987). A common quote is that “information wants to be free.” Illustrative of a larger misunderstanding, perhaps, is the misquoting of this statement. Brand made the original statement as part of a larger context, which, in its entirety, reads:

Information wants to be free. . . . It wants to be expensive because it can be immeasurably valuable to the recipient. That tension will not go away. It lead to endless wrenching debate about price, copyright, “intellectual property,” and the moral rightness of casual distribution, because each round of new devices makes the tension worse, not better.

⁶ Jane C. Ginsburg: Biography, COLUMBIA LAW SCHOOL, http://www.law.columbia.edu/fac/Jane_Ginsburg (last visited Jan. 4, 2011). Ginsburg is the author of numerous books and articles on intellectual property law and is currently the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia Law School.

⁷ Jane C. Ginsburg, *Essay—How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 61 (2002).

each position in the overarching debate has become characterized in its extremity: either information should be free, and therefore copyright is bad, or information should be controlled, and therefore copyright is good.⁸

The fact that technology advances faster than the law—in fact, lapping it over and again—contributes to a lack of understanding and clarity as to how the law should be, or is, applied to new sets of facts. The more that copyright law looks like an old man unable to keep up, the further those opposing viewpoints become entrenched. As notions of copyright become demonized, myths proliferate; including that copying music for any reason is bad.⁹ These gross misunderstandings of the law are harmful, both because they are inaccurate, and because they create an *us-against-them* mentality. *We* are the consumers and creators of content, and *they* are supposed to be the law—the essential purpose of which, ironically, is to support the creation and development of that content.¹⁰

This Article places the mix tape under the lens of contemporary copyright law. Part II discusses the history and progression of copyright law in conjunction with the development of audio home-recording technologies and the sharing of music. Part III explores the breadth and depth of the Audio Home Recording Act (AHRA), including its (in)application to modern technologies. To the extent that the AHRA was crafted explicitly with the purpose of guaranteeing “the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use,”¹¹ it fails to do so in contemporary reality. Part IV analyzes mix tapes under principles of fair use and existing statutory and case law, examining the following question: If the purpose of copyright law is to encourage creativity, how does this purpose play out when it comes to making mix tapes, which at their heart seek to create something larger than their “borrowed” parts?

Part V discusses the need for copyright law to address modern music sharing in practical ways. Although technology has changed, mix tapes nonetheless remain. When significant others risk violating the law because they make each other mix CDs for Valentine’s Day, that law needs to be looked at very carefully. What is private and noncommercial might be more difficult to determine in the context of digital media, but no one is served—neither the creators of content, nor the creators of mixes, nor an anthropomorphized copyright law—by failing to address the issue on its merits. The state of the law is unclear at best and practically inapposite to contemporary reality at worst. By failing to

⁸ RIP! A REMIX MANIFESTO (EyeSteelFilm 2009), available at <http://www.hulu.com/watch/88782/rip-a-remix-manifesto> (discussing the conflict between the “copyRIGHT” and the “copyLEFT”).

⁹ See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 268-71 (2008) (addressing the need for the “decriminalization” of copying); see also Mark A. Fischer, *Mark Fischer on Copyright in the Digital Age*, TRUTHDIG (Jan. 30, 2009), http://www.truthdig.com/arts_culture/item/20090130_mark_fischer_on_copyright_in_the_digital_age/ (“The record industry’s campaign of suing allegedly infringing consumers, even if legally correct, was never an entirely happy one. The [RIAA] recently announced that it is largely abandoning the tactic of litigating against individuals . . . [and instead] will focus on cooperative agreements with Internet service providers.”).

¹⁰ See RIP! A REMIX MANIFESTO, *supra* note 8.

¹¹ S. REP. NO. 102-294, at 30 (1992).

address practical realities of modern home recording, copyright law alienates both the creators and the works it seeks to promote.

A. *Mix Tapes Communicate Meaning Through Music*

Suddenly, with the advent of audio home-recording technology, ordinary consumers could create their own compilations of music to communicate their feelings. Los Angeles-based writer Matias Viegner observes that “[m]ix tapes mark the moment of consumer culture in which listeners attained control over what they heard, in what order and at what cost” and “I am no mere consumer of pop culture, it says, but also a producer of it.”¹² Mix tapes rapidly became “a very subtle art” in “using someone else’s poetry to express how you feel.”¹³ Viegner describes a mix tape as “predigested cultural artifacts combined with homespun technology and magic markers” that turn it into “a message in a bottle.”¹⁴

The main character in Nick Hornby’s generational classic *High Fidelity*¹⁵ (later made into a film of the same name) details the complicated nature of making a mix tape: “You gotta kick it off with a killer, to grab attention. Then you gotta take it up a notch, but you don’t wanna blow your wad, so then you gotta cool it off a notch. There are a lot of rules.”¹⁶ According to musician Dean Wareham, founder of influential post-punk group Galaxie 500:

It takes time and effort to put a mix tape together. The time spent implies an emotional connection with the recipient. It might be a desire to go to bed, or to share ideas. The message of the tape might be: *I love you. I think about you all the time. Listen to how I feel about you. Or, maybe: I love me. I am a tasteful person who listens to tasty things. This tape tells you all about me.*¹⁷

Music journalist Rob Sheffield writes about the mix in *Love Is a Mix Tape*, which he wrote after his wife died of a pulmonary embolism.¹⁸ Each chapter discusses a particular mix one or both of them made, telling the story of their life together:

I believe that when you’re making a mix, you’re making history. You ransack the vaults, you haul off all the junk you can carry, and you rewire all your ill-gotten loot into something new. You go through an artist’s entire career, zero in on that one moment that makes you want to jump and dance and smoke bats and bite the heads off drugs. And then you play that one moment over and over.¹⁹

Beginning in the 1970s, in light of all the new recording technology, music fans of all ages and technical abilities were able to record onto cassette from a variety of sources—songs from the radio, their own record albums, and later, with the introduction of a double tape deck into the market, songs from

¹² MIX TAPE: THE ART OF CASSETTE CULTURE 35 (Thurston Moore ed., 2004).

¹³ HIGH FIDELITY at 01:38:48-59 (Touchstone Pictures 2000); see also Max Mobley, *Requiem for the Mix Tape*, CRAWDADDY MAGAZINE (Dec. 5, 2007), <http://www.crawdaddy.com/index.php/2007/12/05/requiem-for-the-mix-tape/>.

¹⁴ MOORE, *supra* note 12, at 35.

¹⁵ See generally NICK HORNBY, HIGH FIDELITY (1995).

¹⁶ HIGH FIDELITY, *supra* note 13, at 01:46:20-30.

¹⁷ MOORE, *supra* note 12, at 28.

¹⁸ ROB SHEFFIELD, LOVE IS A MIX TAPE: LIFE AND LOSS, ONE SONG AT A TIME 148 (2007).

¹⁹ *Id.* at 23.

cassettes themselves.²⁰ Thurston Moore of the band Sonic Youth, one of the seminal underground American bands of the 1980s and 1990s, edited a book entitled *Mix Tape: The Art of Cassette Culture*.²¹ There, Moore describes the first mix tape he ever heard of, which was made by Robert Christgau, a writer for *The Village Voice*.²² Christgau wrote in the *Voice* about a compilation tape he had made of all of the non-LP B-sides by the Clash.²³ What struck Moore was that Christgau had made his own personalized Clash record to give to friends as a memento of his rock 'n' roll devotion.²⁴

Moore describes mix tapes as a type of cultural love letter, both to rock 'n' roll and to friends and lovers, emblematic of "the true love and ego involved in sharing music."²⁵ Moore himself made a mix of all of his favorite hardcore punk singles for his own listening; compiling something in a form he was unable to purchase so that he could hear the records in a "more time-fluid way," creating a "monolithic hardcore rush" that sustained "every cell and fiber in [his] body on heavy sizzle mode."²⁶ Moore began making other compilations. He made mixes of New York City hip-hop he culled from the cut-out bins of Sounds record store on St. Marks Place to take on a Sonic Youth tour in the mid 1980s.²⁷ He made a box of mix tapes for his wife, Kim, when she went to the hospital to have a baby.²⁸ He made many tapes, as did his friends, and they "would play them, lose them, bring them on tour, or lend them out and never see them again."²⁹

B. *Long After the Demise of the Cassette, Mix Tapes Remain*

Today, even after the demise of the cassette, people still make mix tapes. More accurately, they make digital mixes of various sorts, many of which are still referred to as mix tapes.³⁰ In some ways, in substance if not in form, the modern mix tape is the same as the traditional mix tape. People make mix CDs for friends and lovers, centered on a certain theme or selected and arranged in a particular way. Sometimes the mixes have elaborate homemade cover art, and sometimes none.

²⁰ See *Cassette Deck*, ACADEMIC DICTIONARIES & ENCYCLOPEDIAS, <http://en.academic.ru/dic.nsf/enwiki/105645> (last visited Jan. 4, 2011).

²¹ See MOORE, *supra* note 12, at 11.

²² *Id.* at 9.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 12-13.

²⁶ *Id.* at 10.

²⁷ *Id.* at 11.

²⁸ *Id.* at 12.

²⁹ *Id.* at 11.

³⁰ See SHEFFIELD, *supra* note 18, at 24 ("Most mix tapes are CDs now, yet people still call them mix tapes. The technology changes, but the spirit is the same. I can load up my iPod with weeks' worth of music and set it on shuffle to play a different mix every time. I can borrow somebody else's iPod and pack it with songs I think they'd like. I can talk to a friend on the phone, mention a couple of songs, download them on LimeWire while we're talking, and listen together. The hip-hop world now thrives on mix tapes, with artists circulating their rhymes on the street via bootleg CDs. They're never technically tapes, but they're always called mix tapes anyway.").

In other ways, however, digital technology has changed the mix tape. Instead of making a mix for a party and playing that mix at the party, hosts can now easily also give that mix out to every guest. Instead of merely playing a mix at a wedding, a bride and groom can give the CD out as a wedding favor. Modern mix creators can create playlists at the click of a mouse, and the audio quality is nearly indiscernible, to ordinary ears, from a digital master.³¹ Mix creators can make playlists and share them digitally (either with or without legitimate “gifting” features of software applications) through iTunes or other websites such as Mixcloud,³² 8tracks.com,³³ Playlist,³⁴ Opentape,³⁵ Grooveshark,³⁶ and MixTape.me.³⁷ Sheffield writes that although technology changes, the spirit of making mix tapes is the same now as it has always been.³⁸

II. COPYRIGHT LAW AND AUDIO HOME RECORDING HAVE BOTH PROGRESSED RELATIVE TO TECHNOLOGICAL ADVANCEMENTS

“You may ask yourself, ‘Well, how did I get here?’”

—Talking Heads³⁹

In the murky legal waters, one thing is clear: Under federal statutory law, prior to 1831, consumers would have been able to make as many mix tapes as they wanted and send them to as many people as they wanted, whether lover or stranger. The Constitution provides for copyright and patent protection 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.”⁴⁰ Intellectual property protection’s core mission is the promotion of creative works, and it seeks to strike a balance between treating creative works as proprietary, so that the creator can reap the benefit from them, and ensuring those works enter into the public domain at some later point, so that other

³¹ David F. Gallagher, *For the Mix Tape, a Digital Upgrade and Notoriety*, N.Y. TIMES, Jan. 30, 2003, at G1, available at <http://www.nytimes.com/2003/01/30/technology/for-the-mix-tape-a-digital-upgrade-and-notoriety.html?sec=&spon=&pagewanted=all> (discussing how “digital mixes have better sound quality” than their analog predecessors).

³² MIXCLOUD, <http://www.mixcloud.com/> (last visited Jan. 4, 2011) (an interactive internet radio, which likens itself to the YouTube of radio).

³³ 8TRACKS, <http://8tracks.com/> (last visited Jan. 4, 2011) (a website dedicated to allowing people to share music through mix tapes).

³⁴ PLAYLIST.COM, <http://www.playlist.com/> (last visited Jan. 4, 2011) (allows users to access free music online, create mix tapes, and share them via social networks).

³⁵ OPENTAPE, <http://opentape.fm/> (last visited Jan. 4, 2011) (free site for making web mix tapes).

³⁶ GROOVESHARK, <http://listen.grooveshark.com/> (last visited Jan. 4, 2011) (a playlist-based online radio).

³⁷ MIXTAPE.ME, <http://mixtape.me/> (last visited Jan. 4, 2011) (a website allowing people to share their playlists with others). Mix sharing sites are sometimes short-lived. By the time of this Article’s publication, some of the services listed might have been disabled. Mix-sharing sites that have been shut down include FavTape, Mixwit, Muxtape (the original version), and Seeqpod.

³⁸ See SHEFFIELD, *supra* note 18, at 24.

³⁹ TALKING HEADS, *Once in a Lifetime*, on REMAIN IN LIGHT (Sire Records 1980).

