GOING BEYOND THE MUSIC MODERNIZATION ACT: CREATION IN THE DIGITAL ERA

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I. INTRODUCTION

The internet democratized content generation. Gone are the days when only the music elite—those with connections to the industry and access to studios—could share their work with the masses. Now, anyone can create or recreate a song and share it with others, all they need is a microphone, recording device, and the ability to upload their creation onto the internet. Along with this, technology spurred the creation of mashup culture. Audio editing software has made it easy to rearrange and overlay multiple songs. Virtually anyone can create or share such works. However, regardless of the time and effort put into creating a work to share with society, if it contains copyrighted songs it can be immediately taken down by the copyright holders.

Copyright is the primary source of protection for music. Music copyright aims to balance incentivizing creation with compensating creators. Prior to 2018, artists relied on antiquated copyright laws that had not been greatly modified since 1976, to protect their interests. However, these laws were passed in an era where "the internet" and "streaming" were just science fiction. internet piracy disrupted this balance and the music industry struggled to adapt.[1] In response to the growing concern that music copyright needed to be brought in line with current technology, Congress passed the Orrin G. Hatch—Bob Goodlatte Music Modernization Act, or the Music Modernization Act (MMA).[2] It passed with bipartisan support in the House and Senate and was widely welcomed by various entities and individuals in the music industry.

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1. *See* Paul Resnikoff, The Music Industry has 99 Problems. And They Are…, DIGITAL MUSIC NEWS (July 22, 2016) https://www.digitalmusicnews.com/2016/07/22/music-industry-99-problems-2/.

2. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

The MMA recalibrated the balance between compensation and creation with regards to copyright holders and music streaming platforms. It makes significant progress aligning copyright with modern music distribution, which better guarantees that artists receive accurate royalty payments when their music is accessed on platforms.

Despite the MMA's many gains, there are areas where it falls short. Notably, the MMA did not address how to deal with user generated content, such as covers and mashups, that may contain copyrighted music. Since these creators are not the original copyright holders, they need to license the copyrighted work, or it can be taken down for infringement. But, many people do not know they need these licenses, let alone how to secure them. These works may nonetheless be protected by the fair use defense to copyright infringement. However, as this Note discusses, fair use is a subjective standard, typically adjudicated, not in courts, but by technology companies that host content created by people on their platforms. Because covers and mashups fall within a copyright grey area, platforms are incentivized to deny creators this fair use defense. Consequently, these works are often removed, even if they should be considered "fair use."

This Note explains how the MMA fails to address how music copyright should apply to amateur creation and mashups in the digital age. Specifically, it argues that the law should adapt to allow non-commercial covers and mashups, that contain copyrighted works, to remain online. To accomplish this, there should be a blanket fair use exception for all non-commercial covers and mashups. Part II provides background on the development of music copyright law and the MMA. It also provides definitions for covers and mashups and the legal background surrounding them. Part III addresses fair use and how copyright is enforced in the digital realm. Part IV argues fair use should apply to non-commercial musical works that incorporate copyrighted music. Part V then explores the benefits of a blanket fair use policy, defines a framework, and addresses enforcement concerns.

II. HISTORY OF MUSIC COPYRIGHT LAW

A. PRE-MMA MUSIC COPYRIGHT

Changes in technology have necessitated amendments to music copyright, from its inception to the MMA. Songs receive two types of copyright protections: (1) for the musical composition, and (2) for the sound recordings based on the musical compositions.[3] In 1831, music gained formal protection

3. PETER S. MENELL, MARK A. LEMLEY & ROBERT P. MERGES, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGY AGE 671 (2019).

for the first time when musical compositions became protectable under copyright.[4]

Over the next century, music copyright laws evolved in reaction to the introduction of new technologies. For instance, concerns that the player piano could create a potential monopoly instigated the inclusion of mechanical compulsory licenses in the 1909 Copyright Act.[5] Prior to mechanical licenses, larger companies could create exclusive licensing deals with music composers, effectively freezing out everyone else from using or performing those pieces.[6] Mechanical compulsory rights allow anyone to produce sound recordings based on a musical composition, essentially by paying the copyright holder a royalty rate determined by law. In the 1920s, various agencies emerged to help administer these licenses and ensure rights holders were paid.[7]

Despite some dissatisfaction with the model, the compulsory license has been retained through subsequent copyright amendments, albeit with some modifications.[8] For instance, the 1976 Act maintained it but increased the compulsory license rate to keep pace with inflation. Congress revisited the mechanical compulsory license again in the Digital Performance Rights in Sound Recording Act of 1995 (DPRA), as people started listening to music via digital audio transmission, instead of physical albums.[9] The DPRA extended

4. *Id.* Prior to 1831, sheet music, and thus, musical compositions, were already protected against unauthorized copies under copyright law. William Ellsworth drafted a proposal to amend copyright. In the report he proposed that "the law of copy-right ought to extend to musical compositions, as does the English law." The exact reasoning for why he decided to formally recognize music as a category to be protected is unclear. Oren Bracha, *Commentary on the U.S. Copyright Act 1831*, *in* PRIMARY SOURCES ON COPYRIGHT (1450-1900), (L. Bently & M. Kretschmer eds. 2008), *available at* www.copyrighthistory.org (last visited Feb. 9, 2020) (internal quotations omitted).

5. Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA HIGH TECH. L.J. 215, 222 (2009).

6. *See id.* at 223–24.

7. The Harry Fox Agency, which still exists today, was one of the first agencies that helped administer licenses. *Id.*

8. The Register of Copyrights suggested the eradication of the statutory mechanical license for three reasons: (1) the royalty rate did not change with inflation, (2) the threat of a monopoly was the sole reason for the creation of the license, and (3) it was the fundamental right of a copyright owner "to have the exclusive right to control the commercial exploitation of his work" and this right should also apply to the recording of music. However, proponents of the license feared abolishing it would lead to exclusive licensing deals and lessen the number of covers. As a result, the public would have access to less variety of the same works, smaller companies would be unable to compete with larger ones by offering recordings of the same music, and creators would suffer because their work would not garner as much exposure and royalty revenues. *Id.* at 222 (internal quotations omitted).

9. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.23.

the compulsory licenses to include Digital Phonorecord Deliveries (DPDs).[10] A DPD is basically "each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording."[11]

As these changes demonstrate, the law mostly kept pace with the new listening formats, such as radio, cassettes, CDs, etc. At least until the internet hit. As the internet took hold globally, piracy became easier and more popular than ever. Websites like Napster enabled people to circumvent legal methods of obtaining music.[12] Napster allowed users to upload files, including copyrighted music. Anyone could download those files, effectively allowing people to illegally obtain music for free. Record sales drastically declined, and many artists struggled to profit off their work.[13] The music industry filed hundreds of lawsuits against individuals who were downloading and distributing copyrighted music in hopes of preventing further piracy and declines in sales.[14]

Eventually, legal online streaming platforms, such as Spotify and Apple, emerged. Streaming services gained popularity for their ease of use, low cost, and huge music repositories.[15] However, streaming services faced industry opposition for failing to pay artists accurate royalties.[16] Various record

10. *Id.*

11. 37 C.F.R. 255.4 (2012). This definition came from the DPRA and remained unmodified until early 2017 when the Copyright Office removed the definition. 82 Fed. Reg. 9354, 9366 (Feb. 6, 2017) (removing and reserving 37 C.F.R. Part 255).

12. The music industry entered somewhat of a dark era. Peer-to-peer file sharing services such as LimeWire and Napster allowed for users to upload copyrighted music to the platform that could then be downloaded by other users. Eventually, multiple members of the Recording Industry Association in America sued Napster for copyright infringement. The Ninth Circuit held that the platform could be held liable, and it subsequently went out of buisness. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001). In 2010, a district court issued a permanent injunction against LimeWire, to prevent further copyright infringement. Arista Records LLC v. Lime Group LLC, 715 F. Supp 2d 481, 511 (S.D.N.Y. 2010).

13. *See* Eamonn Forde, *Oversharing: how Napster nearly killed the music industry*, THE GUARDIAN (May 31, 2019, 5:00 AM) https://www.theguardian.com/music/2019/may/31/napster-twenty-years-music-revolution.

14. Paul R. La Monica, *Music industry sues swappers*, CNN MONEY (Sept. 8, 2003), https://money.cnn.com/2003/09/08/technology/riaa_suits/.

