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GIRL TALK ON TRIAL: COULD FAIR USE PREVAIL?

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[This fictitious court opinion considers the "mash up" music created by Gregg Gillis, known in the music world as "Girl Talk." Gillis makes upbeat music collages out of clips from other artists' songs. He claims that his work falls under the copyright doctrine of fair use and is, hence, permissible. Many practitioners and the projection of legal precedent on digital sampling suggest otherwise. Gillis claims that no artist has threatened suit against him, though iTunes and a CD distributor have stopped carrying his album due to legal concerns. This fictitious opinion considers a scenario, in which the owner of Queen's sound recording in "Bohemian Rhapsody," Queen, *Bohemian Rhapsody*, *on* NIGHT AT THE OPERA (Hollywood Records 1975), has sued Gillis for his use of the song in Gillis' "What It's All About." While the facts pertaining to the lawsuit are hypothetical, the facts pertaining to Gillis' use of Queen's song are not. This decision tackles a potential argument for fair use and considers whether it might prevail in a courtroom, despite the admitted doctrinal hurdles.]

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HOLLYWOOD RECORDS,

Plaintiff-Appellee,

—v.—

ILLEGAL ART, GREGG GILLIS,

Defendants-Appellants.

January 30, 2009, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of New York.

ELMAN, *Circuit Judge*:

Defendants, Gregg Gillis and Illegal Art, appeal the District Court's grant of summary judgment in favor of plaintiff Hollywood Records. This action arises out of the use of a sample from the sound recording[1] "Bohemian Rhapsody" in the song "What It's All About." More specifically, defendants appeal the District Court's decision to grant summary judgment in favor of the plaintiff on the grounds that the alleged infringement was not fair use.

I

"Bohemian Rhapsody," a densely layered rock operetta,[2] is often considered to be Queen's magnum opus. Written for the band's 1975 album "Night at the Opera," "Bohemian Rhapsody" reached number one on the charts in the United Kingdom for nine weeks and is Britain's third best selling

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1 The copyright to the musical composition, owned by Trident Music, is not at issue in this case. Trident Music is not a named plaintiff in the litigation. "Sound recordings and their underlying compositions are separate works with their own distinct copyrights." Newton v. Diamond, 349 F.3d 591, 592–93 (9th Cir. 2003); 17 U.S.C. §102(a)(2), (7) (2008).

2 See Rock and Roll Hall of Fame: Queen, http://rockhall.com/inductee/queen (last visited Jan. 29, 2009).

single of all time.[3] In the United States, the song's 1992 appearance as part of the Wayne's World soundtrack renewed its popularity. In 2004 "Bohemian Rhapsody" was inducted into the Grammy Hall of Fame.[4] Registration of the sound recording belongs to Hollywood Records.

Gregg Gillis, known to fans as "Girl Talk," released an album in 2008 entitled "Feed the Animals." Without seeking plaintiff's permission, Gillis admittedly incorporated 15 seconds of "Bohemian Rhapsody" into 20 seconds of his song "What It's All About."[5] Sampling takes place when a composer manipulates a recorded fragment of sound from a preexisting recording and uses it as part of a new composition which includes original work of his own.[6] Gillis' album is known in the industry more specifically as a "mash-up." A mash-up is a new composition created entirely of sampled music combining the rhythm tracks of one song with the vocal tracks of another.[7] In the case of defendant's album, "Feed the Animals," he combines the rhythm tracks and vocal tracks of over 300 songs to create a danceable musical collage of short overlapping clips from other artists' songs.[8]

Less than a year after the release of "Feed the Animals," Hollywood Records sued Gillis and his record company Illegal Art for copyright infringement. The District Court, in granting summary judgment for Hollywood Records, reasoned that Gillis' mash-up of "Bohemian Rhapsody" is not sufficiently transformative and encroaches on Hollywood Records' licensing market for derivative works. This Court reviews the District Court's grant of summary judgment *de novo*. Halpern v. FBI, 181 F.3d 279, 286 (2d Cir. 1999).

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3 See Wikipedia: Queen (band), http://en.wikipedia.org/wiki/Queen_(band)#cite_note-bhsa-10 (last visited Jan. 29, 2009).

4 See Grammy.com, http://www.grammy.com/Recording_Academy/Awards/Hall_Of_Fame/#B (last visited Jan. 29, 2009).

5 "Bohemian Rhapsody" is sped up and a portion of it repeated or "looped" three times in "What It's All About." This explains why the length of the portion taken from the song is not the same as what is used in defendant's song.