⁴⁰ U.S. CONST. art. I, § 8, cl. 8.

creators can use that work to reap their own benefits. Part of this balance is struck through the fair use doctrine, which allows the use of copyrighted works by the public in limited ways.

A. *Copyright Law Develops in Piecemeal Fashion*

The Copyright Act has evolved as a sort of legal crazy quilt, pieced together over time with the development and use of various new media. The Copyright Act of 1790, the first incarnation of which interestingly predates the First Amendment right of free speech, granted protection only to maps, charts, and books, and did not include music.⁴¹ Expansion of categories of protected works proceeded in a somewhat piecemeal way, often in response to technological and cultural developments; in 1831, Congress added musical compositions to the list.⁴² The Copyright Act of 1909 further protected performance rights in musical compositions as well as the arrangement of the melody and any form of recording from which the melody could be reproduced.⁴³

Keeping with this slow evolution, sound recordings were not included until technology emerged that enabled widespread copying of recorded works.⁴⁴ By the early 1970s, reproduction of vinyl recordings onto magnetic tape inspired the 1971 Sound Recordings Act, affording copyright holders the right to reproduce and distribute the sound recordings of any copyrighted works produced on or after February 15, 1972.⁴⁵ Pre-1972 works—for example, John Lennon’s “Imagine,” which was released in 1971—are not included. Although Lennon allegedly described the recording of this album as “chocolate-coated for public consumption,”⁴⁶ he might not have realized all the forms that public consumption might take. The Copyright Act of 1976 incorporated protection for sound recordings as well, although it mistakenly did not extend such protection to pre-1972 recordings due to an error on the part of an attorney in the Justice Department.⁴⁷ That anomaly persists today.

Because copyright exists as a set of rights, any or all of which may be retained or given away on an individual basis, technology and the market have often shaped who benefits most from recorded works. In the 1700s and 1800s, composers often sold any rights they had to publishers, which profited financially from sheet music without having to pay any royalties to composers.⁴⁸

⁴¹ Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802).

⁴² Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (1831).

⁴³ Act of Mar. 4, 1909, ch. 320, § 1, 35 Stat. 1075, 1075 (1909).

⁴⁴ Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391, 391 (1971); *see also* DAVID J. MOSER, MUSIC COPYRIGHT FOR THE NEW MILLENNIUM 14 (2002); H.R. REP. NO. 104-274, at 11 (1995).

⁴⁵ 85 Stat. at 391; *see also* JOANNA DEMERS, STEAL THIS MUSIC 35 (2006).

⁴⁶ This quote is attributed to Lennon, but there is no record of when he originally made the statement. *See Imagine (album)*, WIKIPEDIA, [http://en.wikivisual.com/index.php/Imagine_\(album\)](http://en.wikivisual.com/index.php/Imagine_(album)) (last visited Jan. 4, 2011).

⁴⁷ *See* 17 U.S.C. § 1101(a) (2006); MELVILLE B. NIMMER ET AL., CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION INCLUDING UNFAIR COMPETITION, DEFAMATION, PRIVACY 103 (7th ed. 2006).

⁴⁸ *See* Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 920-45 (2005) (discussing the struggle between composers and publisher in regards to changing copyright protection).

While publishers enjoyed a good standard of living, composers were often poor.⁴⁹ Sheet music brought in solid revenue because recordings of musical works were not yet readily available.⁵⁰ After musical recordings became affordable and abundant, the revenue for sheet music decreased, replaced by a widespread market in the recorded music of professional entertainers.⁵¹

B. The History of Home Recording Parallels Advances in Consumer Technology

The history of audio home recording parallels the rapid development of consumer technology.⁵² Although home recording was possible on a limited scale through eight-track cartridges in the 1960s and 1970s,⁵³ it took root with the development of cassettes.⁵⁴ Cassette recording technology was less expensive than eight-track recording and had practical advantages, such as rewinding capability and a smaller size.⁵⁵ Single cassette recorders could hook up through a stereo receiver to record songs from vinyl records or, alternatively, the radio.⁵⁶ Diehard music fans often were reluctant to buy cassettes, finding the sound quality to be better (and longer lasting) on vinyl.⁵⁷ Such fans would often purchase a record and then use a tape deck to record it onto cassette, engaging in an early form of “space-shifting” and creating a copy that was portable for use in cars and personal cassette players, which could then be replaced if the tape wore out or broke.⁵⁸ The stereo receiver was, in those times, the hub of the action, uniting turntable and cassette recorder and adding its own radio reception to the mix.⁵⁹ Through the stereo receiver, a consumer could record songs through these media with relative ease.⁶⁰

⁴⁹ DEMERS, *supra* note 45, at 18-19 (discussing the need for publishers to lobby on behalf of composers who were being “exploited”).

⁵⁰ *See id.* at 34.

⁵¹ Brian D. Johnston, *Rethinking Copyright's Treatment of New Technology: Strategic Obsolescence as a Catalyst for Interest Group Compromise*, 64 N.Y.U. ANN. SURV. AM. L. 165, 175-76 (2008) (addressing the impact of piano rolls and phonographs on sheet music sales).

⁵² *See generally* RECORDING HISTORY: THE HISTORY OF RECORDING TECHNOLOGY, <http://www.recording-history.org/> (last visited Jan. 4, 2011).

⁵³ *Id.* (follow “Technology” link, then follow “Story of the 8-Track Tape” link).

⁵⁴ *Id.* (follow “Industry” link, then follow “History of the Music Recording Industry” link, then click on page 6).

⁵⁵ *See, e.g., Compact Cassette*, WIKIPEDIA, http://en.wikipedia.org/wiki/Compact_Cassette (last visited Jan. 4, 2011).

⁵⁶ *Boombox*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Boombox> (last visited Jan. 4, 2011).

⁵⁷ *See The History of Electronic Music: Part 28: “The Champ is Down But Not Out”: The History of the Phonograph, Chapter 6*, THE RACE MUSIC (Mar. 2, 2010, 3:45 PM), <http://theracemusic.net/the-history-of-electronic-music/part28-the-champ-is-down-but-not-out-the-history-of-the-phonograph>.

⁵⁸ *Id.* For an explanation of “time-shifting,” see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 423-24 (1984). The term “space-shift” originates from the Ninth Circuit in its discussion of *Sony*. *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).

⁵⁹ *Boombox*, *supra* note 56.

⁶⁰ *See MOORE, supra* note 12, at 9-13.

When double cassette players became widely accessible, it suddenly became possible to record from cassettes, as well.⁶¹ CD players and burners eventually joined, then replaced, double tape decks by enabling higher-quality home recording using digital technology.⁶² With this increase in quality came even greater portability, and as car stereos and portable music players began incorporating CD players, both the need and the desire for cassettes were effectively eliminated, making them practically obsolete.⁶³ Eventually, the personal computer and the Internet became central to the way people consumed music at every step in the process, from purchase to listening to storage. With the CD drive in a personal computer, consumers no longer needed a separate CD player, let alone a stereo receiver to serve as a central hub—the personal computer itself became the ultimate media hub. The development of software programs and online services, which greater facilitated the sharing of music, was not far behind.

C. The Development of Digital Media Made Both Sharing Music and Stealing Music Much Easier

With the advent of digital media, it became much easier to share music in all ways, including without paying for it. Companies such as Napster facilitated peer-to-peer (P2P) file sharing of digital music files using specific software, and the process of sharing music became much faster and easier, through both legal and illegal means.⁶⁴ Music “sharing” services of all sorts became exponentially popular, and copyright law has wrestled with these processes and resultant products.⁶⁵ Many services created in recent years have been disabled or shut down entirely, only to be replaced by new sites with new technologies.⁶⁶

At the same time file sharing became widespread, revenue from the music industry as a whole decreased significantly.⁶⁷ Software applications such as iTunes arose to bridge the gap between purchasing a CD (an accepted legal

⁶¹ *Compact Cassette*, *supra* note 55.

⁶² See MOSER, *supra* note 44, at 59-60.

⁶³ See generally RECORDING HISTORY: THE HISTORY OF RECORDING TECHNOLOGY, <http://www.recording-history.org/> (last visited Jan. 4, 2011) (follow “Industry” link, then follow “History of the Music Recording Industry” link, then click on page 6 and 7).

⁶⁴ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (holding that peer-to-peer file sharing was copyright infringement).

⁶⁵ See *id.*; see also *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1073 (9th Cir. 1999) (addressing whether an MP3 player’s lack of anti-infringement technology constitutes a violation of the Audio Home Recording Act); *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003) (holding that an Internet service was liable for its chat room users’ sharing of copyright protected music files because the service facilitated the sharing).

⁶⁶ Hykra, *A Review and History of P2P File Sharing From Napster to Torrent to Kazaa*, ASSOCIATED CONTENT (Jan. 10, 2006), http://www.associatedcontent.com/article/8434/a_review_and_history_of_p2p_file_sharing_pg2.html?cat=15.

⁶⁷ Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 2 (2007); see also Alejandro Zentner, *File Sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries*, 5 TOPICS IN ECON. ANALYSIS & POL’Y 1, 1 (2005), <http://www.bepress.com/cgi/viewcontent.cgi?article=1452&context=bejeap>.

way to purchase music) and downloading music online (an often-illegal way to obtain music).⁶⁸ iTunes created a system that was both legal and easy, enabling individuals to purchase music online with a mere click. Purchase of music online has skyrocketed, with sales of digital music totaling 32 percent of the market in 2008.⁶⁹ The structure of iTunes generally enabled purchases by song instead of by album, which further transformed the manner in which people consume music. And in an ironic twist, along with increased ease of access to other people's copyrighted works, do-it-yourself technology has advanced as well, leading to an upsurge in the creation of amateur music.⁷⁰ The prevalence of music recording software, such as the multi-track recording application GarageBand (now standard issue with all Apple computers), has led to a proliferation of recorded do-it-yourself works.⁷¹

III. THE AUDIO HOME RECORDING ACT SOUGHT TO PROTECT PRIVATE AND NONCOMMERCIAL HOME RECORDING UNDER COPYRIGHT LAW

"You will miss me when I burn."

—Palace Brothers⁷²

Under the Audio Home Recording Act of 1992 (AHRA), private, noncommercial home recording is permissible, whether digital or analog.⁷³ Therefore, the recording of copyrighted works for the purposes of making a mix tape, whether on cassette or CD, is theoretically permissible, provided the individual's use is private and noncommercial. In fact, Congress enacted the AHRA in part expressly "to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use."⁷⁴ Congress recognized that home recording had become an issue of great concern to the music industry, after technological advances in audio recording had enabled widespread private copying and digital advances had enabled the preservation of sound quality in those copies.⁷⁵

⁶⁸ See, e.g., Apple, *iTunes Terms and Conditions*, APPLE.COM, <http://www.apple.com/legal/itunes/us/terms.html> (scroll down to "A. iTunes Store, App Store, and iBookstore Terms of Sale") (last visited Jan. 4, 2011).

⁶⁹ Recording Indus. Ass'n of Am., *2008 Year-End Shipment Statistics*, <http://76.74.24.142/1D212C0E-408B-F730-65A0-C0F5871C369D.pdf> (last visited Jan. 4, 2011).

⁷⁰ Various Internet sites are devoted to helping people create, publish, and promote music. See, e.g., Ram Samudrala, *Doing it Yourself: A Guide to Making Music*, <http://www.ram.org/music/making/tips/DiY.html> (last visited Jan. 4, 2011); *A Resource for D.I.Y. Music*, TONEPAD, <http://www.tonepad.com/> (last visited Jan. 4, 2011).

⁷¹ Apple's website even touts "Your own recording studio" on its GarageBand '11 software page. *GarageBand '11*, <http://www.apple.com/ilife/garageband/> (last visited Jan. 4, 2011).

⁷² PALACE BROTHERS, *YOU WILL MISS ME WHEN I BURN* (Drag City 1994).

⁷³ 17 U.S.C. § 1008 (2006); S. REP. NO. 102-294, at 30 (1992).

⁷⁴ S. REP. NO. 102-294, at 30.

⁷⁵ H.R. REP. NO. 102-780, pt. 1, at 18 (1992).

