

A MIXTAPE DJ'S DRAMA
AN ARGUMENT FOR COPYRIGHT PREEMPTION OF GEORGIA'S UNAUTHORIZED
REPRODUCTION LAW

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Abstract

The mixtape, a result of selecting and combining copyrighted sound recordings and musical compositions, has become vital to the hip-hop world. In January 2007, the Recording Industry Association of America in conjunction with Georgia police arrested mixtape artist DJ Drama. After confiscating thousands of CDs, numerous vehicles, and various assets, the RIAA pursued a state law action under the Georgia racketing statute based upon a violation of Georgia's unauthorized reproduction law.

In order to demonstrate that the state law claims brought against DJ Drama are preempted by federal copyright law, I will offer a background on the mixtape genre and the important role mixtapes play in rap and hip-hop music. After setting up the basic requirements for preemption under Section 301 of the Copyright Act, I will explain how mixtapes fall within the subject matter of copyright and describe how, given the results in recent cases involving sampling, mixtape artists are infringing the copyrights of both musical compositions and sound recordings when they create their works without permission of those copyright owners. I will also compare the state law claims against DJ Drama under Georgia law to recent California, Illinois, New York, and Washington decisions and statutes on the issue of preemption. Finally, utilizing this

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comparison and the extra element test for preemption, I will defend my thesis that the state law claims against DJ Drama assert rights equivalent to copyright and are therefore preempted.

I. Introduction

When we hear the word “disc jockey” or “DJ”, we tend to think of a fast-talking figure in sunglasses working multiple turntables in a trendy nightclub. Perhaps, we even think of the quick-talking music gurus of a radio station. Music DJs are now more than just figureheads with microphones. Modern DJs create their own beats, raps, and mixes on albums of their own, finding success and glory along the way. DJ Drama and DJ Canon of Atlanta are prime examples of disc jockeys turned artists who have spun their way to the top of the hip-hop world with their mixtapes called “Gangsta Grillz.”¹

The two DJs’ fame and fortune halted in January 2007 when the Recording Industry Association of America (RIAA) utilizing Georgia SWAT teams and officers raided the DJs’ studio. Presenting a warrant, the Georgia officers seized over 80,000 CDs, four automobiles, recording equipment, and other assets.² The DJs spent the night in jail and were released on a \$10,000 bail.³ The RIAA brought a state, not federal, claim alleging the DJs violated the Georgia racketeering (RICO) statute.⁴ The RIAA predicated the state RICO claim on Georgia’s unauthorized reproduction statute.⁵ Although no federal copyright infringement claim has been alleged thus far, a federal copyright claim might have been pursued and may be alleged in similar cases. Therefore, it is important to analyze whether the state law RICO claims are

¹ Samantha M. Shapiro, Hip-Hop Outlaw (Industry Version), *N.Y. Times*, Feb. 18, 2007, § 6 (Magazine), at 30, available at www.lexis.com.

² *Id.*

³ Kelef Sanneh, With Arrest of DJ Drama, the Law Takes Aim at Mixtapes, *N.Y. Times*, Jan. 18, 2007, at E1, available at www.lexis.com.

⁴ See Affidavits for Arrest, Don Cannon and Tyree Simmons, filed Jan. 8, 2007, Fulton County, Georgia, copy on file with author.

⁵ *Id.*

preempted by 17 U.S.C. § 301 because the claims are analogous to a copyright infringement claim.

II. Mixing It Up: A Background

Artists record songs which are termed “sound recordings.”⁶ Sound recordings are derived from musical compositions which are “the written notes, words, and arrangements of a song.”⁷ For example, the album *Like A Virgin* was released by Madonna in 1984 and contains the song *Material Girl*.⁸ *Material Girl* was recorded and performed by Madonna, but Robert Rans and Peter Brown were the musical composers of that song fixed in the sound recording.⁹

Mixtapes are the result of selecting, arranging, and juxtaposing copyrighted sound recordings and musical compositions into a new work.¹⁰ The mixtape was once called the “most widely practiced American art form.”¹¹ Mixtape DJs typically add a theme to the mixtape expressing their own tastes.¹² Each mixtape varies in its theme reflecting different time periods, emotional states, moods, and ideas.¹³ As a result of the artists’ expressed tastes and ideas, most mixtape artists want to be recognized for their musical creations and sequenced tracks.¹⁴

⁶ Ryan C. Grelecki, Can Law and Economics Bring the Funk . . . or Efficiency?: A Law and Economics Analysis of Digital Sampling, 33 Fl. St. U. L. Rev. 297, 298 (2005).

⁷ Id. at 298.

⁸ Madonna Discography, www.billboard.com/bbcom/discography/more.jsp?tp=albums&pid=50294&aid=10921, (last visited Dec. 30, 2007).

⁹ Madonna Discography, supra note 8.

¹⁰ David F. Gallagher, For the Mix Tape, A Digital Upgrade and Notoriety, **N.Y. Times**, Jan. 30, 2003, § G, at 1, available at www.lexis.com; see also Art of the Mix, www.artofthemix.org/writings/faq.asp (last visited Jan. 2, 2008).

¹¹ Burnlists: The Digital “Mix Tape” Comes of Age, www.events-in-music.com/burnlist-mix-tapes.html (last visited Jan. 2, 2008) (quoting essayist Geoffrey O’Brien’s view of mixtapes).

¹² Gallagher, supra note 10; see also Shapiro, supra note 1, at 30.

¹³ Art of the Mix, supra note 10.

¹⁴ “DJ Drama” Drama, http://analoghole.typepad.com/analoghole/2007/01/dj_drama_drama.html (last visited Jan 2, 2008); see also *Briggs v. State*, 638 S.E.2d 292, 295 n.1 (Ga. 2006) (noting that “given the nature of the entertainment industry,” majority of artists or producers do not prefer anonymity).

While early mixtapes were produced on audiocassettes, mixtapes currently exist on CDs and MP3s as a result of advancing technology.¹⁵ Mixtapes can be part of an ongoing series or instead may be a quick method to get an artist's music out to the public.¹⁶ Mixtapes may be comprised of remixes of popular songs, or an artist may freestyle his or her own words over another artist's beats.¹⁷ The mixtapes are usually packaged in low-quality containers and then sold to customers at flea markets, independent record stores, and over the internet.¹⁸

Mixtapes are not part of a specific music genre.¹⁹ Various genres and mixes include punk, folk, pop, rock, world music, electronic, workout mix, get-well mix, and love mix.²⁰ A mixtape can be compiled under any music genre the artist feels is compatible with the style of the album.

Moreover, mixtapes may or may not be produced with the permission of the copyright holders of the sound recordings and musical compositions. A recent article noted that a mixtape CD often contains a combination of "unauthorized and authorized material."²¹ However, when DJs use sound recordings and musical compositions without a valid license or permission from the copyright owners, it seems to present a case of copyright infringement.

III. Hip-Hop and Rap: The Role of Mixtapes

Mixtapes have become a "vital part of the hip-hop world."²² In the late 1970s, a mixtape revolution occurred where listeners found out about hip-hop culture from cassette tapes passed

¹⁵ Gallagher, *supra* note 10 (recognizing that because "the cassette is on its deathbed," mix CDs are now experiencing a "golden age").

¹⁶ Shapiro, *supra* note 1, at 30.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Art of the Mix, *supra* note 10.

²⁰ Art of the Mix, *supra* note 10.

²¹ Bakari Brock, Andrew Pequignot & James Trigg, *Valid and Correct*, Copyright World, March 2007, www.ipworld.com (last visited Oct. 14, 2007).

²² Sanneh, *supra* note 3.

around on the street before being sold on records or played on radio stations.²³ The mixtape revolution continued into the 80s and 90s, and the mixtape is currently the “first tier promotion for hip-hop artists.”²⁴

When creating mixtapes, artists have two primary objectives. First, DJs aim to make a profit from producing the mixtapes.²⁵ Additionally, mixtapes allow listeners to keep up with a fast evolving music genre like rap and preview an artist’s upcoming release.²⁶ Although DJs typically do not receive permission from record labels to collaborate with the artists, many record labels view the mixtape industry as a way to “build hype” for upcoming albums.²⁷ Some record label promoters will even send beats, vocals, and tracks from upcoming albums to DJs in order to promote the artist on the street.²⁸ The New York Times reported that these types of record label-DJ deals are often “informal” and “secret” with a “don’t ask, don’t tell policy.”²⁹

One of the most popular figures of the mixtape industry is Tyree Simmons, best known as DJ Drama.³⁰ The main figure behind the Aphilliates Music Group hosts his own radio show on two different stations and appears on the cover of hip-hop magazines.³¹ The Aphilliates consists of three hip-hop DJs named Drama, Canon, and Sense, and the group has become widely known for its “Gangsta Grillz” mixtapes.³² “Gangsta Grillz” is typically “hosted” by an additional rap artist outside the Aphilliates and focuses on Southern rap.³³ With sixteen popular installments,

²³ Shapiro, supra note 1, at 36.