6 Jeremy Beck, Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests, 13 UCLA Ent. L. Rev. 1, 2 (2005).

7 Matthew Rimmer, Digital Copyright and the Consumer Revolution: Hands Off My IPod 131 (2007).

8 Robert Levine, Steal This Hook? D.J. Skirts Copyright Law, N.Y. TIMES, Aug. 7, 2008, at E1, available at http://www.nytimes.com/2008/08/07/arts/music/07girl.html#.

II

This case places the court in the middle of an inevitable and perhaps everlasting struggle between the two primary purposes of copyright law. "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the *ultimate* aim is, by this incentive, to stimulate artistic creativity for the general public good." Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) (emphasis added). Application of the fair use analysis "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." Stewart v. Abend, 495 U.S. 207, 236 (1990); Campbell v. Acuff-Rose, 510 U.S. 569, 577 (1994). All four statutory factors may not be treated in isolation but, rather, are to be weighed together in light of the dual purposes of copyright law. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1110–11 (hereinafter Leval).

A

The first factor of the fair use inquiry is "the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). The purpose of this investigation is to determine whether the new work supplants the original or instead "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative." Campbell, 510 U.S. at 579; Leval, supra, at 1111. Judge Leval, who coined the term "transformative," further explains that a work is transformative if it creates "new information, new aesthetics, new insights and understandings." Leval, supra, at 1111. The preamble of section 107 provides that fair use for purposes "such as criticism, comment, news reporting," and the like does not constitute infringement. However, this list is not all encompassing. The more a work is held to be transformative, the less significant other factors such as commercialism will weigh against a finding of fair use. Campbell, 510 U.S. at 579.

Let us first examine how the defendant uses plaintiff's work in his mash-up. Like the rest of Girl Talk's album "Feed

the Animals," "What It's All About" mixes pop and rock classics with modern rap and R&B. The last twenty seconds of defendant's song contains "Bohemian Rhapsody."[9] For the first nine of these seconds, the song plays simultaneously with three other sound recordings (Jackson 5's "ABC," Rihanna's "Umbrella," and Vanilla Ice's "Havin' a Roni"), followed by an additional one second in which "ABC" cuts out leaving "Bohemian Rhapsody" and the two other songs playing, followed by six seconds in which Umbrella cuts out leaving just ABC and "Bohemian Rhapsody," followed by four seconds of "Bohemian Rhapsody" playing alone without any overlapping music. The District Court rejected defendant's argument that his work is a comment under section 107. Instead, the court found a mere repackaging of plaintiffs work. A "mere contextual change" the court stated is insufficient to constitute a transformative work. The court referenced a concern raised by Justice Kennedy in his Campbell concurrence in which he stated that "[w]e should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original. Almost any revamped modern version of a familiar composition can be construed as a 'comment on the naiveté of the original." Id. at 599 (Kennedy, J., concurring).

We recognize the District Court's dilemma. On one hand there is a fear, as the court notes, that "[i]f an infringement of copyrightable expression could be justified as fair use solely on the basis of the *infringer's* claim to a higher or different artistic use . . . there would be no practical boundary to fair use." Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992) (emphasis added). Nevertheless, this Court sees as even more troubling the possibility that truly higher or different artistic uses will be stifled, impeding copyright law's *ultimate* goal of stimulating creative activity. Thus, this Court aims to strike a balance. Instead of merely examining the purpose and character of defendant's work as he defines it, as did the District Court, we must also consider how the music industry, fans, and critics have received and interpreted the defendant's work vis-à-vis the plaintiff's work.[10] Prior decisions, in which

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9 See Appendix A for a detailed breakdown by the second of the overlapping songs in "What It's All About."

10 See Laura A. Heymann, *Symposium: Everything Is Transformative: Fair Use and Reader Response*, 31 Colum. J.L. & Arts 445 (2008) (arguing that the "transformative" aspect of the fair use inquiry should be refocused such that the question is approached from the other end of the interpretive process). Courts often, as the word "purpose" suggests, focus their analysis on the creator of the second work. The question then becomes not how the work is perceived or interpreted but

defendants have claimed that their works are a parody, have stated that "the threshold question when fair use is raised in defense of parody is whether a parodic character may be reasonably perceived." See Campbell, 510 U.S. at 582; see also Abilene Music, Inc. v. Sony Music Enter., Inc., 320 F. Supp. 2d 84, 89–90 (S.D.N.Y. 2003) ("The question is not whether Ghostface Killah intended The Forest purely as a parody of Wonderful World, but whether, considered as a whole, The Forest differs [from the original] in a way that may reasonably be perceived as commenting . . . on what a viewer might reasonably think is the unrealistically uplifting message of Wonderful World."). Thus, this Court must look beyond Gillis' stated purpose in creating the work but also to how it is reasonably perceived. In doing so, if the record lacks sufficient evidence of how others perceive defendant's work, courts are sufficiently equipped to act as the reasonable listener in order to answer the transformativeness inquiry.[11]