A. *The Audio Home Recording Act Emerged as a Legislative Compromise in Reaction to Universal City Studios, Inc. v. Sony Corp.*

The AHRA was, in part, Congress's response to the Supreme Court's decision in *Universal City Studios, Inc. v. Sony Corp.*⁷⁶ In that case, the Court held that private home taping of copyrighted television broadcasts for the purpose of time-shifting was a fair use, a holding that created more questions than answers when it came to the music industry.⁷⁷ Film industry companies, including Universal and Walt Disney Studios, had sued Sony, the manufacturer of the Betamax video tape recorder (VTR), on the basis of contributory liability for manufacturing a device that could be used (and indeed was being used) for copyright infringement.⁷⁸ The Ninth Circuit held that Sony was secondarily liable for copyright infringement, reasoning that the main purpose of the VTR was copying, and such copying of entire works was not a fair use of copyrighted material.⁷⁹

In a legendary and controversial 5-4 decision, the Supreme Court reversed, holding that Sony was not liable for contributory infringement where the manufactured device was capable of significant non-infringing use.⁸⁰ Importantly, the Court noted that "private, noncommercial time-shifting in the home"⁸¹ was a plain example of a significant, non-infringing use of the Betamax recorder. The Court stated:

[W]hen one considers the nature of a televised copyrighted audiovisual work . . . and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use.⁸²

While the dissent focused on the possible aggregate harm created by the library-building capabilities of people who used a VTR,⁸³ the majority looked primarily to the time-shifting element of recording. It posited that the act of copying the material actually expanded the audience for the copyrighted works because more people were able to view the programs without being limited by local programming schedules.⁸⁴ Furthermore, evidence suggested that VTR users remained consumers of regularly scheduled television programs, as well.⁸⁵

Songwriters, music publishers, recording companies, and performers argued that the *Sony* Betamax holding was limited to home videotaping for

⁷⁶ S. REP. NO. 102-294, at 31.

⁷⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 421 (1984).

⁷⁸ *Id.* at 421-22.

⁷⁹ *Id.* at 420.

⁸⁰ *Id.* at 456. The Court also noted that respondents had "no right to prevent other copyright holders from authorizing" copying for their programs, and that the act of "supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents' works." *Id.* at 442, 446.

⁸¹ *Id.* at 442.

⁸² *Id.* at 449-50.

⁸³ *Id.* at 458-59 (Blackmun, J., dissenting).

⁸⁴ *Id.* at 454 (majority opinion).

⁸⁵ *Id.*

time-shifting purposes.⁸⁶ The electronics industry, on the other hand, argued that the decision was broadly applicable to home recording as a whole.⁸⁷ When digital audio recorders were developed, the controversy became more pronounced because, for the first time, consumers were able to make “virtually perfect” reproductions of copyrighted works.⁸⁸ In contrast to analog recorders, Digital Audio Tape (DAT) technology enabled preservation of the sound quality of the original recordings.⁸⁹ The House of Representatives was concerned that consumers would be, and had been, denied access to these advancements in technology due to disputes and litigation between the music industry and the electronics industry.⁹⁰

Thus, another lawsuit targeted Sony in 1990, this time to ban the importation of DAT recorders and blank cassettes.⁹¹ Congress had contemplated the implementation of a royalty system even before the Supreme Court’s decision in the *Betamax* case, and after the decision was issued the music industry intensified lobbying efforts for anti-copying software, as well.⁹² Before the DAT lawsuit could be resolved, both houses of Congress pushed for enactment of a legislative solution in what eventually became the AHRA.⁹³

In debates about the AHRA, Congress sought information about the effect of home recording on the market. In congressional hearings, the recording industry estimated that \$1 billion was lost every year because of home recording.⁹⁴ The Senate examined several reports that sought to quantify the loss.⁹⁵ In one report, the Copyright Office concluded that “copying of prerecorded works . . . displace[s] sales of authorized copies, both in analog and digital formats, although the magnitude and economic impact of the displacement is difficult to assess.”⁹⁶ A coalition of music publisher and songwriter interests, called the Copyright Coalition, agreed, estimating lost sales somewhere in the range of 322.5 million recordings.⁹⁷ In that report, completed by the Roper Organization, a telephone survey of respondents age fourteen years and older found that 37 percent had taped prerecorded music, and nearly 50 percent of respondents from the ages of fourteen to forty-nine taped music at home and believed that they would tape even more music at home if the equipment they owned had digital audio recording technology.⁹⁸ The Senate examined a third report, completed by its Office of Technology Assessment (OTA).⁹⁹ Although the OTA report was inconclusive as to the effect of home taping on sales, it did estimate that 40 percent of people taped recorded music in 1988, a significant

⁸⁶ S. REP. NO. 102-294, at 31 (1992).

⁸⁷ *Id.*

⁸⁸ H.R. REP. NO. 102-780, pt. 1, at 18 (1992).

⁸⁹ *Id.* at 18.

⁹⁰ *Id.* at 21.

⁹¹ S. REP. NO. 102-294, at 32-33.

⁹² *Id.* at 31.

⁹³ *Id.*

⁹⁴ *Id.* at 34.

⁹⁵ *Id.*

⁹⁶ *Id.* at 35.

⁹⁷ *Id.*

⁹⁸ *Id.* at 34-35.

⁹⁹ *Id.* at 34.

increase over previous estimates, and concluded that people who tape music are more likely to be interested in music and to purchase more music generally than non-tapers.¹⁰⁰

B. By Enacting the AHRA, Congress Sought to End the Stalemate Over Home Recording and to Add Legal Clarity.

Through enactment of the AHRA, Congress sought to add some measure of clarity, if not “end the stalemate”¹⁰¹ surrounding audio home recording. The statute is the product of compromise on the part of multiple competing interests—the music and consumer electronics industries, as well as the public.¹⁰² The AHRA addresses both secondary liability issues, which were directly at issue in *Betamax*, and primary liability issues on behalf of consumers.¹⁰³ Specifically, the statute prohibits copyright infringement suits for the manufacture, importation, or distribution of digital or analog audio-recording media, or for the use of that recording media to make copies.¹⁰⁴ With regard to home taping, the statute provides that consumers may make analog or digital audio copies for noncommercial use.¹⁰⁵

As the term *compromise* indicates, the AHRA also includes concessions to the music industry. As a balance to the prohibition on actions against individuals who copy music for noncommercial use and the manufacturers of devices that enable such copying, the AHRA implemented certain procedures to benefit copyright holders and discourage mass copying.¹⁰⁶ Two aspects of the AHRA are particularly relevant toward these ends. First, the AHRA implemented a royalty system on digital recording devices and media, designed to benefit copyright holders.¹⁰⁷ Second, the AHRA mandated the creation of a Serial Copy Management System (SCMS) on all devices made or sold in the United States, in order to prevent unlimited copying of protected works.¹⁰⁸

Before the AHRA was enacted, seventeen other countries had established royalty systems of some sort for digital music devices and media, creating a perceived imbalance of benefit between American artists and artists from other countries.¹⁰⁹ Thus, Congress was encouraged to adopt a royalty system not just because of pressure from the music industry at large, but also in order to even the playing field for trade.¹¹⁰ The AHRA places a 2 percent royalty on the first sale of digital recording devices¹¹¹ and a 3 percent royalty on the first sale of

¹⁰⁰ *Id.*

¹⁰¹ H.R. REP. NO. 102-780, pt. 1, at 18-19 (1992).

¹⁰² *See e.g., id.* at 22 (“The benefits to consumers of the legislation of release from liability regarding home copying and eventual access to digital technology outweigh the limited . . . burdens [of] having to indirectly pay royalties and enduring some limits on taping through technological fixes.”).

¹⁰³ 17 U.S.C. § 1008 (2006).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* §§ 1002-1007.

¹⁰⁷ *Id.* § 1004.

¹⁰⁸ S. REP. NO. 102-294, at 64 (1992).

¹⁰⁹ *Id.* at 47.

¹¹⁰ *Id.* at 22.

¹¹¹ 17 U.S.C. § 1004(a)(1).

digital recording media.¹¹² A majority of the AHRA delineates the necessary steps for both paying and collecting from these royalties.¹¹³ Furthermore, the AHRA prohibits the import, manufacture, or distribution of any digital audio-recording device or digital audio interface device that does not incorporate a SCMS.¹¹⁴ SCMS allows people to make first-generation copies of digitally recorded work, but technologically prohibits second-generation copies.¹¹⁵ However, users may make unlimited first-generation copies.¹¹⁶

C. The AHRA Is Flawed Because It Does Not Cover Home Recording Involving Personal Computers

The AHRA seeks to balance the interests of the music industry, the electronics industry, and consumers regarding audio home recording. However, while Congress expressly sought to address both contemporaneous as well as future, undeveloped technologies, there was one compromise which had serious consequences for future home recording: certain provisions of the AHRA, including the royalty and SCMS requirements, only apply to digital audio-recording devices as defined under the Act.¹¹⁷ A digital audio recording device is:

any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use.¹¹⁸

Digital audio-recording media includes “any material object in a form commonly distributed for use by individuals, that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device.”¹¹⁹ Not included is any object “that is primarily marketed and most commonly used by consumers . . .

¹¹² *Id.* § 1004(b).

¹¹³ Manufacturers must file notice and statements of account with the Register of Copyrights and include the royalty payments with the notice and statements. *Id.* § 1003. The Register of Copyrights then deducts expenses and deposits the net sum in the United States Treasury, which invests it in interest-bearing securities. *Id.* § 1005. Sixty-six and two-thirds of the funds go to the Sound Recordings Fund, which includes the American Federation of Musicians and the American Federation of Television and Radio Arts, and one-third goes to the Musical Works Fund, which includes music publishers and writers. *Id.* § 1006(b). Interested copyright holders must then file a claim with the Copyright Royalty Judge to collect from these proceeds within the first two months of the year to collect for the prior year. *Id.* § 1007(a). In return, copyright holders agree to waive claims of infringement against consumers for using recording devices in their homes. *Id.* § 1008.

¹¹⁴ *Id.* § 1002(a).

¹¹⁵ *Id.* § 1001(11) (defining the term “serial copying”).

¹¹⁶ H.R. REP. NO. 102-780, pt. 1, at 18 (1992) (response to the music industry’s concern about digital copying and its ability to produce perfect copies regardless of how many times a copy is made from a copy, unlike analog, which deteriorates over time).

¹¹⁷ 17 U.S.C. § 1001(3).

¹¹⁸ *Id.*; see also § 1001(3)(a)-(b) (expressly excluding from this definition “professional model products” and “dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds”).

¹¹⁹ *Id.* § 1001(4)(A).

for the purpose of making copies of . . . nonmusical literary works, including computer programs or data bases.”¹²⁰ Digital musical recordings under the AHRA expressly exclude objects “in which one or more computer programs are fixed”¹²¹ which, of course, includes recordings made through personal computers.

In constructing the language of the AHRA, Congress did not anticipate the explosion in home digital-recording technologies through computers and the Internet. Because computers are not digital recording devices as defined in the AHRA, its provisions do not cover them; consequently, nor do they cover the bulk of modern audio home recording.¹²² With the advent of the MP3 file, computers became the primary audio home-recording mechanism. In 1999, the Ninth Circuit examined whether MP3 players fell within the scope of the AHRA.¹²³ The Recording Industry Association of America (RIAA) and other members of the music industry sued the manufacturers of the Rio MP3 player, arguing that the Rio was not in compliance with the AHRA’s SCMS requirements because it did not contain the copyright-identifying codes that inform a device if the audio material is protected and specify whether it is an original work or a copy.¹²⁴ The court noted that the AHRA specifically excludes objects or devices “in which one or more computer programs are fixed,”¹²⁵ and held that because the Rio had to copy the files from a hard drive, which was not governed by the AHRA because its primary purpose was not to copy audio files, the MP3 player was not copying directly from digital music recordings and therefore was not within the purview of the AHRA.¹²⁶

The Ninth Circuit examined the legislative history of the AHRA and did not find any evidence that Congress intended “digital musical recording[s]” to include songs on computer hard drives.¹²⁷ In fact, the court was influenced by express language in the Senate report, which asserted that a machine is not considered a “digital audio recording device” if “the ‘primary purpose’ of the recording function is to make objects other than digital audio copied recordings . . . even if the machine or device is technically capable of making such recordings.”¹²⁸ The court further pointed out that a stated purpose of the AHRA was to allow for private, noncommercial copying, and the MP3 player at issue was designed to allow individuals to make private and portable copies of their music files.¹²⁹ The AHRA intends to shield manufacturers and distributors of

¹²⁰ *Id.* § 1001(4)(B)(ii).

¹²¹ *Id.* § 1001(5)(B)(ii) (“[E]xcept that a digital musical recording may contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material.”).

¹²² *See* Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1078, 1081 (9th Cir. 1999).

¹²³ *Id.* at 1075.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1076 (quoting § 1001(5)(B)(ii)).

¹²⁶ *Id.* at 1076.

¹²⁷ *Id.* at 1077.

¹²⁸ *Id.* at 1078 (quoting S. REP. NO. 102-294, at 121 (1992)).