²⁴ Id.

²⁵ Sanneh, supra note 3.

²⁶ Sanneh, supra note 3.

²⁷ Shapiro, supra note 1, at 31.

²⁸ Id. at 36.

²⁹ Id.

³⁰ Sanneh, supra note 3.

³¹ Shapiro, supra note 1, at 32; Sanneh, supra note 3.

³² Shapiro, supra note 1, at 30, 32.

³³ Id. at 30.

the New York Times has called the series “award winning.”³⁴ Aphilliates has received endorsement deals from clothing companies and beverage companies like Pepsi.³⁵

Rap artists such as T.I. and Lil Wayne have gained popularity by collaborating with DJ Drama to produce hip-hop mixtapes.³⁶ Hip-hop and rap mixtapes are produced in one of two ways.³⁷ The first method is remixing a hit song.³⁸ For example, the Aphilliates group altered a Michael Jackson song by adding another DJ’s lyrics.³⁹ The second technique is “freestyling.”⁴⁰ This method occurs when an artist improvises rap lyrics “over the beat from another artist’s song.”⁴¹ For example, in 2002, LL Cool J hit the top of the Billboard charts with his song *Love You Better*.⁴² On one mixtape, artist 50 Cent freestyled *Love You Better* turning it into *After My Cheddar*.⁴³ Ultimately, mixtapes are often the result of DJ “modif[ying] the original song without acquiring the rights to it . . .”⁴⁴ DJs tend to add just about any musical creation into a mixtape at their own discretion without copyright considerations.⁴⁵

Based on this disregard for copyright laws, the mixtape culture has developed unclear standards and blurry lines for copyright violations. DJ Drama even revealed to The New York Times that “aspects of his business were . . . in a legal[ly] gray area.”⁴⁶ Recently, the music

³⁴ Shapiro, *supra* note 1, at 30.

³⁵ *Id.* at 31.

³⁶ Sanneh, *supra* note 3.

³⁷ Shapiro, *supra* note 3, at 30.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² LL Cool J Artist Chart History, www.billboard.com/bbcom/-artists.jsp (conduct artist search for “LL Cool J”) (last visited Jan. 2, 2008).

⁴³ Shapiro, *supra* note 1, at 30.

⁴⁴ *Id.*

⁴⁵ *Id.* (emphasizing that “in most cases” when DJs sample songs for mixtapes, DJs don’t “worry about copyright”).

⁴⁶ *Id.* at 31.

industry has cracked down on piracy to defend artists' rights,⁴⁷ however the DJ Drama mixtapes are complicated because they tend to contain "enthusiastic endorsements from the artists themselves."⁴⁸ Although artist endorsements exist and record label interest in DJ Drama is high, copyright issues arise when Drama and the Aphilliates fail to obtain permission for the sound recordings and musical compositions incorporated on their mixtapes.

Given that Drama is one of the most popular mixtape artists, DJ Drama's arrest is important to the legal and entertainment community. The actions brought against Drama set an example for future mixtape artists as to the appropriate standards that must be followed under federal law. Although a federal copyright infringement claim has yet to be alleged against him, what if both state and federal claims were brought against DJ Drama? Given the broad sweep of the Copyright Act's preemption provision, section 301, the issue of preemption must be analyzed to determine whether the RIAA's state law claim is preempted by federal law.

IV. Preemption Basics

Section 301 of the Copyright Act provides for express preemption of state laws equivalent to those of federal copyright law.⁴⁹ The basic preemption principle provides that the federal Copyright Act governs a legal action when two conditions are met.⁵⁰ If "legal or equitable rights [] are equivalent to any of the exclusive rights" of section 106, the first condition is met.⁵¹ The second condition is satisfied if the subject matter at issue "comes within the subject matter of copyright as specified by sections 102 and 103."⁵²

⁴⁷ Jeff Leeds, *Labels Win Suit Against Song Sharer*, *N.Y. Times*, Oct. 5, 2007, § C, at 1 (discussing recent legal actions brought by record labels including \$222,000 in damages recently imposed on Minnesota woman for online music sharing).

⁴⁸ Sanneh, *supra* note 3.

⁴⁹ Copyright Act, 17 U.S.C. § 301 (2007) (original version at 1 U.S.C. § 101, 90 Stat. 2572 (1976)).

⁵⁰ 17 U.S.C. § 301(a) (2007).

⁵¹ 17 U.S.C. § 301(a) (2007).

⁵² 17 U.S.C. § 301(a) (2007).

A court conducting a preemption analysis under section 301 performs a two-step test.⁵³ Under the first question, the court must determine whether the subject matter falls under sections 102 or 103 of the Copyright Act.⁵⁴ If the answer to the first question is in the affirmative, the second question is whether the state law claim alleges rights equivalent to those granted to copyright owners under section 106.⁵⁵ The second question of the preemption test utilizes the “extra element test,” which has enjoyed a wide support in courts and among copyright scholars.⁵⁶ As Patry explains, “equivalency . . . exists when the core of the right alleged under state law is an act which infringes a right granted in the Copyright Act.”⁵⁷

The answers to both questions of the test must be answered affirmatively in order for a court to find preemption and dismiss the state law claim.⁵⁸ Mixtapes are likely to be deemed copyrightable subject matter, which meets the first question. The major obstacle for an artist like DJ Drama will be the second question relating to the equivalency of the state law claim and a federal copyright claim.

A. Mixtapes as Copyrightable Subject Matter

Relevant to DJ Drama’s case is 17 U.S.C. § 103, which allows for copyright protection in compilations and derivative works.⁵⁹ Section 103(a) specifically excludes protection for unlawful use of preexisting material.⁶⁰ Section 102(a) is also significant as it provides copyright protection

⁵³ 1 William F. Patry, *Patry on Copyright: Preemption of Other Laws*, § 18:9 (2007).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at § 18:18 (citing over forty cases from all eleven circuits expressing approval of extra element test).

⁵⁷ *Id.* at § 18:16.

⁵⁸ *Id.*

⁵⁹ 17 U.S.C. § 103 (2007).

⁶⁰ 17 U.S.C. § 103(a) (2007).

for musical compositions and sound recordings.⁶¹ Section 102(b), however, excludes copyright protection for ideas.⁶²

A derivative work is one formed from “one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”⁶³ The work will be considered derivative and thereby saved from copyright infringement if “the borrowed or copied material was taken with the consent of the copyright owner of the prior work.”⁶⁴ Compilations are works “formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”⁶⁵ Derivative works and compilations are given copyright protection under section 103; however, the protection does not extend to preexisting material not contributed by the author.⁶⁶

Contingent on valid permission from the copyright holders, Drama’s songs and recordings are copyrightable subject matter as either derivative works or compilations. Because Drama adds to a preexisting sound recording with his lyrics and beats, mixtapes contain original authorship and sufficient creativity so that the mixtapes can be protected as a derivative work. Similarly, because Drama arranges and constructs preexisting materials in an original and creative manner, his mixtapes can receive copyright protection as a compilation. However, without permission of the copyright holders of the copyrighted songs and recordings, Drama’s

⁶¹ 17 U.S.C. § 102(a) (2007).

⁶² 17 U.S.C. § 102(b) (2007).

⁶³ 17 U.S.C. § 101 (2007).

⁶⁴ 1 **Melville B. Nimmer, Nimmer on Copyright: The Nature of a Derivative Work** § 3.01 (Matthew Bender ed., LexisNexis 2007) (1963).

⁶⁵ 17 U.S.C. § 101 (2007).

⁶⁶ 17 U.S.C. § 103(b) (2007).

copyright protection as either a derivative work or compilation vanishes, turning Drama into an infringer.

B. Equivalent Rights and the Analogy to Sampling: “Thou Shalt Not Steal”

Section 106 of the Copyright Act specifies the copyright owner’s exclusive rights.⁶⁷ Section 106 provides owners with six rights including reproduction, preparation of derivative works, distribution, display, performance for literary/musical works, and performance for sound recordings in some circumstances.⁶⁸ DJ Drama enjoys these exclusive rights for his mixtapes with valid permission from copyright holders. However, upon a showing that Drama uses copyrighted songs and recordings without a license from the copyright holders, he infringes several exclusive rights granted to the copyright holders. A federal copyright infringement claim is likely appropriate because Drama would seem to be violating the reproduction, adaptation, distribution, and performance rights granted by section 106 of the Copyright Act.

A recent line of cases discussing the implications of the digital technology termed “sampling” supports this conclusion. Sampling involves integrating “short segments of prior sound recordings into new recordings.”⁶⁹ In the 1960s, the practice of sampling actually began when disc jockeys in Jamaica utilized “portable sound systems to mix segments of prior recordings into new mixes.”⁷⁰ The digital sampling process quickly developed throughout the 1970s, 1980s, and 1990s, and now allows artists to “slow down, speed up, combine, and otherwise alter the samples.”⁷¹

⁶⁷ 17 U.S.C. § 106 (2007).