The defendant's own characterization of his work suggests that he intends it to be a comment on plaintiff's work.[12] The defendant additionally provides extensive evidence to show that critics of his work characterize it as a commentary on plaintiff's work.[13] We will discuss a few such examples. In the Village Voice's reputable "Sound of the City" interview, the interviewer states "[y]our tracks are spliced together in such a

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what the author intended or hoped to achieve. The better test of whether a second work has contributed a "new expression, meaning, or message" to the first is to turn to the reader. Asking the question from the reader's perspective is more likely to determine whether the defendant's use promotes the delivery of new works to the public, the ultimate goal of copyright law).

11 Id. at 457.

12 Gillis views his work as a commentary in the sense that he is "creating a character for people to digest. . . . You're still just trying to create a character and trying to push that image upon people. For me, I try to break all music down, because if you bring it all together you can kind of see how this all works within the same world of entertainment . . . for me, it's like I almost use the bands in my mind as instruments. I like to use them in a way that everything is recognizable. That's a part of the fun where you recognize the sample and you hear how it can be manipulated. In the long run, going along with the idea of fair use, I want the new work to be transformative. Even if you hate Wings, maybe the way I'm working the song and the way that I'm recontexualizing it, and how it comes out in the end, that's the new product. So it's like I'm using the whole world of pop as my sound palate. And I'm going to combine it all together and make an intricate collage out of it while trying to push it to be a new entity." Sound of the City, Interview: Girl Talk a/k/a Greg Gillis, Village Voice, Nov. 14, 2008, http://blogs.villagevoice.com/music/archives/2008/11/interview_girl.php.

13 Ideally, the author would have introduced critiques/sources that discuss and analyze of the use of plaintiff's "Bohemian Rhapsody" in the defendant's song "What It's All About." However, because this information is not readily available, he has instead looked at how critics view defendant's album more generally and hopes that one can analogize this to the song at issue in the case.

way that I interpret them—in a very loose way—as a kind of social commentary or some kind of critique of pop culture . . . it kind of breaks down barriers between certain genres of music. I see it as more of an egalitarian genre. There's something for everyone almost, and if there isn't, there's going to be." Pitchfork Media, a Chicago-based daily Internet publication devoted to music criticism and commentary, says "[T]he Three Stages of Girl Talk [are] knee-jerk recognition, easy-to-swallow consumption, and, finally, cemented recontextualization. When people go apeshit for his famous Biggie-Elton John pairing, they're taking pleasure in their own memories, the room's collective memory, the indisputable greatness of 'Juicy' and 'Tiny Dancer,' and, possibly above all else, they're cheering for the Girl Talk song that combines all those things so seamlessly. In concert, these mental synapses pop at the same time, and the result is thrilling— the apotheosis of the Girl Talk experience. *Feed the Animals* offers a new round of associative concoctions ready to blow out clubs this summer and beyond."[14] Bloggers also view defendant's work as either commenting on plaintiff's work or using plaintiff's work to create something that is aesthetically entirely new. "What surprised me the most as I kept listening was that I hated about 50% of the songs by themselves. But somehow Girl Talk was able to take a bunch of mediocre pop records and work them into something incredible. . . . I knew this album was going somewhere I'd never been before."[15] Another blogger writes that "[a]fter a couple of listens, it becomes evident that the most transcendent moments on the album are when really, really ironic things happen. Girly lyrics like Lil' Mama's 'Lip Gloss' spill over the death march ending from Metallica's 'One,' Dr. Dre crams some explicitness in between the lines on the lead verse from Styx's 'Renegade,' and (my personal favorite), a 12-year-old Michael Jackson sings 'ABC' over a sped-up ending from "Bohemian Rhapsody."[16]

As stated by Justice Holmes and reiterated in *Campbell,* "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious

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14 See Ryan Dombal, Girl Talk: Feed the Animals, Pitchfork Media, June 27, 2008, http://www.pitchforkmedia.com/article/record_review/51537-girl-talk-feed-the-animals.