¹²⁹ *Id.* at 1079.

recording media from secondary liability for copyright infringement.¹³⁰ Manufacturers of such media, however, must satisfy SCMS requirements per the Act;¹³¹ the manufacturers of the Rio were not liable for a lack of compliance with SCMS requirements because the recording device used did not fall within the purview of the AHRA.¹³²

Although the manufacturers of the Rio were not obligated to comply with SCMS requirements because the device did not fall within the parameters of the AHRA, owners of P2P file-sharing businesses ironically have not been able to seek safe harbor under the AHRA for similar reasons. The AHRA shields manufacturers and distributors of recording media from secondary liability for copyright infringement, but it does not preclude liability for P2P file-sharing services, in part because it “does not cover the downloading of MP3 files to computer hard drives.”¹³³ As the Ninth Circuit suggested, “There are simply no grounds in either the plain language of the definition or in the legislative history for interpreting the term ‘digital musical recording’ to include songs fixed on computer hard drives.”¹³⁴ Therefore, web services with software that allows music sharing, beginning with Napster in the late 1990s, cannot seek safe harbor under the AHRA because computers are the primary mechanism (and source) for that sharing, and neither can creators of mix tapes crafted in that way.¹³⁵

¹³⁰ See 17 U.S.C. § 1008 (2006).

¹³¹ *Id.* § 1002.

¹³² *Diamond*, 180 F.3d at 1081.

¹³³ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001) (“[U]nder the plain meaning of the Act’s definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices because their ‘primary purpose’ is not to make digital audio copied recordings.” Furthermore, “computers do not make ‘digital music recordings’ as defined by the . . . Act.”); see also *Diamond*, 180 F.3d at 1078.

¹³⁴ See *Diamond*, 180 F.3d at 1077.

¹³⁵ See *Napster*, 239 F.3d at 1025, 1027. In 1998, teenager Shawn Fanning launched Napster, one of the first P2P file-sharing networks. Fanning was heralded as an immediate new-media celebrity, appearing on the cover of *Wired* magazine in August of 2005 and as a surprise (albeit rumored) guest on the MTV Video Music Awards in 2000. Host Carson Daly introduced Fanning as the teenager that, in a year, “developed a technology that has revolutionized the way we all get our music.” Fanning entered from backstage wearing a Metallica t-shirt, which was notable because Metallica was a vocal opponent of music file sharing. Laughing, Daly commented, “Nice shirt.” Fanning responded, “Like it? Actually, a friend of mine shared it with me. I’m thinking about getting my own, though.” *MTV Video Music Awards* (MTV television broadcast Sept. 7, 2000), available at <http://www.poetv.com/video.php?vid=45646>; see also *MTV Video Music Awards: 2000*, MTV.COM, <http://www.mtv.com/ontv/vma/2000/> (last visited Jan. 4, 2011).

IV. MODERN MIX TAPES MIGHT NOT FALL WITHIN THE PARAMETERS OF
FAIR USE

*“Caught, now in court ‘cause I stole a beat.
This is a sampling sport but I’m giving it a new name.
What you hear is mine.”*

—Public Enemy¹³⁶

Unable to seek protection under the AHRA for users’ home recordings of copyrighted music files, music-sharing sites have analogized *Sony* and alleged that their users were making fair uses of the copyrighted works.¹³⁷ Courts, however, have not been inclined to find music file sharing a fair use. The seminal case on music file sharing is *A&M Records, Inc. v. Napster*. Napster enabled P2P file sharing of MP3 files through use of its free MusicShare software.¹³⁸ Users could create directories of their music files, which others could search and access through the Napster system.¹³⁹ The users’ file names were stored in a library on the Napster server, and the server provided a collective directory listing the users that were connected at any given time and all file names that were immediately accessible.¹⁴⁰ Napster had a search function on its server, which enabled users to search available files connected to the network servers, and to download those MP3 files to their computers.¹⁴¹ In essence, Napster facilitated mass online sharing of copyright-protected music recordings. When sued by various components of the music industry for vicarious and contributory copyright infringement, Napster argued that, despite the reproduction of copyrighted works, the music sharing on its system was protected by the fair use doctrine under theories of sampling, space-shifting, and permissive distribution of recordings.¹⁴²

Fair use is an affirmative defense to copyright infringement. The doctrine of fair use is premised on the strong public interest in promoting creativity, in ways big and small.¹⁴³ It “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹⁴⁴ The fair use analysis focuses on a set of four factors, although the Copyright Act instructs that this list is not exhaustive: (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the portion taken in relation to the work as a whole, and (4) effect on the potential market for or value of the copy-

¹³⁶ PUBLIC ENEMY, *Caught, Can We Get a Witness*, ON IT TAKES A NATION OF MILLIONS TO HOLD US BACK (Def Jam Recordings 1988).

¹³⁷ See *Napster*, 239 F.3d at 1014, 1019.

¹³⁸ *Id.* at 1011.

¹³⁹ *Id.* at 1011-12.

¹⁴⁰ *Id.* at 1012.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1014.

¹⁴³ NIMMER, *supra* note 47, § 13.05.

¹⁴⁴ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719 (9th Cir. 2007) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)) (alteration in original) (citation omitted).

righted work.¹⁴⁵ Courts generally focus on factors one and four in their analyses, although the Supreme Court has cautioned that the fair use analysis is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. . . . Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.¹⁴⁶

A. The Purpose and Character of the Use Is a Key Element of the Fair Use Defense

The first factor is the purpose and character of the use, one of the key inquiries for the fair use analysis.¹⁴⁷ This factor explores the degree to which “the new work merely replaces the object of the original creation or instead adds a further purpose or different character.”¹⁴⁸ Courts will examine whether the new work is “transformative,” and whether it is a commercial or noncommercial use of the copyrighted material.¹⁴⁹ According to the Supreme Court, a use is transformative if it does not “‘merely supersede[] the objects of the original creation’ . . . [but] adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁵⁰ Uses are transformative when a work is changed or used “in a different context such that the . . . work is transformed into a new creation.”¹⁵¹

In *Campbell v. Acuff-Rose Music, Inc.*, 2 Live Crew’s use of the music from Roy Orbison’s song “Oh, Pretty Woman” was found to be transformative, for example, because it was a parody.¹⁵² Parodies “provide [a] social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”¹⁵³ By way of another example, Google’s use of copyrighted images reproduced in thumbnail size for image-searching purposes was highly transformative because it changed the image from having “an entertainment, aesthetic, or informative function” to serving as “a pointer directing a user to a source of information.”¹⁵⁴ Just as parody has a social benefit, a search engine has a “social benefit by incorporating an original work into a new work, namely, an electronic reference tool.”¹⁵⁵

The court found the copyrighted works at issue in *Napster* not transformative.¹⁵⁶ Unlike parody, which changes the message of the work for the purposes of comment, or a search engine index, which changes the basic function

¹⁴⁵ 17 U.S.C. § 107 (2006).

¹⁴⁶ *Campbell*, 510 U.S. at 577-78 (citations omitted).

¹⁴⁷ 17 U.S.C. § 107.

¹⁴⁸ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

¹⁴⁹ *Campbell*, 510 U.S. at 578-79.

¹⁵⁰ *Id.* at 579.

¹⁵¹ *Wall Data, Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769, 778 (9th Cir. 2006) (holding that use of a reproduction of a copyrighted computer program to save the cost of buying additional copies was not fair use).

¹⁵² *Campbell*, 510 U.S. at 594.

¹⁵³ *Id.* at 579.

¹⁵⁴ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 721 (9th Cir. 2007).

¹⁵⁵ *Id.*

¹⁵⁶ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

of the work, Napster, at best, retransmitted a work in a different medium.¹⁵⁷ The copyrighted works were copied wholesale, with only minor, often indiscernible, reductions in sound quality.¹⁵⁸ When an original work is merely produced in a different medium, courts are reluctant to find that the work is sufficiently transformed.¹⁵⁹ Rather, it is the substance, not the form, that determines whether a use is fair.

When considering the purpose and character of the use, courts also explore the degree of commercial activity involved. Although commercial activity may generally weigh against a finding of fair use, the *Campbell* court objected to the tendency of courts to give it “virtually dispositive weight.”¹⁶⁰ In that case, 2 Live Crew sold approximately 250,000 copies of the song that significantly appropriated Orbison’s song.¹⁶¹ The effect of commercial sales on the fair use analysis was a substantial part of the oral argument in that case.¹⁶² The Court found that commercial activity did not automatically preclude fair use, and, in fact, that inquiry should instead focus on the harm to the original work, of which commercial activity might or might not be indicative.¹⁶³

In *Napster*, the Ninth Circuit concluded that, despite the lack of economic purpose, the use was still commercial because the users were making their files available to other anonymous users in a “repeated and exploitive” manner.¹⁶⁴ Because this use saved others from purchasing the songs themselves, the use was commercial.¹⁶⁵ Like photocopying scholarly journal articles at a research laboratory to save the expense of purchasing additional copies, downloading copies of video games to avoid having to buy a copy, or distributing unauthorized reproductions of religious texts to members of a church, Napster demonstrated a commercial use through repeated and exploitative reproduction and distribution of copyrighted works.¹⁶⁶

The creator of a mix tape, whether analog or digital, faces the same analysis. The classic mix tape on cassette—a compilation of recorded songs given to a family member, a friend, a significant other, or even kept for one’s own listening pleasure—is, as stated earlier, exempt from liability under the AHRA, provided the recording is for private and noncommercial use.¹⁶⁷ However, modern digital mix tapes typically do not fall within the parameters of AHRA protection because they rely mainly on computers. Furthermore, the AHRA does not say that audio home recording is not infringing; rather, it says that a

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* at 1012.

¹⁵⁹ *Id.* at 1015; *see also* *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000).

¹⁶⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

¹⁶¹ *Id.* at 572-73.

¹⁶² *See generally* Oral Argument, *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (No. 92-1292), available at http://www.oyez.org/cases/1990-1999/1993/1993_92_1292/argument.

¹⁶³ *Campbell*, 510 U.S. at 590-91.

¹⁶⁴ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (citing *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994); *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679, 687 (N.D. Cal. 1994); *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000)).

¹⁶⁷ *See supra* Part III.

suit for infringement cannot be *brought*.¹⁶⁸ The creator of a mix tape (analog or digital, old or new) is, without question, reproducing copyrighted works. If there is a copyrighted work and a violation of one of the exclusive rights guaranteed by Section 106 of the Copyright Act, there is a *prima facie* case of infringement.¹⁶⁹

Mix tape creators infringe individual copyrights when they reproduce sound recordings to create compilations. The question arises, thus: Is the creation of a mix tape a fair use of the underlying copyrighted works? Although the spirit behind digital mix tapes might be the same as that of analog versions, technological developments create material differences between the two. The AHRA aside, what might have been “fair” in an analog world might be infringing in a digital one.

1. *Mix Tapes Transform Content Solely Through Context*

Because mix tapes reproduce whole tracks faithfully, any transformation under the first fair use factor is contextual. Songs are typically copied in their entirety exactly as they sound on the original recording, but the creator of a mix tape seeks to create a new meaning for particular songs by changing the context. As Sheffield states, “A mix tape steals . . . moments from all over the musical cosmos, and splices them into a whole new groove.”¹⁷⁰ Mix tapes take musical tracks out of their context, and transport them to another auditory place, with a different landscape and to different effect. Context indicates experience when it comes to listening to music, and a mix tape at its best creates an entirely new contextual experience:

We music fans love our classic albums, our seamless masterpieces, our *Blonde on Blondes* and our *Talking Books*. But we love to pluck songs off of those albums and mix them up with other songs, plunging them back into the rest of the manic slipstream of rock and roll. I’d rather hear the Beatles’ “Getting Better” on a mix tape than on *Sgt. Pepper* any day. I’d rather hear a Frank Sinatra song between Run-DMC and Bananarama than between two other Frank Sinatra songs. When you stick a song on a tape, you set it free.¹⁷¹

A mix tape creator could argue that the removal and recombination of tracks is a transformative use of copyrighted material. In an analog mix tape, this argument would be analogous to the argument surrounding appropriation art. Appropriation art involves the “borrowing” of images or elements belonging to someone else and incorporating them into a new work with the purpose of reframing them or bring out some new meaning.¹⁷² William Patry has noted that, with regard to appropriation art:

¹⁶⁸ See 17 U.S.C. § 1008 (2006).

¹⁶⁹ *Id.* § 106.

¹⁷⁰ SHEFFIELD, *supra* note 18, at 23.

¹⁷¹ *Id.* at 24.

¹⁷² William Patry, *Appropriation Art and Copies*, THE PATRY COPYRIGHT BLOG (Oct. 20, 2005, 10:22 AM), <http://williampatry.blogspot.com/2005/10/appropriation-art-and-copies.html>; see also Heather J. Meeker, Comment, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195, 220 (1993). A compilation of detailed comments and instructions on the art of making a mix can be found at THE ART OF THE MIXTAPE, <http://www.kempa.com/articles/tape/> (last visited Jan. 4, 2011).