15. Neil Howe, *How Music Streaming Won over Millennials,* FORBES (Jan. 16, 2019), https://www.forbes.com/sites/neilhowe/2019/01/16/how-music-streaming-won-over-millennials/#353e86325c7c.

16. In 2014, Taylor Swift pulled her albums from Spotify because she felt that the streaming service was not paying artists fairly. Fast-forward to 2017, and Taylor Swift's catalog suddenly reappeared on Spotify without an explanation. Swift couldn't have predicted how

companies sued Spotify, alleging that the company was not properly filing for compulsory licenses and, therefore, was committing mass copyright infringement.[17] Despite these challenges with the compensation model, music streaming services have undoubtedly displaced traditional music technologies.[18] Instead of records, individuals predominately use online services to access music.[19] Streaming services helped change the way people consume music. Now, more people use these services, instead of piracy and illegal file sharing sites. This shift sent ripples throughout the music community by fundamentally altering the economics of the industry and the way artists engage with fans. Streaming services have become a necessity for artists to get paid, reach fans, and qualify for certain awards. Now, instead of record sales, touring and live performances account for a large percent of revenue generated by artist.[20]

As streaming unseated incumbent technologies as the preferred music consumption method, paying artists accurate mechanical royalties became critical because this became one of the main ways artists were compensated.[21] It was clear to the music industry, and to Congress, that the law was unable to address this technological change.

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successful streaming services would become, and it just was not economically realistic to avoid these platforms. *See* Kaitlyn Tiffany, *A history of Taylor Swift's odd, conflicting stances on streaming services*, THE VERGE, (June 9, 2017, 11:50 AM) https://www.theverge.com/2017/6/9/15767986/taylor-swift-apple-music-spotify-statements-timeline.

17. Prior to the enactment of the MMA, Spotify settled several copyright infringement lawsuits. The suits alleged that Spotify failed to provide proper notice of intent and payment under § 115 of the Copyright Act. Eriq Gardner, *Spotify Settles Copyright Lawsuits Brought by Songwriters*, HOLLYWOOD REPORTER (June 27, 2019, 9:28 AM), https://www.hollywoodreporter.com/thr-esq/spotify-settles-copyright-lawsuits-brought-by-songwriters-1221403; *see* Bluewater Music Serv. Corp. v. Spotify U.S., Inc., 2018 U.S. Dist. LEXIS 173064 (W.D. Tenn. Sept. 29, 2018) (denying Spotify's motion to dismiss for lack of standing and failure to state a claim).

18. *See* Juli Clover, *Streaming Music Contributed 75% of Total U.S. Music Industry Revenues for 2018*, MACRUMORS (Feb. 28, 2019), https://www.macrumors.com/2019/02/28/streaming-services-music-industry-revenues-2018/ (discussing the Recording Industry Association of America's 2018 year-end music industry report).

19. *See generally* Benjamin M. Fly, How Does Music Consumption Impact the Music Industry and Benefit Artists? (May 2016) (unpublished B.S. Thesis, University of Arkansas) (on file with ScholarWorks@UARK, University of Arkansas) (an empirical study showing how music consumption has changed over time and how it has impacted revenue generation in the music industry).

20. *Id.*

21. Clover, *supra* note 18.

B. MUSIC MODERNIZATION ACT

The MMA is the most substantial copyright reform passed since the 1970s and is comprised of three previously proposed bills: (1) Musical Works Modernization, (2) Classics Protection and Access, and (3) Allocation for Music Producers.[22] Each of the bills addresses a unique long-standing problem in the music industry. The first focused on challenges with the licensing system. The second aimed to provide federal copyright protection for pre-1972 sound recordings. The final bill provided music producers a direct method for receiving compensation for their contributions to musical recordings.[23] In 2018, Congress combined these three bills and unanimously passed the Act.

For the purposes of this Note, only the first title, the Musical Works Modernization Act (MWMA), is relevant. It authorizes the creation of a universal system for allocating copyright ownership for mechanical licenses of musical works. The new framework will ensure songs are properly attributed to copyright owners, enabling accurate compensation.[24] The regime aims to fix many of the problems involving copyright of sound recordings and DPD licenses. The MWMA creates a compulsory blanket license for whenever a digital music provider makes a permanent download, limited download, or authorizes interactive streaming.[25] In the old regime, streaming services had to license individual songs by serving a notice of intention on the individual copyright holders.[26] After serving the notice, they had to pay the applicable royalty fees to the copyright holders. Under the new regime, the blanket license will cover all works that that are available for compulsory licensing, thereby eliminating the need to obtain a license on a song-by-song basis and decreasing transaction costs involved in deal making.[27] In order to provide flexibility to those in the music industry, parties will still be able to create voluntary licensing deals for songs in lieu of the blanket licenses.[28]

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22. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

23. *Id.*

24. Orrin G. Hatch-Bob Goodlatte Music Modernization Act § 101. The blanket licenses will go into effect January 1, 2021.

25. 17 U.S.C. § 115 (a)(4)(A)(ii)(I)(cc) (2018).

26. *Summary of H.R. 1551, the Music Modernization Act (MMA)*, COPYRIGHT ALLIANCE, https://copyrightalliance.org/wp-content/uploads/2018/10/CA-MMA-2018-senate-summary_CLEAN.pdf.

27. 17 U.S.C. § 115 (c)(2); Music Modernization Act Implementing Regulations for the Blanket License for Digital Uses and Mechanical Licensing Collective, 84 Fed. Reg. 49,966 (Sept. 24, 2019) (revising 37 C.F.R. § 201).

28. 17 U.S.C. § 115 (c)(2). Many streaming services are legally hosting copyrighted music on their platform through individual deals with record companies and copyright holders. The

Further, it authorizes the creation of a Mechanical Licensing Collective (MLC) to oversee the new licensing system. The MLC will collect and distribute the royalties and create and maintain a public database that identifies sound recordings and attribute ownership of the works.[29] The MLC will be funded in part by contributions made by digital music providers that are engaged in activities related to a blanket license and "significant nonblanket licensees."[30]

While the MWMA did not change the current compulsory licensing rates, it details a uniform rate-setting standard. This standard allows Copyright Royalty Judges to determine what reasonable rates would be in a free-market system.[31] Current mechanical licensing rates are "9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever is larger, for physical phonorecord deliveries and permanent digital" downloads.[32]

While this Act lays the foundation for the MLC and blanket licenses for streaming platforms, there are several unanswered questions surrounding use of copyrighted music by individuals. Notably, the MMA did not address how the law should handle works created by amateurs that contain copyrighted music.

C. COVERS AND MASHUPS: WHERE THE MMA FELL SHORT

Covers are audio remakes of musical compositions, while mashups tend to be more complex. There are many different forms of mashups. A mashup may combine the lyrics of one song with the music of another, superimpose several songs over each other, or take segments of multiple songs and combine them to create a cohesive composition.[33] While artists can "legally" make covers by obtaining a mechanical or negotiated license, there is no similar licensing

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MMA creates a compulsory license as a baseline. Previously, third parties could send copyright holders a Notice of Intent (NOI), which informed copyright holders of the third parties' intention to record or distribute the copyrighted composition. Now, if someone uses copyrighted music without sending the proper NOI, instead of being liable for copyright infringement damages, they can pay the compulsory fee through the MLC. This decreases the potential for litigation and transaction costs. However, the blanket license does not prevent the creation of deals like those created in the pre-MMA era if the parties involved choose to do so. Music Modernization Act Implementing Regulations for the Blanket License for Digital Uses and Mechanical Licensing Collective, 84 Fed. Reg. at 49,966.

29. 17 U.S.C. § 114(f)(1)(A).

30. *Id.* § 115 (d)(7)(A)(i)(I)–(II). The MLC will be funded by several sources, including compulsory fees from digital music providers and voluntary contributions. *Id.* § 115 (d)(7).

31. *Id.* § 115 (d)(3)(D)(v).

32. Mechanical License royalty rates available at COPYRIGHT.GOV, https://www.copyright.gov/licensing/m200a.pdf.

33. Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441, 457–58 (2016).

procedure in place for creating mashups. The creator must get permission from the rights holders of each of the songs they plan to use in their mashup. After the enactment of the MMA, there is still no formal regime streamlining the legal process for creating mashups that contain copyrighted work.

Several solutions have been proposed, including that Congress or the music industry implement an extended version of cover licensing where the fee is split up amongst all the songs sampled.[34] Alternatively, if there are so many songs sampled that it would be impossible to split up the fee equitably, the artist could be required to pay a fee based off the baseline royalty rate, to the MLC set up under the MMA. The MLC could internalize this cost and use it for regular operations.

