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Mixed Signals: How Mixtapes Have Blurred the Changing Legal Landscape in the Music Industry

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**MIXED SIGNALS: HOW MIXTAPES HAVE BLURRED THE
CHANGING LEGAL LANDSCAPE IN THE MUSIC
INDUSTRY**

MEREDITH L. SCHANTZ*

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I. INTRODUCTION

When investigative authorities began searching for the source of several infringing compact discs (“CDs”) found at Best Buy, they did not anticipate discovering a new form of alleged music piracy. The information uncovered by Georgia law enforcement officers led them to a prominent Atlanta mixtape producer, DJ Drama, and later provided enough evidence for his arrest under Georgia’s Racketeer Influenced and Corrupt Organizations (RICO) law. Following DJ Drama’s arrest, mixtapes and questions about the legality of their content jumped to the forefront of the recording industry’s anti-piracy efforts. The mixtape medium presents several issues: (1) Are mixtapes a form of music piracy? (2) Are state consumer protection laws or federal copyright statutes better equipped to deal with the resulting legal issues? and (3) How can record labels, recording artists, and mixtape disc jockeys (“DJs”) come to terms with their respective obligations under a revised mixtape industry?

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In this article, I intend to posit likely answers to these questions using the current criminal case against DJ Drama as a case study. Part II examines the history of and purpose behind mixtapes. The term “mixtape” applies to a variety of sound recordings, only some of which contain allegedly illegal content. This broad definition shows that, as a whole, mixtapes do not violate any laws, resulting in the need for in-depth analysis of individual cases before initiating any legal action. A second, but equally important, inquiry revolves around the status mixtapes hold in hip-hop culture. Underground mixtapes often play an integral role in the traditional music industry, a characteristic which must be balanced against its potentially illegal aspects.

Part III discusses the relevant criminal laws at both the state and federal levels applicable to combating mixtapes containing unauthorized copyrighted content. While several federal statutes apply to the issues arising from unauthorized mixtapes, they often require a case to meet both monetary and numeric thresholds before it can be heard. Many music piracy cases fail to meet these thresholds, and, currently, prosecutors instead rely on state consumer protection-based laws to hold infringers accountable. The inconsistencies among state laws—both in what amounts to an offense and what are the applicable penalties—have made it challenging for the recording industry to effectively combat the threat of physical music piracy. Additionally, with the arrest of DJ Drama, a new inquiry focuses on whether state Racketeering Influenced and Corrupt Organizations (RICO) laws will become a weapon used by the traditional music industry to protect their intellectual property. Finally, Part IV examines alternatives to litigation to the problems presented by mixtapes, such as creating licensing schemes between record labels and DJs, or the option of having recording labels produce mixtapes on their own.

II. HISTORY OF THE MIXTAPE

A. *The Birth of Mixtapes*

Mixtapes—collections of exclusive advance tracks, hot street jams, diss songs, and freestyles—function as a vital cog in the wheel of current hip-hop culture.¹ The contemporary mixtape traces its roots to the 1970s and club DJs such as Grandmaster Flash and Afrika Bambaataa.² Known then as

¹ Steve Jones, *Money in the Mixtape*, USA TODAY, Apr. 21, 2006, at 1E, available at http://www.usatoday.com/life/music/News/2006-04-20-mixtapes-main_x.htm.

² Shaheem Reid, *Mixtapes: The Other Music Industry*, MTV, Feb. 10, 2003, http://www.mtv.com/bands/m/mixtape/news_feature_021003/ (last visited Apr. 14, 2009) [hereinafter *Mixtapes*].

“party tapes,” party-spinning and club performances were recorded by popular DJs, who then sold those records on street corners for \$20 apiece.³ DJs also created customized tapes, charging each customer more than a dollar per minute for cassettes of current hit music overlaid with shout-outs to the purchaser.⁴ Mixtapes filled an unmet need: music consumers loved the mixes played in clubs and at parties, but lacked a way to capture the uniqueness and energy of a live DJ performance.⁵ Mixtapes offered a solution, albeit an illegal one. While record labels allowed major DJs to use copyrighted songs in public appearances, that permission did not extend to recording those performances and selling the music for personal profit.⁶ Since its inception, the mixtape has been tainted with illegality.

Throughout the 1980s and into the 1990s, mixtapes evolved in tandem with the changing technological and musical landscapes. Rap and R&B began to emerge as popular music genres,⁷ and cassette tapes replaced 8-tracks and vinyl as the music medium of choice, in turn providing an easier medium for DJs to record mixtapes.⁸ The term “mixtape” actually derives from recording the compilations onto cassettes.⁹ As the clubs playing host to much of the early hip-hop scene began to close down, DJs shifted their attention to the tapes they recorded on regular home stereo systems.¹⁰ Similar to live-performance mixtapes from the 1970s, these tapes were also sold on street corners.¹¹ During the early 1990s, the focus of DJ mixtapes transitioned from recording live club performances to blending and mixing beats.¹²

Many hip-hop aficionados consider the modern mixtape era to have originated during the mid-1990s with DJ Clue, a New York DJ who began incorporating exclusive tracks and freestyles into his mixtapes.¹³ DJ Clue’s new style of mixtape focused less on a DJ’s turntable skills and more on his ability to showcase and break new talent.¹⁴ A notable example of the potential impact mixtapes can have on an artist’s career is the rapper 50

³ *Mixtapes*, *supra* note 2. See also Shaheem Reid, *Mixtape History*, MTV, Feb. 10, 2003, http://www.mtv.com/bands/m/mixtape/news_feature_021003/index8.jhtml (last visited Apr. 14, 2009) [hereinafter *Mixtape History*].

⁴ *Mixtape History*, *supra* note 3.

⁵ *Id.*

⁶ *Mixtapes*, *supra* note 2.

⁷ *Mixtape History*, *supra* note 3.

⁸ *Id.*

⁹ *Mixtapes*, *supra* note 2.

¹⁰ *Mixtape History*, *supra* note 3.

¹¹ *Mixtapes*, *supra* note 2.

¹² *Mixtape History*, *supra* note 3.

¹³ *Id.*

¹⁴ *Id.*

Cent.¹⁵ After numerous run-ins with the law, his original label dropped him.¹⁶ Rather than immediately signing with another label, 50 Cent released a series of mixtapes to showcase his talents, achieving massive success and notoriety in the process.¹⁷ His success created a bidding war among major labels. Shady/Aftermath Records ultimately signed him for \$1 million, and 50 Cent's major label debut sold 872,000 units in its first week.¹⁸ Record labels' attention to the mixtape scene has not been confined solely to recording artists, as DJs have also been signed to record deals.¹⁹ The bevy of well-known mixtape DJs signed to major label deals further exemplifies the music industry's increasing recognition of this mainly underground movement.

With the emergence of hip-hop as the preeminent music genre of the current generation, record labels have finally acknowledged the advantages of mixtapes.²⁰ First, the mixtape subculture provides the recording industry with a valuable marketing tool to test consumer response to new music and cultivate a buzz at the grassroots level.²¹ Second, an artist's release of a mixtape generates "street cred" while cultivating an instant fan base on which a label-produced album may capitalize.²² 50 Cent's first-week sales are a perfect example.²³ Finally, the hype created by a mixtape also works in reverse: unsigned and independent artists who release popular mixtapes often catch the attention of major labels and secure either recording contracts or distribution deals.²⁴ However, while labels' marketing departments recognize the benefits of mixtapes, the business and legal departments tend to view unauthorized mixtapes as illegal, and competing, musical products.²⁵ Regardless of whether a mixtape includes music from

¹⁵ *Mixtapes*, *supra* note 2.

¹⁶ Jones, *supra* note 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Geoff Boucher, *The Freshest Spin: Where Lawyers See Piracy, Talent Scouts See Potential. It's the Hip-Hop Mixtape*, L.A. TIMES, Apr. 20, 2003, at Sunday Calendar 1 (Riggs Morales, an executive at Shady Records, described the current trend of signing DJs for the personalities they exhibit on a mixtape: "Who Kid just got a deal on Capitol Records, Kay Slay has a deal on Columbia, [DJ] Clue has a deal with Roc-A-Fella, DJ Envy just dropped an album with Epic . . .").

²⁰ *Mixtapes*, *supra* note 2.

²¹ Oliver Wang, *Tales of the Tape: Mix CDs Radically Transform the Business and Culture of Hip-Hop*, THE VILLAGE VOICE, July 23–29, 2003, at 1, available at <http://www.villagevoice.com/music/0330,176712,45698,22.html>.

²² Kelley L. Carter, *Taking It to the Streets: Hip-Hop Artists Use Mixtapes to Promote Music, Build Lucrative Street Cred – Now with the Help of Major Labels*, DETROIT FREE PRESS, June 18, 2006, at F1.

²³ *Mixtapes*, *supra* note 2.

²⁴ Jones, *supra* note 1.

²⁵ Boucher, *supra* note 19.

a new or established artist, it becomes illegal once it is sold to the public without the authorization of the copyright owner.²⁶

B. *Today's Mixtape: A Breakdown*

Today's urban mixtape is more diverse and difficult to define than ever.²⁷ As CDs replaced cassette tapes, mass-producing mixtapes became easier and faster.²⁸ Mixtapes are now available on recordable CDs and even as downloadable MP3 files.²⁹ Mixtape CDs are purchased on street corners, in flea markets, at small mom-and-pop record stores, online, and even in some major retail outlets.³⁰ At their worst, they range from unauthorized collections of a single artist's entire catalog to compilations of multiple artists' latest hits.³¹ At their best, mixtapes include authorized original tracks, freestyles, and promotional cuts.³² In between, they may contain a mix of authorized original music, hit tracks used without permission, or blended tracks whose original songs are only identifiable to a discerning ear.³³ Mixtapes feature any or all of the following: sought-after, unreleased exclusive tracks and previously released songs from A-list or up-and-coming rappers; freestyles; an entire "unofficial" album from one artist; DJs' special mixes of songs or the blending of two different tracks together; artists speaking out on current topics affecting themselves or the hip-hop community; or DJs playing popular collections of songs at considerably slower speeds than normal, or adding scratches and cuts to the mixes.³⁴ Due to this variety, determining what is legal in the mixtape world has proved difficult for those who must balance encouraging musical creativity with protecting copyrighted material.