[T]here is a perspective brought to bear by the art community that deserves consideration by courts, and that is the conflation of originality, author, and copy into a reflexive need to protect copyright owners against wholesale reproduction that might be viewed as conceptually transformative in the appropriation art sense of that term. Might some conceptual appropriation provide new insights into the original? If so, we might think twice before legally condemning it.¹⁷³

Perhaps the same comment could be made about a mix tape. Geoffrey O'Brien has called mix tapes "the most widely practiced American art form."¹⁷⁴ Mix tapes have been treated as art in the market, as well—cultural artifacts in a digital world. The Museum of Communication in Hamburg, Germany held an exhibition it entitled "Cassette Stories," featuring the mix tape.¹⁷⁵ Eighty mix tape creators were invited to tell stories behind mixes they had made, and "[t]he picture that emerged was of the mix cassette as a way of re-sequencing music to make sense of our most stubbornly inexpressible feelings, a way of explaining ourselves to someone we love, or to ourselves."¹⁷⁶ To the extent that mix tapes represent collages of material illustrating a particular theme, the significance of the songs extrapolated from their albums and placed into that new context might imbue the original work with new meaning, might comment on that work by placing it in a new context, or might lend conceptual insights into the work.

a. As Creative Works, Mix Tapes Might be Copyrightable as Compilations

In this vein, a mix tape creator may have copyright protection over the mix tape itself if the work as a whole qualifies as an original compilation. Under the Copyright Act, a compilation is defined as "collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."¹⁷⁷ A compilation is copyrightable where an author selects, coordinates, or arranges preexisting materials in such a way as to create an original work of authorship.¹⁷⁸ In *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, the Supreme Court emphasized that the congressional interest in protecting compilations was to "make plain that the criteria of copyrightable subject matter . . . apply with full force to works . . . containing preexisting material."¹⁷⁹

In *Feist*, the Court held that a company's telephone directory was not protected as a compilation because the selection of listings was obvious and did not contain the modicum of originality required under the Copyright Act.¹⁸⁰ Although "the statute envisions that there will be some fact-based works in

¹⁷³ Patry, *supra* note 172.

¹⁷⁴ THE NEW WORCK, <http://thenewworck.com/info> (last visited Jan. 4, 2011).

¹⁷⁵ James Paul, *Last Night a Mix Tape Saved My Life*, THE GUARDIAN, Sept. 26, 2003, available at <http://www.guardian.co.uk/music/2003/sep/26/2>; see also *Mixtapes*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Mixtape> (last visited Jan. 4, 2011).

¹⁷⁶ Paul, *supra* note 175.

¹⁷⁷ 17 U.S.C. § 101 (2006).

¹⁷⁸ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 357 (1991).

¹⁷⁹ *Id.* (quoting H.R. REP. NO. 94-1476, at 57 (1976)) (second alteration in original).

¹⁸⁰ *Id.* at 362.

which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection,”¹⁸¹ the originality requirement does not create a high bar.¹⁸² The selection and arrangement must simply demonstrate a minimal level of creativity. Originality may occur, separately or solely, in the selection of the material in the compilation.¹⁸³

The value of the mix tape lies in the originality of its selection, arrangement, and composition of the particular tracks used. The classic mix tape is arranged with a particular theme, whether temporal or substantive, or even in form. In *Love Is a Mix Tape*, Sheffield makes a list of typical themes people use to create a mix: The Party Tape; I Want You; We’re Doing It? Awesome!; You Like Music, I Like Music, I Can Tell We’re Going To Be Friends; You Broke My Heart and Made Me Cry and Here Are Twenty or Thirty Songs About It; The Road Trip; No Hard Feelings, Babe; I Hate This Fucking Job; The Radio Tape; and The Walking Tape.¹⁸⁴ “There are millions of songs in the world,” Sheffield writes, “and millions of ways to connect them into mixes. Making the connections is part of the fun of being a fan.”¹⁸⁵

However, regardless whether a mix tape has sufficient originality to be protectable, a copyrightable compilation has a very limited protection, covering “only the ‘author’s original contributions—not the facts or information conveyed.”¹⁸⁶ Thus, regardless of the mix tape’s copyrightability, the creator would still be liable for copyright infringement for reproducing any protected works; the copyrightability of a compilation “has no effect one way or the other on the copyright or public domain status of the preexisting material.”¹⁸⁷

2. *Digital Technology Changes Contextual Aspects of a Mix in Material Ways*

The argument that the mix tape transforms works by recontextualizing them, thus imbuing them with new meaning, becomes a more difficult one as mix tapes move from analog to digital. To the extent that the architecture of digital mixes facilitates separation of individual tracks from the whole, the division of a mix into its component parts, it becomes more difficult to argue that the context is transformative. If a digital mix uploaded to one’s computer can effectively assimilate individual tracks into the whole of that individual’s music library, it looks less like art and more like appropriation, because the tracks can be used and reused independently of the mix itself; if the context is dynamic, that is, it becomes harder to argue there is any static message realized. Individuals might only listen to a digital mix tape in its entirety, as it was created, but often music library software applications, such as iTunes, import songs without

¹⁸¹ *Id.* at 358.

¹⁸² *Id.* (“[T]he originality requirement is not particularly stringent.”).

¹⁸³ *Id.* at 358-59.

¹⁸⁴ SHEFFIELD, *supra* note 18, at 17-23. Sheffield adds, “*There are lots more where these came from. The drug tape. The commute tape. The dishes tape. The shower tape. The collection of good songs from bad albums you don’t ever want to play again. The greatest hits of your significant other’s record pile, the night before you break up.*” *Id.* at 23.

¹⁸⁵ *Id.*

¹⁸⁶ *Feist*, 499 U.S. at 359.

¹⁸⁷ *Id.* (quoting H.R. REP. NO. 94-1476, at 57 (1976)).

distinction.¹⁸⁸ There might be some very slight reduction in sound quality, but, under *Campbell* and like *Napster*, that reduction alone does not in any way imbue the work with a new meaning or message.¹⁸⁹ For this reason, a mix CD in hard copy, read-only format would have a better argument than one with digital files ripped into a larger library on a hard drive.

One digital mix tape site, QCMixtapes, uses the back-end database SoundCloud to allow the uploading and sharing of mixes as single files, so that the creator of the mix has control over the content and the context in which the music is presented.¹⁹⁰ This service requires that the creator make the mix tape just as he or she would have done in the days of analog mixes—rather than dragging and dropping into a playlist, the mix tape creator must record individual and sequential tracks in order to create one large file.¹⁹¹ It is more difficult to create, but the mix tape creator has a better argument for a transformative context where that context is a requisite and intrinsic part of the mix itself.

3. *Mix Tapes Are Generally Created for Personal and Noncommercial Use*

The mix tape creator, whether analog or digital, benefits from the fact that taping is a noncommercial and personal use. This, in fact, is the key motivation under the AHRA, and is a prime inquiry for the determination of fair use of copyrighted works.¹⁹² As mentioned previously, the commercial aspect of a use has been somewhat deemphasized in recent fair use cases because “many, if not most, secondary users seek at least some measure of commercial gain from their use,”¹⁹³ and uses that are commercial have nonetheless been found to be fair.¹⁹⁴ However, the noncommercial aspect of a particular use, while not determinative, is nonetheless relevant to the inquiry both under the first factor and the fourth, for noncommercial uses do not affect the market for the copyrighted work in the way that a commercial appropriation might.¹⁹⁵

¹⁸⁸ LESSIG, *supra* note 9, at 134 (detailing iTunes’ method of importing tracks from CDs).

¹⁸⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

¹⁹⁰ QC MIXTAPES, http://www.qcmixtapes.com/?page_id=2 (last visited Jan. 4, 2011); *see also* Eliot Van Buskirk, 8 *Best Ways to Share ‘Mix Tapes,’* WIRE (Oct. 26, 2009, 6:04 PM), <http://www.wired.com/epicenter/2009/10/best-8-ways-to-share-mix-tapes/>.

¹⁹¹ *How to Properly Document a Mixtape That Is Publicly-Shared on SoundCloud*, QC MIXTAPES.COM, <http://www.qcmixtapes.com/mixdoc.htm> (last visited Jan. 4, 2011); *see also* Buskirk, *supra* note 190.

¹⁹² 17 U.S.C. § 1008 (2006); *see also Napster*, 239 F.3d at 1015.

¹⁹³ *See Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 921 (2d Cir. 1994); *Campbell*, 510 U.S. at 584 (“If, 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 § 107. . . .”).

¹⁹⁴ *See, e.g., Campbell*, 510 U.S. at 569.

¹⁹⁵ *Compare Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450-51 (1984) (“[A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.”), *with Napster*, 239 F.3d at 1015 (“[C]ommercial use is demonstrated by a showing that repeated and exploitive unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies.”).

Additionally, the more personal the use, the easier it will be for a mix tape creator to make the argument that the use is fair. One of the most recent cases on P2P file sharing addressed this issue. In *Sony BMG Music Entertainment v. Tenenbaum*, a district court rejected the assertion that sharing copyrighted musical works on a P2P system was a fair use, due to the defendant's "widespread, unlimited file sharing."¹⁹⁶ The court noted, however, that it could "envision a scenario in which a defendant sued for file sharing could assert a plausible fair use defense," when it might be relevant "with whom he shared files—a few friends or the world—as well as how many copyrighted works he shared."¹⁹⁷ The personal nature of a mix tape is really the heart of the creation itself, and this factor should be influential to the fair use analysis.

a. Digital Mix Tapes Challenge the Limits of What Is Personal and Noncommercial

Under this aspect of the fair use defense, the typical creator of an analog mix once again fares better than the typical creator of a digital one. The creator of an analog mix makes one copy of a particular mix. It takes at least ninety minutes to make a ninety-minute mix, and, if copies are made, they experience such a rapid decline in quality, generation to generation, that they quickly become useless. A digital mix has no such practical limitations. Digital mixes take very little time to create and can be reproduced indefinitely without discernible reduction in sound quality.¹⁹⁸ Whereas it never would have been conceivable for a couple to give out two hundred analog mix tapes at their wedding, it is well within the realm of possibility to give out that number of mix CDs as favors. Furthermore, many of the online mix tape sites involve possible distribution to a large number of people—in some situations, anyone with Internet access. The mix tape might have been created with a specific purpose for a specific person, but it might be nonetheless available to anyone for download.¹⁹⁹ When individuals create mixes and reproduce hundreds of them for distribution as wedding favors, or upload those mixes to the internet, the limits of what is personal and noncommercial are called into question.

The boundaries of *personal* or *private* uses are unclear. The AHRA statutorily exempts from liability qualifying audio recordings made for private, non-commercial use, but offers little guidance. The Act's legislative history, however, does give some illustration as to what the boundaries of the intended

¹⁹⁶ *Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217, 238 (D. Mass. 2009).

¹⁹⁷ *Id.* at 237-38.

¹⁹⁸ See *supra* Part II.B. Software applications have at times attempted to control this. iTunes allows a playlist to be copied a maximum of seven times. iTunes further permits the authorization of only five supported devices at any given time for one user's account. See Apple, *iTunes Terms and Conditions*, *supra* note 68 (scroll down to "B. iTunes Store Terms and Conditions").

¹⁹⁹ Muxtape was a site that allowed users to create mix tapes online, by uploading songs and creating playlists. It did not filter out copyright-protected material through audio footprints, and it was shut down following a dispute with the RIAA. See Eliot Van Buskirk, *Muxtape Keeps the Mixtape Concept Alive*, WIRED (Mar. 25, 2008, 2:29 PM), http://www.wired.com/listening_post/2008/03/muxtape-keeps-t/; Eliot Van Buskirk, *Life After Muxtape: Where Do We Go Now?*, WIRED (Aug. 26, 2008, 9:25 AM), http://www.wired.com/listening_post/2008/08/life-after-muxt/.

meaning of *private* might be under that statute by pointing out that a person who makes a tape of a copyrighted recording for use in his home, car, or portable player, or for a family member would be protected from suit, whereas a person who makes copies of a recording and sells them to others would not be protected, but would still have the full range of defenses under copyright law.²⁰⁰ Unfortunately, that illustration offers two extremes, without addressing the typical reality of contemporary, personal music sharing.

The legislative guidance from the AHRA creates a slippery slope: Is it a personal use to make four mix tapes for roommates? For six friends for Christmas gifts? For twenty party guests as party favors? For one hundred of a couple's closest family and friends at their wedding? For all friends on a social network? Is it personal use to make the mix tape available for download on a personal blog? To post the mix on a searchable mix tape web site?

With analog mix tapes, there is a practical constraint imposed by the architecture of the medium and the practical reality of the effort it takes to create. With digital mix tapes, however, those constraints are often removed, and mass distribution is not only possible, but also easy, looking more like *Napster* than *Betamax*. As in so many other realms, the personal becomes the public. It becomes more important than ever, perhaps, to determine what a personal or private use is, while simultaneously becoming infinitely more difficult. One thing that is clear in the balance of fair use factors is that the less a use seems personal, the less fair it will seem relative to the other factors.