The internet made music accessible to the masses. On top of the robust music industry, there are music hobbyists and bloggers who want to incorporate music into their works. Many people who are not in the music industry do not realize the nuances of music copyright, or recognize that they need to pay to use others' works. This is in part because the internet has greatly changed the way people view copyright.[35] People feel more entitled to use copyrighted works in ways that are not legally permissible.[36] As a result, people often create or upload works that incorporate copyrighted music without getting proper licenses. Due to the realities of copyright enforcement, these works are often treated as infringement and are taken down.

III. DIGITAL COPYRIGHT ENFORCEMENT AND THE ROLE OF PLATFORMS

While the MMA fixed some of the existing problems for legal streaming platforms, it does not address how to deal with other types of popular digital content that may infringe upon music copyright. In this system, platforms that

34. Menell proposes creating a remix compulsory license that is an extension of the cover license. *Id.* at 496.

35. *See generally* Milijana Mičunović, *Author's rights in the digital age: how Internet and peer-to peer file sharing technology shape the perception of copyrights and copy wrongs*, 8 LIBELLARIUM 27–28 (2015). Mičunović conducted a study on the effect of technology on copyright violations. The study looked at 535 surveys and found that most respondents had used peer-to-peer file sharing, in violation of copyright. While perceptions of authorship and authors rights have stayed the same, due to the availability of digital production and consumption, users' attitudes and habits have changed. *Id.*

36. In the post Napster era, music copyright has maintained a bad reputation on the internet. Takedowns are frustrating for both creators and fans. Ryan Higa, otherwise known as "nigahiga," was the most subscribed YouTuber from 2009–2011. A lot of the early videos and parodies he posted were taken down, due to copyright violations. At one point, his entire channel was taken down leading to frustration for him and his fans. Nigahiga, *Copyrighted*, YOUTUBE, https://www.youtube.com/watch?v=FCTAqdDfL58 (last visited Feb. 9, 2020).

host user generated content, like YouTube or SoundCloud, largely act like the arbiters of online content because they are the de facto enforcers of the Digital Millennium Copyright Act (DMCA). The DMCA is one of the biggest barriers facing creators of mashups and covers.

Congress passed the DMCA in 1998 to combat copyright challenges in the digital era. The DMCA allows copyright owners to send online platforms takedown notices for content they believe infringes their registered copyrighted materials.[37] The DMCA contains safe harbor provisions that help absolve platforms of liability if infringing content is found on their websites, if they follow certain procedures. This Section will discuss how, as a result of this system, platforms must determine whether a work contains infringing materials and why they are incentivized to take these works down even if they fall under "fair use." First, this Section discusses the DMCA safe harbor provision and how it incentivizes platforms to takedown works. Then it discusses fair use, with a particular focus on how it applies to music copyright, and operates on the internet.

A. DMCA § 512

The DMCA provides a series of safe harbor provisions, such as Section 512, to protect platforms from liability for every copyright violation that may occur on their site. These safe harbors protect service providers, such as YouTube, by providing immunity for transmitting, storing, or linking to unauthorized copyright content as long as they do not have "actual knowledge" or awareness of "specific and identifiable instances of infringement."[38] For example, YouTube avoids liability under this standard in two ways: by (1) allowing copyright holders to flag videos for takedown and (2) using its own internal content identification service to flag potential violations.[39] YouTube then notifies the video's uploader of the takedown, and the uploader can choose to appeal.[40]

To ensure it receives protection under the Section 512 safe harbor, a platform will generally immediately remove content for which it received a

37. 17 U.S.C. § 512.

38. *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 32 (2d Cir. 2012); 17 U.S.C. § 512.

39. *For Studio Professionals: The Allocation for Music Producers Act (AMP Act)*, ADVOCACY, https://www.grammy.com/advocacy/issues-policy/studio-professionals [https://perma.cc/J9HT-TR9S].

40. *Id.*

takedown notice from a copyright holder.[41] As a result, the takedown procedure is skewed in favor of the copyright holder, allowing the practice to be abused.

Some safeguards are in place to protect the second-generation creators. For example, copyright holders are supposed to issue takedown notices in good faith. But as the Ninth Circuit noted in *Rossi v. the Motion Picture Association of America*, good faith beliefs under the DMCA encompass a subjective, not objective standard.[42] As part of this good faith assessment, copyright holders must consider fair use before sending a takedown notice. However, for the reasons described below, the application of fair use to music cases is not straightforward.

B. ROLE OF FAIR USE IN MUSIC COPYRIGHT

Musicians have borrowed elements from previous works for centuries.[43] Courts and Congress have recognized that in some circumstances this type of borrowing, or use of another's copyrighted work, is permissible through the doctrine of fair use. Fair use is a defense to copyright infringement that permits second-generation creators, under certain circumstances, to build upon copyrighted works without a license and free of liability.[44] For example, the Supreme Court has recognized that musical parodies "almost invariably copy

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41. Copyright on the internet is enforced in tandem between rights holders and platforms. *See* Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, Notice and Takedown in Everyday Practice 17 (UC Berkeley Public Law Research Paper No. 2755628, 2017), https://ssrn.com/abstract=2755628 [https://perma.cc/3DYD-4MT8].

> Congress divided the burdens of compliance between OSPs and copyright owners. Congress placed on Internet intermediaries the burden of responding to valid takedown notices by "expeditiously" removing or disabling access to the identified allegedly infringing content. Congress placed the burden on copyright holders to identify infringing material because it considered that they know what material they own, and "are thus better able to efficiently identify infringing copies than service providers [. . .] who cannot readily ascertain what material is copyrighted and what is not." Courts have since affirmed that the DMCA notice and takedown provisions follow longstanding copyright law by "plac[ing] the burden of policing ongoing copyright infringement—identifying potential infringing material and adequately documenting infringement—squarely on the owners of the copyright." *Id.*

42. Rossi v. Motion Picture Ass'n of Am., Inc., 391 F.3d 1000, 1004 (9th Cir. 2004) (addressing 17 U.S.C. § 512(c)(3)(A)(v)).

43. *See* Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV 1874, 1890–92 (2018).

44. PETER S. MENELL, MARK A. LEMLEY & ROBERT P. MERGES, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGY AGE 752 (2018) (referencing Neil Weinstock Nataneal, *Locating Copyright Within the First Amendment*, 54 STAN. L. REV. 1 (2001)).

publicly known, expressive works" but nonetheless are permissible as fair use.[45]

To evaluate whether the goals of fair use are served by the work, courts turn to the four fair use factors. First, courts look at the "purpose and character of the use" which includes determining "whether such use is of a commercial nature or is for nonprofit educational purposes."[46] When evaluating the purpose and character of a work, one must ask, "whether and to what extent the new work is 'transformative.' "[47]

For instance, in *Cariou v. Prince*, a well-known appropriation artist altered and used several of the plaintiff's copyrighted photographs.[48] The portions of the photographs used, "and the amount of each artwork that they constitute[d] var[ied] significantly from piece to piece."[49] The Second Circuit held that the works were fair use because, despite being used for commercial purposes, they were transformative in nature.[50] The court found the works to be transformative because they had a different character from the original work, gave the photographs a new expression, and employed new aesthetics.[51] The works in *Cariou* did not present the same material in a different manner, rather they "added something new and presented images with a fundamentally different aesthetic."[52] Further, "[t]he more transformative the secondary use, the less likelihood that the secondary use substitutes for the original," even if "the fair use, being transformative, might well harm, or even destroy, the market for the original."[53]

Next, when evaluating fair use, courts look at the "nature of the copyrighted work."[54] The second factor is rarely determinative.[55] The third

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

46. 17 U.S.C. § 107(1).

47. *Campbell*, 510 U.S. at 579 (quoting Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

48. 17 U.S.C. § 107(3).

49. Cariou v. Prince, 714 F.3d 694, 700 (2d Cir. 2013).

50. *Id.* at 706.

51. *Id.* at 708.

52. *Id.* (internal quotations omitted). Derivative works that "merely presents the same material but in a new form, such as a book of synopses of televisions shows, [are] not transformative. *Id.*

53. Castle Rock Entm't, Inc. v Carol Publ'g, Inc., 150 F.3d. 132, 145 (2d Cir. 1998) (citing *Campbell*, 510 U.S. at 591–92).