⁶⁸ 17 U.S.C. § 106 (2007).

⁶⁹ *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004), cert. denied, 545 U.S. 1114 (2005).

⁷⁰ Id.

⁷¹ Id. at 1192.

Digital sampling occurs frequently in hip-hop and rap genres.⁷² The artists can make use of other artists' sound recordings by lifting the notes, altering them if desired, and inserting them into a new song.⁷³ Examples of rap and hip-hop songs which have sampled prior sound recordings include M.C. Hammer's *You Can't Touch This*, 2Pac's *Changes*, and Vanilla Ice's *Ice Ice Baby*.⁷⁴ The artists behind the sampling reason that sampling is not only a simple technological process, but with a popular prior recording, the sampled portion can also make the new recording popular and profitable.⁷⁵ Beginning in the 1990s, as songwriters, composers, and artists felt threatened with the developing technology of digital sampling, courts began to set out rules of law depending on the circumstances of sampling.

In 1991, a New York court in Grand Upright Music Limited vs. Warner Brothers Records, Inc. defined the first digital sampling rule.⁷⁶ The sampler in Grand Upright was Biz Markie, a rap group who used three words from artist Gilbert O'Sullivan's recording *Alone Again (Naturally)*.⁷⁷ Beginning appropriately with the quote "Thou shalt not steal," the court concluded that the plaintiff held a valid copyright to the underlying composition and that the defendants' use was not authorized.⁷⁸ The court emphasized that the defendants clearly knew "they were violating the plaintiff's rights" with the aim to "sell thousands upon thousands of records."⁷⁹ The New York court set out a bright line rule: if there is no valid permission to sample the prior recording, the sampling constitutes infringement and perhaps imposes criminal penalties.⁸⁰

⁷² Grelecki, supra note 6, at 298.

⁷³ Id.

⁷⁴ Id. at 304.

⁷⁵ Id. at 304-305.

⁷⁶ Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

⁷⁷ Id. at 183.

⁷⁸ Id. at 183-184.

⁷⁹ Id. at 185.

⁸⁰ Grand Upright Music, 780 F. Supp at 184-185; see also Grelecki, supra note 6, at 306.

In a 1993 case, Jarvis v. A&M Records, defendants Robert Clivilles and David Cole sampled portions of Boyd Jarvis's *The Music's Got Me*.⁸¹ The defendants then placed the sampled portions into their sound recording, *Get Dumb!*⁸² Because Jarvis owned the musical composition and the defendants admitted to the sampling, the only question for the court was whether there was enough copying to be deemed an "unlawful appropriation."⁸³ Emphasizing that the test required the "response of an ordinary lay person," the court said the substantial similarity test asked whether "the value of the original work [was] substantially diminished by the copying."⁸⁴ The court held the substantial similarity of the musical composition compared to the sampled copy was a fact intensive question for the jury.⁸⁵ However, the court held for the defendants on the sound recording issue finding they had met the "prima facie showing of ownership of the copyright in the sound recording."⁸⁶ The Jarvis court was the first to use the term "substantial similarity" in the sampling law context, and as more infringement cases were brought, courts were forced to define the fuzzy test.

Ten years later, a sampling case arose involving the Beastie Boys in Newton v. Diamond.⁸⁷ In their song *Pass the Mic*, the Beastie Boys utilized six seconds of plaintiff James Newton's sound recording, *Choir*.⁸⁸ Newton had previously given all sound recording rights in *Choir* to ECM Records; however, Newton still held the rights to the musical composition.⁸⁹ The court set out two rules: a license was allowed in order to avoid sound recording infringement but

⁸¹ Jarvis v. A&M Records, 827 F. Supp. 282, 286 (D.N.J. 1993).

⁸² Id. at 286.

⁸³ Id. at 289.

⁸⁴ Id. at 290, 291.

⁸⁵ Id. at 292.

⁸⁶ Id. at 292 (emphasizing that even plaintiff Jarvis "is not clear what the situation is with the sound recording").

⁸⁷ Newton, 388 F.3d at 1191.

⁸⁸ Id. at 1192.

⁸⁹ Id. at 1191.

the substantial similarity test must be used for musical composition infringement.⁹⁰ The Ninth Circuit held the Beastie Boys' sampling of Newton's musical composition was *de minimis* reasoning that although *Pass the Mic* and *Choir* were similar, there was a "limited scope of copying" because the sampled portion appeared merely once in Newton's work and accounted for only approximately two percent of *Choir*.⁹¹ The Newton rule strays from the bright line defined in Grand Upright, requiring an in-depth analysis of each musical composition.⁹²

The reverse scenario arose in 2004 in Bridgeport Music, Inc. v. Dimension Film, where the sampler did not have permission to use the sound recording but did have a license for the musical composition.⁹³ In Bridgeport, No Limit Films sampled portions of the song *Get Off Your Ass and Jam* in their new song *100 Miles and Runnin*.⁹⁴ The song was placed on one of No Limit's newly released movie soundtracks.⁹⁵ Bridgeport Music owned both the musical composition and sound recording rights of *Get Off*.⁹⁶ The court only addressed the infringement issue relating to the sound recording because Bridgeport had entered into a license agreement with the original owners of the composition.⁹⁷ The Sixth Circuit held for Bridgeport, finding a new rule of law: samples are derivative works belonging exclusively to copyright holders.⁹⁸ The court justified its rule by saying that the Copyright Act provides for this rule and also that when one samples, it is "never accidental."⁹⁹

⁹⁰ Grelecki, supra note 6, at 298; Newton, 388 F.3d at 1192-1193.

⁹¹ Newton, 388 F.3d at 1192, 1195-1196.

⁹² Grelecki, supra note 6, at 307, 308.

⁹³ Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 796 (6th Cir. 2005) (adhering to conclusions of 2004 decision but expanding on reasoning).

⁹⁴ Id. at 795.

⁹⁵ Id.

⁹⁶ Id. at 796.

⁹⁷ Id. at 796 (explaining that the plaintiff's "claims are for infringement of the sound recording 'Get Off'" only due to a "fatal" license agreement with the owners of the composition, "100 Miles").

⁹⁸ Id. at 800-802.

⁹⁹ Id. at 800-801.

Similar to sampling infringement, the art of mixtapes may also constitute infringement under sampling law. When DJs remix LL Cool J's *Love You Better* to produce 50 Cent's new song *After My Cheddar*, the process is comparable to when Vanilla Ice uses portions of David Bowie and Queen's *Under Pressure* to include on the song *Ice Ice Baby*.¹⁰⁰ Just like digital sampling, creating a mixtape involves lifting notes, copying beats, and employing similar riffs from prior recordings. Mixtape production may even utilize what the Jarvis court called "literal verbatim similarity": the works could not be more similar because the second is literally copied from the first.¹⁰¹ In most of DJ Drama's mixtapes, he does just that. Drama takes segments of other artists' sound recordings and musical compositions, places them into his own recordings, and calls them his own mixtapes.

A court could view DJ Drama's acts as digital sampling and hold him liable under the rules of sampling cases. First, under Grand Upright, because the court emphasized the necessity of a license¹⁰², Drama would likely be liable because he rarely seeks permission from the copyright owners. Next, the standard from Jarvis looks to the substantial similarity test asking if the infringer utilized original portions of the work "either qualitatively or quantitatively."¹⁰³ DJ Drama once worked in conjunction with a Detroit-based DJ to alter and remix Michael Jackson songs for a mixtape illustrating Drama could be liable under Jarvis for using both quantitative and qualitative portions of the original work.¹⁰⁴ Moreover, the rule of Newton likely proves Drama liable for both sound recording and musical composition infringement as Drama does not obtain licenses for the former and the substantial similarity test likely proves him guilty for the

¹⁰⁰ Shapiro, supra note 1, at 30 (discussing how LL Cool J's song was remixed into 50 Cent's new version); Grelecki, supra note 6, at 297 (noting that Vanilla Ice's song samples David Bowie and Queen's sound recording).

¹⁰¹ Jarvis, 827 F. Supp. at 289.

¹⁰² Grand Upright Music, 780 F. Supp at 184-185.

¹⁰³ Jarvis, 827 F. Supp. at 291.

¹⁰⁴ Shapiro, supra note 1, at 30.

latter. Lastly, Bridgeport establishes Drama as an infringer because the samples are derivative works which solely belong to the owners.

By adapting, modifying, and reproducing portions of copyrighted sound recordings and musical compositions, Drama is acting in a way that closely resembles the sampling. Even though the mixtape industry currently has unclear standards, so did the digital sampling context prior to Grand Upright.¹⁰⁵ With the decisions of the sampling cases, courts can utilize those standards in the mixtape industry.