The financial decline of the music industry has been attributed in part to the mixtape trade.³⁵ As record sales dropped off in the late 1990s, labels began investigating areas that significantly harmed their cash flow.³⁶ They

²⁶ 17 U.S.C. § 106(3) (2007).

²⁷ Boucher, *supra* note 19.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*; see also Kelefa Sanneh, *With Arrest of DJ Drama, the Law Takes Aim at Mixtapes*, N.Y. TIMES, Jan. 18, 2007, at E1.

³¹ Wang, *supra* note 21.

³² *Mixtapes*, *supra* note 2.

³³ Interview with L. Carlos Linares, Vice President of Anti-Piracy Affairs, Recording Indus. Ass'n of Am., in Washington, D.C. (July 11, 2007).

³⁴ *Mixtapes*, *supra* note 2.

³⁵ Jones, *supra* note 1.

³⁶ See Boucher, *supra* note 19.

identified the mixtape market as having serious potential to displace their prospective sales.³⁷ Mixtapes, sold on street corners for anywhere from \$5 to \$10,³⁸ offer a low cost alternative to label-released CDs, which retail for around \$17.³⁹ While mixtape producers emphasize that they do not profit monetarily,⁴⁰ economics and simple calculations fail to support such statements. A quality mixtape will cost a DJ anywhere between \$3,000 and \$4,000 to produce—including the expenses of studio time and printing CD covers⁴¹—and another \$5,000 to press a run of 10,000 copies at \$0.50 apiece.⁴² A pressing of 10,000 CDs with a production cost of \$9,000 would net a DJ anywhere between \$41,000 (at a \$5 sale price per CD) and \$91,000 (at a \$10 sale price per CD). Even if the street-corner vendor selling the merchandise takes a cut, a single mixtape release can provide the producing DJ with a substantial return. Additionally, these figures represent pure profit, because a DJ pays neither sales taxes on the merchandise sold nor licensing fees for any copyrighted music included in the mix.⁴³ With new mixtapes released every week, such numbers start to increase significantly. Some artists make more money in the mixtape circuit than recording with a major label.⁴⁴

C. *The Current Mixtape Climate*

The impact of mixtapes on the current hip-hop culture is undeniable. Unsigned artists or major-label artists with a new album set for release almost always find it necessary to release a mixtape.⁴⁵ However, the labels' increased notice of the potentially illegal aspects of mixtapes has accompanied their rise in visibility as a promotional tool. As mixtapes found their way to record labels, executives grew concerned after discovering that the mixes contained unauthorized material by the label's artists.⁴⁶ As a result, the labels turned to the Recording Industry Association of America (RIAA), a trade association representing the recording industry, whose mission is to "foster a business and legal climate that supports and promotes

³⁷ See *id.*

³⁸ Samantha M. Shapiro, *Hip-Hop Outlaw (Industry Version)*, N.Y. TIMES, Feb. 18, 2007, at 29.

³⁹ WILLIAM C. THOMPSON, JR., *BOOTLEG BILLIONS: THE IMPACT OF THE COUNTERFEIT GOODS TRADE ON NEW YORK CITY* 12 (2004).

⁴⁰ Jones, *supra* note 1.

⁴¹ Carter, *supra* note 22.

⁴² Shapiro, *supra* note 38, at 33.

⁴³ Boucher, *supra* note 19.

⁴⁴ Carter, *supra* note 22.

⁴⁵ *Id.*

⁴⁶ See *Mixtapes*, *supra* note 2.

[the] members' creative and financial vitality."⁴⁷ The RIAA often acts in an advisory capacity. For example, RIAA investigators aid local area law enforcement in demonstrating that consequences of music piracy are real.⁴⁸ The RIAA claims to function as the legal arm of the recording industry, protecting the interests of the labels who create, manufacture, or distribute more than 90 percent of the legitimate sound recordings in the United States.⁴⁹ Opponents of the RIAA, including the Electronic Frontier Foundation, criticize the trade association for justifying lawsuits as protecting artists⁵⁰ and instead claim that the RIAA's legal actions offer no benefit to artists.⁵¹

The conflict between the mixtape's countervailing promotional and infringement aspects came to a head on January 16, 2007, when the Fulton County Sheriff's Office and local police raided the Atlanta, Georgia, offices of well-known mixtape producer DJ Drama.⁵² Both DJ Drama and his associate, Don Cannon, were arrested on one felony count under the Georgia RICO law.⁵³ Police confiscated 81,000 CDs, four vehicles, recording equipment, and other assets during the raid.⁵⁴ The arrest of two prominent mixtape DJs led to a general outcry within the hip-hop community, making DJ Drama an instant martyr for a music genre that has never been "understood" by the corporate labels.⁵⁵ DJ Drama's situation presents two issues: whether to categorize mixtapes as counterfeit products, and whether state RICO statutes should apply to music counterfeiters.⁵⁶ Some hip-hop artists, critical of the mixtape system, were not surprised by DJ Drama's arrest.⁵⁷ Although the case is still pending, the court of public

⁴⁷ RIAA, Who We Are, <http://www.riaa.com/aboutus.php> (last visited Apr. 15, 2009) [hereinafter Who We Are].

⁴⁸ RIAA, Piracy: Online and on the Street, <http://www.riaa.com/physicalpiracy.php> (last visited Apr. 15, 2009) [hereinafter Piracy].

⁴⁹ Who We Are, *supra* note 47.

⁵⁰ Piracy, *supra* note 48 ("[P]iracy . . . doesn't even begin to adequately describe the toll that music theft takes on the many artists, songwriters, musicians, record label employees and others whose hard work and great talent make music possible.").

⁵¹ Electronic Frontier Foundation, File Sharing, <http://www.eff.org/issues/file-sharing> (last visited Apr. 16, 2009) ("The RIAA's and MPAA's irrational war on P2P is not generating a single penny for artists . . . [y]et the lawsuits have forced ordinary Americans to pay thousands of dollars to music and movie industry lawyers . . .").

⁵² Sanneh, *supra* note 30, at E1.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Shapiro, *supra* note 38, at 31.

⁵⁶ Interview with L. Carlos Linares, *supra* note 33.

⁵⁷ Shapiro, *supra* note 38, at 33 ("In the aftermath of the raid, talking to artists, the stuff they say when Drama's not around—there is a little bit of animosity, because he is clearly making money off these

opinion immediately proclaimed DJ Drama's innocence by labeling record companies as "the ultimate snitches" and calling for a boycott on the purchase of label releases as a form of protest.⁵⁸

III. APPLICABLE CRIMINAL LAWS

Even as much of the hip-hop community proclaims DJ Drama the victim of a misunderstood form of creative expression, in the eyes of the law, establishing his innocence is somewhat more dubious. While the legality of his copying and distribution activities will be up to a jury to decide, unauthorized mixtapes in general infringe several of the exclusive rights granted to copyright holders.⁵⁹ Criminal copyright infringement includes infringement committed for the purposes of commercial advantage or private financial gain.⁶⁰ Mixtapes containing unauthorized material available for purchase both on the Internet and in traditional brick and mortar stores meet the statutory requirements of federal criminal copyright infringement.⁶¹ Copyright holders whose works have been infringed frequently seek civil redress,⁶² but criminal penalties also apply.⁶³ However, owners of copyrights in sound recordings whose rights have been infringed can find it difficult to prompt law enforcement to bring federal criminal charges due to the necessary monetary and frequency threshold requirements.⁶⁴ As a result, aggrieved parties oftentimes seek criminal enforcement through state laws.⁶⁵

A. State Laws and the Focus on Consumer Protection

The majority of potential criminal copyright infringement cases dealing with unauthorized sound recordings are handled through use of state, not federal, laws.⁶⁶ Federal copyright statutes include minimum requirements

artists. They all saw his car being towed off on TV. What was it? A Mascrati?").

⁵⁸ *Id.* at 31.

⁵⁹ 17 U.S.C. § 106(3) (2007) ("[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted works in copies or phonorecords; . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale . . . (5) . . . to perform the copyrighted work publicly. . . .").

⁶⁰ 17 U.S.C. § 506(a)(1)(A) (2008).

⁶¹ *Id.* (defining the term "work being prepared for commercial distribution").

⁶² Interview with L. Carlos Linares, *supra* note 33.

⁶³ 17 U.S.C. § 506 (2008).

⁶⁴ Interview with L. Carlos Linares, *supra* note 33.

⁶⁵ See discussion *infra* Part III.A.

⁶⁶ Interview with L. Carlos Linares, *supra* note 33.

for bringing suit under their auspices.⁶⁷ Many cases involving sound recordings find these limitations difficult, because the retail value of music, especially in the form of a single song, is less than that of other forms of intellectual property.⁶⁸ In order for copyright holders to receive adequate protection without having to rely solely on federal laws,⁶⁹ the states created consumer protection statutes that prohibit sales of unauthorized recordings without deciding the issue of copyright infringement itself.⁷⁰ Many of these statutes were passed in response to the Supreme Court decision in *Goldstein v. California*, which held that

[n]o reason exists why Congress must take affirmative action either to authorize protection of all categories of writings or to free them from all restraint. We therefore conclude that, under the Constitution, the States have not relinquished all power to grant to authors “the exclusive Right to their respective Writings.”⁷¹

In response to this decision, Congress directly addressed copyright law preemption, placing copyright protection exclusively within the purview of the federal government.⁷² However, Congress included an important exception to preemption: “Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103”⁷³ By including this exception, the

⁶⁷ See *infra* notes 153-57.

⁶⁸ STEPHEN M. SIWEK, IPICTR. FOR TECH. FREEDOM. INST. FOR POLICY INNOVATION, POLICY REPORT 188, *The True Cost of Sound Recording Piracy to the U.S. Economy 7* (2007), available at [http://www.ipi.org/IPI/IPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/\\$File/SoundRecordingPiracy.pdf?OpenElement](http://www.ipi.org/IPI/IPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/$File/SoundRecordingPiracy.pdf?OpenElement) (“[W]e assume a legitimate price of \$0.99 per song.”).

