

STATEMENT OF

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BEFORE THE

**COMMITTEE ON THE JUDICIARY**

Subcommittee on Courts, Intellectual Property and the Internet

U.S. House of Representatives

*The Scope of Fair Use*

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### **I. Introduction**

Chairman Goodlatte, Chairman Coble, Ranking Member, and Members of the Subcommittee:

My name is David Lowery and I am a mathematician, writer, musician, producer and entrepreneur based in Richmond, VA and Athens, GA.

While studying mathematics at the University of California Santa Cruz in the early 1980's, I founded the ensemble *Camper Van Beethoven* and record label *Pitch-a-Tent Records*.<sup>1</sup> In 1991, I moved on to the ensemble *Cracker*. I have also produced a variety of albums for critically acclaimed and commercially successful artists, such as The Counting Crows and Sparklehorse. In 1993, I founded *Sound of Music Studios* with John Morand.<sup>2</sup> Since 2011, I am a Lecturer at the University of Georgia where I teach on the

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<sup>1</sup> These two entities helped jump-start the Indie Rock movement.

<sup>2</sup> The studio has recorded over 500 albums for a wide range of artists from D'Angelo to Lamb of God. In 2005, *Sound of Music Studios* led to *Shockoe Noise LLC*, a company that focuses on custom music and music licensing for TV, film and commercials.

economics and finance of the music business at the University of Georgia.<sup>3</sup> With a few like-minded entrepreneurs, I helped establish The Athens Angel Investment Fund to provide early-stage capital to technology-based startups throughout the Southeast United States. Recently, I have been writing for *The Trichordist*, a blog that examines Artists' Rights in the digital age and seeks to respond to Silicon Valley's aggressive attacks on artists and other content creators.<sup>4</sup> Last May, I wrote *Getting Copyrights Right*, an op-ed for *Politico* concerning copyright reform.<sup>5</sup>

Thank you very much for the opportunity to speak with you today about the scope of fair use. In my different involvements in the music industry, the fair use doctrine plays a role in my life on a daily basis. As a professional singer songwriter, I believe the "fair use" doctrine is working as intended in the music industry. However, I do have concerns about pushes to expand its boundaries beyond its traditional scope, especially when that expansion undermines my and other creators' ability to make a living from our work.

## **II. The Expansion of Fair Use in the Music Industry**

The push to expand fair use in the music industry manifests itself in two areas, unlicensed sampling and permissionless "remixing"; and, lyric annotations and "song meanings".

### **II.I. Unlicensed Sampling And Permissionless "Remixing"**

There are legitimate and compelling "fair uses" of music and lyrics – snippets of lyrics or songs used in journalism, music criticisms and academic studies. Enabling the reasonable use of works when they do not compete with an author's market for these purposes serves the public interest. In contrast, this is not the case with sampling, remixing, mash-ups and lyric annotations for two reasons. First, these uses are operating successfully within existing licensing mechanisms. Second, creators are benefitting financially from these licenses and, therefore, creating more works. In this context,

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<sup>3</sup> In this capacity, I teach the courses Fundamental Concepts in the Music Business, and Promotions and Publicity Techniques. I have also worked to develop and expand the Music Business Certificate Program.

<sup>4</sup> Three of my pieces have gone massively viral, [Letter to Emily White at NPR All Things Songs Considered](#), [Meet the New Boss, Worse than the Old Boss?](#), and [My Song Got Played On Pandora A Million Times And All I Got Was \\$16.89](#).

<sup>5</sup> This piece was entered into the Congressional Record by Rep. Mel Watt D-NC.

expanding fair use to encompass these uses would do a disservice to the public interest to the extent that doing so would subvert the goal of incentivising the creation and dissemination of works for society at large.

Traditionally, fair use has served as a limited exception to the property rights of creators when certain public interests conflict with those rights. When it comes to sampling and ‘remixing’, the argument “I don’t want to ask permission of the artist nor do I want to pay for a license” is not a compelling reason to expand fair use. This “permissionless innovation” should be seen for what it truly is: not free expression but free riding. Expanding fair use to include these uses would allow some to freeload on the works of others.

Moreover, our current copyright system is not broken. Over the last thirty years, the Copyright Act has allowed robust market-based mechanisms and conventions to evolve and facilitate the licensing of samples and remixes. For instance, two of the most popular and commercially successful music genres in recent years, hip-hop and electronic dance music, rely greatly on sampling and remixing.<sup>6</sup> In both genres, seeking permission from and/or compensating sampled artists are—and have been—common practices.<sup>7</sup> These two thriving genres constitute a clear example that existing market dynamics enabled by our copyright laws are serving the public interest as intended.