15 Posting of Gotty to The Smoking Section, http://smokingsection.uproxx.com/TSS/?p=1392 (May 23, 2008, 8:13 AM).

16 Music Review of Girl Talk—Feed the Animals (Oct. 22, 2008), http://blogcritics.org/archives/2008/10/22/095148.php.

limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke." Bleistein v. Donaldson Lithograph Co., 188 U.S. 239, 251 (1903). Thus, while the Court refrains from making a judgment as to the quality of Gillis' commentary, we think Gillis' work is in fact perceived by many as commenting on the original work. While the District Court fears that this interpretation will lead to the exploitation of works, this Court believes that by focusing the inquiry not on the author's purpose alone but also on the character of the work as interpreted by those who perceive it, an artist will be adequately restrained from exploiting works. If an artist claims to transform a work which is not reasonably seen as transformative by viewers or listeners, that work will lack sufficient transformativeness. If this Court were to follow the District Court's path, the result would be the stifling of the very creativity that copyright seeks to protect.

This Court agrees with the District Court's assessment that Gillis' work is commercial. Despite Gillis' evidence demonstrating that his motive is not to profit from his musical work,[17] he derives substantial profit from live performances. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price. 4-13 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §1305[A][1][c] (2008) (hereinafter Nimmer). Illegal Art argues that because purchasers can decide to pay as much as they choose when downloading Girl Talk's music, the work should be considered non-commercial. However, that Illegal Art derives substantial

17 Digital download of his album Feed the Animals (including the song at issue) is available for free at http://illegalart.net/downloads/ (though downloaders can decide to pay if they choose, however much they want). Additionally, a CD can be purchased for $10. In various interviews, Gillis has encouraged and supported his fans to download free versions of his music. "For me, all of the free downloads are the best thing that's ever happened. It helps spread that music, more and more people get to know about. If they really like it, then they can support it and buy it. If not, that's fine. Maybe they will come to the show or buy a T-shirt or whatever. Something like what I'm doing would never be at the level that it is without all of the file-sharing and blogs and all of that. Before the Internet, it was extremely difficult to make a living off of independent/underground music. It seems a lot more common now. With the name your price thing, I don't have any specific stats on me, but I'm pretty sure that the majority of people got it for free. Which is cool to me." Girl Talk/Gregg Gillis On New Album, Wash. Post, July 29, 2008, http://www.washingtonpost.com/wp-dyn/content/discussion/2008/07/16/DI2008071601445.html.

profit[18] from the people who do choose to pay for the downloading of music or to purchase the CD for $10 supports the finding that the work is commercial. Nevertheless, the language of section 107 makes clear that the commercial or nonprofit purpose of a work is only one element of the first factor inquiry into its purpose and character, and should not be afforded dispositive weight. Campbell, 510 U.S. at 584. Because the work is transformative, commercialism is less significant in weighing against a finding of fair use.

B

Under the second statutory factor "the nature of the copyrighted work," the more creative a work, the closer it is to the core of intended copyright protection. Id. at 586. We agree with the District Court that Queen's "Bohemian Rhapsody" falls within the core of the intended protection.[19] Nevertheless, in the same way that this factor is "[n]ever likely to help much in separating the fair use sheep from the infringing goats in a parody case," id., this factor is not particularly helpful or decisive in determining fair use for this case. In order to comment on a work, the artist must too invariably copy publicly known, expressive works.

C

The third statutory factor asks whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" are reasonable in relation to the purpose of copying. §107(3); Id. at 586. The proper analysis of this factor includes a determination of not only the quantity used but also the quality. Nimmer, supra, §1305[A][3]. The length of Bohemian Rhapsody is 5:55 of which defendant used fifteen seconds, consisting of ascending octaves of notes from the B flat mixolydian scale,[20] between 4:55 and 5:10 of the original work. In Gillis' work, these fifteen seconds of "Bohemian Rhapsody" are sped up. The first seven seconds

18 This amount is not publicly accessible information.

19 "Bohemian Rhapsody" is in the style of a stream-of-consciousness nightmare that has unusual song structure, especially for popular music. See Wikipedia: Bohemian Rhapsody, http://en.wikipedia.org/wiki/Bohemian_Rhapsody (last visited January 29, 2009).