54. 17 U.S.C. § 107(2). Courts are more likely to find fair use in cases where the underlying copyrighted work is factual.

55. Davis v. Gap, Inc., 246 F.3d 152, 175 (2d Cir. 2001).

factor looks at how much of the copyrighted material the new work used, compared to the "copyrighted work as a whole."[56]

Finally, the fourth factor looks at "whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original."[57]

However, as a multifactor test, fair use includes room for subjectivity which makes it difficult to universally apply. Drawing a line between acceptable uses and theft has never been clear. Adding to this problem, music copyright defendants and courts are often hesitant to turn to the question of fair use.[58] This may be in part because fair use is an affirmative defense. To invoke it, a defendant must admit they infringed upon a copyrighted work or plead it in the alternative.

Edward Lee theorizes several other reasons for why musicians and courts elect to avoid the fair use defenses outside of music parody cases.[59] Music parodies are generally considered "transformative," and so, more cleanly satisfy the fair use test.[60] In other contexts, Lee found that most music copyright cases were resolved on non-infringement grounds, so the fair use question did not need to be considered.[61] Instead of going to court, musicians within the industry who are accused of infringement often choose to settle by sharing song writing credits and royalties.[62] Fair use is also a double edged sword for people within the industry; being able to freely borrow others' works means also allowing others to borrow their own work.[63] Further, if the work is considered fair use it does not need to be licensed. Thus, the primary artist may lose out on revenue.

Lee also proposes a historical reason for the avoidance of fair use. The fair use doctrine in copyright emerged separately from, but around the same time as, music copyright protections.[64] Since the fair use doctrine was so new and

56. 17 U.S.C. § 107(3).

57. *Id.* § 107(4); Authors Guild v. Google, Inc., 804 F.3d 202, 223 (2d Cir. 2015).

58. *See* Lee, *supra* note 43, at 1876–78 (noting the prominence of fair use defenses in other areas of copyright law and its limited use in music copyright).

59. *Id.* at 1874.

60. *Id.* at 1921; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577, 586 (1994) (holding that commercial parodies can qualify as fair use).

61. Only nine percent of all reported music copyright cases from 1987 to January 2018 mentioned fair use. Lee, *supra* note 43, at 1900–1903.

62. *Id.* at 1910.

63. *Id.* at 1915.

64. *Id.* at 1917.

not as robust as it is today, earlier music cases focused on permissible use instead of fair use.[65] The lack of precedent can explain some courts' reluctance to recognize fair use in non-parody music cases. Courts have "avoided th[e] difficult question of how transformative purpose and character can be applied to music borrowing outside of parodies."[66]

The principles of fair use and their application to music sheds light on why it is failing online creators. In practice, both "good faith" and "fair use" require subjective determinations about permissible uses of copyrights. It is not in the interest of a copyright holder to objectively consider whether a work using their material is fair use. Likewise, because the availability of the Section 512 DMCA safe harbor hinges on service providers promptly responding to takedown notices, online service providers are not incentivized to standup for potential fair uses of copyrighted works. Consequently, creators are at a disadvantage. They are not part of the music industry, so they do not have access to the same strategies used by those in the industry to avoid infringement suits. Further, the counter notice process, which allows creators to respond to DMCA notices, is largely considered ineffective, again, because of service providers' reliance on Section 512 safe harbors.[67]

Studies confirm that takedown notices are stacked against alleged infringers. A study that looked at over one hundred million automated DMCA takedown notices, found that over thirty percent of the notices were flawed or questionable.[68] In a separate study, the same researchers found that one in fifteen notices sent by rights holders had characteristics that weighed towards fair use. A large portion of these requests targeted "potential fair uses as mashups [or] remixes."[69] These findings reveal how covers and mashups that should be considered fair use, are not being treated as such. The copyright system needs to be modified to allow for permissive uses of copyrighted works to remain on the internet.

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65. *Id.*

66. *Id.* at 1921 (explaining courts' reluctance to use a fair use analysis in non-parody music cases).

67. Urban et al., *supra* note 41.

68. Urban and her colleagues conducted three studies to determine how the DMCA and online copyright enforcement has evolved since its conception. The data presented came from Study 2, which examined random takedown notices (out of a sample of 108 million requests) that were generated by automated procedures. Further, one in twenty-five cases, or for 4.5 million requests, the "targeted content did not match the identified infringed work." *Id.* at 2, 11.

69. *Id.* at 95. The first study focused on qualitative data based on surveys completed by OSPs and rights holders. *Id.* at 1, 95. The study was under-inclusive in finding works that had characteristics of fair use. It did not consider musical covers when discussing works that had fair use elements. *Id.* at 162.

C. PRACTICAL APPLICATION OF DIGITAL COPYRIGHT MANAGEMENT TO USER GENERATED MASHUPS AND COVERS

The realities of digital enforcement, coupled with the subjectivity of fair use, have made it virtually impossible for platforms to apply fair use to online works. While an individual may upload a work that should fall under fair use, it may nevertheless be taken down. In practice, platforms lack the flexibility to consider these factors when they receive takedown notices for works that contain copyrighted material, because they can be held liable for "knowingly" hosting infringing content.

For example, the MMA has not changed the ways third party creators can use copyrighted music in their videos or mashups on hosting sites such as YouTube. While YouTube is one of the largest music streaming services in the world, it is also a host site where individuals upload their own content to channels. To ensure user compliance with copyright, YouTube provides users with a bank of songs that are "free" to use.[70] These songs and effects can be used without violating copyright. If a creator wants to use music outside of the bank, YouTube maintains a separate library that lists the current copyright policies for use of various songs.[71] By using the directory and guidance, the creators can determine what steps they need to take to use the song without violating copyright; most often the creator must get an individual license to use the song.[72]

If the creators do not follow the proper policies and upload something that incorporates copyrighted music, then the copyright holder may issue a takedown notice, or YouTube's Content ID filter will flag the song for takedown. Once the user has received a takedown notice they can (1) do nothing and YouTube will remove the video, (2) remove and/or replace the music, (3) get a license, (4) in some cases allow the copyright holder to monetize the video and get ad revenue from the song, or (5) challenge the notice.[73] Currently, YouTube's Content ID filter can block works containing copyrighted material a few moments after the video is uploaded onto a

70. *See* YouTube Studio, *Audio Library*, YOUTUBE, https://www.youtube.com/audiolibrary/music?nv=1 (last visited Feb. 9, 2020).

71. *See* YouTube Studio, *Music Policies*, YOUTUBE, https://www.youtube.com/music_policies?ar=1576251027059&nv=1 (last visited Feb. 9, 2020).

72. YouTube Creators, *YouTube Copyright Basics*, YOUTUBE, (July 1, 2013), https://www.youtube.com/watch?v=Cp1Jn4Q0j6E (last visited Feb. 9, 2020).

73. *See generally* YouTube About, *Copyright on YouTube*, YOUTUBE, https://www.youtube.com/about/copyright/#learn-about-copyright (last visited Feb. 9, 2020).

channel, which can further discourage creators from sharing their work.[74] In comparison, on SoundCloud, an online platform where creators can share original content and mashups of songs, compositions are often taken down if any portion of the song contains unlicensed copyrighted work.[75]

Creators must navigate this complex system in order to share their work with the public. Even in seemingly innocent uses, where the song is not the focal point of the video, the work can be taken down for violating copyright. For instance, in the early days of YouTube, Universal Music issued a takedown notice of a video of a toddler dancing to Prince's song "Let's Go Crazy."[76] The case ultimately settled, but a Ninth Circuit panel held that under the DMCA, specifically 17 U.S.C. § 512(c)(3)(A)(v), copyright holders must consider fair use before sending a notification.[77] Here, the video contained twenty-nine unmodified seconds of Prince's song, but takedown notices can also be issued for modified works, like covers or mashups, that contain the copyrighted work without a license.[78]

Applied correctly, fair use would cover these works. However, the system is not properly protecting them because platforms are incentivized to take them down, to avoid liability for hosting works that infringe copyright. The next Sections address what can be done to protect these works.

IV. MASHUPS AND COVERS CREATED FOR NON-COMMERCIAL USE SHOULD FALL UNDER FAIR USE

Parts IV and V focus on covers and mashups. This Part argues why non-commercial uses of mashups and covers should be considered fair use by default and, therefore, should not be taken down for copyright infringement nor subject to the mechanical licensing regime. Part V then discusses how such a policy can be implemented given concerns with digital enforcement, copyright holders, and second-generation creators.