⁶⁹ Interview with L. Carlos Linares, *supra* note 33.

⁷⁰ See, e.g., *People v. Borriello*, 588 N.Y.S.2d 991, 996 (1992) (holding that N.Y. Penal Law § 275.35 was not preempted by federal copyright law because it (1) did not require that the defendant infringe the rights of the copyright owner and (2) it was aimed at protecting the rights of consumers, not copyright holders).

⁷¹ *Goldstein v. California*, 412 U.S. 546, 560 (1973), *superseded by statute*, 1978 Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541, *as recognized in* *Roth v. Pritikin*, 710 F.2d 934, 938 (2d Cir. 1983).

⁷² 17 U.S.C. § 301(a) (2007) (“On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”).

⁷³ *Id.* § 301(b)(1). 17 U.S.C. § 102 describes the general subject matter of copyright law protection, with works of authorship encompassed by the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying

Copyright Act left open to the states avenues of additional protection for copyrighted material.

Consequently, instead of charging music pirates with copyright infringement, state prosecutors routinely seek criminal convictions under state laws known as labeling laws or True Name and Address statutes.⁷⁴ Forty-seven states have passed some form of True Name and Address statutes, which generally require all sound recordings offered for sale to display the true name and address of the manufacturer in a prominent place on the product's packaging.⁷⁵ Labeling laws are intended to protect consumers from illegitimate products rather than to protect the rights granted to authors under copyright law.⁷⁶ Many mixtape producers do not include this information on their CDs under the justification that mixtapes are "For Promotional Purposes Only."⁷⁷ However, when DJ Drama's mixtapes began being sold at retail stores without this information,⁷⁸ he violated Georgia's True Name and Address statute.⁷⁹

There are two ways in which infringing products can violate state labeling statutes. First, if the infringing manufacturer includes the name and address of the authorized manufacturer on the mixtape, as the *actual* manufacturer he has violated the statute by not including his own name and address.⁸⁰ This type of situation occurs when sophisticated musical pirates

music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. 17 U.S.C. § 103 extends copyright protection to derivative works and compilations of works included in the categories listed in section 102, but only to the new material added by the author of the compilation or derivative work.

⁷⁴ Interview with L. Carlos Linares, *supra* note 33.

⁷⁵ See, e.g., GA. CODE ANN. § 16-8-60(b) (West 2007); CAL. PENAL CODE § 653w (West 2006). Hawaii, Maine, and Vermont are the only states that do not have some form of True Name and Address statute.

⁷⁶ *People v. Anderson*, 235 Cal. App. 3d 586, 590-91 (1991) ("The state's interest in enacting Penal Code section 653w is the desire to protect the public in general, and the many employees of the vast entertainment industry in particular, from the hundreds of millions of dollars in losses suffered as a result of the 'piracy and bootlegging' of the industry's products.").

⁷⁷ Wang, *supra* note 21.

⁷⁸ Shapiro, *supra* note 38 at 31 ("Several small distributors had begun selling Drama's CDs, repackaged with scannable barcodes, to major retailers like Best Buy.").

⁷⁹ GA. CODE ANN. § 16-8-60(b) (West 2007) ("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.").

⁸⁰ See *State v. El Moghrabi*, 775 A.2d 519, 522 (N.J. Super. 2001) ("The officer picked up the 'Independence Day' box and noticed that the labeling was a poor reproduction of a legitimate label.").

create and sell high quality counterfeit products that are intended to look exactly like a legitimate CD.⁸¹ Second, a pirated sound recording's packaging may include incomplete name and address information or none at all.⁸² While manufacturers unfamiliar with the law may unintentionally omit required information, music pirates purposely leave off identifying information so that law enforcement will have a difficult time tracing any seized product.⁸³ A mixtape manufacturer who provides his correct name and address on his merchandise does not violate the labeling law, but any unauthorized use of copyrighted material may still be punishable under federal statutes.⁸⁴

Penalties for defendants found guilty under True Name and Address statutes vary from state to state.⁸⁵ Georgia's labeling law denotes the crime as a felony,⁸⁶ while California, a state where the entertainment industry plays a vital role in the economy, has a tiered statute.⁸⁷ Other states, such as Florida, distinguish between misdemeanors and felonies with regard to their labeling statutes.⁸⁸ This inconsistency, as well as the inconsistency in the application of the statutes, hinders the purpose of protecting the public from counterfeit goods.⁸⁹

Manufacturing unauthorized mixtapes may also make DJs susceptible to prosecution under state trademark statutes. Unlike the Copyright Act,

⁸¹ Wang, *supra* note 21.

⁸² See *People v. Kane*, 823 N.Y.S.2d 658, 660 (2006) ("The information in this case alleges that . . . a police officer observed the defendant remove the plastic bag that contained garbage from a trash can, and pull out a second clear plastic bag from underneath it, that contained 141 CDs. The names and addresses of the actual manufacturers were not present on these CDs.").

⁸³ Interview with L. Carlos Linares, *supra* note 33.

⁸⁴ See 17 U.S.C. § 301 (2007).

⁸⁵ See *infra* notes 86-88.

⁸⁶ GA. CODE ANN. § 16-8-60(d) (West 2007) (providing that an initial conviction results in a fine of up to \$25,000, a prison sentence of not less than one but not more than two years, or both. A subsequent conviction could subject the offender to a maximum \$100,000 fine, a prison term of one to three years, or both).

⁸⁷ CAL. PENAL CODE § 653w(b) (West 2006) (explaining that an offense involving 100 or more articles of audio recordings is punishable as a felony by up to a year in the county jail or a \$250,000 fine, or both, while an offense with less than 100 articles is punishable as a misdemeanor by up to a year in county jail or a \$25,000 fine, or both).

⁸⁸ FLA. STAT. ANN. § 540.11(3)(b) (West 2007) (stating that an illegal activity involving at least 1,000 sound recordings may result in a third-degree felony conviction and is punishable by up to five years in prison or a \$250,000 fine, or both. If the activity involves less than 1,000 but more than 100 sound recordings, a defendant faces conviction of a third-degree felony punishable by five years in prison, a fine of \$150,000, or both. Any other action violating section 540.11(3)(a)(3) results in a misdemeanor with a penalty of less than a year in jail or a fine up to \$25,000, or both).

⁸⁹ *People v. Anderson*, 235 Cal. App. 3d 586, 590-91 (Cal. App. 1991).

the Lanham Act does not expressly preempt state trademark laws.⁹⁰ States may enhance trademark protection under their own statutes, but they cannot narrow it beyond the scope granted by the Lanham Act.⁹¹ State trademark statutes apply to mixtapes when individuals sell or distribute sound recordings that misappropriate trademarks owned by the recording labels.⁹² Several states do not have trademark statutes, limiting the widespread use of these statutes as a way to fight against the illegal mixtape trade.⁹³

Criminal trademark laws in each state vary in their requirements, most especially on the issue of registration.⁹⁴ Some of the states that have a trademark statute do not require state registration of the mark in addition to registration on the federal Principal Register of the U.S. Patent and Trademark Office.⁹⁵ California's statute on the manufacture or sale of counterfeit goods holds in violation "[a]ny person who willfully manufactures, intentionally sells, or knowingly possesses for sale any counterfeit of a mark registered with the Secretary of State or registered on the Principal Register of the United States Patent and Trademark Office"⁹⁶ Conversely, other states require local registration of the trademark before a criminal case can be brought against an infringer under state law.⁹⁷ Under Utah's trademark statute, a "trademark" includes "every trademark registerable with the Division of Corporations and Commercial Code."⁹⁸ Indeed, the Utah trademark statute does not even mention the federal trademark

⁹⁰ *Fischer v. Holiday Inn of Rhinelander, Inc.*, 375 F. Supp. 1351, 1353 (W.D. Wis. 1973) ("[Section] 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a), created a federal tort of unfair competition. The Court of Appeals for this circuit has held that § 1125(a) does not pre-empt the state law of unfair competition and trademark infringement.")

⁹¹ 15 U.S.C. § 1121(b) (2007) ("No State or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark, or require that additional trademarks, service marks, trade names, or corporate names that may be associated with or incorporated into the registered mark be displayed in the mark in a manner differing from the display of such additional trademarks, service marks, trade names, or corporate names contemplated by the registered mark as exhibited in the certificate of registration issued by the United States Patent and Trademark Office.")

⁹² Interview with L. Carlos Linares, *supra* note 33.

⁹³ See, e.g., CAL. PENAL CODE § 350 (West 2007); UTAH CODE ANN. § 76-10-1001(2) (West 2007). Sixteen states do not have state trademark statutes: Alaska, Arkansas, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, and Wyoming.

⁹⁴ See *infra* notes 95-100.

⁹⁵ E.g., CAL. PENAL CODE § 350 (West 2007).

⁹⁶ *Id.*

⁹⁷ See, e.g., UTAH CODE ANN. § 76-10-1001(2) (West 2007).

⁹⁸ *Id.*

protections offered under the Lanham Act.⁹⁹ Illinois, on the other hand, does not require any registration at all.¹⁰⁰

Mixtape manufacturers can be subject to penalties under state trademark statutes for the same actions prohibited by the Lanham Act, namely, using a false or misappropriated trademark in conjunction with the sale of goods.¹⁰¹ Record label trademarks and the Parental Advisory label comprise the majority of intellectual property at issue in both state and federal trademark cases.¹⁰² The main difference between state trademark statutes and federal trademark law is that several states create a tiered response to the level of illegal activity, while the Trademark Counterfeiting Act of 1984 does not.¹⁰³ For example, South Carolina distinguishes between distribution of counterfeit marks and trafficking in counterfeit marks.¹⁰⁴ Other states, such as New York, delineate trademark counterfeiting into degrees based upon the retail value of the evidence involved.¹⁰⁵ Penalties applied under state trademark statutes are as varied as the statutes themselves: some authorize only misdemeanor charges,¹⁰⁶ while others treat the crime as a felony.¹⁰⁷ This varying degree of accountability under the different state statutes can make it difficult to effectively apply state trademark statutes to mixtapes.