20 See Id.

portion is repeated or "looped" three times followed by the next eight second portion. The total amount taken constitutes approximately 4.2% of "Bohemian Rhapsody." Quantitatively this is not a significant portion of defendant's song. The qualitative aspect, however, may be more important than the quantitative. In an oft quoted example in which the defendant copied less than 400 words from President Ford's memoir, the Supreme Court held that this amount constituted "the heart of the book" and, thus, held there to be no fair use. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985). Determining whether the heart of "Bohemian Rhapsody" is taken in defendant's work is an interesting question due to the song's unique form. The song consists of six or three sections, depending on the source. One review of the piece breaks it into six distinct sections: introduction, ballad, guitar solo, opera, rock, and outro.[21] Another only refers to three parts consisting of a ballad, a mock opera and a heavy rock number with a choir repeatedly singing "mama mia," "galileo" and "magnifico." This format, with abrupt changes in style, tone, and tempo, is highly unusual to rock music.[22] One expert finds the song's most distinct feature to be its fatalistic lyrics: "Mama, just killed a man," "Nothing really matters" and "I sometimes wish I'd never been born at all."[23] We believe that the defendant has not copied the heart of plaintiff's song for two reasons. First, the 15 seconds used comes entirely from what is considered by experts who dissect the song into six parts to be the "outro" of the song. It is therefore not even considered, by some, to constitute one of the three major parts of the song. Moreover, the song does not contain any of the "fatalistic" lyrics that the song is so well known for. Especially in light of defendant's purpose of commenting on the plaintiff's work, he has quantitatively or qualitatively used a reasonable amount of the song.

D

The fourth and final factor is "the effect of the use upon the potential market for or value of the copyrighted work." §107(4). The importance stems from the aims of copyright—a

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21 See Id.

22 Id.

23 See David Chiu, Unconventional Queen Hit Still Rocks After 30 Years, N.Y. Times, Dec. 27, 2005, at E1, available at http://nytimes.com/2005/12/27/arts/music/27quee.html?ex=1293339600&en=5825caa9f4db1fb0&ei=5090.

defendant's use that interferes excessively with an author's incentives subverts the aims of copyright. Leval, supra, at 1124. This factor requires a determination of whether unrestricted and widespread conduct of the type engaged in by the defendant would result in a substantially adverse impact on the potential market for or value of plaintiff's work. Nimmer, supra, §13.05[A][4]. "The inquiry must take account not only of harm to the original but also of harm to the market for derivative works." Harper & Roe, 471 U.S. at 568. We will consider these in turn.

With respect to harm to the original, it is important to note the close relationship between the first and fourth fair use factors. When the second use is transformative, market harm may not be readily inferred. Campbell, 510 U.S. at 591. We agree with the District Court's finding that defendant's use of "Bohemian Rhapsody" has no negative effect on the market of the copyrighted song. Unlike a parody, in which the two works do not fulfill the same demand, consumers of Queen and Girl Talk are likely to overlap. Nevertheless, the only evidence presented on this matter suggests that the defendant's song seems to help more than harm the plaintiff's original work.[24]

Next we consider harm to the market for derivative works. "The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop." Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006) (quoting Campbell, 510 U.S. at 592). "Evidence of substantial harm to it would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals." Campbell, 510 U.S. at 594. We disagree with the District Court's analysis with respect to the market for derivative works. The District Court focused on the derivative market for rap music rather than the narrower market of mash-ups "following the guidance" of Campbell. See Id. at 93 ("2 Live Crew's song comprises not only parody but also rap music."). We believe that this focus was misguided. While the parody at issue in Campbell fell under the category of rap, defendants have provided extensive expert testimony to demonstrate that Gillis' music is not rap (rap is but one of the genres found in his music along with rock, pop, and R&B—no one genre is

24 See, e.g., The 463: Inside Tech Policy, http://463.blogs.com/the_463/2007/03/perhaps_the_coo.html (Mar. 11, 2007, 10:03 PM) (commenting that Girl Talk has brought much attention to an indie band called Grizzy Bear because of his use of the band's song "The Knife" on his album).

particularly prominent).[25]

Defendants have presented convincing evidence to suggest that no virtually no licensing market exists for mash-ups.[26] The mash-up community has been described as an anti-authoritarian scene with an underground "nerd-outcast sensibility."[27] It is highly unlikely that a market could exist for licensing songs for use in a mash-up if most mash-up artists create the works in part to challenge what they find to be a rigid copyright regime that provides copyright owners too much control.[28] Defendant also provides evidence suggesting that licensing songs for use in a mash-up would be prohibitively expensive and would essentially stand as an obstacle for any artist seeking to create a work of this kind.[29]

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25 See Rimmer, supra note 7, at 131–33 for some examples of the different genres of music that come into play in mash-ups.