B. The Second and Third Factors in the Fair Use Analysis Weigh Against Both Analog and Digital Mix Tapes

The second factor looks at “the nature of the copyrighted work:”²⁰¹ the more creative the work is, the less fair an appropriation of that work will be because creative “works are closer to the core” of copyright protection than are fact-based works.²⁰² Musical compositions are generally considered very creative.²⁰³ Works comprised substantially of factual material, such as historical or biographical texts, on the other hand, have a narrower scope of protection.²⁰⁴ Along the same lines, published works have a wider berth of fair use potential than works that are unpublished, based on the theory that authors should be able to control the initial public appearance of their works.²⁰⁵ Sound recordings of copyrighted musical compositions are highly creative and entitled to a wide berth of protection.²⁰⁶

²⁰⁰ S. REP. NO. 102-294, at 51-52 (1992).

²⁰¹ 17 U.S.C. § 107 (2006).

²⁰² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

²⁰³ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001) (upholding district court's determination that musical compositions are creative in nature).

²⁰⁴ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”).

²⁰⁵ *Id.* at 564 (“[S]cope of fair use is narrower with respect to unpublished works.”).

²⁰⁶ *See, e.g., Napster*, 239 F.3d at 1016.

“The amount and substantiality of the portion” of the copyrighted work taken is the third factor in a fair use analysis.²⁰⁷ Generally speaking, the more taken, the less fair the appropriation. Reproduction of a work in its entirety, for example, “militates against a finding of fair use.”²⁰⁸ In *Napster*, the court easily dismissed the second and third factors because musical compositions are very creative in nature and because the users were copying full songs.²⁰⁹ Users of the Napster system were making full reproductions of compositions and sound recordings through their file transfers, copying the entire work at issue and leading the court away from finding fair use.²¹⁰ However, a use may be fair even if an entire work is taken, as was the case in *Betamax*, where entire television programs were taped for time-shifting purposes.²¹¹ By the same token, a use invoking just a small portion of the copyrighted work might not be fair if that portion is the “heart of the [work].”²¹² The heart of a musical work, for example, is often referred to as the “hook.”²¹³

The second and third factors weigh against the mix tape creator because of the creativity of sound recordings and the fact that the amount taken is the work in its entirety, heart *and* soul (or blues, or rock). Courts have been increasingly critical of reproductions of sound recordings in recent years. Cases questioning whether small “sampled” reproductions of sound recordings are fair uses have often been answered in the negative. The Sixth Circuit, for example, held in the oft-cited/discussed/criticized *Bridgeport Music, Inc. v. Dimension Films* that a two-second sample of a sound recording was not a fair use.²¹⁴ Although this case did not eliminate the fair use defense altogether for sampling, it did create a bright-line test for reproductions of sound recordings for the purpose of sampling in the Sixth Circuit.²¹⁵ The use of a copyrighted work for the purpose of sampling is materially different from the use of that work for the purpose of creating a mix tape, particularly relative to the other relevant factors. However, it is important to be aware of the line of cases addressing sound recordings and fair use, which exemplify a degree of intolerance on the part of some courts for reproduction of even brief sound recordings.²¹⁶

²⁰⁷ 17 U.S.C. § 107 (2006).

²⁰⁸ *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986).

²⁰⁹ *Napster*, 239 F.3d at 1016.

²¹⁰ *Id.*

²¹¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984).

²¹² *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 600 (1985) (“Court adheres to its conclusion that The Nation appropriated the heart of the Ford manuscript.”).

²¹³ *See Newton v. Diamond*, 388 F.3d 1189, 1196 (9th Cir. 2004).

²¹⁴ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 796, 800 (6th Cir. 2005) (“If you cannot pirate the whole sound recording, can you ‘lift’ or ‘sample’ something less than the whole[?] Our answer to that question is in the negative.”).

²¹⁵ *Id.* at 801 (“Get a license or do not sample. We do not see this as stifling creativity in any significant way.”).

²¹⁶ *See, e.g., id.*; *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 275-76 (6th Cir. 2009) (holding that there was sufficient evidence for a jury to determine that certain parts of a song were protectable under copyright law). *But see Newton*, 388 F.3d at 1196-97 (holding that a three-note sample from a song sequence was de minimis and therefore non-infringing). For a closer look at the sampling movement, see Shervin Rezaie, *Play Your Part: Girl Talk’s Indefinite Role in the Digital Sampling Saga*, 26 *TOURO L. REV.* 175 (2010).

C. The Effect on the Potential Market Is Often Considered the Most Important Factor

The final common factor in the non-exhaustive list is the effect on the potential market.²¹⁷ Courts often cite this factor as being of primary importance in the fair use analysis.²¹⁸ The key word in the analysis under this factor is “potential.”²¹⁹ Because the right to make derivative works is one of the exclusive rights of the copyright holder, the market is not limited simply to those channels of trade that the copyright holder engages in directly, but extends to potentially derivative channels.²²⁰ The use of thumbnails of copyrighted images, for example, might not be fair even though the copyright owner does not currently use the thumbnails for anything.²²¹ Moreover, the potential market does not include solely the market areas the copyright holder is already involved in, nor the areas a copyright holder could become involved in, but potential licensing markets, as well.²²² The importance of this factor depends on the purpose and character of the use. If it is a commercial use, market harm may be presumed.²²³ If it is a noncommercial use, however, the court will look at whether the “particular use is harmful, or that if it should become widespread, [whether] it would adversely affect the potential market for the copyrighted work.”²²⁴

1. Digital Mix Tapes Might Adversely Affect the Market in Ways that Analog Mixes Did Not

The fourth factor seems to weigh in favor of the analog mix tape, but again, the digital form may lead to a different result. It is true that a potential market for copyright holders would exist if a licensing scheme were developed by which mix tape creators could pay to make additional copies of a particular

²¹⁷ 17 U.S.C. § 107 (2006). *But see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

²¹⁸ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985) (“This last factor is undoubtedly the single most important element of fair use.”).

²¹⁹ *Id.* at 568 (“[T]o negate fair use one need only show that if the challenged use ‘should become widespread, it would adversely affect the *potential* market for the copyrighted work.’”) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)) (emphasis added by later court).

²²⁰ *Id.*

²²¹ See Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 724-25 (9th Cir. 2007) (Although the district court reasoned that Google’s use of thumbnail images could cause harm to Perfect 10’s potential market for cell phone downloads, the Ninth Circuit called this harm “hypothetical.”); see also Rogers v. Koons, 960 F.2d 301, 312 (2d Cir. 1992) (“[D]efendants could take and sell photos of ‘String of Puppies,’ which would prejudice Rogers’ potential market for the sale of the ‘Puppies’ notecards, in addition to any other derivative use he might plan.”); Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir. 1987) (“[E]ffect on the market for Salinger’s letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime. Salinger has the right to change his mind.”).

²²² The breadth with which this factor is viewed can create some difficulties, if not downright circular reasoning. If the court examines potential licensing markets, for example, practically speaking those markets will fill in the gap if the use is found not to be fair. If the use is found to be fair, the licensing market will not exist.

²²³ Sony Corp. of Am., 464 U.S. at 451.

²²⁴ *Id.*

work, (and that, similarly circularly, a potential market will not exist if the use is fair). However, there has been no appreciable evidence that analog mix tapes affect an individual's willingness to purchase music, or even an individual's willingness to purchase an album containing the very music that is on the tape to begin with.²²⁵ *Wired* magazine, which has followed the destruction-reincarnation-resurrection loop of the mix tape over the last several years, noted that the sharing of music through mix tapes of the past had the effect of increasing record sales, although such comment is anecdotal.²²⁶ *Wired* describes the "olden days," when "boys and girls used to spend hours using double cassette decks to carefully craft mix tapes to share in order to express their innermost longings in an artsy way. It sometimes led to love and inadvertently increased record sales by sharing a little taste of previously undiscovered bands."²²⁷

Whether the sharing of analog mixes actually increased record sales is unclear. However, the theory does not require a far leap of reasoning, given existing culture and common-sense market interests. The more music people are exposed to by close friends, the greater chance they will find something they like. The more people discover music they like, the more likely they are to purchase that music—unless, of course, the initial exposure itself creates a market substitution for the music.

This is where the digital mix differs from its analog counterpart. Not only is the quality of a digital track higher and capable of mass reproduction and distribution, but a significant portion of revenue from contemporary music sales is for single-track downloads. In 2007, consumers downloaded 809.9 million single tracks, and 42.5 million albums.²²⁸ In 2008, those numbers increased to 1.03 billion single tracks, and 56.9 million albums.²²⁹ Although the increase in digital album downloads outpaced singles, singles still represent the vast majority of digital downloads. If a track from a digital mix tape assimilates into a consumer's music library, it can be taken out of context and combined with other tracks.²³⁰ In addition, if a consumer decides to purchase more songs by that particular artist, it is usually possible to purchase other

²²⁵ A friend of mine had a favorite mix called *Songs That Made Me Buy the Whole Damn Album*.

²²⁶ See Buskirk, *supra* note 190.

²²⁷ *Id.*

²²⁸ Recording Indus. Ass'n of Am., *2008 Year-End Shipment Statistics*, *supra* note 69.

²²⁹ *Id.*

²³⁰ In March 2010, the band Pink Floyd won a lawsuit against its longtime label EMI, preventing the label from selling tracks from its albums on a track-by-track basis, purportedly based on a clause in the contract requiring EMI to "preserve the artistic integrity of the [band's] albums." Peter Jenner, who managed Pink Floyd in the 1960s when the band signed with EMI, commented, "Clearly in cases like the Floyd, there was a coherence in the content as an album. . . . Tracks were dropped because they didn't fit in with the whole thing." Garth Brooks and AC/DC are among other artists who have objected to their albums being divided into individual tracks. *Pink Floyd Win EMI Court Ruling Over Online Sales*, BBC NEWS (Mar. 11, 2010, 4:52 PM), <http://news.bbc.co.uk/2/hi/8561963.stm>; see also David Kravets, *Pink Floyd Beats EMI in Creativity Flap*, WIRED (Mar. 11, 2010, 2:49 PM), <http://www.wired.com/threatlevel/2010/03/pink-floyd-beats-emi-in-creativity-flap/>; James Lumley & Erik Larson, *EMI Loses U.K. Ruling Over Sale of Pink Floyd Singles*, BLOOMBERG BUSINESSWEEK (Mar. 11, 2010, 5:10 PM), <http://www.businessweek.com/news/2010-03-11/pink-floyd-contract-applies-to-digital-sales-u-k-court-rules.html>.

songs by that artist individually, even from the same album, without paying for the original track.²³¹ With digital mix tapes, that ability to pick and choose the songs one desires without committing to the purchase of the whole album or any other portion of it threatens to cause a total market substitution for the copyrighted work.

It is arguable that mix tapes will expose consumers to music they would not have purchased otherwise, creating more sales than they prevent. However, this argument, no matter how earnestly made, has not seen much success in P2P file sharing cases. The Ninth Circuit, for example, upheld the district court's holding that the Napster system had a "deleterious effect" on both the existing and potential digital downloading market.²³² The court evaluated Napster's expert testimony that the type of file sharing involved actually benefitted the artists because it "stimulate[d] more audio . . . sales than it displace[d]."²³³ The Ninth Circuit considered this testimony to be of "dubious reliability and value," and noted that, regardless, "increased sales of copyright material attributable to unauthorized use should not deprive the copyright holder of the right to license the material."²³⁴

The extent to which file sharing affects the market for copyrighted works is disputed.²³⁵ However, courts have shown little sympathy for the argument that getting something for free that one would otherwise not choose to pay for results in a fair use of copyrighted material.²³⁶ Courts have shown equal reluctance to accept the argument that there is no adverse affect on the market because getting something for free stimulates the consumer to make additional purchases.²³⁷

Napster further argued there was no deleterious effect on the market for copyrighted works because users were merely engaging in "space-shifting" of works they already owned.²³⁸ Because Napster facilitated users' sharing of copyrighted files with the general public, this case was materially distinct from *Diamond* and *Sony*.²³⁹ Napster argued additionally, and equally unpersuasively, that users were merely "sampling" the music in order to decide whether or not to purchase it.²⁴⁰ This argument failed for two reasons.²⁴¹ First, Napster users downloaded a complete and permanent copy of the copyrighted work; samples are often short snippets of a work, or full songs programmed to "time-

²³¹ See generally *What is iTunes?*, APPLE.COM, <http://www.apple.com/itunes/what-is/store.html> (last visited Jan. 4, 2011) (for a list of all possible ways to shop for music on iTunes).

²³² *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001).

²³³ *Id.* at 1017.

²³⁴ *Id.* at 1017-18.

²³⁵ *Id.* at 1016-17.

²³⁶ *Id.* at 1017.

²³⁷ *Id.* at 1018.

²³⁸ *Id.* at 1019.