⁹⁹ *Id.*

¹⁰⁰ 765 ILL. COMP. STAT. ANN. 1040/1 (2007) (“‘Mark’ includes any trade-mark or service mark whether registered or not.”).

¹⁰¹ Compare 15 U.S.C. § 1114(a)(1) (2007) (“Any person who shall, without the consent of the registrant . . . use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services”), with CAL. PENAL CODE § 350(a) (West 2007) (“Any person who willfully manufactures, intentionally sells, or knowingly possesses for sale any counterfeit of a mark . . .”).

¹⁰² See Interview with L. Carlos Linares, *supra* note 33.

¹⁰³ Compare 18 U.S.C. § 2320(a) (2007) (“Whoever intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services, or intentionally traffics or attempts to traffic in labels . . . or packaging of any type or nature, knowing that a counterfeit mark has been applied thereto, the use of which is likely to cause confusion . . . shall . . . be fined”), with S.C. CODE ANN. § 39-15-1190(B)(1) (2007) (“(a) A person who knowingly and willfully violates this subsection with respect to goods or services having a retail sales value of less than fifty thousand dollars is guilty of the offense of distribution of counterfeit marks . . . (b) A person who knowingly and willfully violates the provisions of this subsection with respect to goods or services having a retail sales value of fifty thousand dollars or more is guilty of the offense of trafficking in counterfeit marks.”).

¹⁰⁴ S.C. CODE ANN. § 39-15-1190(B)(1) (2007).

¹⁰⁵ See N.Y. PENAL LAW § 165.71-.73 (McKinney 2007).

¹⁰⁶ E.g., COLO. REV. STAT. § 18-5-110.5 (West 2007); TENN. CODE ANN. § 47-25-513 (West 2007).

¹⁰⁷ E.g., CAL. PENAL CODE § 350 (West 2007); GA. CODE ANN. § 10-1-454 (West 2007).

State Unauthorized Duplication laws prohibit the unauthorized duplication, distribution, and sale of sound recordings.¹⁰⁸ The activities prohibited by these statutes mirror infringement of several of the exclusive rights granted to authors under the Copyright Act of 1976.¹⁰⁹ While the combination of the *Goldstein v. California*¹¹⁰ holding and the passage of section 301 of Title 17¹¹¹ preempt state copyright protection, Unauthorized Distribution statutes remain valid as applying to sound recordings fixed before February 15, 1972.¹¹² Most states do not explicitly state the cutoff date within the statutory language, but others, such as California, make the distinction quite clear.¹¹³

Mixtapes, which tend to draw on post-1972 trends in hip-hop, do not initially seem the type of material applicable to Unauthorized Distribution statutes.¹¹⁴ However, characterizations of urban music include the constant “borrowing” of beats, samples, and hooks from previous recordings.¹¹⁵ Music recorded prior to February 15, 1972, can be just as useful in the creation of a mixtape as the songs sitting atop the current Billboard charts.¹¹⁶ As such, examination of all available evidence in a case against a mixtape manufacturer may be necessary to determine the applicability of Unauthorized Distribution statutes.

Of the forty-eight states with Unauthorized Distribution statutes,¹¹⁷ the majority assess penalties by one of two methods. Some categorize the manufacturer of applicable sound recordings as a separate offense from the

¹⁰⁸ See, e.g., CAL. PENAL CODE § 653h(a)(1) (West 2007) (“Every person is guilty of a public offense . . . who: [k]nowingly and willfully transfers or causes to be transferred any sounds that have been recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with intent to sell or cause to be sold, or to use or cause to be used for commercial advantage or private financial gain through public performance, the article on which the sounds are so transferred, without the consent of the owner.”).

¹⁰⁹ 17 U.S.C. § 106 (2007).

¹¹⁰ *Goldstein v. California*, 412 U.S. 546, 560 (1973), *superseded by* *Roth v. Pritkin*, 710 F.2d 934, 938 (2d Cir.1983).

¹¹¹ 17 U.S.C. § 301 (2007).

¹¹² See, e.g., CAL. PENAL CODE § 653h(i) (West 2007) (“This section applies only to such articles that were initially mastered prior to February 15, 1972.”).

¹¹³ *Id.*

¹¹⁴ *Mixtapes*, *supra* note 2.

¹¹⁵ Shapiro, *supra* note 38, at 30.

¹¹⁶ Interview with L. Carlos Linares, *supra* note 33.

¹¹⁷ See, e.g., CAL. PENAL CODE § 653h (West 2007); FLA. STAT. ANN. § 540.11(2)(b) (West 2007). Vermont does not have an Unauthorized Distribution statute. Indiana repealed its statute on the reproduction of records, tapes and films in 1976, with such actions now included under its receipt of stolen property statute, codified at IND. CODE ANN. § 35-43-4-2 (West 2007).

distribution or sale of the items.¹¹⁸ Of course, a mixtape manufacturer who also sells or distributes his merchandise would face charges under both categories. Other states have created a tiered approach, with penalties escalating as the number of unauthorized sound recordings involved increases.¹¹⁹

California's Unauthorized Distribution statute actually encompasses both penalty approaches,¹²⁰ making any individual who "[k]nowingly and willfully transfers or causes to be transferred any sounds that have been recorded on a phonograph record . . . with intent to sell or cause to be sold . . ." subject to criminal liability.¹²¹ The penalties under the manufacturing element of the statute are broken down into two categories.¹²² An individual convicted of an offense involving more than 1,000 articles can receive up to five years in prison or a \$250,000 fine, or both,¹²³ while a conviction of an offense involving any other violation of the statute carries a maximum punishment of a year in jail or a \$25,000 fine, or both.¹²⁴ The statute covers the sale element of the crime, stating that

[e]very person who offers for sale or resale, or sells or resells, or causes the sale or resale, or rents, or possesses for these purposes, any article described in subdivision (a) with knowledge that the sounds thereon have been so transferred without the consent of the owner is guilty of a public offense.¹²⁵

Penalties for this offense are also considered on a tiered basis.¹²⁶ A violation involving 100 or more articles carries a maximum penalty of one year in jail and a \$10,000 fine.¹²⁷ Any violation concerning less than 100 articles is punishable by six months in the county jail, or a fine of \$5,000, or both.¹²⁸

By arresting DJ Drama under Georgia's RICO law, prosecutors introduced a new means by which to combat the manufacturing and sale of

¹¹⁸ New York's Penal law separates manufacturing of unauthorized recordings (N.Y. PENAL LAW § 275.05-10 (McKinney 2007)) from the advertisement or sale of unauthorized recordings (N.Y. PENAL LAW § 275.25-30 (McKinney 2007)).

¹¹⁹ See, e.g., FLA. STAT. ANN. § 540.11(2)(b) (Wcst 2007).

¹²⁰ CAL. PENAL CODE § 653h (Wcst 2007).

¹²¹ *Id.* § 653h(a)(1).

¹²² *Id.* § 653h(b)-(c).

¹²³ *Id.* § 653h(b).

¹²⁴ *Id.* § 653h(c).

¹²⁵ *Id.* § 653h(d).

¹²⁶ *Id.* § 653(d)(1)-(2).

¹²⁷ *Id.* § 653(d)(1).

¹²⁸ *Id.* § 653(d)(2).

counterfeit sound recordings.¹²⁹ The raid on DJ Drama's offices culminated in his arrest on one count under the Georgia RICO law.¹³⁰ The Georgia General Assembly passed the RICO statute with the intent that it be applied to "an interrelated pattern of criminal activity motivated by or the effect of which is pecuniary gain or economic or physical threat or injury."¹³¹ While RICO is more often applied to organized crime syndicates,¹³² the Georgia statute specifically refers to unauthorized transfers and reproductions of recorded material as predicate offenses.¹³³ Should DJ Drama's mixtapes be determined to violate Georgia's Unauthorized Distribution laws, such actions will amount to predicate charges under Georgia's RICO statute.

In order for RICO to be applicable, a "pattern of racketeering activity" must first be established, which the Georgia statute defines as

[e]ngaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such acts occurred after July 1, 1980, and that the last of such acts occurred within four years, excluding any periods of imprisonment, after the commission of a prior act of racketeering activity¹³⁴

Before a pattern of racketeering activity can be proven, it must first be established that the activities in question constitute racketeering activity.¹³⁵ For DJ Drama, his alleged repeated violation of the Unauthorized Distribution statute meets the statutory definition of "racketeering activity" under RICO.¹³⁶ Once a racketeering activity has been found and a pattern

¹²⁹ See Shapiro, *supra* note 38, at 33 ("Arresting them criminally under RICO was firing a warning shot at anyone who has mixtapes," said Walter McDonough, a copyright lawyer who has negotiated with the RIAA").

¹³⁰ *Id.* at 30.

¹³¹ GA. CODE ANN. § 16-14-2(b) (West 2007).

¹³² Shapiro, *supra* note 38, at 30.

¹³³ See GA. CODE ANN. § 16-14-3(9)(a)(xx).

¹³⁴ *Id.* § 16-14-3(8)(A).

¹³⁵ *Davis v. State*, 589 S.E.2d 700, 705 (Ga. Ct. App. 2003) ("To prove a RICO violation, the State was required to show that Davis engaged in at least two predicate criminal acts that would amount to racketeering activity as defined in O.C.G.A. § 16-14-3 (9).").

¹³⁶ GA. CODE ANN. § 16-14-3(9)(A)(xx) ("[Racketeering activity] means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit any crime which is chargeable by indictment under the following laws of this state . . . relating to unauthorized transfers and reproductions of recorded material.").

of that activity established, the activity becomes prohibited under Section 16-14-4(a): “It 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.”¹³⁷

DJ Drama’s pending trial presents questions on both the issue of mixtapes as pirated music and the application of RICO charges to the facts of a music piracy case.¹³⁸ Future cases will depend on the varying state statutes. Georgia’s RICO statute includes unauthorized distribution of recorded materials as a predicate crime,¹³⁹ but not all state RICO statutes include this in the list of applicable predicate crimes.¹⁴⁰ However, it is certain that DJ Drama currently faces severe penalties. Criminal penalties for violations of Georgia’s RICO statute include imprisonment from five to twenty years, a sentence which may be coupled with a fine of up to “\$25,000 or three times the amount of any pecuniary value gained by [the defendant] from such violation.”¹⁴¹ Based on the evidence seized in the raid of DJ Drama’s offices,¹⁴² a conviction under the RICO charge could find the prominent DJ facing a fine three times the profit his mixtape enterprise generated.¹⁴³

B. Federal Laws Applicable to Mixtapes Infringing on Copyrights

The Copyright Act of 1976 establishes the rights granted to creators of intangible property¹⁴⁴ and the remedies available when those rights are violated.¹⁴⁵ Among the exclusive rights granted is the ability to reproduce the work in copies, create derivative works, and distribute copies to the public by sale.¹⁴⁶ Hip-hop mixtapes made without authorization, like those created by DJ Drama, violate any and all of these rights.¹⁴⁷

¹³⁷ *Id.* § 16-14-4(a).