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74. Emily Hong, *What Beyoncé and Justin Bieber Taught Me About Fair Use*, SLATE (Jan. 25, 2016), https://slate.com/technology/2016/01/what-beyonce-and-justin-bieber-taught-me-about-fair-use.html.

75. *See Learn about Copyright*, SOUNDCLOUD, https://soundcloud.com/pages/copyright#what-is-copyright-infringement-and-how-can-i-avoid-it (last visited Feb. 9, 2020).

76. Lenz v. Universal Music Corp., 815 F.3d 1145, 1149 (9th Cir. 2016).

77. *Id.* at 1151.

78. *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 26 (2d Cir. 2012). To avoid liability, YouTube allows copyright holders to flag videos for takedown and YouTube has its own internal content identification service to flag potential violations. YouTube then notifies the video's uploader of the takedown, and the uploader can choose to appeal an engage in the steps described earlier. *For Studio Professionals: The Allocation for Music Producers Act*, *supra* note 39.

A. SHOULD MASHUPS AND COVERS BE CONSIDERED FAIR USE OR SOMETHING ELSE?

This Section applies the four fair use factors to non-commercial uses of mashups and covers to determine if they should fall under the doctrine. The analysis is constrained by the fact that fair use is "an open-ended and context-sensitive inquiry."[79] Not all mashups and covers are the same—they incorporate different amounts of the copyrighted work. However, at its core, the fair use analysis asks whether non-commercial mashups and covers are "the type of use that furthers the essential goal of copyright law and should be excused from liability for infringement . . . ."[80]

Section IV.A.1, below, addresses why non-commercial uses of copyrighted music should be treated differently from commercial uses. Section IV.A.2 discusses in depth why mashups and covers are inherently transformative. Section IV.A.3 addresses the fourth factor, arguing that covers and mashups do not serve as a replacement for the original and are unlikely to usurp the market.

1. Non-Commercial Uses of Copyrighted Works Should Be Given More Leeway Than Commercial Uses

Use of copyrighted music online for non-commercial purposes should be treated differently than those used for commercial gain. The intent and actions taken by the creator must be considered when assessing if their use of copyrighted music is "commercial" in nature. People post videos on social media for a variety of reasons. For the purposes of this Note, these users fall into three primary archetypes: (1) those who use it as an outlet for their creativity, (2) those who hope to be discovered and become an "influencer," and (3) those who are already "influencers," that have sizable fan followings and make a profit off of their videos and online content. These three classes should be treated differently under fair use, as the non-commercial factor can be determinative. For the sake of this analysis, the creations being discussed are exclusively covers or mashups.

Those who fall in the first category, people who just want to share their work with others, should be considered "amateurs" who are not using music for commercial purposes. Since these creators are not profiting from the copyrighted work, they should be given the benefit of fair use. Those in the second group, who want to eventually use their work for commercial purposes, should be treated like amateur creators since they are not fiscally profiting from

79. Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006).

80. Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737, 749 (S.D.N.Y. 2017).

the work.[81] Finally, the works of influencers should not be considered fair use, as the creators are commercializing and profiting off the work of copyright holders..

Fair use seeks to balance the tension between incentivizing new creation and compensating copyright holders. Ultimately, fair use intended to preclude a finding of infringement where the goals of copyright are better served by use, rather than disuse, of the work.[82] This is one such case. By taking the time to create a cover or create a mashup, amateur artists are injecting their own creativity into the piece, making it their own.[83] Here, the focus is on balancing second-generation creators' incentives to produce new works against ensuring primary creators receive appropriate revenue for their work.

2. There Should Be a Presumption of Non-Infringement for Covers and Mashups, Under a Fair Use Analysis, Because They Are Transformative by Nature

The first element of the fair use test favors findings of fair use for covers and mashups. All mashups and covers are transformative, to a certain degree. Remixes, and even just overlaying two songs over each other, requires a modicum of creativity beyond the original work. Even if the work incorporates a large sample of the song, by adding other elements and labor to it, the second-generation creator is contributing to the work beyond plain consumption and is transforming it. At times mashups and covers can be completely different takes and do not feel like the original song.

While there have been virtually no non-parody music cases that dealt with fair use,[84] other cases can give insight into why covers and mashups should receive its protections. For instance, in *Cariou*, the court found a series of collages to be transformative because they added something new and

81. Some use YouTube in hopes of becoming "YouTube famous." Once they gain a certain number of followers, they can then monetize their videos. However, it is very challenging to become YouTube famous. Max Benator, *Can You Still Become 'YouTube Famous'?,* VOX (May 5, 2015), https://www.vox.com/2015/5/5/11562306/can-you-still-become-youtube-famous; Creator Academy, *Make money on YouTube*, YOUTUBE, https://creatoracademy.youtube.com/page/lesson/revenue-basics#strategies-zippy-link-3 (last visited Feb. 19, 2020).

82. *See* Castle Rock Entm't, Inc. v. Carol Publ'g Grp, Inc., 150 F.3d. 132, 141 (2d Cir. 1998).

83. Fair use can be unpredictable where it potentially intersects with derivative work. The distinction before transformative and derivative works is part of the tension in using fair use in music copyright cases. "A fair use decision in one of the music cases would likely require greater theorization of the whole concept of transformative works and its relationship with and distinction from an infringing derivative work." Lee, *supra* note 43, at 1923.

84. *See id.* at 1921.

presented the images with a new aesthetic.[85] Likewise, the popularity and special magic of mashups is how different they are from the songs they borrow from.

Much like covers and mashups that incorporate varied amounts of the original song, the collages in *Cariou* were transformative, despite the fact that "the amount of each artwork" used "var[ied] significantly from piece to piece."[86] Copyright law makes allowances for small degrees of copying, like the kind woven into many mashups. Under the *de minimis* doctrine, using small amounts of copying is okay.[87] While some mashups may incorporate very little of copyrighted songs, many covers and other mashups incorporate "substantially" more from the original works.[88] Works that use substantially more, versus a small amount, of a copyrighted work are less likely to be fair use. But the amount of use is not dispositive.

Often, the dispositive consideration is whether a challenged work is used commercially or is otherwise transformative in nature. Mashups and covers are typically transformative because they are far more than passive uses of copyrighted work. A passive use of copyright would be just uploading or downloading the original versions of a copyrighted work, as is, which courts have treated as infringement.[89] Just copying the work does not require any creativity or labor on the part of the creator. Unlike passive uses, covers and mashups are transformative, in some cases because they only incorporate small amounts of the original works, and in others, because the creator uses their

85. *See* Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013).

86. *See id.* at 700.

87. Menell, *supra* note 33, at 465. In *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit held that "no substantial similarity or *de minimis* inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording." 410 F.3d 792, 798 (6th Cir. 2005). This ruling effectively eliminated the plaintiff's burden in music sampling cases to show substantial similarity and the defendant's ability raise a de minimis inquiry. However, the Sixth Circuit indicated that a defendant may still prevail if they can establish fair use. *Id.* at 805.

88. Some cover artists may sound very similar to the original artists; in fact, there are tribute and cover bands that tour and perform exclusively other people's works for fiscal gain. Since they are profiting off others' works, it makes sense that they have to pay in order to perform these songs. However, covers posted online that sound like the original, but are not used commercially, should not be held to the same scrutiny, since they are just contributing more works to society. *But see* Midler v. Ford Motor Co., 849 F.2d 460. In *Midler*, Ford tried to recruit famous musicians to sing popular songs of the time in an advertisement. When one of the singers refused to participate, they had a "sound alike" imitate the plaintiff's voice as much as possible. The appeals court found that, although a voice is not copyrightable, the plaintiff still had a claim for the tort of appropriation under California law. Notably though, the "sound alike" was used for commercial purposes and with the sole purpose of impersonating or imitating the original artist.

89. *See* BMG Music v. Gonzalez, 430 F.3d 888, 890–91 (7th Cir. 2005).

creativity to combine and overlay the copyrighted elements in unique ways. For these reasons, covers and mashups routinely satisfy the first element of the fair use defense.