26 Only one or two examples exist in which artists have received authorization to create mash-ups. Jay-Z and Linkin Park collaborated on a series of mash-ups recorded on a compact disc entitled *Collision Course*. The hybrid works included "Dirt off Your Shoulder/Lying From You," "Big Pimpin/Paper Cut," "Numb/Encore," "Jigga What/Faint," "Izzo/In the End," and "Points of Authority/99 Problems/One Step Closer." The work was licensed by various owners of the copyrighted works, the published lyrics, and the sound recording. Each master was individually licensed. See Rimmer, supra note 7, at 145; see also Michael Smith, Music Licensing Comes Late to the Mash-Up Party, ABC News, Apr. 23, 2007, http://abcnews.go.com/Technology/Story?id=3066842&page=2. Note that Jay-Z and Linkin Park are well established, very successful musicians. This is not the typical profile of a "masher."

27 The mash up genre is described as a sort of "anti-authoritarian folk music for a generation whose 'establishment' is represented by corporate intellectual property owners. . . . Now that perennial scenester David Bowie has sponsored a mash-up contest and there's a show devoted to the genre on MTV Europe, some of the DJs and producers who create these millennial bootlegs are going mainstream. But most of the scene retains an underground nerd-outcast sensibility." Annalee Newitz, Protest Music, AlterNet, July 7, 2004, http://www.alternet.org/columnists/story/19164.

28 See Rimmer, supra note 7, at 141 (noting that one organization, the Electronic Frontier Foundation, argued that websites being accused of copyright infringement for posting mash-ups on a website should argue under fair use that "a copyright owner is unlikely to license a work for use in a protest that is critical of the copyright owner itself); see also Jon Healey & Richard Cromelin, When Copyright Law Meets the 'Mash-up', LOS ANGELES TIMES, Mar. 21, 2004, at E1, available at http://articles.latimes.com/2004/mar/21/entertainment/ca-healey21 (discussing how not only the mash-up artists but also public organizations support this form of "protest art") "The main force behind the online release of Burton's [mash-up] album was a loosely organized confederation of websites and online activists who believe copyright holders in general, and the major record labels in particular, have gone too far in trying to enforce their rights." Id.

29 See Future of Music Coalition Blog, http://futureofmusiccoalition.blogspot.com/2008/08/girl-talk-and-sample-license-clearance.html (Aug. 27, 2008, 11:43 AM) ("[T]o properly clear and license all the samples on Feed the Animals, Girl Talk would have had to first figure out who owns each copyright (which is a huge problem on its own), and then gained permission from both the sound recording copyright owner and the composer/publisher for each work he sampled. If you're keeping track, that's about 600 green lights and zero stop signs. . . . Assuming Girl Talk could a) figure

"[I]t is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use." Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930–31 (2d Cir. 1994). As stated in Campbell, plaintiff cannot claim that a derivative market exists by virtue of the fact that Gillis has recorded a mash-up commentary of "Bohemian Rhapsody." Campbell, 510 U.S. at 593. While licensing is theoretically possible for mash-up songs, defendants have introduced sufficient evidence to show that no such market exists in the music world for licensing of songs for mash-ups. Plaintiffs on the other hand can point to merely one example of a licensed mash-up album and offer no evidence to suggest that Gillis' song in any way affects a market for a mash-up of "Bohemian Rhapsody."

III

The District Court erred in finding that Gillis' use of plaintiff's song is not transformative and in its characterization of the market for derivative works. We therefore reverse the judgment of the District Court and remand for entry of judgment dismissing the complaint.

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out who owns the copyrights, and b) get all the permissions necessary, there's another set of hurdles: the cost of licensing these samples. Each negotiation – and there would need to be at least 600 in his case – takes time, and prices can escalate very quickly, especially for samples of well-known artists or songs. (And these are exactly the types of tunes Girl Talk sampled on Feed the Animals.)").

MIDDLETON, *Circuit Judge*, Dissenting:

I disagree with the decision that the court has reached today.

I

A

With respect to the first fair use factor, as a starting point, defendant's use is commercial. The "fact that a publication was commercial as opposed to nonprofit is a [] factor that tends to weigh against a finding of fair use." Harper & Row, 471 U.S. at 562.

With respect to whether defendant's use of "Bohemian Rhapsody" is transformative, the majority accepts defendant's argument that his work is a commentary on plaintiff's work. The majority is in error in allowing the defendant's audience to determine what constitutes a comment. As the majority points out in recognizing that a court cannot accept the defendant's own statement that he intended his work as a comment as dispositive on this issue, "the threshold question when fair use is raised in defense of parody is whether a parodic character may be *reasonably* perceived." Campbell, 510 U.S. at 582 (emphasis added). "Reasonably" here implies an objective measure of what is a comment, not a conclusion reached subjectively by critics. This does not mean that commentary by critics is irrelevant, since such commentary can shed light on what defendant's work is trying to say. But conclusory statements that defendant's work is "a comment" do not help in determining whether defendant's work is a comment as meant by fair use doctrine.