¹³⁸ Interview with L. Carlos Linares, *supra* note 33.

¹³⁹ GA. CODE ANN. § 16-14-3(9)(a)(xx).

¹⁴⁰ *See, e.g.*, CA. PENAL CODE § 186.2(a) (West 2007); 18 PA. CONS. STAT. ANN. § 911(h)(1) (West 2007).

¹⁴¹ GA. CODE ANN. § 16-14-5(a)-(b).

¹⁴² Sanneh, *supra* note 30, at E1 (“[T]he police confiscated 81,000 discs, four vehicles, recording gear . . .”).

¹⁴³ *See* GA. CODE ANN. § 16-14-5(b).

¹⁴⁴ 17 U.S.C. § 106 (2007).

¹⁴⁵ *Id.* § 501–13.

¹⁴⁶ *Id.* § 106.

¹⁴⁷ As of the time of this article, no federal charges had been brought against DJ Drama in relation to his mixtape manufacturing. Any references to charges or penalties under federal law are

The most powerful criminal sanction provided by the Copyright Act to combat mixtape manufacturers dealing in unauthorized music is criminal copyright infringement.¹⁴⁸ The Copyright Act defines infringement as the defendant's violation of any of the exclusive rights granted to the copyright owner in Section 106 of the Copyright Act.¹⁴⁹ Additionally, criminal copyright infringement breaks down into two separate contexts.¹⁵⁰ The first prohibits willful copyright infringement for purposes of commercial advantage or private financial gain.¹⁵¹ The second sets a minimum threshold for infringement by prohibiting "the reproduction or distribution, including by electronic means . . . of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000"¹⁵² If either of these two requirements is met, criminal copyright infringement may apply.

The threshold necessary for a finding of criminal copyright infringement is less than the minimum requirements for criminal punishment under federal law.¹⁵³ Section 2319 of Title 18 outlines the penalties for felony criminal copyright infringement, with the required threshold being higher than that necessary to constitute criminal infringement.¹⁵⁴ Criminal copyright infringement committed for purposes of commercial advantage or private financial gain is punishable as a felony if it consists of "the reproduction or distribution . . . of at least 10 copies or phonorecords, of 1 or more copyrighted works, which have a total retail value of more than \$2,500"¹⁵⁵ The same minimum requirement applies to activity meeting

purely hypothetical.

¹⁴⁸ Because the case study for this comment, DJ Drama, has only been charged with criminal violations, this comment does not focus on any civil remedies at either the state or federal level.

¹⁴⁹ 17 U.S.C. § 501(a) ("Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a) . . . is an infringer of the copyright or right of the author, as the case may be.").

¹⁵⁰ *Id.* § 506(a).

¹⁵¹ *Id.* § 506(a)(1)(A) (17 U.S.C. § 101 defines "financial gain" as "the receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.").

¹⁵² *Id.* § 506(a)(1)(B).

¹⁵³ *Compare id.* § 506(a)(1)(B) ("Any person who willfully infringes a copyright shall be punished . . . if the infringement was committed by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000"), with 18 U.S.C. § 2319(b)(1) (2007) ("Any person who commits an offense under section 506(a)(1)(A) . . . shall be imprisoned . . . if the offense consists of the reproduction or distribution, including by electronic means, during any 180-day period, of at least 10 copies or phonorecords, of 1 or more copyrighted works, which have a total retail value of more than \$2,500").

¹⁵⁴ 18 U.S.C. § 2319 (2008).

¹⁵⁵ *Id.* § 2319(b)(1).

the criminal infringement definition of reproducing or distributing copyrighted works with a total retail value of over \$1,000.¹⁵⁶ The technical requirements of criminal infringement often prevent cases concerning sound recordings from reaching the federal courts if one or more of the elements are difficult to prove.¹⁵⁷ Had DJ Drama been charged with criminal copyright infringement, the extensive evidence seized suggests a strong possibility that the three elements would be established. Also, it is important to note that in sound recording cases, felony infringement can be proven by a single track¹⁵⁸ or any combination of tracks so long as there are at least ten with a total retail value of \$2,500.¹⁵⁹ The monetary value requirement is the most difficult for law enforcement to meet due to the lack of a definition of "retail value."¹⁶⁰ In cases of sound recording infringement, the cost attributed to the minimum ten tracks does not begin to reach the necessary retail value.¹⁶¹

A mixtape DJ charged with felony criminal copyright infringement would be subject to harsh penalties.¹⁶² Criminal infringement of a copyright for purposes of commercial advantage or private financial gain is punishable by imprisonment of up to five years or a fine of up to \$250,000, or both.¹⁶³ This punishment is in addition to any other penalties found under Title 17 or other applicable laws.¹⁶⁴ A defendant who infringes "10 or more copies . . . of 1 or more copyrighted works, which have a total retail value of \$2,500 or more . . ." is subject to three years in prison or a \$250,000 fine, or both.¹⁶⁵ A criminal infringement involving one or more copies of copyrighted works

¹⁵⁶ *Id.* § 2319(c)(1).

¹⁵⁷ COMPUTER CRIME AND INTELLECTUAL PROP. SECTION CRIMINAL DIV., U.S. DEP'T OF JUSTICE, PROSECUTING INTELLECTUAL PROPERTY CRIMES 58 (2001) [hereinafter *COMPUTER CRIME*].

¹⁵⁸ In the recording industry, a single "track" equals a single song as opposed to an entire album. A single song is recognized as a copyrighted work based on the definition of "sound recording" in 17 U.S.C. § 101, thereby fulfilling the requirement of "1 or more copyrighted works" within 18 U.S.C. § 2319(b) and (c).

¹⁵⁹ 18 U.S.C. § 2319(b).

¹⁶⁰ *COMPUTER CRIME*, *supra* note 157, at 59.

¹⁶¹ STEPHEN M. SIWEK, IPI CTR. FOR TECH. FREEDOM. INST. FOR POLICY INNOVATION, POLICY REPORT 188, THE TRUE COST OF SOUND RECORDING PIRACY TO THE U.S. ECONOMY 7 (2007), available at [http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/\\$File/SoundRecordingPiracy.pdf?OpenElement](http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/$File/SoundRecordingPiracy.pdf?OpenElement) ("[W]e assume a legitimate price of \$0.99 per song.").

¹⁶² 18 U.S.C. § 2319.

¹⁶³ *Id.* § 2319(b)(1).

¹⁶⁴ *Id.* § 2319(a) ("Any person who violates section 506(a) (relating to criminal offenses) of title 17 shall be punished as provided in subsections (b), (c), and (d) and such penalties shall be in addition to any other provisions of title 17 or any other law.").

¹⁶⁵ *Id.* § 2319(c)(1).

with a total retail value of more than \$1,000, but less than \$2,500, is punishable as a misdemeanor by a prison term of not more than one year or a \$100,000 fine, or both.¹⁶⁶

Today's mixtapes can be grouped into three broad categories based on the authorization of their content. First, "completely or partially unauthorized," are mixtapes consisting entirely of works from a single artist or compilations of multiple artists' popular songs without authorization from the sound recording owner(s), or those containing unauthorized copyright material in addition to authorized new material, freestyles, or original rhymes.¹⁶⁷ This type of mixtape is appearing in larger retail establishments, such as Best Buy, causing problems for the recording industry by competing against authorized releases.¹⁶⁸ The majority of DJs or distributors do not have permission from copyright holders to sell the music contained on one or more tracks of the recording.¹⁶⁹

Second, "chopped and screwed," are mixtapes containing either copyrighted material or new material manipulated to such a degree that it is often unidentifiable.¹⁷⁰ On "chopped" tracks, DJs overlay the same song at a delayed pace, cross-fading between the two for a repetitive effect.¹⁷¹ "Screwed" refers to playing popular collections of songs at considerably slower speeds than normal.¹⁷² While these types of mixtapes may contain copyright-infringing material, the excessive alterations make it difficult to determine.

Finally, "pure" mixtapes are released by new artists of their own material that do not contain any copyright-infringing samples or tracks, or mixtapes from established or up-and-coming artists of material authorized by their labels.¹⁷³ Pure mixtapes embody the true purpose of a mixtape: they serve as vehicles for new artists to introduce themselves to the public or for known artists to maintain "street cred" and promote new material.¹⁷⁴ Whether this type of mixtape is used as a promotional or a commercial item is irrelevant as the distribution of the content is authorized by the parties who own the recordings.

¹⁶⁶ *Id.* § 2319(c)(3).

¹⁶⁷ *Mixtapes*, *supra* note 2; Interview with L. Carlos Linares, *supra* note 33.

¹⁶⁸ See Shapiro, *supra* note 38, at 31.

¹⁶⁹ *Id.* at 30.

¹⁷⁰ Interview with L. Carlos Linares, *supra* note 33.

¹⁷¹ UrbanDictionary.com, Chopped and Screwed, <http://www.urbandictionary.com/define.php?term=chopped+and+screwed> (last visited Nov. 10, 2007).

¹⁷² *Mixtapes*, *supra* note 2.

¹⁷³ Interview with L. Carlos Linares, *supra* note 33.

¹⁷⁴ Carter, *supra* note 22.