3. Covers and Mashups Do Not Negatively Impact the Market for Original Songs

The next fair use factor also cuts towards finding fair use for non-commercial covers and mashups. The minimal potential impact of mashups and covers on the market cuts in favor of considering covers and mashups fair use. "[T]he more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original."[90] Although covers and mashups take elements from other songs, they are still different from the original work. Courts have held that the more transformative the secondary work is, "the less likelihood" that it will serve as a replacement for the original.[91]

Ultimately, covers and mashups do not serve as replacements for the original song, but rather can help promote exposure of it. In the 1970s, record companies allowed radio stations to play songs for free because it was good for publicity and encouraged record sales. Similarly, now it is commonplace for new artists to share their music for free on TikTok in order to get exposure and develop a fan base.[92] In the era of social media, where exposure is everything, use and proper attribution of copyrighted music can help boost the music industry. These derivative works can even lead to more streams for the original work, which would provide compensation to the original artists through the MMA's blanket licensing scheme.[93] Many platforms already require mashups or covers to identify what songs they are sampling. Making this a hard legal requirement for creators would further the promotion of new music.

A natural concern with making covers and mashups fall under the fair use doctrine is that it may cut into the original artist and copyright holder's profit. If non-commercial mashups or covers are considered fair use, there may be situations where the cover or mashup is more successful or popular than the

90. Authors Guild v. Google, Inc., 804 F.3d 202, 223 (2d Cir. 2015) (summarizing a standard set out in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994)).

91. Castle Rock Entm't, Inc. v. Carol Publ'g Grp, Inc., 150 F.3d. 132, 145 (2d Cir. 1998) (citing to *Campbell*, 510 U.S. at 591–92).

92. Duncan Cooper, *How TikTok Gets Rich While Paying Artists Pennies,* PITCHFORK (Feb. 12, 2019), https://pitchfork.com/features/article/the-great-music-meme-scam-how-tiktok-gets-rich-while-paying-artists-pennies/.

93. Menell, *supra* note 33, at 462 (referencing Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 827, 827 n.208 (2007)).

original work. In these cases, neither the primary and second-generation creators would be profiting from the work. But the platform hosting the content may be generating ad revenue from people visiting their site to listen to the mashup or cover. As a result, potential revenue may be diverted from the original artists to the platform.

There are already technological solutions to this concern. Currently, YouTube allows the rights holder to claim ad revenue for the work that contains their copyrighted work as an alternative to taking the work down.[94] If non-commercial uses of covers are fair use, copyright holders would no longer be able to monetize and keep the ad revenue from videos uploaded to YouTube.[95] The main value the copyright holder would get from the work would be from publicity. As described above, even if the engagement for the original work is lower than it is for the mashup or cover, this can lead to legitimate streams which will generate some revenue for the artists that they would not have gotten without publicity from the mashup or cover.

Further, copyright aims to provide incentives for artists to create, not necessarily to maximize their profits. Not fiscally compensating artists for non-commercial mashups and covers made by amateur artist will not take away all incentives for primary creators. Fair use tells us that the law should be less concerned with non-commercial uses, if it is not taking away the market for the original work.[96] Courts have also acknowledged that in cases where the work falls under fair use and is transformative, it is okay if it "harm[s], or even destroy[s], the market for the original."[97] Even though there will be some loss in licensing fees, these works do not harm the original market at the level where it would disincentivize primary creators to continue creating.

Finding fair use for these works aligns with the policy basis of the doctrine—increasing the public's access to works by promoting new, socially beneficial creations that use copyrighted materials. Therefore, there should be a presumption in favor of non-infringement for covers and mashups.

94. Currently, copyright holders can revenue share on videos that contain their copyrighted work. *See* YouTube Help, *How Content ID works*, YOUTUBE, https://support.google.com/youtube/answer/2797370?hl=en (last visited Feb. 9, 2020).

95. *Id.*

96. Courts are more likely to find fair use in cases where the work does not deter from the market for the work. *See* Authors Guild v. Google, Inc., 804 F.3d 202, 223 (2d Cir. 2015).

97. Castle Rock Entm't, Inc. v. Carol Publ'g Grp, Inc., 150 F.3d. 132, 145 (2d Cir. 1998) (citing to Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591–92 (1994)).

B. IT IS SOCIALLY BENEFICIAL FOR NON-COMMERCIAL COVERS AND MASHUPS TO FALL UNDER FAIR USE

The four factors cut towards treating covers and mashups as fair use. But they rarely receive such treatment because platforms are incentivized to take down works challenged by a copyright holder. Even if users think their work falls under fair use, in practice, users rarely use the counter notice process. So, once their work is taken down, it stays down.

This Section discusses why this overinclusive takedown practice harms creators and stifles creativity and content generation for amateurs and upcoming artists. Therefore, treating all non-commercial covers and mashups as fair use would be socially beneficial.

1. Takedown Notices Disproportionately Harm Amateur Artists and Discourage Them from Creating New Works

Taking down non-commercial mashups or covers for copyright violations may disincentivize second-generation creators from producing or sharing their work with the public. Copyright law aims to incentivize creation, so allowing new artists to access the market should be prioritized. Aside from takedowns there are already safeguards in place on some platforms. YouTube, for example, allows copyright holders to monetize ads on covers instead of taking the video down. This enables copyright holders to be compensated for use of the work through the platform.[98] However, on other platforms, like SoundCloud, if creators use copyrighted music without permission, the entire track gets taken down.[99] If the file is a direct re-share of the original work, which happened often in the peer-to-peer file sharing era, the platform should take the work down to protect the copyright holder's interests. In contrast, mashups and covers should be allowed to stay up. Doing so encourages further creativity and increases public access to these works. Since these individuals

98. YouTube policy allows creators to monetize their channel through the YouTube partner program. Creators can earn money through various means, such as advertising revenue, by meeting certain requirements. *See* YouTube Help, *How to earn money on YouTube*, YOUTUBE, https://support.google.com/youtube/answer/72857?hl=en (last visited Feb. 9, 2020). On the other hand, SoundCloud allows users with premier accounts to monetize individual tracks they create. To qualify for monetization members must own all the publishing, masters, and distribution rights to the song. So, mixes, including those that are properly licensed, do not qualify. *See* SoundCloud 101, *What is the SoundCloud Creator Guide*, SOUNDCLOUD https://creators.soundcloud.com/guide (last visited Feb. 9, 2020).

99. SoundCloud Help Center, *Your mashup was taken down for copyright infringement*, SOUNDCLOUD, https://help.soundcloud.com/hc/en-us/articles/115003563368-Your-mashup-was-taken-down-for-copyright-infringement (last visited Feb. 9, 2020).

are not profiting off their creations through ad revenue, there should be a presumption in favor of fair use for these works.

Penalizing upcoming artists by taking down their work or flagging their channel for copyright infringement has real consequences. Many platforms have enforcement mechanisms that disproportionally impact online creators. On SoundCloud, just one copyright violation prevents the user from being able to monetize their channel in the future, creating an additional barrier for new artists to break into the industry.[100] YouTube has a similar policy.[101] Even if these creators want to start commercializing and profiting from their original works, they will be unable to reap the full benefits of online platforms. Knowing they will not be able to profit off their content may dissuade them from generating their own original content. The consequence of losing all ability to monetize is grossly disproportionate to the harm of one allegation of copyright infringement. Even if creators make works that involve copyrighted material, fair use aims to incentivize forms of creation that can benefit society. When the penalty for infringement is so burdensome that it prevents new works, the goals of copyright are compromised.

Treating covers and mashups as fair use may cause copyright holders to lose out on some revenue, as the works would not be subjected to the mechanical licensing fee, but it will help encourage participation in the music industry. The access-incentive balance is arguably skewed in favor of the rights holder. Compensation under copyright is intended to reward and encourage artists to keep producing new works. Copyright seeks to balance creation with author's rights—economic benefits for authors are only half the equation.

Looking at copyright only though an economic lens may lead to the under-emphasis of access and promoting creativity.[102] Discussions around democratic theories of copyright focus on prioritizing access, and participation in culture.[103] Covers and mashups are cultural phenomena that allow people to

100. SoundCloud Help Center, *How do copyright strikes work?*, SOUNDCLOUDhttps://help.soundcloud.com/hc/en-us/articles/360005032554-How-do-copyright-strikes-work- (last visited Feb. 9, 2020).

101. YouTube has a copyright strike policy. The first one serves as a warning, and then users must go to copyright school. If you get three strikes, your account can be terminated, all your videos will be deleted, and you will be banned from creating new channels. YouTube Help, *Copyright strike basics*, YOUTUBE, https://support.google.com/youtube/answer/2814000?hl=en (last visited Feb. 9, 2020).

102. Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 233–34 (2014).