A comment under fair use doctrine is a comment on the original work itself, not on something else. "If . . . the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger." Id. at 580. On the other hand, a comment on an original work itself may "need[] to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination . . . ." Id. at 580–

81. The examples of critic commentary that the majority points to, including Gillis' own statements, suggest only that he is commenting on the entertainment world or on society as a whole, not on the original work itself. I do not see how the evidence considered by the court suggests that "Bohemian Rhapsody" in particular is an object of the comment that the court thinks a reasonable listener may hear. As such, nothing is stopping Gillis from creating his own music of various styles and superimposing them in a single track to make the same "comment."

Since the defendant's work is commercial, and defendant has not presented any evidence that the work is transformative, the first factor favors plaintiff.

B

With respect to the second factor, as the majority admits, "Bohemian Rhapsody" falls within the core of intended protection. Accordingly, this factor does not help the defendant.

C

With respect to the third factor, the majority points to two interpretations of what constitutes "Bohemian Rhapsody." According to the first interpretation,[30] the song is made up of six parts—one of which is the outro. According to the first interpretation, the section of "Bohemian Rhapsody" used by defendant (between 4:55 and 5:10 of the original work) is part of the outro. According to the second interpretation,[31] the song is made up of three parts—none of which is considered to be simply an outro. The second interpretation does not indicate where one part of the song ends and the next part begins, and where the part of the song used by defendant fits, but, presumably, the part used by defendant must fall into one of the parts discussed by the second interpretation, since the second interpretation nowhere suggests that there are other parts to the song than the parts it mentions.[32]

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30 See Wikipedia: Bohemian Rhapsody, http://en.wikipedia.org/wiki/Bohemian_Rhapsody (last visited January 29, 2009).

31 See Chiu, supra note 23.

32 It is possible that the part used by defendant falls into two of these sections, but that is ultimately irrelevant.

The majority notes that "the fifteen seconds used comes entirely from what is considered by experts who dissect the song into six parts to be the "outro" of the song," and that "it is therefore not even considered, by some, to constitute one of the three major parts of the song." The majority appears to confuse the two interpretations of the song when it assumes that the parts defined by the second interpretation do not include the outro—and hence the portion of the song used by defendant—as defined in the first interpretation. However, the second interpretation of the song makes no reference to the first interpretation, nor does the author of the second interpretation suggest that he had the first interpretation in mind when developing his interpretation of the song.

Further, nowhere does the defendant show, with reference to the six parts delineated by the first interpretation, that a critic has picked any three parts to be more important than the other parts, nor has he shown that critics have found the outro to be any less important than the rest of the song.

On the contrary, "Bohemian Rhapsody" does not appear to have any "most important" part to speak of. There is no chorus that is repeated, nor is any of the music continuously repeated throughout the song. Instead, each part of the song plays a pivotal role in the story told by the song. With regard to the outro, it adds "a level of complex resistance to the song's already charming subversion of macho rock and roll," which is achieved through the "bohemian stance toward identity, which involves a necessarily changeable self-definition ("Any way the wind blows")."[33] As such, each part of the song is as important as the next, and thus the fifteen seconds of music taken by defendant is as critical as any other fifteen seconds. Unless we were to say that the song has no value, this implies that the entirety of the song constitutes the heart of the song, and thus, the fifteen seconds is qualitatively important to the original work.

The majority states that because the portion used by defendant does not contain any of the "fatalistic lyrics" that are so important to the song, the defendant has not copied the heart of plaintiff's song. This suggests that defendant could have copied the music from any part of plaintiff's song, even the background to the "fatalistic lyrics," and the defendant would not have taken the heart of the song. But although the lyrics may be an important aspect of any song, the musical

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33 Wikipedia: Bohemian Rhapsody, http://en.wikipedia.org/wiki/Bohemian_Rhapsody (last visited January 29, 2009).

accompaniment to those lyrics is also important. Similarly, the music that immediately precedes such lyrics will also be important. In this case, defendant took music that immediately precedes the lyrics "nothing really matters," one of the "fatalistic lyrics" that the majority says is so important to the plaintiff's work. Certainly, a person listening to the music immediately preceding those lyrics would identify that music as the run up to the important lyrics, and thus consider the music to be important to the overall piece.

Since I find no evidence to support defendant's work to be a comment on the original work, there is no reason to give defendant much leeway on the amount of the original work used. Cf. Campbell, 510 U.S. at 587.