Completely or partially unauthorized mixtapes contain several distinguishing features that make them vulnerable to a criminal copyright infringement charge. First, each mixtape contains an obviously higher number of tracks than an authorized label release, and each track is protected under copyright law as a “phonorecord.”¹⁷⁵ Second, these types of mixtapes are often sold online or in flea markets, where the volume of available merchandise is more likely to meet the minimum retail value requirement.¹⁷⁶ Lastly, the copyrighted material included on these types of mixtapes is often recognizable, making it easier to provide a jury with evidence of copying.¹⁷⁷ Songs included on a “chopped and screwed” mixtape have sometimes been distorted to such a degree that the work infringed is difficult to recognize.¹⁷⁸ Material included on a “pure” mixtape is authorized, and therefore not subject to a copyright infringement claim.¹⁷⁹

Some mixtape producers may have a defense against a charge of criminal copyright infringement. Record label marketing departments encourage the creation of mixtapes by giving certain DJs exclusive freestyle raps or songs that will not appear on mainstream albums.¹⁸⁰ Depending on the contents of the agreement, a mixtape producer finding himself subject to a copyright infringement claim can argue he had been granted a nonexclusive license. With a nonexclusive license, the copyright owner does not transfer ownership of the copyright, but instead “permits the use of a copyrighted work in a particular manner.”¹⁸¹ A nonexclusive license may be granted orally or may even be implied from the conduct of the parties.¹⁸² Additionally, “when the totality of the parties’ conduct indicates an intent to grant such a permission, the result is a nonexclusive license.”¹⁸³

In *Lowe v. Loud Records*, a songwriter created a beat intended to impress well-known rap artist Dr. Dre.¹⁸⁴ The plaintiff admitted giving the beat he created to a producer, Scott Storch, with the express intent it be presented to Dr. Dre, and if it were later used in a song, the plaintiff was to receive

¹⁷⁵ 17 U.S.C. § 101 (2007).

¹⁷⁶ See Boucher, *supra* note 19.

¹⁷⁷ See *Mixtapes*, *supra* note 2.

¹⁷⁸ See Interview with L. Carlos Linares, *supra* note 33.

¹⁷⁹ *Id.*

¹⁸⁰ Jones, *supra* note 1, at 1E.

¹⁸¹ *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996).

¹⁸² MELVILLE R. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, vol. 3, § 10.03(A)(7) (Supp. 2007).

¹⁸³ *Id.*

¹⁸⁴ *Lowe v. Loud Records*, No. 01-1797, 2003 U.S. Dist. LEXIS 21234 (3d Cir. Pa. Nov. 20, 2003), *aff'd*, No. 03-4812 2005 U.S. App. LEXIS 4753 (3d Cir. 2005).

credit.¹⁸⁵ Dr. Dre included the beat in a song he wrote for rapper Xzibit without crediting the plaintiff, and Lowe sued for copyright infringement.¹⁸⁶ The court found that “[t]he fact that [the plaintiff’s] affidavit and deposition testimony declare that he willingly gave ‘West Coast Beat’ to Storch, with the intention that it be utilized by the Defendants, contradicts his copyright infringement claim which is premised upon the basis that ‘West Coast Beat’ was taken . . . without either his permission or knowledge.”¹⁸⁷ The facts of *Lowe v. Loud Records* reflect many of the same elements present when a record label gives a track to a mixtape DJ for inclusion on a mixtape.

The defense of a nonexclusive license is not guaranteed, however. In *Effects Associates v. Cohen*, the Ninth Circuit created a non-exhaustive test for the finding of a nonexclusive license: an implied nonexclusive license has been granted when (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work.¹⁸⁸ The first and second elements of this test were not met in the *Lowe* decision, as Lowe created the work on his own, not at the request of either the producer or the record label.¹⁸⁹ The same is true for mixtapes, as labels do not have their artists create tracks at the request of the DJs but instead offer DJs songs controlled by the label.¹⁹⁰ However, Lowe intended for his work to be used in a song and distributed.¹⁹¹ The same is true of record labels who give tracks to DJs.¹⁹²

An implied license inquiry is fact-specific and requires a conclusion that the parties manifested a mutual assent to a licensing arrangement.¹⁹³ In *Viacom International v. Fanzine International*, a publisher raised the defense of an implied license for graphic reproductions of Nickelodeon characters reproduced from slides provided by Nickelodeon’s promotional department.¹⁹⁴ The court found that the brief conversation between a Nickelodeon employee and the defendant’s agent did not convey a license

¹⁸⁵ *Id.* at *11.

¹⁸⁶ *Id.* at *2.

¹⁸⁷ *Id.* at *11–12.

¹⁸⁸ *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 558–59 (9th Cir. 1990).

¹⁸⁹ *See Lowe*, 2003 U.S. Dist. LEXIS 21234, at *11.

¹⁹⁰ *Jones*, *supra* note 1, at E1.

¹⁹¹ *See Lowe*, 2003 U.S. Dist. LEXIS 21234, at *11.

¹⁹² *Shapiro*, *supra* note 38, at 33 (“Labels prefer to use established mixtape DJs . . . rather than produce promotional CDs themselves . . . because ‘the best DJs have a better brand than the average label does.’”).

¹⁹³ *Viacom Int’l, Inc. v. Fanzine Int’l, Inc.*, 2000 U.S. Dist. LEXIS 19960 *1, *11 (S.D.N.Y. July 5, 2000).

¹⁹⁴ *Id.*

to the defendant allowing reproduction of the characters without charge.¹⁹⁵ In the case of a mixtape, genuine issues of fact arise regarding the exact nature of a communication between a DJ and a record label representative. Most often, agreements “are conducted with a wink and a nod rather than with a contract; the label doesn’t officially grant the DJ the right to distribute the artist’s songs”¹⁹⁶

Should an implied license defense be raised by a mixtape manufacturer, a court’s inquiry will most likely focus on why the work was created. The *Effects Associates v. Cohen* test has evolved to finding exclusive licenses only in the narrow circumstances where one party creates a work *at the other’s request* and delivers it intending that it be copied and distributed.¹⁹⁷ The majority of record labels do not create songs at the request of a DJ. Conversely, the DJs who create works at the request of the labels do not deliver it to the label, but instead disseminate copies on their own. However, a court may find an implied license where a copyright owner both knew that the work was being copied and failed to object to the unauthorized use.¹⁹⁸ A mixtape DJ who can prove that a label knew of a song’s inclusion on a mixtape and failed to object to it may prevail on the finding of an implied license. In many instances, such proof may be readily available, as some labels request sales data from DJs on mixtapes containing the label’s copyrighted material.¹⁹⁹

Mixtape DJs and manufacturers may find their products subject to federal regulations against trafficking in counterfeit labels. Mixtape manufacturers may make an effort to design their products in such a way that they appear authentic or come from an authentic source.²⁰⁰ Mixtapes, unlike counterfeit CDs, are generally not intended to pass as a legitimate retail album, and often confuse consumers as to the authorization of the material included on the mixtape.²⁰¹ Federal law criminalizes the actions of anyone who “knowingly traffics in a counterfeit label or illicit label affixed to . . . or designed to be affixed to . . . a phonorecord”²⁰² This criminal action applies to copyright infringement in sound recordings when “the counterfeit label or illicit label is affixed to, encloses, or accompanies, or is

¹⁹⁵ *Id.* at *10–11.

¹⁹⁶ Shapiro, *supra* note 38, at 30.

¹⁹⁷ See *Pavlica v. Behr*, 379 F. Supp. 2d 519, 526–27 (S.D.N.Y. 2005); *Smithkline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc.*, 211 F.3d 21, 25 (2d Cir. 2000).

¹⁹⁸ See *Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944, 947 (S.D.N.Y. 1997).

¹⁹⁹ See Shapiro, *supra* note 38, at 33 (“[R]ecord-label promoters want sales figures for [the DJs’] mixtapes so they can chart sales patterns, which they use in marketing their own releases.”).

²⁰⁰ Interview with L. Carlos Linares, *supra* note 33.

²⁰¹ COMPUTER CRIME, *supra* note 157, at 91.

²⁰² 18 U.S.C. § 2318(a)(1)(A) (2008).

designed to be affixed to, enclose, or accompany a phonorecord of a copyrighted sound recording or copyrighted musical work”²⁰³

In order for trafficking in counterfeit labels to apply to the products of a mixtape manufacturer, all elements enumerated in the statute must be satisfied. First, a defendant must be shown to have “knowingly” trafficked in counterfeit labels. This element of intent is a question of fact to be decided by the jury.²⁰⁴ Second, the labels in question must meet the statutory definitions of either “counterfeit”²⁰⁵ or “illicit”²⁰⁶ labels. Examples of counterfeit labels with regard to mixtapes include some or all of authorized products’ album covers, sleeves, jackets, and containers. If a mixtape features material from a current hit hip-hop album, the manufacturer might include some of the cover art from the legitimate CD on the packaging of the mixtape in order to draw attention to the material contained on the disc.²⁰⁷ Such actions encourage consumers to purchase mixtapes with the same material as the actual album but at a much lower cost.

Penalties for trafficking in counterfeit labels are similar to those for criminal copyright infringement.²⁰⁸ A defendant found guilty of counterfeiting “shall be fined under [Title 18] or imprisoned for not more than 5 years, or both.”²⁰⁹ Additionally, punishment for counterfeiting includes the confiscation and destruction of all materials related to the offense:

When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all counterfeit labels or illicit labels and all articles to

²⁰³ *Id.* § 2318(c)(3)(A).

²⁰⁴ *Morrisette v. United States*, 342 U.S. 246, 274 (1952) (“Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury.”).

²⁰⁵ 18 U.S.C. § 2318(b)(1) defines a “counterfeit label” as “an identifying label or container that appears to be genuine, but is not.” 18 U.S.C. § 2318(b)(1) (2007).

²⁰⁶ 18 U.S.C. § 2318(b)(4) defines an “illicit label” as “a genuine certificate, licensing document, registration card, or similar labeling component (A) that is used by the copyright owner to verify that a phonorecord . . . is not counterfeit or infringing of any copyright and (B) that is, without the authorization of the copyright owner, (i) distributed or intended for distribution not in connection with the copy, phonorecord, or work of visual art to which such labeling component was intended to be affixed by the respective copyright owner” 18 U.S.C. § 2318(b)(4) (2007).

²⁰⁷ Interview with L. Carlos Linares, *supra* note 33.