As a recording studio owner for nearly 20 years, I have observed how creativity is served by current copyright laws first-hand. A hip-hop artist will build a track around a sample. Then, the artist will attempt to clear the sample. If successful, then the artist

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<sup>6</sup> See NIELSEN GROUP, U.S. MUSIC INDUSTRY YEAR-END REVIEW: 2013 10 (2013) available at

<sup>6</sup><http://www.nielsen.com/us/en/reports/2014/u-s-music-industry-year-end-review-2013.html> (showing that rap and R&B music produced 26.2% of total album sales and 18.7% of total digital track sales in 2013 in the U.S.); See Zach O'Malley Greenburg, Ryan Mac, *The World's Ten Highest Paid DJs of 2013*, FORBES (Aug. 14, 2013), <http://www.forbes.com/pictures/eeel45egemd/the-worlds-highest-paid-djs-6/>

<sup>6</sup>(showing that in 2013, the ten highest paid DJs earned between \$46 million and \$13 million each).

<sup>7</sup> Stephan Nikun, *Illegal Sampling Motivates Kevin Saunderson to Speak Out*, XLR8R (Feb. 21, 2011), <http://www.xlr8r.com/news/2011/02/illegal-sampling-motivates-kevin> (quoting Kevin Saunderson, a well-known creator of electronic dance music, explaining that common reliance on sampling and the clearing of samples in the genre); see also Thomas W. Joo, *Remix Without Romance*, 44 Connecticut Law Review 415 (2011).

proceeds. If the artist cannot arrive at a mutually beneficial arrangement with the rights holders, the artist *creates* a new “loop” that does the same job as the originally sought sample. This creation of new works to serve the public is what the Founding Fathers had in mind when they introduced the Copyright Clause into the Constitution. My experience illustrates that under existing legal and market conditions, even when sampling work legally is not possible, creativity still finds its way.

There are also several emerging-market and permission-based solutions that allow the public to create amateur and fan remixes while protecting the rights of other creators. YouTube and the National Music Publishers Association currently have a licensing agreement where users can upload videos and remixes incorporating music from a multitude of songwriters without seeking individual permissions. In this arrangement, songwriters and music publishers share the ad revenue that these videos generate. There are also small companies that allow fans to remix works from creators who submit their works in exchange for compensation.<sup>8</sup> The Principles for User Generated Content Services, developed through a multistakeholder cooperative process, provide guidelines for services that disseminate user-uploaded content to facilitate lawful uses and mitigate infringing uses.<sup>9</sup> This variety of alternatives and business models are further proof that the market is working and, therefore, there is no need for legislative intervention.

## **II.II. Unlicensed Song Meanings and Lyrics Annotations**

Some commentators have suggested that sites engaged in the wholesale reproduction of song lyrics along with “annotations” or “song meanings” are covered by the “fair use” doctrine.<sup>10</sup> Although I am fully supportive of these services, their providers are not free from their obligation of compensating creators and rights holders. The ability to add value to someone else’s property has never excused the appropriation of that property.

Personally, I have experienced both the authorized and unauthorized use of my lyrics. As part of my official research duties in the Music Business Program at the

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<sup>8</sup> See e.g. Indiloop - Remix Online, <http://www.indiloop.com>.

<sup>9</sup> See <http://www.ugcprinciples.com>.

<sup>10</sup> Timothy Geigner, *When Is A Lyric Site More Than A Lyric Site?*, TECHDIRT (Nov. 12, 2013, 2:34 PM),

<sup>10</sup><http://www.techdirt.com/articles/20131112/04223125204/when-is-lyric-site-more-than-lyric-site.shtml>

University of Georgia, I began studying and cataloguing many of the “lesser known” kinds of copyright infringing websites this past summer. It may seem surprising in the digital age to be talking about song lyrics, but anecdotal evidence suggests that lyric websites generate large amounts of web traffic and significant revenues—in fact, unlike sound recordings business, lyrics may be *more* valuable in the Internet era. Indeed, the vast majority of lyric websites appear to have well-established advertising-based monetization schemes, with accounts with major online advertising exchanges featuring advertising from major brands.