V. The State Law Aimed at Mixtapes: Copyright Infringement by a Different Name?

Although DJ Drama was charged with unauthorized reproduction in a Georgia state court, similar acts of reproducing original sound recordings and musical compositions can occur by other artists in other jurisdictions. By first outlining the Georgia reproduction law, the true names portion of the law, and the relevant case law, this prepares for an in-depth discussion of why the Georgia law should be preempted were a federal claim alleged. Also, for further justification of this proposition, reproduction statutes from California, Illinois, New York, and Washington are discussed for a basis of comparison.

A. Georgia Law

1. Georgia Statutes

The state of Georgia has enacted two statutes which are applicable to DJ Drama's case: a racketeering statute and a reproduction statute used as the predicate offense. To establish a violation under RICO, the state must prove "the defendant committed two or more predicate criminal acts indictable under the RICO Act . . ."¹⁰⁶ The Georgia Court of Appeals stated that "a predicate act may be any racketeering activity" as outlined in the definitions sections of RICO,

¹⁰⁵ Shapiro, *supra* note 1, at 31 (discussing how DJ Drama knew parts of mixtape business exist in "a legal gray area"); Grelecki, *supra* note 6, at 305 (noting that Grand Upright was "first major sampling case").

¹⁰⁶ Jones v. State, 556 S.E.2d 238, 240 (Ga. Ct. App. 2001).

O.C.G.A. § 16-14-3(9).¹⁰⁷ The only predicate offense the state alleged against DJ Drama is unauthorized reproduction.

The reproduction statute is established in O.C.G.A. § 16-14-4. Section 16-14-4(a) provides,

[I]t is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.¹⁰⁸

Additionally, a related portion of the code defines “racketeering activity” as,

[A]ny act or threat involving murder, kidnapping, gambling, arson, robbery, theft, receipt of stolen property, bribery, extortion, obstruction of justice, dealing in narcotic or dangerous drugs, or dealing in securities which is chargeable under the laws of the United States of any of the several states and which is punishable by imprisonment for more than one year.¹⁰⁹

“Racketeering activity” can be committing, attempting to commit, or soliciting a violation of one of forty named Georgia laws including unauthorized reproduction.¹¹⁰

It has been suggested the Georgia government could place Drama’s alleged violations of racketeering activity under “theft” or potentially “receipt of stolen property.”¹¹¹ The argument asserts that most of the general public envisions record and tape piracy as theft, therefore Drama’s copying and recording of the copyrighted works is a racketeering activity.¹¹² A better argument would allow the state to place a predicate offense on DJ Drama under Georgia’s reproduction statute, O.C.G.A. § 16-8-60.¹¹³ Enacted in 1975, the statute has two main parts.¹¹⁴ First, section (a) of the statute aims to criminalize “all unauthorized distribution of sound recordings or audiovisual work without the consent of the owner of the master” copy of a

¹⁰⁷ Id. at 240.

¹⁰⁸ O.C.G.A. § 16-14-4(a) (2007).

¹⁰⁹ O.C.G.A. § 16-14-3(9)(B). (2007).

¹¹⁰ O.C.G.A. § 16-14-3(9)(A) (2007).

¹¹¹ More Drama, http://analoghole.typepad.com/analoghole/2007/01/more_drama.html (last visited June 15, 2008).

¹¹² Id.

¹¹³ Id.

¹¹⁴ O.C.G.A. § 16-8-60 (2007).

particular disc, tape, videotape, film or other device.¹¹⁵ Section 16-8-60(a) does not require consent from the copyright owner of the recording, but, instead, requires consent from the owner of the “master copy” without defining “master.”

Second, section (b) of O.C.G.A. § 16-8-60 is known as the “true names law.”¹¹⁶ The true names law aims to give local law enforcement a mechanism to crack down on street vendors selling pirated CDs and DVDs.¹¹⁷ Section 16-8-60(b) provides,

It is unlawful for any person, firm, partnership, corporation, or association to sell; distribute; circulate; offer for sale, distribution, or circulation; or possess for the purposes of sale, distribution, or circulation any phonograph record, disc, wire, tape, videotape, film, or other article on which sounds or visual images have been transferred unless such phonograph record, disc, wire, tape, videotape, film, or other article bears the actual name and address of the transferor of the sounds or visual images in a prominent place on its outside face or package.¹¹⁸

As the express language of the statute dictates, Georgia’s true names law is simply satisfied upon a showing of a transferor’s name and address on the article’s packaging. Georgia case law notes that a “transferor of sounds” is the person “who conveyed the sounds by transferring them to the article in question.”¹¹⁹ However, the case law fails to suggest an example of who a transferor might be or how to determine an article’s transferor.

2. *Georgia Case Law*

In Briggs v. State, the Supreme Court of Georgia attempted to clarify the issues surrounding mixtapes.¹²⁰ The court granted an appeal to determine whether the Georgia reproduction statute was unconstitutionally vague or overbroad, and whether claims under it

¹¹⁵ O.C.G.A. § 16-8-60(a)(1) (2007); More Drama, http://analoghole.typepad.com/analoghole/2007/01/more_drama.html (last visited Oct. 15, 2007).

¹¹⁶ “DJ Drama” Drama, *supra* note 15.

¹¹⁷ More Drama, *supra* note 111.

¹¹⁸ O.C.G.A. § 16-8-60(b) (2007).

¹¹⁹ Briggs v. State, 638 S.E.2d 292, 294 (Ga. 2006).

¹²⁰ Id.

were preempted by the Copyright Act.¹²¹ Although the opinion lacks many factual details, the Court stated the defendant possessed fifty-two CDs and his CD labeling was in violation of the true names portion of the statute.¹²² As to the vagueness question, the defendant argued that without a definition of “transferor” in the statute, he could not “determine who or what to identify on the packaging.”¹²³ The court denied the statute was vague using Black’s Law dictionary to define “transferor” as “the individual who conveyed the sounds to the article in question.”¹²⁴ The court also rejected the argument that the statute was overbroad and not narrowly tailored because it forced transferors to disclose private information.¹²⁵ The court emphasized that instead of being a pure speech restriction, the statute protects the entertainment industry and prevents copyright infringement.¹²⁶

Moving to the preemption question, the Briggs majority focused on the apparent “extra element” of the reproduction statute: the labeling requirement.¹²⁷ This labeling requirement requires the transferor to display the name and address prominently on the article.¹²⁸ Based on this extra element, the court found the statute qualitatively different from federal copyright law and not preempted.¹²⁹

B. California Law

1. California Statute

¹²¹ Id. at 293.

¹²² Id.

¹²³ Brock et al., supra note 21.

¹²⁴ Briggs, 638 S.E. 2d at 294.

¹²⁵ Id. at 294.

¹²⁶ Id. at 294 (stating that because the reproduction statute “furthers a substantial government interest that is unrelated to the suppression of free expression” the law meets the requisite O’Brien test).

¹²⁷ Brock et al., supra note 21.

¹²⁸ O.C.G.A. § 16-8-60(b) (2007).

¹²⁹ Briggs, 638 S.E. 2d at 295.

The relevant statute in California is Section 653w(a) entitled “Failure to Disclose the Origin of a Sound Recording.”¹³⁰ Section 653w(a) is California’s version of a “true names” law.

The statute provides:

A person is guilty of failure to disclose the origin of a recording or audiovisual work if, for commercial advantage or private financial gain, he or she knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale or resale, or rents, or manufactures, or possesses for these purposes, any recording or audiovisual work, the cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer thereof and the name of the actual author, artist, performer, producer, programmer, or group thereon.¹³¹

California’s “true names” law requires labeling of the name and address of the manufacturer in addition to the artist’s name. As discussed below, this is significantly different from the Georgia statute which only requires the transferor name and yet does not define “transferor.”

2. *California Case Law*

The Ninth Circuit also ruled on the preemption issue in 1994.¹³² In Anderson v. Nidorf, police arrested the defendant for selling approximately 5,000 pirated tapes without disclosing an origin or manufacturer.¹³³ Section 653w(a) was at issue, and the court stated the law was aimed at protecting the public and the employees of the entertainment industry from piracy and bootlegging.¹³⁴

In regard to preemption of the state statute, the Anderson court stated “if violation of [a] state right is ‘predicated upon an act incorporating elements beyond mere reproduction or the like,’ there is no preemption.”¹³⁵ The court reasoned the extra element, disclosing the

¹³⁰ Cal. Penal Code § 653w(a) (2007); Anderson v. Nidorf, 26 F.3d 100, 101 (9th Cir. 1994).

¹³¹ Cal. Penal Code § 653w(a) (2007).

¹³² Anderson v. Nidorf, 26 F.3d 100 (9th Cir. 1994).

¹³³ Id. at 101.

¹³⁴ Id. at 102.

¹³⁵ Id. (citing Oddo v. Ries, 743 F.2d 630, 635 (9th Cir. 1984)).

manufacturer and the artist, helped to decrease consumer confusion in the market.¹³⁶ The court emphasized the statute was not aimed at criminalizing unauthorized distribution, therefore exclusive rights under 17 U.S.C. § 106 were not infringed.¹³⁷

C. Illinois Law

1. Illinois Statutes

Two Illinois statutes are relevant to the discussion of mixtapes under state law: section 16-7 pertaining to unlawful use of recorded sounds or images and section 16-8 regarding unlawful use of unidentified sound or audio visual recordings.¹³⁸ In essence, section 16-7 is a reproduction statute, and section 16-8 is a true names law.