103. *Id.*

engage with music.[104] Encouraging a participatory society should not—and does not need to—be in direct conflict with economic incentives. Too much focus on the initial rights holders' economic interests can smother emerging artists. Conversely, too little attention makes it difficult to transform musical talents into a living. Music helps encourage creativity and self-expression. Sharing new music with others should be prioritized. The law seeks to balance these competing aims, but has been stymied by platforms' draconian takedown policies.

By retaining the compulsory license in the Copyright Act of 1976, Congress recognized the importance of covers in promoting new music at the expense of delinking control from compensation. Opponents of the compulsory license wanted to get rid of it to realign copyright law with other types of property laws by giving artists back the right to exclude others from using their work.[105] Lawmakers actively chose to keep the compulsory license and thereby showed that music copyright should not be treated as a pure property right. Congress recognized that compromising traditional property features was necessary to guard its twin interests in incentivizing new works and promoting access to the arts.[106] Like covers, mashups give consumers access to more variations of similar works. Technology now allows for broad access and use of songs. Covers and mashups are socially beneficial and finding fair use for these works would promote the goals of copyright.

2. *Allowing Mashups and Covers to Remain Online Can Help New Artists Break into the Industry*

Aside from increasing access to new works and encouraging creation, covers and mashups can help launch careers. Therefore, those who create covers and mashups with the intent of eventually monetizing their work should be treated the same as amateurs, until they start commercializing their works. YouTube and SoundCloud have helped launch several artists' careers, such as Adele, Carly Rae Jepsen, and The Weeknd, to name a few.[107] Often, new artists will cover famous songs to get noticed. Once they develop their own following

104. Mashups are a cultural phenomenon. *See generally* John Shiga, *Copy-and-Persist: The Logic of Mash-Up Culture*, 24 CRITICAL STUD. MEDIA COMM. 93, 93–94 (2007) (discussing how the internet allowed for the emergence of mashup-culture); Menell, *supra* note 33, at 444.

105. Abrams, *supra* note 5, at 222.

106. *Id.* at 222–23.

107. Michelle Regalado, *9 Singers Who Came to Fame Online*, SHOBIZ CHEATSHEET (Dec. 12, 2020), https://www.cheatsheet.com/entertainment/9-singers-who-came-to-fame-online.html/.

or get signed to record companies, they begin to create their own work.[108] Or, if these artists already have original work, covering popular songs may allow the artist to gain notoriety and garner interest in their original songs. Other artists, like Chance the Rapper, got their start by releasing original work on SoundCloud.[109] Treating these artists leniently, when they are coming up, can help them gain a following, thereby encouraging the promotion and creation of new works by these artists.

3. Works Used for Commercial Purposes Should Not Be Treated as Fair Use

Artists who monetize their channel and profit off the copyrighted materials should not be treated as leniently as amateurs. These creators should have to go through the proper licensing process, whether it be using the compulsory license, or through a separate deal. As mentioned earlier, there are no official licensing regimes in place for mashups.[110] If these creators are making a profit off the work, they should have to give a portion of the proceeds proportional to the amount sampled to the original holders.

On SoundCloud, this is easier to manage as individual tracks are monetized. YouTube also has a policy in place that allows monetized channels to turn off revenue on certain videos.[111] These creators would have the option to keep videos containing copyrighted work up by: (1) licensing and monetizing the video, or (2) choosing not to commercially benefit from the work.[112]

The four factors point to finding fair use for non-commercial covers and mashups. Treating these works as such is socially beneficial and is in line with the purposes of copy right law.

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108. Justin Bieber, Shawn Mendes, and 5 Seconds of Summer are examples of musicians who got noticed for performing covers on social media. *Id.*

109. Chance the Rapper was propelled to stardom through online streaming platforms. Now several Grammy wins later he still uploads all his albums to SoundCloud and refuses to charge fans for his albums. In 2017, Chance the Rapper "saved" SoundCloud. It was rumored that the platform was going to shut down. Chance the Rapper tweeted that he was "working on the SoundCloud" thing and that it is "here to stay" after discussions with the CEO. *See* Ashley King, *After Helping to Save SoundCloud In 2017 Chance the Rapper Hits 1 Billion Streams on the Platform* (Aug. 17, 2019), https://www.digitalmusicnews.com/2019/08/17/chance-the-rapper-soundcloud-billion/; John Lynch, *Chance the Rapper says SoundCloud is 'here to stay,' after a report says its cash will run out in 50 days*, BUISNESS INSIDER (July 14, 2017), https://www.businessinsider.com/chance-the-rapper-soundcloud-here-to-stay-amid-financial-struggles-2017-7.

110. *See supra* Section II.C.

111. Creator Academy, *supra* note 81.

112. *Id.*

Properly understood, fair use should insulate creative works like mashups and covers from abusive copyright takedowns. However, for the reasons discussed above, fair use has not adapted to the new challenges created by the internet. The current system needs to be changed to allow for these works to remain accessible to the public.

V. DEFINING A FRAMEWORK

Creating a statutory exception for non-commercial mashups and covers is one way to ensure that fair use is applied *fairly* to non-commercial covers and mashups. After all, fair use is judged by platforms. And the safe harbor provisions encourage platforms to side with the rights holders to avoid liability.[113] As a result, second-generation creators' rights are stifled. Something needs to change to incentivize platforms to modify their enforcement mechanisms. Creating a legislative carve-out will help recalibrate fair use to accommodate the realities of the internet and encourage platforms to consider second-generation creator's rights without fear of legal repercussions.

A. PROPOSAL

This proposal aims to recalibrate the balance between increasing access to new works and protecting rights holders' interest. The statute needs to balance the interests of the copyright holder, the second-generation creator, and platforms. It must create a statutory, rebuttable presumption that mashups and covers are fair use. The presumption for fair use exists to prevent the automatic takedown of mashups and covers and ensure fair use is being fairly applied. It has to be rebuttable to protect against works that are incorrectly, or falsely, labeled as mashups and covers, but are unmodified uploads of the copyright holder's work. Creators need to signal to platforms and copyright holders that their work is a cover or mashup, and it is not being monetized. For this to be successful in practice, the liability placed on platforms needs to change. Platforms should not be held liable for having a good faith belief that the work is a cover or mashup, if it turns out to not be one. If they can be held liable, they will still be legally incentivized to continue an over inclusive practice of taking down works that should fall under fair use. By not holding them liable for a good faith belief, they will not be penalized for allowing covers and mashups to remain on their websites, shifting the balance towards promoting access.

113. *See supra* Part III.

1. Presumption for Fair Use for Non-Commercial Mashups and Covers

Under this proposal, there would be a presumption of fair use for non-commercial mashups and covers. To qualify, first, the work must be non-commercial, meaning the second-generation creator cannot be deriving monetary value from the work. Second, it must be a mashup or a cover. It cannot be direct uploads of a copyrighted work. To qualify as a cover, and not a direct copy, the creator must either generate the vocal component, instrumental component, or both, in their song. As iterated earlier, covers and mashups are inherently transformative because users actively contribute and modify the work; it is not passive consumption. Further, they are not meant to replace the original song, but can boost interest in it.

Under the proposed policy mashup artists will not have to get licenses for every song they sample for non-commercial works. To ensure copyright holders receive some benefit from the secondary work, the second-generation creators must indicate and attribute all the copyrighted works included, as to not confuse the sources. Crediting the original artist may encourage people to listen to the original source, thereby providing some compensation for the copyright holder.

Crucial to this is that the cover or mashup does not greatly impact the market for the original songs, or that the second-generation creator fiscally profit off the labor of the original creators. Therefore, the mashup and cover must be created and shared for non-commercial purposes. The combination of these factors supports a presumption of fair use and should be automatically given to non-commercial mashups and covers.

2. Rebuttable Presumption

Just claiming the work is a cover or mashup is not enough to allow a work to remain online. Rights holders cannot be deprived of their ability to enforce their copyright on works that do not fall under the fair use presumption. Copyright holders should be able to flag unauthorized uses of their work and specify why the work is not a cover or mashup. If they merely flag the work as infringement, it would be no different from the current system, and a specification requirement will prevent frivolous notices.

To satisfy the specification requirement, rights holders would need to indicate what aspect of the work is infringing their copyright in an impermissible way. For instance, they would be able to indicate if the work is a direct upload of their work, was being used for commercial purposes, or did not properly credit the underlying work to the rights holder.