In October 2013, I published a list of *Fifty Undesirable Lyric Websites* through the University of Georgia.<sup>11</sup> The list shows the most popular commercial lyric websites that do not appear to be licensed. Soon after, a self-described “editor in chief” of RapGenius.com, one of the most famous lyrics annotation sites and number one on my undesirable list, copied, posted and began annotating the lyrics of my song “Low”.<sup>12</sup> These same lyrics were also posted on the licensed site Letssingit.com.<sup>13</sup> Although the services are virtually identical, I only received revenue from Letssingit.com for every page view. In this instance, RapGenius’ “permissionless” copying of my lyrics directly competed with the fully licensed site and interfered with my revenue.

RapGenius ended up doing the right thing, entering into license agreements with Sony/ATV and other music publishers.<sup>14</sup> A number of other websites on the list did the same.<sup>15</sup> In fact, licensing of music lyrics has never been easier through clearinghouse licensing authorities such as LyricFind<sup>16</sup> and MusixMatch.<sup>17</sup> These services enable the

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<sup>11</sup> David Lowery, *Undesirable Lyric Website List* (2013); *available at*

<sup>11</sup> [http://media.terry.uga.edu/socrates/publications/2013/10/UGA\\_Music\\_Business\\_Undesirable\\_Lyric\\_Website\\_List\\_Oct\\_22nd\\_2013.pdf](http://media.terry.uga.edu/socrates/publications/2013/10/UGA_Music_Business_Undesirable_Lyric_Website_List_Oct_22nd_2013.pdf).

<sup>12</sup> See Exhibit 1 (please note the annotations are invisible as they appear only as hyperlinks to pop up windows).

<sup>13</sup> See Exhibit 2.

<sup>14</sup> Alex Pham, *Rap Genius, Universal Music Publishing Group Strike Licensing Deal*, *Billboard* (Jan. 22, 2014), *available at* <http://www.billboard.com/biz/articles/news/digital-and-mobile/5877856/rap-genius-universal-music-publishing-group-strike>.

<sup>15</sup> See “Early results and evolution of the UGA Undesirable Lyric Website Study to include advertisers,” UGA Undesirable Lyric Website Project, *at* <http://ugalyricwebsitelist.org/2014/01/01/early-results-and-evolution-of-the-uga-undesirable-lyric-website-study-to-include-advertisers/>.

<sup>16</sup> <http://www.lyricfind.com/about-lyricfind/>

offering of commercial lyric sites to consumers in a way that serves the lyric site operators' interests in turning revenue, the consumer's interest in having accurate information about lyrics, and that fairly compensates the artist.

### III. Asking permission is easy

In recent years, there has been an unfortunate push to cast aspersions on the concept of permission or control. The notion that individual creators' rights are some pesky obstacle standing in the way of a wonderland of creativity has gained momentum in certain sectors. In countering these ideas, our current copyright laws protect creators based on the notion that permission, or consent, is the foundation of civilization. In addition, rights holders have never been easier to find.<sup>18</sup> I wholeheartedly believe that in this context where the law and technology make it easy for authors to authorize the use of their work, there is no compelling reason to change the fair use doctrine as it currently exists.

Advocates for further expansion of fair use often appeal to the *noncommercial* nature of many remixes and lyrics annotations sites as a reason to place these activities under the fair use umbrella. This argument fails to consider that *commercial* intermediaries distribute these works and profit from their widespread dissemination.<sup>19</sup>

### IV. Conclusion

In conclusion, I humbly ask that the Members of the Subcommittee look at the history of fair use and its traditional purpose to see that it is working as intended and to see that no legislative intervention is needed at this time.

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<sup>17</sup> <http://musixmatch.com/>; see Jennifer Hicks, Turning Lyrics into a Business: musiXMatch's Next Generation Lyrics API, Forbes (Jun. 30, 2011, 5:35 PM) <http://www.forbes.com/sites/jenniferhicks/2011/06/30/turning-lyrics-into-a-business-musixmatches-next-generation-lyrics-api/2/> (citing CEO Massimo Cicciola's statement "The secret to our success is in licensing data. It's all about data today, which is probably one of the most overlooked aspects of the music industry. MusiXMatch's Lyrics API delivers exactly what music site owners need to meet the demands of users and content rights holders.")

<sup>18</sup> ASCAP, BMI, Sesac, HFA, and SoundExchange, to name a few, provide databases of ownership information for songs. In addition, any song can be readily identified with an iPhone app like Shazam (<http://www.shazam.com/music/web/about.html>)

<sup>19</sup> See e.g. ORGANIZATION FOR TRANSFORMATIVE WORKS, COMMENTS IN RESPONSE TO DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 62 (2013).

Thank you very much.