²⁰⁸ *Compare* 18 U.S.C. § 2319(b)(1) (2007) (“Any person who commits an offense under section 506(a)(1)(A) of title 17 (1) shall be imprisoned not more than 5 years, or fined in the amount set forth in this title, or both”), *with id.* § 2318(a)(1) (“Whoever, . . . knowingly traffics in a counterfeit label or illicit label affixed to, enclosing, or accompanying, or designed to be affixed to, enclose, or accompany (A) a phonorecord . . . shall be fined under this title or imprisoned for not more than 5 years, or both.”).

²⁰⁹ *Id.* § 2318(a).

which counterfeit labels or illicit labels have been affixed or which were intended to have had such labels affixed, and of any equipment, device, or material used to manufacture, reproduce, or assemble the counterfeit labels or illicit labels.²¹⁰

The importance of this provision to the protection of copyrighted materials is twofold. First, it protects future consumers from being misled by the infringing material currently in the possession of the infringer. Second, the destruction of equipment used to create the unauthorized material serves as a deterrent to the infringer from continuing his operation. Whether record labels would enforce such measures against mixtape DJs is uncertain. However, the remedy is available should they prevail under a trafficking-in-counterfeit-labels claim.

A third federal statute that may apply to mixtapes is trademark counterfeiting.²¹¹ To make their products look more professional, mixtape DJs may include the logos of the record companies whose music is included on the mixtape.²¹² The inclusion of these logos encourages confusion among consumers by giving the impression that the mixtape is manufactured or distributed by the label whose music is included.²¹³ A second, and equally common, instance of trademark counterfeiting with regard to mixtapes is the inclusion of the Parental Advisory label.²¹⁴ The genres of rap and hip-hop music often contain explicit lyrics and adult-themed content, and their increasing popularity during the 1980s prompted the record industry to yield to pressure from the Parents Music Resource Center to identify these recordings to consumers.²¹⁵ The RIAA developed the Parental Advisory label, which is affixed to albums that individual labels consider to contain explicit content.²¹⁶ The Parental Advisory label is a trademark owned and licensed by the RIAA, and its inclusion on unauthorized mixtapes is generally not allowed.²¹⁷

The Trademark Counterfeiting Act of 1984 created the crime of trafficking in counterfeit trademarks in relation to trafficking in counterfeit goods or services.²¹⁸ The statute makes it illegal to

²¹⁰ *Id.* § 2318(d).

²¹¹ *Id.* § 2320.

²¹² Interview with L. Carlos Linares, *supra* note 33.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ RIAA, Parental Advisory Label (“PAL”) Program, http://www.riaa.com/parentaladvisory.php?content_selector=#background (last visited Apr. 19, 2009).

²¹⁶ *Id.*

²¹⁷ Interview with L. Carlos Linares, *supra* note 33.

²¹⁸ 18 U.S.C. § 2320 (2007).

intentionally traffic[] or attempt[] to traffic in goods or services and knowingly use[] a counterfeit mark on or in connection with such goods or services, or intentionally traffic[] or attempt[] to traffic in labels . . . or packaging of any type or nature, knowing that a counterfeit mark has been applied thereto, the use of which is likely to cause confusion, to cause mistake, or to deceive²¹⁹

This is generally applicable to the manufacture or distribution of mixtapes containing infringing material. Unlike copyright infringement, there are no threshold requirements for an allegation of trademark counterfeiting, as a single use of a counterfeit mark constitutes a felony violation.²²⁰ In order to prevail under this statute, the prosecution must prove that the defendant: “(1) trafficked or attempted to traffic in goods or services; (2) did so intentionally; (3) used a counterfeit mark on or in connection with such goods and services; and (4) knew the mark was counterfeit.”²²¹ While the statute requires proof that the defendant intended to traffic in goods or services and knew that the marks used were counterfeit, there is no requirement that the defendant know that the mark in question was registered.²²²

The elements of trafficking in counterfeit trademarks can be applied to the sale of infringing mixtapes using the reported facts of DJ Drama’s case as an example.²²³ First, the prosecution will need to prove that DJ Drama “trafficked or attempted to traffic in goods or services.”²²⁴ “Traffic” means to “transport, transfer, or otherwise dispose of, to another, for purposes of commercial advantage or private financial gain.”²²⁵ The term encompasses all aspects of commercial manufacture, distribution, and sale, including possession of goods with intent to sell.²²⁶ DJ Drama has a legitimate

²¹⁹ *Id.* § 2320(a).

²²⁰ *United States v. Foote*, 413 F.3d 1240, 1246 (10th Cir. 2005) (“[T]rafficking in a single counterfeit good constitutes trafficking in ‘goods’ and is therefore a violation of the Counterfeit Trademark Act. Nothing in the language or context of the statute mandates a different result.”).

²²¹ *United States v. Habegger*, 370 F.3d 441, 444 (4th Cir. 2004) (citations omitted).

²²² *United States v. Infurnari*, 647 F. Supp 57, 58–59 (W.D.N.Y. 1986).

²²³ See *infra*. The discussion incorporates a hypothetical comparison of the known evidence relating to DJ Drama’s arrest. Any assumptions of evidence not publicly known are used only for illustrative purposes.

²²⁴ See *Habegger*, 370 F.3d at 444 (citations omitted).

²²⁵ 18 U.S.C. § 2320(e)(2) (2008).

²²⁶ *Id.* (“[T]he term ‘traffic’ means to transport, transfer, or otherwise dispose of, to another, for purposes of commercial advantage or private financial gain, or to make, import, export, obtain control of, or possess, with intent to so transport, transfer, or otherwise dispose of . . .”).

business enterprise in the state of Georgia that creates and sells mixtape CDs, which may or may not contain counterfeit trademarks.²²⁷ He is a well-known DJ, and his (often) self-titled merchandise can be found in outlets ranging from online retailers to stores such as Best Buy.²²⁸ DJ Drama's business dealings also satisfy the second element, that the trafficking be intentional. The "store" link on DJ Drama's official website allows users to purchase his mixtapes online.²²⁹

For the third element—use of a counterfeit mark in connection with goods or services—it is not enough, under the statute, to show that DJ Drama used a mark on the goods he was trafficking.²³⁰ It has to be proven that the mark was, indeed, counterfeit.²³¹ The label in question must be shown to have been affixed to the materials being manufactured or sold.²³² This can be shown either by exhibits purchased during an investigation that bear the marks under contention, or by evidence of using the marks in a manufacturing process, such as a design layout controlled by the defendant. It is in this third element that the absence of a threshold becomes most important: the prosecution must prove only once that a mark has been used.²³³ For mixtapes, testimony from representatives of the respective labels or the RIAA, or both, that a defendant had not been granted a license to use their marks would be the best proof that the marks in question were counterfeit.

The last element—knowledge that the mark used was counterfeit—is the most difficult to prove. The requisite showing of knowledge may be made through direct or circumstantial evidence.²³⁴ DJ Drama, who has been in the music business for years and has built a large network including record label executives and recording artists, should have gained at least a cursory knowledge of how his industry works.²³⁵ One of the recording industry's main revenue sources is intellectual property rights from songs,

²²⁷ An intention that the "trafficking" be in violation of the law is not a necessary element of the crime. *United States v. Dougherty* held that "[t]he requirement that a defendant must know that his act violates the law is ordinarily not an essential element of the offense." *United States v. Dougherty*, 763 F.2d 970, 974 (8th Cir. 1985).

²²⁸ Shapiro, *supra* note 38, at 31.

²²⁹ Drama—The Official Website, <http://www.gangstagrillz.com> (last visited Apr. 19, 2009).

²³⁰ See *United States v. Habegger*, 370 F.3d 441, 444 (4th Cir. 2004).

²³¹ *Id.*

²³² *Contra* *United States v. Giles*, 213 F.3d 1247, 1251 (10th Cir. 2000) ("Because the statute does not so provide, we are persuaded that section 2320 does not forbid the mere act of trafficking in counterfeit labels which are unconnected to any goods.").

²³³ *United States v. Foote*, 413 F.3d 1240, 1246 (10th Cir. 2005).

²³⁴ COMPUTER CRIME, *supra* note 157, at 111.

²³⁵ Interview with L. Carlos Linares, *supra* note 33.

so DJ Drama could be expected to know of the licensing schemes that make the industry function.²³⁶ Without proof of a license to use the marks, a jury could infer that DJ Drama knew that the trademarks used were counterfeit. Other evidence that may be used to prove knowledge includes “a defendant’s purchase or sale of the goods, manipulation of the goods, methods of delivery, packaging conventions, or an unusually low price.”²³⁷ Mixtapes, including those manufactured by DJ Drama, are sold through unusual retail channels,²³⁸ are packaged differently than label-released albums,²³⁹ and are offered at steep discounts.²⁴⁰

Penalties for trafficking in counterfeit goods are the harshest that a mixtape manufacturer may face.²⁴¹ An individual convicted of a first offense faces imprisonment of up to ten years or a fine of up to \$2,000,000, or both.²⁴² A subsequent conviction subjects the defendant to a prison term of up to twenty years or a fine of up to \$5,000,000, or both.²⁴³ In a situation where a defendant faces a simultaneous charge for criminal copyright infringement, any sentence imposed for trafficking in counterfeit goods will be in addition to, not concurrent with, the sentence imposed for the copyright charge.²⁴⁴

²³⁶ *Id.*

²³⁷ COMPUTER CRIME, *supra* note 157, at 23.

²³⁸ Shapiro, *supra* note 38, at 30 (“The CDs are packaged in thin plastic jewel cases with low-quality covers and are sold at flea markets . . .”).

²³⁹ *Id.*

²⁴⁰ *Id.* at 33 (“Mixtapes sell for anywhere from \$5 to \$10 on the street . . .”).

²⁴¹ See 18 U.S.C. § 2319(b)(1) (2008) (“Any person who commits an offense under section 506(a)(1)(A) of title 17-- (1) shall be imprisoned not more than 5 years, or fined in the amount set forth in this title, or both . . .”); 18 U.S.C. § 2318(a)(1)(A)(i) (2008) (“Whoever, . . . knowingly traffics in-- (A) a counterfeit label or illicit label affixed to, enclosing, or accompanying, or designed to be affixed to, enclose, or accompany-- (i) a phonorecord . . . shall be fined under this title or imprisoned for not more than 5 years, or both.”); 18 U.S.C. § 2320(a)(1) (2008) (“Whoever intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services . . . shall . . . be fined not more than \$2,000,000 or imprisoned not more than 10 years, or both . . .”).