3. Good Faith Exception

Currently, platforms act as strict gatekeepers and takedown essentially anything that may implicate copyrighted music to prevent liability.[114] This proposal will prevent platforms from taking down videos that use copyrighted works that should be covered by fair use. SoundCloud's policy directly states that any use of copyrighted work, even for non-commercial use is not fair use, and it will take down any infringing works.[115] Creating a good faith exception for platforms would prevent them from over-policing content through such liability shifting techniques.[116]

By requiring creators to identify their works as mashups or covers upfront, platforms are put on notice that the works contain copyrighted materials that the second-generation creator does not own. Currently, platforms can be held liable under the DMCA if they have "actual knowledge" or awareness of "specific and identifiable instances of infringement."[117] Under existing law, it is possible for platforms to be held liable if it hosts something that was labeled as a non-commercial mashup or cover that turns out to not be one, because it can be argued that the platforms had "actual knowledge" that a specific work contained or could contain infringing content. Therefore, platforms would still be incentivized to takedown works. To prevent this behavior, platforms should not be held liable for having a good faith belief that the work was a mashup or cover. The good faith belief would come from users self-reporting the status of their work. If later a copyright holder flags a video for not falling within the permissible uses of copyrighted music, the good faith requirement would alleviate liability concerns for platforms.

However, platforms would still have to maintain filters. Internally, filters would have to be modified to distinguish between monetized and non-monetized channels when running their algorithm. The concept of fair use is hard for an algorithm or filter to detect, since they contain copyrighted work,

114. Julia Alexander, *YouTubers and Record Labels are Fighting, and Record Labels Keep Winning*, THE VERGE (May 24, 2019), https://www.theverge.com/2019/5/24/18635904/copyright-youtube-creators-dmca-takedown-fair-use-music-cover.

115. SoundCloud Help Center, *Best Practices for uploading a track under fair use*, SOUNDCLOUD, https://help.soundcloud.com/hc/en-us/articles/115003445707-Best-practices-for-uploading-a-track-under-fair-use (last visited Feb. 9, 2020).

116. YouTube's Content ID filter can be employed to immediately flag and block videos that may fall into a "gray" area of fair use, such as fan videos and mashups. For instance, a creator tried to upload a video combining the audio from Justin Bieber's song Sorry and dancing from Beyoncé's music video for "Grown Women." The video was almost immediately flagged by Content ID. YouTube blocked the video, and the creator specific channel privileges. Hong, *supra* note 74.

117. *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 26, 30 (2d Cir. 2012); 17 U.S.C. § 512.

so having a presumption that these works are fair use will help eliminate some of the ambiguity. But, if the platform has something like YouTube's Content ID filter, it will not be a good faith belief, if the filter identifies that the entire uploaded work is a direct copy.

Nevertheless, the good faith belief would prevent the overinclusive takedown of works by absolving platforms of potential liability.

B. CREATING A BLANKET FAIR USE EXCEPTION FOR COVERS AND MASHUPS WILL BENEFIT CREATORS AND NOT MAKE ENFORCEMENT MORE CHALLENGING

From a policy perspective, implementing this proposal will help promote the arts and right the balance between incentivizing second-generation content creation, platforms, and rights holders. In this era of free-flowing ideas, works created for non-commercial purposes should continue to thrive to encourage content generation and access to creative works. Fair use is failing online creators, and not just those who make covers and mashups. For instance, people who record guitar tutorials and other educational videos often get their work taken down for DMCA copyright violations.[118] It is difficult for creators to counter these allegations.[119] While copyright holders are supposed to consider fair use before issuing takedown notices, they do not always do so in practice. Further, automatic takedown processes, like YouTube's Content ID filter, further complicate the ability to consider fair use before sending takedown notices. By giving these works a presumption of fair use, the works will be able to stay up, increasing access and content of works.

While copyright holders may disagree with how their work is being used in a cover or a mashup, artists have not been able to completely control who uses their music since 1909.[120] In order to use someone's song, you did not need to get their permission, you just had to file a notice of intent with the copyright office.[121] Unlike other areas of law where people have the right to exclude others from their property, copyright has long recognized music as incompatible with traditional property rights. The compulsory licensing system severed the copyright holder's right to exclude others from using their musical composition by delinking control from compensation. In the pre-internet era, even though people could not control who used their music, it was much easier to prevent violations of copyright, because use and access of copyrighted

118. Use of copyrighted materials for educational purposes is typically considered fair use. Alexander, *supra* note 114.

119. *Id.*

120. MENELL, *supra* note 3, at 672.

121. *Id.*

works were more restricted.[122] Now, the internet makes it much easier for people to access and use copyrighted music, so these same principles need to be extended in the digital age.

Applying and advertising a uniform policy can decrease confusion for creators. Creating a compulsory licensing scheme for mashups is challenging because, unlike covers, mashups sample multiple songs and may overlay tracks. The proposed policy, for finding fair use for non-commercial uses, allows mashup and cover artists to create without having to get permission and individual licenses for each song used.

Creating an exception for non-commercial covers and mashups will help advance creation and copyright enforcement. Mashups allow people to express creativity and discover their self-identity. People are going to continue to create work using copyrighted materials, regardless if they share their work online or not.[123] The abundance of takedown notices for works that should fall within the fair use exception has caused some people to become skeptical of the entire copyright system.[124] A presumption for fair use will allow these people to share their work, thus, promoting creativity and not alienating people from the copyright system.[125]

Further, implementing this proposal will not make enforcement across platforms much more burdensome for copyright holders. Copyright holders have always held the burden of identifying infringing works that they own as they "are thus better able to efficiently identify infringing copies than service providers [. . .] who cannot readily ascertain what material is copyrighted and what is not."[126] Additionally, record companies and copyright holders are already required to consider fair use before issuing a takedown notice.[127] Under a presumption for fair use, the rights holders just need to consider two things.

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122. Menell, *supra* note 33, at 482.

123. YouTube is constantly taking down copyrighted work through takedown notices and issuing Content ID notices. For videos tagged by Content ID, YouTube lets the copyright holder decide how they want to proceed. They can either block the whole video, monetize the video by running ads on it, or track viewership. YouTube Help, *supra* note 94. On SoundCloud, creators are not allowed to upload any work that may contain copyrighted work. This restriction extends to "private works" that are not share publicly as the creator can still share the work with a limited audience. SoundCloud Help Center, *How to avoid copyright infringement*, SOUNDCLOUD, https://help.soundcloud.com/hc/en-us/articles/115003566668-How-to-avoid-copyright-infringement (last visited Feb. 9, 2020).

124. *See* Peter K. Yu, *The Copyright Divide*, 24 CARDOZO L. REV. 331, 381 (2003) (discussing how the internet has led to a rise in "anti-copyright," "anti-establishment culture" and people who subscribe to the mindset that all information should be free).

125. *See supra* Part IV.

126. Urban et al., *supra* note 41, at 17.

127. Alexander, *supra* note 114.

First, whether the work is commercial or non-commercial and, second, if it is a mashup or cover and not just an unmodified upload of the original work. The platform will need to indicate the commercial nature of the work to viewers and record companies. Currently, there is no formal process to evaluate if record companies are taking fair use into consideration when issuing takedown notices, so creating a presumption of fair use will shift the balance in favor of second-generation creators.[128] Even if a notice is issued, creators will have a legal basis to argue why their work should remain online. The balance shifts from "infringing" to "non-infringing," unless proven otherwise.

Just as the MMA fixed the balance between rights holders and streaming services, implementing such a system will help correct the balance between second generation creators, copyrights holders, and platforms.

VI. CONCLUSION

The MMA helped address some of the music copyright issues created by the internet and new forms of listening. Specifically, the MWMA helped create a system to ensure accurate compensation, so copyright holders can benefit from their work. However, the MMA dealt largely with challenges faced by those in the music industry and did not consider music copyright issues that second-generation creators have when using copyrighted work.

The DMCA liability structure encourages platforms to takedown videos if there is any chance of infringement. Fair use, an affirmative defense to infringement, is a multi-step test and can be difficult to apply. As such, works that should be considered fair use are also taken down. Non-commercial covers and mashups should be considered fair use, until proven otherwise, in order to incentivize second-generation creators and increase society's access to creative musical works.

Creating a statutory, rebuttable presumption for fair use will benefit second-generation creators, while protecting copyright holders' ability to remove unauthorized uploads of their work.

128. *Id.* Any takedown requests sent to YouTube counts as a strike against the user, even if they are invalid. Urban et al., *supra* note 41, at 47.