²³⁹ *Id.* (distinguishing *Napster* from *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999) and *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

²⁴⁰ *Napster*, 239 F.3d at 1018.

²⁴¹ *Id.*

out” after a certain amount of time.²⁴² Second, even authorized temporary downloading of individual songs for sampling purposes is commercial in nature because it affects the potential licensing market for samples, and thus the copyright holder’s derivative rights.²⁴³ Once the court determined that users of the Napster system were liable for infringement, it was not a far step to hold Napster liable for contributory infringement for facilitating users’ direct infringements.²⁴⁴

To the extent that mix tapes are personal and noncommercial, they approach the *Sony* side of home recording; to the extent that they facilitate the acquisition of free music, creating a market substitution, they begin to look more like file sharing.

V. TO ITS DETRIMENT, COPYRIGHT LAW FAILS TO ADEQUATELY ADDRESS THE PRACTICALITIES OF MODERN HOME RECORDING

*“There’ll be the breaking of the ancient western code
Your private life will suddenly explode.”*

—Leonard Cohen²⁴⁵

The legality of mix tapes in digital form is, at best, unclear. The AHRA seeks to protect private and noncommercial recording of both digital and analog musical works; however, the AHRA does not apply to recordings made with the use of computers. This legislative exception means that analog mix tapes are protected under copyright law but the vast majority of modern home recordings, including digital mixes, are not. The RIAA has been unequivocal in its condemnation of making mixes, stating that, because of the sound quality and ease of reproduction of digital music, “[I]t would be naïve . . . [to] allow that type of activity.”²⁴⁶ In this environment, the AHRA fails to fulfill its stated purpose, which is “to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.”²⁴⁷ In light of this failure, one must turn to fair use principles to determine whether contemporary copyright law permits or proscribes modern mix tapes.

²⁴² *Id.* It is up for debate whether this aspect of the Ninth Circuit’s reasoning will ultimately prove to be a majority view.

²⁴³ *Id.*

²⁴⁴ *Id.* at 1027. More recently, the *Tenenbaum* court noted that it might be possible for a defendant who has engaged in music file sharing to allege fair use if that defendant “deleted the mp3 files after sampling them, or created mp3 files exclusively for space-shifting purposes from audio CDs they had previously purchased,” or even, for example, if a defendant “shared files during a period before the law concerning file sharing was clear and paid outlets were readily available.” However, the *Napster* court did not find any of these elements to be present, nor did it lend sympathy here. *Sony BMG Music Entm’t v. Tenenbaum*, 672 F. Supp. 2d 217, 237 (D. Mass. 2009).

²⁴⁵ LEONARD COHEN, *The Future*, ON THE FUTURE (Columbia Records 1992).

²⁴⁶ Gallagher, *supra* note 31 (“Frank Creighton, who directs antipiracy efforts for the Recording Industry Association of America, said that money did not have to be involved for copying to be illegal. While mixes on cassette tapes may not have inspired the wrath of the record industry in the past, Mr. Creighton said, digital mixes have better sound quality. And given the proliferation of CD burning for friends and relatives, ‘it would be naïve of us to say that we should allow that type of activity,’ he said.”).

²⁴⁷ S. REP. NO. 102-294, at 86 (1992).

Analog mixes generally fall within the parameters of fair use, but the application of fair use to the digital mix is more difficult. By failing to adequately address digital realities, the law in its current state no longer reflects practical reality of consumer behavior vis-à-vis personal use. In the murky waters of legal vagaries, other modalities creep in to fill in the gaps.

A. *In the Face of Gaps in Copyright Law, Consumer Behavior Becomes Regulated by Other Means*

In his seminal article on Internet regulation, Larry Lessig discusses how four methods of regulating behavior—law, social norms, markets, and architecture—apply to cyberspace.²⁴⁸ Law regulates behavior by demanding that individuals act or refrain from acting in certain ways, with punitive consequences for noncompliance.²⁴⁹ Norms regulate communities in a more decentralized way; as patterns of social behavior, norms “typically have sanctions attached, and conformity to them is typically prescribed by one person to another.”²⁵⁰ Markets regulate, to the extent permitted by law and norms, through price constraints, and architecture regulates behavior through the limits of physical construction and design.²⁵¹ A physical architecture, for example, might limit individuals’ entry into a building through a certain route, or a password requirement might limit individuals’ access to a certain location online.

These methods of regulating behavior, both direct and indirect, interact—cooperatively or in contradiction—with differing results. The objective for a regulator, Lessig claims, is to determine the right mix of direct and indirect strategies.²⁵² The more that these methods exist in opposition to one another, the more difficult it is to constrain behavior in productive ways. Where one strategy seeks to regulate behavior in a certain way, but proves inadequate to do so, the others will often crop up to take its place. The mix tape illustrates this problem well.²⁵³

The architecture of the digital mix both complicates the legal issues and fills in where the law is unclear. The creation of analog mix tapes was limited by the time it took to create them—at least ninety minutes for every ninety-minute mix and, practically speaking, much longer. Furthermore, the reproduction of those mixes would not only take significant additional time, but would decrease the audio quality of the mix dramatically (generally to the degree of being unworkable). The architecture of digital media, however, enables the creation of a mix tape in the amount of time it takes to drag and drop songs into a playlist, and also facilitates an indefinite number of quality reproductions of that mix. Often, the architecture of digital media also allows individuals to

²⁴⁸ Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999).

²⁴⁹ *Id.*

²⁵⁰ Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1877 (2009).

²⁵¹ Lessig, *supra* note 248, at 507.

²⁵² *Id.* at 512.

²⁵³ A thorough explication of the four modalities for regulation of behavior is outside the scope of this Article.

separate the tracks from the mix and reassemble them into their general music libraries.

While the architecture results in behavior that is more problematic in a copyright sense, architecture has also arisen in some ways to constrain behavior in light of these normative difficulties. As the most popular software-based online store for downloading media, iTunes has led the charge to use architecture to regulate digital home recording behavior in ways directly relevant to the mix tape.²⁵⁴ In its Terms of Service for the iTunes Store, Apple explicitly states that users of its service are only permitted to make copies of certain copyrighted works for personal, noncommercial use.²⁵⁵ Beyond contractual provisions, however, iTunes has experimented a great deal over the years with architectural regulation, some of which have been more effective than others. One of the less-popular efforts was a failed attempt to charge more or less for music depending on whether it had embedded Digital Rights Management (DRM). In 2007, Steve Jobs, CEO of Apple, announced that EMI Music's catalog would be DRM-free on iTunes for an extra thirty cents per track, raising the price per track to \$1.29.²⁵⁶ DRM-free tracks would be in a new category called "iTunes Plus."²⁵⁷ Soon, Amazon.com began selling DRM-free music for between eighty-nine and ninety-nine cents per track; in response to that market pressure and competition, Apple dropped its price back down to ninety-nine cents.²⁵⁸ In January 2009, Apple announced that it would now

²⁵⁴ See generally *iTunes Store*, WIKIPEDIA, http://en.wikipedia.org/wiki/iTunes_Store (last visited Jan. 4, 2011); Martyn Williams, *Apple's iTunes Store Serves Up 10 Billionth Song*, PC WORLD (Feb. 24, 2010, 2:10 PM), http://www.pcworld.com/businesscenter/article/190187/apples_itunes_store_serves_up_10_billionth_song.html.

²⁵⁵ Apple, *iTunes Terms and Conditions*, *supra* note 68 (scroll down to "Usage Rules") ("(ii) You shall be authorized to use the Products only for personal, noncommercial use. . . . (xii) You may copy, store and burn iTunes Plus Products as reasonably necessary for personal, noncommercial use."). The AHRA, if it applied, would have used the language "private, noncommercial." Fair use principles consider the personal nature as well as the commercial aspect of the use in evaluating whether or not a use of a copyrighted work is fair, but the inquiry is not limited to those factors. See discussion *infra* Part IV.A.

²⁵⁶ Press Release, Apple, *Apple Unveils Higher Quality DRM-free Music on the iTunes Store* (Apr. 2, 2007), <http://www.apple.com/pr/library/2007/04/02itunes.html>. In February of that year, Jobs had released a now-legendary essay entitled "Thoughts on Music," in which he called upon the "big four music companies" to allow their music to be sold online without DRM software, creating a "truly interoperable music marketplace." Jobs asserts that DRM technology is ineffective at combating music piracy, difficult to maintain, and detrimental both to consumers and to innovation. Steve Jobs, *Thoughts on Music*, APPLE.COM (Feb. 6, 2007), <http://www.apple.com/hotnews/thoughtsonmusic/>.

²⁵⁷ Apple, *iTunes Terms and Conditions*, *supra* note 68 (scroll down to "Usage Rules") ("(vi) iTunes Plus Products do not contain security technology that limits your usage of such Products, and Usage Rules (iii)-(v) do not apply to iTunes Plus Products"). Usage Rules (iii)-(v) read:

(iii) You shall be able to store Products from up to five different Accounts at a time on compatible devices, provided that each iPhone may sync ringtone Products with only a single Apple-authorized device at a time, and syncing an iPhone with a different Apple-authorized device will cause ringtone Products stored on that iPhone to be erased.

(iv) You shall be authorized to burn an audio playlist up to seven times.

(v) You shall not be entitled to burn video Products or ringtone Products.

²⁵⁸ Candace Lombardi, *Apple Drops Price of DRM-free iTunes*, CNET NEWS (Oct. 16, 2007, 8:19 AM), http://news.cnet.com/8301-10784_3-9798044-7.html.

only sell DRM-free music in the iTunes store—8 million tracks from that day, and 2 million more in March of that year.²⁵⁹

FairPlay, Apple's DRM software, now manages only songs purchased before January 2009, which are not part of the iTunes Plus category. FairPlay permits the reproduction of a particular playlist a maximum of seven times before that playlist must change.²⁶⁰ A FairPlay-managed music track can be reproduced onto a CD an unlimited number of times, however, and the resulting CD is free of DRM and may then be reproduced, burned, or ripped an unlimited number of times.²⁶¹ An individual who wants to create a mix for multiple people with tracks purchased before January 2009 must presumably purchase the songs on that mix every eighth time.²⁶² Alternatively, users can upgrade their library to iTunes Plus for an additional thirty cents per track, and make as many mixes as they want, for personal, noncommercial use.²⁶³ In the absence of clear legal guidance, Apple has put a lot of effort into managing home recording through the architecture of its services. That architecture has further been affected by market demands to change, most notably when Amazon.com entered into the music market and caused Apple to return to its original prices and maintain DRM-free music.

B. *Social Norms Permit, Even Encourage, the Making of Mix Tapes*

Regardless whether creating digital mix tapes is illegal, a prevailing social norm says there is nothing wrong with making mix tapes, digital or otherwise. To compare the Napster system with digital mix tape is reasonable under the state of the law, but the social norms surrounding mix tapes are very different. A permissive norm rightfully existed in the analog world, and it stretches well into the digital one. Even the very first iTunes advertisement in 2001 encouraged the creation of a mix tape. The infamous "Rip. Mix. Burn." ad

²⁵⁹ Press Release, Apple, Changes Coming to the iTunes Store (Jan. 6, 2009), <http://www.apple.com/pr/library/2009/01/06itunes.html>. Music and television shows sold in the iTunes store still have DRM through Apple's FairPlay software.

²⁶⁰ Apple, *iTunes Terms and Conditions*, *supra* note 68 (scroll down to "Usage Rules"); *see also* Apple, *Can't Burn a CD in iTunes for Windows*, APPLE.COM, <http://support.apple.com/kb/TS1436> (last modified Apr. 1, 2010) ("An unchanged playlist that contains songs purchased from the iTunes Store can be burned no more than seven times.") Other architectural restrictions in iTunes include allowing a user to authorize a maximum of five computers to be associated with a particular account. FairPlay enables tracks to be played on up to five authorized accounts simultaneously. Apple, *iTunes Terms and Conditions*, *supra* note 68 (scroll down to "Usage Rules"); *see also* Apple, *Can't Burn a CD in iTunes for Windows*, *supra*. ("iTunes will stop burning a disc if one or more of the songs in a playlist were purchased from the iTunes Store but are not authorized to play on this computer. This message appears: 'Some of the files can not be burned to an audio CD. Do you still want to burn the remainder of this playlist? For more information on why some files can not be burned, click below.'")

²⁶¹ The audio CD is not, however, entitled to first sale rights and cannot be sold, leased, distributed, or lent.

²⁶² On a personal note, I made a digital mix tape for a copyright class a few years ago, and had to purchase some tracks thrice for this very reason.