To establish unlawful use under section 16-7(a)(1), an individual must have “intentionally, knowingly or recklessly transfer[ed] or cause[ed] to be transferred without the consent of the owner, any sounds or images recorded on any sound or audio visual recording with the purpose of selling or causing to be sold, or using or causing to be used for profit the article to which such sounds or recordings of sound are transferred.”¹³⁹ An individual may also be liable for unlawful use by selling, offering for sale, advertising, or attempting to profit from any article named in section 16-7(a)(1).¹⁴⁰ Illinois’ true names law provides:

A person commits unlawful use of unidentified sound or audio visual recordings when he intentionally, knowingly, recklessly or negligently for profit manufactures, advertises or offers for sale, sells, distributes, transports, vends, circulates, performs, leases, or possesses for such purposes, unidentified sound or audio visual recordings or causes the manufacture, advertisement or offer for sale, sale, distribution, transportation, vending, circulation, performance, lease, or possession for such purposes, unidentified sound or audio visual recordings.¹⁴¹

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *People v. Williams*, 876 N.E.2d 235, 241-242 (Ill. App. Ct. 2007).

¹³⁹ 720 Ill. Comp. Stat. 5/16-7(a)(1) (2007).

¹⁴⁰ 720 Ill. Comp. Stat. 5/16-7(a)(2) (2007).

¹⁴¹ 720 Ill. Comp. Stat. 5/16-8(a) (2007).

Illinois' true names law in itself does not specify the labeling requirements, however section 16-7(b) contains detailed definitions.¹⁴²

Unlike Georgia's reproduction law, Illinois' reproduction statute provides a specific guide for various terms found in the statute. Terms including "sound or audio visual recording" and "owner" are defined, but most importantly the labeling requirements are set out in detail.¹⁴³ A sound or audio visual recording will be considered "unidentified" when the article fails to contain "the actual name and full and correct street address of the manufacturer, and the name of the actual performers or groups prominently and legibly printed on the outside cover or jacket and on the label of such sound or audio visual recording."¹⁴⁴ The statute defines "manufacturer" as "the person who actually makes or causes to be made a sound or audio visual recording."¹⁴⁵ Additionally, effective January 1, 2008, the Illinois law provides that a manufacturer "does not include a person who manufactures the medium upon which sounds or visual images can be recorded or stored, or who manufactures the cartridge or casing itself."¹⁴⁶ Illinois statutes provide a clear basis for understanding how to grapple with unauthorized sale and transfer of recorded material.

2. *Illinois Case Law*

In 2007, an Appellate Court of Illinois faced the issue of preemption of its state reproduction and true names laws.¹⁴⁷ In People v. Williams, the defendant attempted to sell approximately 200 to 300 CDs and DVDs out of a suitcase to patrons of a laundromat.¹⁴⁸ To assist in prosecution of the charges, the RIAA's current supervisor testified about numerous

¹⁴² 720 Ill. Comp. Stat. 5/16-7(b) (2007).

¹⁴³ 720 Ill. Comp. Stat. 5/16-7(b).

¹⁴⁴ 720 Ill. Comp. Stat. 5/16-7(b)(5)(2007).

¹⁴⁵ 720 Ill. Comp. Stat. 5/16-7(b)(6)(2007).

¹⁴⁶ 720 Ill. Comp. Stat. 5/16-7(b)(6).

¹⁴⁷ Williams, 876 N.E.2d at 245-252.

¹⁴⁸ Id. at 239.

illegal characteristics of the defendant's CDs and DVDs including improper labeling and photocopied covers.¹⁴⁹

The court first recognized the purpose of the Illinois statutes as preventing record piracy and copyright infringement by prohibiting unauthorized reproduction and distribution.¹⁵⁰ The court then analyzed whether section 16-7(a)(2), the portion of the statute pertaining to sales, was preempted by federal copyright law.¹⁵¹ The court explained that the only difference between section 16-7(a)(2) and a copyright infringement claim was the state requirement of criminal intent when using or selling sound recordings unlawfully.¹⁵² Upon referencing *Nimmer* for the principle that criminal intent will not be "sufficient to qualify as an extra element," the court found section 16-7(a)(2) preempted by the Copyright Act.¹⁵³

Noting the *Briggs* and *Anderson* decisions, the court held section 16-8 was not preempted.¹⁵⁴ The court provided more analysis than either *Briggs* or *Anderson* and explained that labeling was a "crucial element" because without the actual name of the manufacturer, the article's cover was misleading the public as to its origin.¹⁵⁵ The court further stated that because the true names law provided protection to prospective consumers, not to copyright holders, the law was different in kind from a copyright infringement action.¹⁵⁶

D. New York Law

1. New York Statutes

¹⁴⁹ *Id.* at 239-240.

¹⁵⁰ *Id.* at 247, 249.

¹⁵¹ *Id.* at 249.

¹⁵² *Id.* at 249.

¹⁵³ *Id.* at 249.

¹⁵⁴ *Id.* at 250.

¹⁵⁵ *Id.* (describing the CD as being in a "deceptive condition" when the actual manufacturer name was missing, and that "consumers. . . are entitled to be informed" of such information).

¹⁵⁶ *Id.*

Three relevant statutes exist in the state of New York which provide guidance on the issue of preemption in the law of mixtapes. Sections 275.25 and 275.30 of the New York Penal Code pertain to unauthorized reproduction of sound recordings, while section 275.35 is the jurisdiction's true names law, appropriately titled "failure to disclose the origin of a sound recording in the second degree."

Section 275.25 is entitled "Advertisement or sale of unauthorized recordings in the second degree" and applies only to "sound recordings initially fixed" before February 15, 1972.¹⁵⁷ Specifically, a person is liable under section 275.25 when he or she "knowingly advertises, offers for sale, resale, or rental, or sells, resells, rents, distributes or possesses for any such purposes, any recording that has been produced or transferred without the consent of the owner."¹⁵⁸ New York's second unauthorized reproduction statute is section 275.30, "Advertisement or sale of unauthorized recordings in the first degree." An offender under section 275.30 must have violated section 275.25 and have committed one additional act relating to section 275.25: the offender must have been either "previously been convicted of that crime within the past five years; or commission of that crime involve[d] at least one thousand unauthorized sounds recordings or at least one hundred unauthorized audiovisual recordings."¹⁵⁹

The New York true names law is the third relevant provision. The section provides:

A person is guilty of failure to disclose the origin of a recording in the second degree when, for commercial advantage or private financial gain, he knowingly advertises or offers for sale, resale, or rental, or sells, resells, or rents, or possesses for such purposes, a recording the cover, box, jacket or label does not clearly and conspicuously disclose the actual name and address of the manufacturer or the name of the performer or principal artist. The omission of the actual name and address of the manufacturer, or the omission of the name of the performer or

¹⁵⁷ N.Y. Penal Code § 275.25 (2007).

¹⁵⁸ *Id.*

¹⁵⁹ N.Y. Penal Code § 275.30 (2007).

principal artist, or the omission of both, shall constitute the failure to disclose the origin of a recording.¹⁶⁰

Not surprisingly, the New York true names law is almost verbatim for the California true names law. Although the New York true names law does not provide a definitions section like that of Illinois, the statute is more specific than the ambiguous Georgia law.

Section 275.35 is explicit concerning liability, and the statute is exact in its disclosure requirements. The first phrase of New York's true names law specifically establishes liability when a person does not disclose the origin for the purpose of "commercial advantage or private financial gain." Unless the offender is vying for financial rewards when failing to label the recording, no liability is imposed. Moreover, the New York statute does not employ the ambiguous term "transferor" seen in the Georgia statute. Instead, New York provides for specific disclosure requirements of either (1) the name and address of the manufacturer or (2) the name of the performer or principal artist.¹⁶¹

2. New York Case Law

A 1992 case from New York has been quite persuasive in setting the stage for decisions on copyright preemption of state law reproduction statutes.¹⁶² In People v. Borriello, the defendant, who owned three video stores, was found in possession of 800 to 900 unauthorized videocassette recordings.¹⁶³ The State charged Borriello under the three state reproduction statutes arguing that Borriello rented video recordings to the public without the copyright holders' permission.¹⁶⁴

¹⁶⁰ N.Y. Penal Code § 275.35 (2007).

¹⁶¹ Id.

¹⁶² People v. Boriello, 155 Misc. 2d 261 (N.Y. Sup. Ct. 1992).

¹⁶³ Borriello, 155 Misc. 2d at 262.

¹⁶⁴ Id. at 262, 265.