²⁴² See 18 U.S.C. § 2320(a)(1) (2008).

²⁴³ *Id.*

²⁴⁴ *Id.* § 2319(a).

IV. EFFECT OF CRIMINALIZING MIXTAPES ON THE RECORDING INDUSTRY

The mixtape industry is thriving.²⁴⁵ However, the recording industry views mixtapes as a form of physical piracy,²⁴⁶ which in turn harms the labels that create and sell authorized music releases.²⁴⁷ Record labels argue that mixtape manufacturers exploit intellectual property they neither own nor pay to use.²⁴⁸ Even DJ Drama, currently the mixtape industry's most public figure, described aspects of his business as operating in "a legal gray area."²⁴⁹ However, while the record labels can legally enforce their intellectual property rights, the economics and potential public ramifications of such actions should make them pause before committing to such an aggressive course of action.

Before the record labels can seriously confront any issues posed by the mixtape industry, they need to examine practices within their own companies. From both a legal and public relations perspective, it does not work in a company's favor for the legal arm to support prosecution of the same people to whom the marketing arm gave the material in question.²⁵⁰ Promotions departments of record labels contributed to the rise of the mixtape industry by sending prominent mixtape DJs vocal tracks and beats to include on mixtapes for specific artists.²⁵¹ In most cases, these agreements were completed with a handshake, rather than with a formal contract written and approval from the legal department.²⁵² Courts may view these types of agreements as nonexclusive licenses, giving DJs the right to use—and profit from—mixtape tracks originating from a record label.²⁵³ Until the marketing and legal departments of record labels can reach a compromise between what they *can* achieve and what they would *like* to achieve, the

²⁴⁵ *Mixtapes*, *supra* note 2.

²⁴⁶ Sanneh, *supra* note 30, at E1 ("The [RIAA] makes no distinction between counterfeit CDs and unlicensed compilations like those that DJ Drama is known for.").

²⁴⁷ Siwek, *supra* note 161, at 1.

²⁴⁸ See Sanneh, *supra* note 30, at E1 ("Mixtapes are, by definition, unregulated. . .").

²⁴⁹ Shapiro, *supra* note 38, at 31.

²⁵⁰ *Id.* at 33 ("[A] label's marketing department wants to get its artists' songs in front of as many people as possible . . . [but] the business department wants to collect royalties.").

²⁵¹ See Jones, *supra* note 1, at 1E.

²⁵² Shapiro, *supra* note 38, at 30 ("In many cases, these arrangements are conducted with a wink and a nod rather than with a contract; the label doesn't officially grant the DJ the right to distribute the artist's songs or formally allow the artist to record work outside his contract.").

²⁵³ See *supra* notes 180-99.

labels will constantly fight external struggles originating within their own disjointed operations.

As a solution, labels' legal departments could draw up standard mixtape contracts for licensing an artist's songs to a DJ, complete with an indication of how many CDs may be distributed and how royalties to the artist are to be paid. While mixtape DJs may be hesitant to change a business model that has benefited them thus far, cooperation with the labels is a far better option than being subjected to state or federal prosecution. Under a cooperative licensing scheme, DJs may continue to create a level of hip-hop not often seen in commercial circles while at the same time benefiting the artists on whom their livelihoods depend.

Moreover, with the tastes of music consumers constantly changing and the labels struggling to satisfy those new tastes, such a substantial internal change will require a great deal of effort. The labels' main challenge in converting illegal mixtapes into legal products comes from the "immediate" atmosphere that surrounds the mixtape culture.²⁵⁴ The additional requirement of licensing will add a delay to the production of mixtapes, which DJs may resist. Allowing the chaos and promotional power of the mixtape to remain intact, while at the same time bringing it within the realm of legal conformity, may be difficult for the labels and mixtape DJs to accomplish. However, label cooperation with specific DJs and standard contracts that allow a DJ more creative control can help offset this drawback.

Executives at the major record labels not only need to remedy internal communication among departments, but also external communications between the company and its artists. Hip-hop artists understand the necessity of mixtapes to build credibility and maintain connections with their fan base, often giving a DJ permission to include their material on his latest release.²⁵⁵ Most hip-hop artists recognize that some of the things they say on a mixtape would be prohibited on a major-label release.²⁵⁶ Despite the creative incentive of mixtapes, most artists do not retain the rights to authorize the use of their music. Instead, that right almost always belongs to the label with which the artist is signed.²⁵⁷ Additionally, an artist may technically be violating the terms of his contract with the label by

²⁵⁴ Sanneh, *supra* note 30, at E1 ("[P]art of the fun is hearing rappers remake one another's songs and respond to one another's taunts; a great mixtape captures the controlled chaos that hip-hop thrives on.").

²⁵⁵ Boucher, *supra* note 19.

²⁵⁶ *Mixtapes*, *supra* note 2.

²⁵⁷ JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 132 (2d ed. 2006) ("[R]ecord labels typically require recording artists to sign contracts that state that their contributions are works made for hire, and (in the alternative) assign the copyrights in their sound recordings to the record company.").

performing and releasing recordings not controlled by the label.²⁵⁸ A DJ may raise an argument that the artist was an agent of the record label and therefore had the apparent authority to authorize use of the songs. However, the definitions of both “agency”²⁵⁹ and “apparent authority”²⁶⁰ negate this argument. Standard recording contracts provide that an artist is an employee and the products of his labor are works-for-hire, with the label retaining ownership in the copyrights.²⁶¹ Additionally, an artist allowing a mixtape DJ to use a label-owned song is not working on the label’s behalf, as required by agency law.²⁶²

While the majority of the hip-hop community lauds the mixtape as an essential part of their culture, a number of artists remain critical of the mainly unauthorized practice.²⁶³ Some artists prefer making label releases rather than mixtapes for the sole purpose of avoiding potential legal trouble.²⁶⁴ Still, others balk at the common declaration that mixtape DJs do not profit from their enterprises. Pimp C, half of the hip-hop duo UGK, has produced two mixtapes, and from that experience says he has realized that the lack of a paper trail makes it easy for DJs to invent sales figures that leave the artist without a cut of the profits.²⁶⁵ With artists divided over the advantages of mixtapes, it becomes even more critical for labels to communicate clearly with these employees. If an artist desires to release or participate on a mixtape, a label needs to know so that all contractual issues are negotiated prior to the tape’s release. Without such communication, the relationships between the labels and the artists will become further strained.

One option open to the labels is to create and distribute mixtapes themselves. Some labels have already taken steps in this direction by signing

²⁵⁸ T.M. Wolf, *America’s Most Policed Art Form: The Rise of the Informal Mixtape Economy*, POPMATTERS, May 14, 2007, <http://www.popmatters.com/pm/features/article/33987/americas-most-policed-art-form-the>.

²⁵⁹ RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (“Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

²⁶⁰ RESTATEMENT (SECOND) OF AGENCY § 8 (1958) (“Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other’s manifestations to such third persons.”).

²⁶¹ M. WILLIAM KRASILOVSKY & SIDNEY SHEL, *THE BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* 27 (10th ed. 2007).

²⁶² RESTATEMENT (THIRD) OF AGENCY § 1.01, *supra* note 259.

²⁶³ Shapiro, *supra* note 38, at 33.

²⁶⁴ *Id.* (“Killer Mike, an Atlanta rapper signed to Sony. . . [said] ‘I feel the amount of rhymes you have to write to put out a mixtape is the same amount you have to for an album . . . I’d rather put out albums over my own beats than use other people’s beats and have a problem later.’”).

²⁶⁵ *Id.*

DJs as artists in their own right.²⁶⁶ Others have begun releasing their own mixtapes. Universal Music Enterprises has created a series of legal mixtapes, the Lethal Squad Mixtapes, retailing for anywhere between \$5 and \$6.²⁶⁷ While it is uncertain whether a corporate mixtape will have the same viability as a street-level offering, the initial attempt by Universal shows that labels understand the importance of mixtapes. The first Lethal Squad Mixtape, released in July 2007, has sold poorly, which commentators attribute to the lack of a big-name DJ at the helm.²⁶⁸ However, major label entry into a mainly underground market will take time, and mistakes are sure to be made along the way. The overall advantage to a mixtape under a label's control is that the question of authorization no longer arises. Labels looking into the possibility of releasing their own mixtapes are well-advised to contract with a prominent DJ and allow for the creative freedom necessary to maintain the energy characteristic of underground mixtapes.

V. CONCLUSION

The thrust of mixtapes to the forefront of the music industry's fight against piracy highlights the many mixed signals they present: Are mixtapes illegal? If so, should law enforcement focus on federal or state laws as the best way to combat them? Why do record labels fail to have consistent practices throughout their departments? None of these questions has an easy answer. Some mixtapes may be illegal. However, no court has yet had the opportunity to formally declare them as such. Arresting DJ Drama under Georgia law shows a leaning toward prosecution under state laws, but the variation in both the statutes and the penalties applied pose a problem for consistent application. Federal copyright law addresses the problem of inconsistency, but offers its own obstacles by imposing numeric and monetary threshold requirements. Unless those requirements are reduced, bringing criminal copyright infringement charges against mixtape producers would prove difficult. Lastly, record label executives must decide whether to pursue prosecution or collaboration with mixtape DJs. Enhancing communication both among departments and with outside artists and DJs will be effective in helping labels address the problem of mixtapes. However, the actual implementation of that communication is a hurdle not easily cleared. It remains to be seen how, and whether, any of these questions will find a satisfying solution.

²⁶⁶ Boucher, *supra* note 19.

²⁶⁷ Ed Christman & Hillary Crosley, *Lethal But Legal*, BILLBOARD, Aug. 25, 2007, available at http://www.billboard.biz/bbbiz/search/article_display.jsp?vnu_content_id=1003627146.

²⁶⁸ *Id.*