²⁶³ Press Release, Apple, *supra* note 256.

features a man selecting tracks from his music library to create a mix CD.²⁶⁴ He sits in a concert hall and looks up to the stage, where all of the artists from his music collection are lined up before him.²⁶⁵ He crafts a mix, beginning with Liz Phair and ending with Barry White, with artists from George Clinton to Wilco to Ziggy Marley in between.²⁶⁶ At the end of the commercial, George Clinton says, “It’s your music. Burn it on a Mac.”²⁶⁷ It is still well within accepted social norms to make digital mixes for friends, either individually or in groups. *Brides of North Texas* magazine recommends that a couple make a mix CD for guests as a wedding favor.²⁶⁸ On the Internet, there are eHow articles and wikis giving instructions on “How to Make a Mix Tape.”²⁶⁹ A well-known supplier of prom supplies, Stumps, even offers personalized CD cases to go with mix CDs of songs played at prom, which can be handed out to all guests.²⁷⁰ Even National Public Radio has stated that “mix CDs have become the new cultural love letter/trading-post.”²⁷¹ As Sheffield stated, “It’s a fundamental human need to pass music around, and however the technology evolves, the music keeps moving.”²⁷²

It may be argued that there was more of an art form to the creating an analog version of the mix tape, through the sheer time and effort it required

²⁶⁴ Apple, “Rip. Mix. Burn.” *Apple iTunes Advert*, YouTube (May 23, 2007), <http://www.youtube.com/watch?v=4ECN4ZE9-Mo>.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Favors: 4 Fab Gifts Your Guests Will Love*, BRIDES OF NORTH TEXAS, Spring/Summer 2010, at 108; see also THE KNOT, <http://www.theknot.com/> (search for “mix CD”; then follow any of the many hyperlinks to articles and advice which involve the use of a homemade mix CD as a favor for wedding guests, bridal showers, and even “save-the-date” cards). An anecdotal story on Facebook indicated that many couples do not think twice about making a mix for wedding guests. Some typical responses to the question, “Did you make a mix CD for guests at your wedding, and if so, how many?” included: (1) “Yes . . . 100 for our wedding. Want one? It was actually widely popular I had to burn more. Are the copyright police going to come get us? The police did shut our wedding down . . . maybe it was the CDs . . .”; (2) “Yes—125 as the favor at our wedding. Would you like for me to send you a copy or jot down the tracks for you? Of course I’m sure no one used ours as coasters, since we have such exceptional taste (and it features wings’ ‘silly love songs’ and who doesn’t love that?”); and (3) “I did—I know maybe some people don’t like them—but everyone I passed them out to loved them (I really have no idea but I do know that my 90 year old grandfather still listens to his—I had to make him another copy). We made about 300 I think.” Comments on file with author.

²⁶⁹ See, e.g., Travis Derouin et al., *How to Make a Perfect Mix Tape or CD*, wikiHow, <http://www.wikihow.com/Make-a-Perfect-Mix-Tape-or-CD> (last updated Oct. 29, 2010); Ashia Sims, *How to Make a Mixtape*, eHow, http://www.ehow.com/how_2111911_make-a-mixtape.html (last visited Jan. 4, 2011); Jack Tripper, *How to Make the Perfect Mix Tape*, ANGELFIRE (Oct. 19, 2001), http://www.angelfire.com/indie/tinymixtapes/columns/10.15.01_how_to_make_the_perfect_mix_tape.htm.

²⁷⁰ *Theme CD Case*, STUMPS, <http://www.stumpsparty.com/party/Theme-CD-Case.cfm?caid=1068716> (last visited Jan. 4, 2011) (“Create a mix of popular songs to play at your Prom and pass it out in this 5 1/2” high x 4 3/4” wide case . . .”).

²⁷¹ *Talk of the Nation, The Mix Tape: Art and Artifact* (National Public Radio broadcast June 14, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4701169> (both the recording and transcript can be found here).

²⁷² SHEFFIELD, *supra* note 18, at 24.

(not to mention that the tape had to walk six miles in the snow, uphill both ways). As explained,

It took hours to make just one: pulling apart your record collection of various formats and then listening to a few songs before making the commitment to sticking them on a cassette in real time. And you had to get the recording levels just right, muting the recorder at just the right point to avoid clumsy segues and clicks. And a mistake often meant going back several songs to fix it. Yes, making a mix tape required a level of commitment that just isn't necessary in our precise-copy, drag and drop, click and burn world.²⁷³

However, the sweat of the brow involved in creating an analog mix tape does not necessarily make it any more creative for copyright purposes. Like their analog counterparts, digital mix tapes in their true form, personal and noncommercial and bigger than the sum of their borrowed parts, should be legal. Sure, digital media is easier to reproduce on a massive scale. Sure, it becomes harder to define the parameters of “personal” and “noncommercial.” But those should be the material and important questions to answer when it comes to the legality of audio home recording, and that should be the focus of the inquiry—not whether it was DAT technology or a computer that was involved in the recording process.

C. *By Failing to Adequately Address Contemporary Realities, Copyright Breeds Contempt*

The increasingly unclear and ineffectual application of copyright law to the mix tape (and, frankly, many other digital media issues outside the scope of this Article) causes a disjuncture. Where the law is widely dissociated from the social norm, where changes in architecture seek to fill gaps through constant configuration and reconfiguration, and where market forces exert pressure to resolve contradictions, the law becomes increasingly inapposite to practical reality. Under current copyright law, it is very likely illegal for an individual to make a mix CD of significant songs and give it to a friend. In such a climate, it is no wonder that copyright law becomes the victim of mass disrespect.²⁷⁴

Such a climate, in fact, creates an environment that compels Steve Albini, one of the most talented record producers and recording engineers in modern music—who has worked with such prolific artists as Nirvana, the Pixies, PJ Harvey, and Jimmy Page and Robert Plant—to speak unequivocally negatively about the very law that is supposed to encourage the production of creative works.²⁷⁵ One documentary about Albini claims that he has been “saving independent rock ’n’ roll” for the last twenty years, dedicated as he is to the creative

²⁷³ Mobley, *supra* note 13.

²⁷⁴ See Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 382-83 (2005) (discussing the growing opinion that “we are approaching the ‘tyranny of copyrights’”).

²⁷⁵ Other bands include, but are not nearly limited to, The Jesus Lizard, Don Caballero, The Breeders, Helmet, Fred Schneider, The Wedding Present, Bush, Joanna Newsom, Low, Dirty Three, Cheap Trick, Manic Street Preachers, The Frames, Slint, Cath Carroll, Superchunk, Fugazi, Jon Spencer Blues Explosion, Urge Overkill, Man or Astro-Man, Palace Music, Smog, Veruca Salt, Guided by Voices, Scrawl, Will Oldham, Edith Frost, Godspeed You Black Emperor, Songs: Ohia, and Electrelane. *Steve Albini Discography*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_Steve_Albinis_recording_projects (last visited Jan. 4, 2011);

process and helping bands record for minimal cost.²⁷⁶ One would think that if copyright had a fan club, Albini would be an enthusiastic member; after all, copyright law seeks at its core to encourage the creation of original works. However, Albini gave the keynote address at NX35, a recent music conference, and commented, “I think intellectual property as a concept is fucking absurd.”²⁷⁷

VI. STEALING MUSIC IS BAD, SHARING MUSIC IS GOOD, AND COPYRIGHT LAW, IF IT IS TO BE EFFECTIVE, MUST ADDRESS THE DIFFERENCE

Trying to control the stealing of music is imperative for copyright law as it seeks to encourage the production of creative works through the granting of limited exclusive rights to the creators of those works. But, as Moore said, “[T]rying to control sharing through music is like trying to control an affair of the heart—nothing will stop it.”²⁷⁸ Perhaps one of the first ways to share music and emotion in modern popular culture over distance and time was the “long-distance dedication” on Casey Kasem’s *American Top 40* radio program.²⁷⁹ Started in 1970, the *American Top 40* counts down the forty most popular singles in the United States each week.²⁸⁰ During Kasem’s reign, he would select and read one letter from a listener, dedicating a song to someone else who was far away. The song (which, in my own memory seemed uncannily always to be the Eagles’ “Desperado”) was intended to surpass distance and time to connect individuals through music.²⁸¹ Mix tapes are more Casey Kasem than Shawn Fanning.²⁸² They are all about music sharing and not

see also Steve Albini, WIKIPEDIA, http://en.wikipedia.org/wiki/Steve_Albin (last visited Jan. 4, 2011).

²⁷⁶ TheShippingYard, *Steve Albini: Don’t Call Me Producer*, YOUTUBE (May 24, 2007), <http://www.youtube.com/watch?v=mFMU-IFUMOI> (stating also that Albini built a studio in his home and decided not to charge bands to use the studio, but only for his time, so that he could offer bands with no money a space with high-end equipment so they could make albums at low cost).

²⁷⁷ Steve Albini, Keynote Speech at NX35 Music Festival (Mar. 13, 2010), *available at* <http://www.youtube.com/watch?v=aHlcGgrXLF8>. I also presented at this conference, on copyright issues. After contemplating whether or not to include Albini’s quote in raw and complete form, I was reminded of what Andy Warhol told the Velvet Underground. According to John Cale, one of the two founding members of the Velvet Underground, Andy “was always reminding us to put swear words back into songs.” *Studio 360, John Cale on Andy Warhol* (Public Radio International broadcast Aug. 9, 2009), *available at* <http://www.pri.org/arts-entertainment/music/john-cale-andy-warhol1450.html>.

²⁷⁸ *Talk of the Nation*, *supra* note 271.

²⁷⁹ For information about the current incarnation of the radio show, *see American Top 40*, WIKIPEDIA, http://en.wikipedia.org/wiki/American_Top_40#Features_of_the_Kasem-era_shows (last visited Jan. 4, 2011); *see also American Top 40 with Ryan Seacrest*, AT40, <http://www.at40.com/> (last visited Jan. 4, 2011).

²⁸⁰ The show used the Billboard charts when it first aired. In the late 1990s, it switched to Radio and Records, and it now uses data from Mediabase. *American Top 40*, WIKIPEDIA, *supra* note 279.

²⁸¹ Okay, so it wasn’t always the Eagles’ “Desperado.” The first Long Distance Dedication, in fact, was made by a man whose girlfriend, Desiree, was moving with her family to an Air Force base in Germany. The requested song was “Desiree” by Neil Diamond. *Id.*

²⁸² *See supra* note 135 and accompanying text.

music stealing; they communicate emotion and meaning through time and distance.

Many years ago, when I was in graduate school and traveling to Seville, Spain, to conduct research, I nearly missed a plane because it was inconceivable to leave without the tape that my boyfriend was making for my journey, even though I owned all of the tracks on that tape. A year later, after said boyfriend had become fiancé, we were late to the rehearsal dinner for our wedding because we were still working on the mix tape we wanted to play at the wedding. (To the truths of our lives, we will add both procrastination and music.) A wedding presented a chance to force our grandparents and distant cousins and college friends to sit in one place and listen to what the music we loved had to say.²⁸³ As Dean Wareham stated, “[I]n the future, when social scientists study the mix tape phenomenon, they will conclude—in fancy language—that the mix tape was a form of ‘speech’ particular to the late twentieth century.”²⁸⁴

Since that time, through many moves, I have carted around boxes of cassettes, many unlabeled. It is likely that I would disclaim ownership of many of them. But in the silt of those boxes are dozens of mix tape diamonds. Last year, I borrowed a cassette player, hooked it up to my computer, downloaded several of the mix tapes, and burned them onto CDs. I took the cases, to the extent I could match up case to tape in such a haystack, made color copies, and turned them into CD covers. There is *Castle*, and *Waiting*, and *Christmas '94 Drive to DC*. There is *New Years '89*, *The Made-for-TV Mix*, and an untitled one I named *Someone One of Us Dated Must Have Made This*. And, yes, there is *Seville*, and there is *Wedding*. The value of the mix tape is not so much in the having of individual tracks as in the value added to those tracks, the stuff that came in addition to the tracks, the message that said, “I love you,” or “I want you to miss me,” or, even, “This is what it is like to sit in my room without air conditioning missing you on a summer day.”

Making mix tapes for personal, noncommercial use should, quite simply, be legal. Whether that involves amending the AHRA to encompass software and personal computers, fleshing out the fair use doctrine, or something else entirely, the law must provide clear guidance to the consumers it so affects. As we seek to define the dimensions of personal and noncommercial use in a digital world, the market will demand compliant technologies with supportive architecture. Just as iTunes facilitated a change of social norms in the area of music downloading by developing an easy, practical, and legal alternative, such will be the case with modern mix tapes. But copyright law must take the lead, not leave the other modalities to grasp at ambiguity while technology evolves at warp speed. Developing concrete and realistic legal principles is essential to facilitate the production of creative works, the Progress of Science and the useful Arts, and compliance with (and respect for) the law.

²⁸³ If we had digital mixes then, perhaps we wouldn't have been late for our own rehearsal dinner, as we could have made a playlist in mere minutes and forced everyone to take their own personal copy home.

²⁸⁴ MOORE, *supra* note 12, at 28.