The court first provided a thorough explanation of statutory presumptions, the Copyright Clause, and state law preemption generally.¹⁶⁵ The court then recognized the extra element test by stating that “[i]f other elements are required by the State statute” beyond the rights provided by copyright, there is no preemption of the state law.¹⁶⁶ The court noted that “[i]f the statute is in reality a copyright statute, it will be deemed equivalent” to a copyright infringement claim.¹⁶⁷

The court ultimately found sections 275.25 and 275.30 preempted because no extra elements existed to make the statutes qualitatively different in kind than a copyright infringement claim.¹⁶⁸ The court stated that the statutes “deal[t] exclusively with distribution and prohibit[ed] matters related to distribution.”¹⁶⁹ The court said the *actus res* elements of the statutes were selling, reselling, or renting, which were identical to the *actus res* under Section 106 of the Copyright Act.¹⁷⁰ The court noted that “differing *mens rea* elements such as ‘awareness’ or ‘intent’” would not provide the extra element to preclude copyright preemption.¹⁷¹ The court then briefly addressed the issue of advertisement stating that “advertisement for sale” was not an extra element.¹⁷² Because sections 275.25 and 275.30 do not mention false advertising or misrepresentations, the laws are not aimed at consumer protection.¹⁷³ The court concluded by recognizing that violations could occur under the reproduction laws “[e]ven where the consumer has accurate information.”¹⁷⁴

¹⁶⁵ *Id.* at 262-265.

¹⁶⁶ *Id.* at 265 (citing *Nimmer on Copyright; Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985)).

¹⁶⁷ *Id.* at 265.

¹⁶⁸ *Id.* at 266.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 265-266.

¹⁷¹ *Id.* at 266.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

The New York court's next issue was determining the purpose and preemption status of section 275.35, the true names law. The court recognized that the focus of the statute "[was] on labeling or packaging" and further said that the "crucial element" of the statute was that the recording's container be in a "deceptive condition."¹⁷⁵ The court held the New York true names law not preempted by federal copyright law and stated that the "statute [did] not require the defendant to infringe the rights of the copyright owner."¹⁷⁶ The court emphasized the extra element was clear and conspicuous disclosure of the manufacturing information.¹⁷⁷ Concerned over criticism that section 275.35 contained distribution elements, the court noted "although distribution is an element of this statute, [labeling was] an additional element which [took] it out of a copyright infringement statute."¹⁷⁸ Lastly, the New York court pointed out the purpose of section 275.35 as a consumer protection statute.¹⁷⁹ Comparing the purpose of a federal copyright infringement claim to the true names law, the court emphasized that federal copyright law protected "the owner's property rights in his intellectual endeavors" whereas the true names law aimed to "protect the public from purchasing under a false belief."¹⁸⁰

When discussing preemption of the true names law, the Borriello court stated "this statute [could] be violated even if the transferor [had] permission and authority to sell the recording from the copyright owner if the labels or packages [were] deceptive."¹⁸¹ The court was attempting to state that even with valid permission, liability could still be imposed without correct labeling. However, unlike the Illinois court in Williams that specifically stated that a

¹⁷⁵ Id. at 268.

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ Id.

¹⁸⁰ Id.

¹⁸¹ Id.

transferor was equivalent to a manufacturer,¹⁸² the Borriello court failed to define “transferor.” Additionally, section 275.35 does not even make reference to “transferor” nor define who a “transferor” is. Section 275.35 specifically allows an individual to escape liability upon disclosure of either the manufacturer or the performer/principal artist.¹⁸³ Thus, the court’s use of “transferor” is ambiguous, suggesting a “transferor” could be any one of those three individuals. Although the court’s opinion is sound in its reasoning, it could have been more precise by avoiding the term “transferor” or providing details of who a “transferor” was.

E. Washington Law

1. Washington Statutes

The true names law for the state of Washington is section 19.25.040, “Failure to disclose origin or certain recordings unlawful.” The three-part statute provides a detailed description of how a recording must be labeled and the various fines for a violation depending on the quantity of recordings offered, rented, sold, leased, or possessed.¹⁸⁴

The punishments can be harsh with the mid-range punishment being a \$250,000 fine and possible prison time of up to five years when the violation involves 10 to 100 recordings during a six-month period.¹⁸⁵ The true names portion, section 19.25.040(1), provides:

A person is guilty of failure to disclose the origin of a recording when, for commercial advantage or private financial gain, the person knowingly advertises, or offers for sale, resale, or rent, or sells or resells, or rents, leases, or lends, or possesses for any of these purposes, any recording which does not contain the true name and address of the manufacturer in a prominent place on the cover, jacket, or label of the recording.¹⁸⁶

¹⁸² Williams, 876 N.E.2d at 244 (scolding defendant for not listing “the actual manufacturer, i.e., the transferor”).

¹⁸³ N.Y. Penal Code § 275.35 (2007).

¹⁸⁴ Wash. Rev. Code Ann. § 19.25.040 (2008).

¹⁸⁵ Wash. Rev. Code Ann. § 19.25.040(2)(b) (2008).

¹⁸⁶ Wash. Rev. Code Ann. § 19.25.040(1) (2008).

Washington's true names law appears almost identical to the reproduction and true names statutes of California, New York, and Illinois, but despite the similarity, Washington's statute has a key difference.

The California and Illinois statutes mandate not only identification of the manufacturer on the jacket or cover of the recording but identification of the performer or artist as well.¹⁸⁷ The New York true names law provides an alternative; disclosure of the manufacturer or the performer or principal artist will be sufficient to save an individual from liability.¹⁸⁸ The difference apparent in Washington's true names law is that only the manufacturer must be disclosed: no artist, no author, no performer, no programmer, no producer, and, most importantly, no transferor. Thus, while two hurdles must be jumped in California and Illinois, only one, the "manufacturer hurdle," must be overcome in Washington. Washington's statutory construction provides clear guidance for actors in the mixtape and recording industry.

2. *Washington Case Law*

Just two years after the Borriello case in New York, a case was decided by the Court of Appeals in the state of Washington with facts eerily similar to those of DJ Drama.¹⁸⁹ In State v. Awawdeh, the RIAA was suspicious of the sale of counterfeit tapes at a Washington State Fair, and therefore the northwest regional director of the RIAA sent a lieutenant to the fair to investigate.¹⁹⁰ Upon finding Defendant Awawdeh selling tapes at a display booth and believing the tapes were counterfeit, the lieutenant bought two tapes and "mailed them to Mr. Vaughn [the regional director] who confirmed that the tapes were counterfeit."¹⁹¹ Awawdeh was arrested

¹⁸⁷ 720 Ill. Comp. Stat. 5/16-7(b)(5) (2007); Cal. Penal Code § 653w(a) (2007).

¹⁸⁸ N.Y. Penal Code § 275.35 (2007).

¹⁸⁹ State v. Awawdeh, 864 P.2d 965 (Wash. Ct. App. 1994).

¹⁹⁰ Id. at 966.

¹⁹¹ Id.

after a search revealed approximately 900 tapes from Awawdeh: over 200 from his display booth and another 700 from his vehicle.¹⁹²

The defendant challenged his conviction on five primary grounds including federal preemption.¹⁹³ The court relied on Borriello from New York, adopting the same reasoning and rationale.¹⁹⁴ The court noted that the focus of both the New York and Washington statutes was to protect consumer rights.¹⁹⁵ The court further recognized that the Washington and New York statutes were “almost identical” with the extra element being “the requirement that the recording’s outer container not be deceptive.”¹⁹⁶ The court emphasized that this requirement made the Washington law “qualitatively different from the federal copyright act.”¹⁹⁷ The court concluded by stating that because section 19.25.040 “[did] not regulate the contents of a recording,” the statute survived preemption.¹⁹⁸

VI. All the Drama: Why Claims Under Georgia’s Law Are Preempted

A. The Briggs Difference: Who Really is a “Transferor”?

DJ Drama has been charged under Georgia’s RICO statute with the state alleging Drama reproduced and distributed unauthorized recorded material.¹⁹⁹ It is significant to note the marked differences between the Georgia statute and the other jurisdictions’ true names laws especially considering the heavy weight the Briggs court placed on the Anderson court’s reasoning regarding the California statute.

¹⁹² Id.

¹⁹³ Id.

¹⁹⁴ Id. at 968-969.

¹⁹⁵ Id. at 968.

¹⁹⁶ Id.

¹⁹⁷ Id. (discussing the statute in Borriello, and subsequently stating “[w]e adopt the rationale of Borriello”).

¹⁹⁸ Id.

¹⁹⁹ Affidavits for Arrest, supra note 4 (alleging that Drama “offer[ed] for sale items that have been confirmed pirated by the Recording Industry Association of America . . . and did sell pirated music” on two instances in 2007 “without the consent of the owner of the copyright . . .”).

It is likely that Drama violated the first portion of the Georgia reproduction statute, O.C.G.A. § 16-8-60(a). Drama needed the “consent of the person who owns the master” copy to avoid violating the unauthorized distribution portion of the statute.²⁰⁰ Even though Drama might assert he is the owner of the master copy or consent was implicitly given when artists endorsed his recordings, the master owner is likely the recording company or the copyright holders of the songs and recordings Drama copied on his mixtapes. Drama needed permission to copy and distribute his mixtapes, and it is unclear if he received valid permission in all cases.