D

With respect to the fourth factor, while the majority is correct to say that defendant's use of "Bohemian Rhapsody" will have no negative effect on the market for plaintiff's work, it is incorrect to assert that it will have a positive effect. The majority points to the positive effects of defendant's work on the work of an indie band because of defendant's use of one of the indie band's songs on his album. While it may be true that defendant can draw attention to little known performers with his music, given the fame of plaintiff's song, it is unlikely that many listeners of defendant's work will not have also been independently exposed to plaintiff's song.

I also disagree with the court's narrow interpretation of what constitutes the market for derivative works. A "mash-up" is not a genre like rap, R&B, or death metal. The definition of "mash-up" in no way requires any type of music to be included; a perfectly good mash-up could include only country music. In the present case, defendant's song involves numerous pop, R&B and rock songs, which are all commonly found in pop music, and thus, easily fit into the pop music genre. Accordingly, the pop music market is the appropriate derivative work market to consider here, and allowing defendant to use plaintiff's work without licensing will harm that market.

Even if the "mash-up" market were the relevant market, the fact that virtually no licensing market currently exists for mash-ups does not mean, as the majority suggests, that such a market could not develop. If a relatively new genre of music does not have an established licensing market, no licensing

market could ever be established if the courts preemptively allowed such music to be created without licensing. Mash-ups have only been around since the beginning of the 21st century,[34] and it would be impossible for the market in mash-ups to develop if we do not give artists a chance to establish licensing schemes that are appropriately suited for the market.

The defendant argues that no such market could exist because the cost of getting licenses would be too high. He cites three costs as leading to this result: the cost of finding the owners of the original copyrighted works, the cost of negotiating license terms, and the cost of the actual licenses themselves. However, the defendant has not attempted to get licenses for the music he uses, so he has no direct evidence that the costs were too high here. In addition, the support the defendant provides for the assertion that the licensing costs are too high does not provide any actual evidence that the costs would be too high. Instead, the defendant only makes the bald assertion that the costs would be too high; he provides no support for this assertion, even on a theoretical level.

With respect to the costs of finding copyright owners, most musical works are owned by the record labels that distribute the music.[35] This is especially true where the original artists are dealing with major labels.[36] Since a large part of defendant's song is composed of major works, the defendant should not have much trouble finding most owners of the works that he wants to use, and thus, most of the owners should be readily available. To the extent that some of the owners of the copyrights are not so easy to find, this is no different than any other derivative work, and is of no concern to us here.

Regarding the costs of negotiating license terms, defendant has again not shown that the costs would be too high. It may be difficult at this time to determine license terms for mash-ups, but as the music becomes more prevalent, and the market becomes better developed, more standard terms will be developed, reducing negotiation costs. Even at present, defendant, after licensing some music from others,

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34 See Rimmer, supra note 7, at ch. 4.

35 Future of Music Coalition Blog, http://futureofmusiccoalition.blogspot.com/2008/08/girl-talk-and-sample-license-clearance.html (Aug. 27, 2008, 11:43 AM) ("[W]hen artists sign major label contracts, they almost always turn over their copyrights to the record label.").

36 Id.

would be able to use these contracts to structure negotiations with other authors.

As for the actual cost of the licenses themselves, nothing suggests that plaintiff would not be willing to grant a license to the defendant at a reasonable royalty. Certainly, authors of original works have allowed others to sample their works in other genres, such as rap and hip-hop, and there is nothing that suggests they would be unwilling to allow sampling for mash-ups at reasonable royalties as well. Simple economics tells us that defendant will only be able to pay a certain amount for a sampled work, and that plaintiff will recognize that it is not his entire work that is being used, and the plaintiff and defendant should be able to reach a mutually agreeable price that will not make the licenses required for defendant's work prohibitively expensive.

It is no excuse for defendant to say that he is part of an anti-authoritarian scene, and is in the process of challenging a "rigid copyright regime" in which copyright owners have too much control. The majority's consideration of this argument is quite baffling. Nowhere in the case law is there support for the argument that no market can exist because the potential class of licensees for that market has refused to deal with the authors of original works. The majority's result begs the question: by allowing potential infringers to deny the existence of a market by simply refusing to license works from copyright owners, no market would ever exist. All that a potential infringer would have to do is claim that he is protesting the copyright regime, and the majority would find no market.

II

Since all of the fair use factors weigh in favor of plaintiff, the defendant's reliance on fair use is misplaced. I would affirm the district court's decision to grant summary judgment for the plaintiff.

I respectfully dissent.

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