The real controversy arises when courts address the true names portion of the statute. Sources in the entertainment industry suggest Drama would not have violated this portion of the statute. One blog reported that it was “exceedingly likely” that Drama’s mixtapes identified the artists and the names of the producing DJs.²⁰¹ The blog emphasized that “unlike a typical[] street vendor of pirated CDs, a DJ selling mixtapes would want to identify the product as his own.”²⁰² However, counsel in Atlanta for DJ Drama, Ms. Uwonda Carter, recently stated the sole reason for the raid in January 2007 was the omission of DJ Drama’s address on the mixtapes.²⁰³ Based on the mere omission of DJ Drama’s address, immediate issues arise including whether the Briggs court interpreted the statute correctly and who precisely is a “transferor.”

The Briggs analysis contains gaps in its reasoning, flaws when comparing statutes, and insufficient explanation for its holding thus suggesting the Court’s statutory interpretation was incorrect. One of the initial issues the Court did address was whether the statutory language of “transferor of sounds or visual images” was unconstitutionally vague.²⁰⁴ However, the Court’s transition from the definition of “transferor of title or property” to the definition of “transferor of

²⁰⁰ O.C.G.A. § 16-8-60(a) (2007).

²⁰¹ “DJ Drama” Drama, supra note 14.

²⁰² Id.

²⁰³ Entertainment Law Institute, ICLE in Georgia, Sept 21, 2007, conference packet on file with author.

²⁰⁴ Briggs, 638 S.E.2d at 294.

sounds” is a large jump without much explanation. The court could have provided examples of what constitutes a “transferor” and therefore made it clear the precise name and address to be displayed on the CD packaging.

Additionally, the Court in Briggs relied on the Anderson decision interpreting California Penal Code 653w, but the Briggs court failed to recognize the two statutes are markedly different. While the California statute requires the names and addresses of both the artist and the manufacturer, the Georgia true names law only requires the name and address of the transferor.²⁰⁵ In addition to the artist, the California law will allow any other relevant performers, groups, or producers involved with the recorded material to satisfy the disclosure requirement.²⁰⁶ Georgia has no such flexible alternative for its “transferor” language. California’s law is also more specific mandating clear and conspicuous display of the required labels.²⁰⁷ The Briggs court did not note these important distinctions between the California and Georgia statutes, and ultimately, the two laws are not truly comparable.

Additionally, Briggs fails to provide sufficient explanation for its holding. Although Briggs was decided about one year prior to the Illinois decision in Williams, the Georgia Supreme Court had opinions from two other jurisdictions to turn to for guidance: Borriello in 1992 and Awawdeh in 1994. The New York, Washington, and Illinois courts provide better explanation for finding their respective true names laws not preempted.

Compared to the Illinois true names law, the Georgia law does not provide a similar comprehensive definitions section. Because section 16-7(b) of the Illinois true names law contains specific definitions for “master sound recording,” “owner,” “unidentified sound or audio visual recording,” and “manufacturer,” the statute is unambiguous as to what constitutes a

²⁰⁵ O.C.G.A. § 16-8-60(b) (2007); Cal. Penal Code § 653w(a) (2007).

²⁰⁶ Cal. Penal Code § 653w(a) (2007).

²⁰⁷ Cal. Penal Code § 653w(a) (2007).

violation. Most importantly, in Williams, when discussing incriminating facts concerning the defendant, the court stated a manufacturer was equivalent to a transferor.²⁰⁸ By stating a manufacturer and a transferor are interchangeable terms, the Illinois court provided explicit insight regarding who may be a transferor. Both the definitions of the Illinois law and the statements of the court help illustrate how the Georgia case law and the statute could be more precise.

Another important difference exists between the cases. The Washington court in Awawdeh did rely heavily on the New York court's reasoning in Borriello. However, that reliance is distinguishable from when the Georgia Supreme Court in Briggs relied on the California decision in Anderson. The Georgia law contains the vague "transferor" language while the California law is more exact in its disclosure requirements. Thus, the Georgia Supreme Court should have provided a more thorough justification for finding the true names law not preempted instead of merely relying on Anderson. However, the Awawdeh court appropriately relies on the Borriello opinion because Washington and New York have similar, detailed true names laws without the ambiguous "transferor" language.

Ultimately, the Court's reasoning in Briggs and its statutory interpretation does not stand on sound footing with cases in other jurisdictions which provide an in-depth analysis of their respective reproduction and true names laws. California and Illinois law suggest that other individuals could be the "transferor" for DJ Drama's mixtapes including the original artist, an author, a producer, a programmer, or a record label. The other jurisdictions suggest transferor is not a term relevant under the statutory analysis. Based on the incongruence between Briggs, on one side, and Anderson, Williams, Borriello, and Awawdeh, on the other, DJ Drama might not be a "transferor" under Georgia's true names law.

²⁰⁸ Williams, 876 N.E.2d at 244 (scolding defendant for not listing "the actual manufacturer, i.e., the transferor").

B. Preemption under Section 301: Which Claim Wins Out?

Based upon the holding of Briggs, it appears that a state law claim under O.C.G.A. § 16-8-60 is not preempted by copyright. However, because Briggs compares two dissimilar statutes and provides little explanation for its holding, it is inappropriate to stop there. It is necessary to do a separate analysis of the Georgia reproduction statute based on the extra element test for preemption without involving the Briggs case.

The preemption test has two questions that must be answered affirmatively for a court to find preemption: 1) does the subject matter fall under federal copyright law, and 2) if so, are the rights alleged by the state law claim equivalent to those under section 106.²⁰⁹ The second question of equivalency utilizes the “extra element test” to determine if the state law claim grants equivalent rights to that of section 106.²¹⁰

The first question of the preemption test requires the work be fixed in a tangible medium.²¹¹ A work is fixed “as soon as it is written down or recorded.”²¹² Drama’s mixtapes are fixed. The recordings are copyrightable subject matter, the mixtapes are placed on CDs, and the recordings are easily capable of being heard.

The second question of the test, which concerns equivalency, is specifically mentioned in 17 U.S.C. § 301(b)(3). The provision explains there is no preemption for “activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.”²¹³ In order to analyze the second question of the

²⁰⁹ Patry, *supra* note 53, § 18:9.

²¹⁰ *Id.* at § 18:16.

²¹¹ *Id.* at § 18:10.

²¹² Evan Medow & Alan Kress, Entertainment Industry Contracts, §172.01, Matthew Bender & Comp., www.lexisnexis.com.

²¹³ Copyright Act, 17 U.S.C. § 301(b)(3) (2007).

test correctly, it is important to ignore any labels the parties may use to identify the causes of action.²¹⁴ The analysis should focus on the substance of the claim, not the form.²¹⁵

Because the term “equivalent” has not been expressly defined in section 301, many courts require an extra element to make the state law claim “qualitatively different” from a copyright infringement claim.²¹⁶ A New York judge articulated that the “extra element . . . must be one which changes the nature of the action. . . .”²¹⁷ Patry’s treatise emphasizes the “qualitatively different in kind” test is the correct approach in determining whether an extra element exists so the claim avoids preemption.²¹⁸ The test explains that state law elements which narrow, expand, or merely tinker with the scope of the exclusive rights under section 106 will not change the nature of the state claim to avoid preemption.²¹⁹

In DJ Drama’s case, the government argues the extra element is the true names portion of the statute. The argument, like in Anderson and Williams, is that a labeling requirement makes the state law claim different from a copyright infringement claim. However, by comparing the Georgia statute and the charges against Drama to one of Patry’s particular actions, an argument can be made that labeling in the Georgia statute is not qualitatively different from copyright, and thus the state claim should be preempted.

As a threshold matter, O.C.G.A. § 16-8-60(a) will likely be found equivalent to a copyright claim. Standing alone, it appears to protect a copyright holder’s exclusive reproduction and distribution rights under section 106. However, Georgia created O.C.G.A. § 16-8-60(b), the true names law, in an effort to escape an equivalency determination and avoid preemption.

²¹⁴ Patry, supra note 53, § 18:17.

²¹⁵ Id.

²¹⁶ Id. at § 18:18.

²¹⁷ Mayer v. Josiah Wedgwood & Sons, Ltd., 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985).

²¹⁸ Patry, supra note 53, § 18:19.

²¹⁹ Id.

1. Unjust Enrichment

Unjust enrichment claims typically do not withstand preemption under section 301. The Supreme Court has stated that state claims may not grant “alternative remedies” to ones already provided under federal laws which preempt an entire field, such as the Copyright Act.²²⁰ Patry thus emphasizes that unjust enrichment claims are preempted because they are “mere attempts to state a claim for damages for unauthorized copying or other activity encompassed by Section 106.”²²¹ A claim solely for damages will not survive preemption because the claimant could just as well receive compensation under federal law.²²² Specifically, Section 504 of the Copyright Act provides remedies for the copyright owner when infringement occurs including actual damages suffered or statutory damages.²²³ As Patry explains, unjust enrichment claims are “poorly disguised claims for damages” and are thus preempted.²²⁴

Patry is not the only authority asserting that unjust enrichment claims should be preempted. Professor David Shipley and Mr. Jeffrey Hay, two scholars in copyright law, agree that unjust enrichment claims should be preempted because the elements for the state law cause of action are equivalent to federal copyright claims.²²⁵ In a typical unjust enrichment cause of action, the plaintiff must demonstrate wrongful use by the defendant.²²⁶ However, as Shipley and Hay point out, when comparing an unjust enrichment claim to a copyright infringement claim, wrongfulness is the only absent element.²²⁷ Shipley and Hay emphasize that proving

²²⁰ *Id.* at § 18:21 (citing *Aetna Health Inc. v. Davila*, 542 U.S. 200, 213-215 (2004)).

²²¹ *Id.* at § 18:51.

²²² *Id.* at § 18:21.

²²³ 17 U.S.C. § 504 (2008); *see also*, Patry, *supra* note 53, at § 18:21.

²²⁴ *Id.* at § 18:42.

²²⁵ David E. Shipley & Jeffrey S. Hay, *Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption*, 63 N.C. L. Rev. 125, 177 (1984).

²²⁶ *Id.* at 177.

²²⁷ *Id.*

wrongfulness does not differentiate the two claims, thus the state law cause of action should be preempted.²²⁸

Comparing a state law unjust enrichment claim to the Georgia reproduction statute demonstrates that similarities are apparent. When a claim is brought under the Georgia reproduction statute, the plaintiff is asserting he deserves compensation because the defendant was unjustly enriched as a result of the profits earned from defendant's unauthorized reproduction. A violation under the Georgia reproduction statute can result in the defendant paying up to \$25,000 in damages.²²⁹ Because the plaintiff could receive damages for unauthorized reproduction under section 106 of the Copyright Act, the Georgia reproduction statute should be preempted.

Case law supports the idea that an unjust enrichment claim should be preempted. In the 2001 case of Murray Hill Publications, Inc. v. ABC Communications, Inc., the dispute concerned a song from a radio show involving both copyright infringement and state law claims.²³⁰ The court tried to find an extra element in the unjust enrichment claim but ultimately found the claim preempted stating the claim depended on nothing more than the "unauthorized use of the plaintiff's work."²³¹

A 1998 case also found an unjust enrichment claim preempted by federal copyright law.²³² The plaintiff was an Elvis photograph collector who brought suit against the tabloid magazine, *Star*.²³³ The tabloid used approximately seven Elvis pictures from the plaintiff's copyrighted photograph compilation in its issue entitled *Salute to Elvis*.²³⁴ Focusing on the two-

²²⁸ Id.

²²⁹ O.C.G.A. § 16-8-60(d) (2007).

²³⁰ Murray Hill Publ'ns, Inc. v. ABC Commc'ns, Inc., 264 F.3d 622, 627-629 (6th Cir. 2001).

²³¹ Id. at 638.

²³² Curtin v. Star Editorial Inc., 2 F. Supp. 2nd 670, 674-675 (1998).

²³³ Id. at 672.

²³⁴ Id.

step preemption test of section 301, the court said “to the extent that plaintiff asserts an exclusive right to and reimbursement for the use of his compilation of photographs, his claim for unjust enrichment is preempted.”²³⁵

Beyond scholarly authority and case law, the sentiments among artists illustrate that DJ Drama unjustly benefits when using copyrighted works without permission. Unjust enrichment claims are founded on the idea of fundamental fairness,²³⁶ and the copyright owners believe DJ Drama’s reproduction and distribution is unfair. For example, after Drama’s arrest, when discussing the artists who have collaborated with Drama, an editor of a hip-hop magazine was quoted as saying, “there is a little bit of animosity, because [DJ Drama] is clearly making money off these artists. . . [the artists] all saw his car being towed off on TV. . .[a] Maserati.”²³⁷ Additionally, a popular Texas rapper named Pimp C won’t participate in the mixtape industry because he says DJs tend to make up sales figures and tell the public they are only breaking even.²³⁸ Pimp C spoke with The New York Times saying he knew “how much bread” DJs are making.²³⁹ He feels DJs are gaining plenty off mixtapes but prefer to not “give [the] artist a cut.”²⁴⁰ These opinions suggest that DJs are unjustly enriched when producing, mixing, and adapting the works of artists, songwriters, and composers yet refusing to provide adequate compensation.

Scholarly authority, case law, and entertainment industry opinions suggest that state claims for unjust enrichment are preempted by federal copyright law. Based on the similarities between the Georgia reproduction statute and an unjust enrichment claim, a strong case exists

²³⁵ *Id.* at 675.

²³⁶ Shipley & Hay, *supra* note 225, at 175.

²³⁷ Shapiro, *supra* note 1, at 37.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

that the Georgia law is not qualitatively different from a copyright infringement claim so as to withstand preemption.

2. Misappropriation

The Georgia reproduction statute is similar to a state law cause of action for misappropriation. The principle against converting “another’s investment” was developed in INS v. AP where the court emphasized one is not allowed to “reap where it has not sown.”²⁴¹ The misappropriation doctrine has three elements: (1) the plaintiff’s product was created “through extensive time, labor, skill and money,” (2) because the defendant copier was not burdened with similar “development expenses incurred by [the] plaintiff,” defendant receives an advantage when utilizing the product in competition with the plaintiff, (3) and the plaintiff incurs “commercial damage.”²⁴²

Scholars and courts have deliberated over whether a misappropriation claim is preempted by federal copyright law.²⁴³ Although there are situations in which misappropriation may escape preemption,²⁴⁴ uncertainty in misappropriation law has led some courts to rule a misappropriation claim preempted.²⁴⁵ A Texas court found a misappropriation claim preempted in a case concerning copyrighted drawings and plans for a shopping center.²⁴⁶ The court stated that the additional elements of defendants’ competitive use of plaintiffs’ products and commercial detriment to the plaintiffs were not qualitatively different to escape preemption.²⁴⁷

²⁴¹ Shipley & Hay, supra note 225, at 159; Int’l News Serv. v. Associated Press, 248 U.S. 215, 239 (1918).

²⁴² Shipley & Hay, supra note 225, at 160, n.255 (citing Synercom Technology, Inc v. University Computing Co., 474 F. Supp. 37, 39 (N.D. Tex. 1979)).

²⁴³ Id. at 161.

²⁴⁴ Id. at 162-163 (discussing that when patterns of misappropriation are shown, misappropriation claims are preserved).

²⁴⁵ Id. at 162 (noting that even if plaintiff proves all elements of misappropriation plus pattern of misappropriation, claim could still be preempted).

²⁴⁶ Schuchart & Associates, Professional Engineers, Inc. v. Solo Serve Corp., 540 F. Supp. 928, 932-933, 944 (W.D. Tex. 1982); see also Shipley & Hay, supra note 225, at 163.

²⁴⁷ Schuchart, 540 F. Supp. at 944.

Like a state law misappropriation claim, Georgia's reproduction statute aims to prevent against converting another's investment, specifically prohibiting reproduction and distribution of recorded material. Georgia seeks to proscribe copyright infringement and music piracy through the reproduction statute, thus individuals are prohibited from reaping where they have not sown. Because the statute compensates those injured from reproduction, transfer, circulation, and sale of unauthorized material, the statute mirrors a misappropriation claim.

The specific charges against DJ Drama under the reproduction statute could qualify as a misappropriation claim if brought by an injured copyright holder. A copyright owner, perhaps another hip-hop artist, creates his work after investing much time, money, and labor, and Drama receives a competitive advantage in the music marketplace by entering the hip-hop genre with his mixtapes yet not laboring as hard. Thus, the copyright owner bears commercial damage due to Drama's misappropriation of the copyrighted sound recordings.

The Georgia reproduction statute has similar goals as a misappropriation cause of action. Furthermore, given that, in one instance, competitive use and commercial detriment were not sufficient to escape preemption, a mere labeling requirement in the Georgia reproduction statute should not survive.

VII. Conclusion: Not So Mixed Up

DJ Drama's mixtape situation could be complicated by the possibility of a federal copyright claim brought against him. If a federal copyright claim is pursued, claims under the Georgia statute should be preempted on equivalency grounds. Georgia's reproduction statute is not qualitatively different from a federal copyright claim to escape preemption under section 301. Because the reproduction statute used to bring charges against Drama is similar to claims for unjust enrichment and misappropriation, the Georgia reproduction statute should face a

similar result of preemption. Although the courts have not yet defined clear standards for violations in the mixtape industry, the courts should be aware of the interrelation between state reproduction statutes like Georgia's and federal copyright law.