

99 problems but a riff ain't one:
How sampling helps
copyright promote originality

A thesis submitted for the degree of
Doctor of Philosophy of
The Australian National University

© Copyright by Alan Hui 2017

All Rights Reserved

Statement of originality

This thesis is my own original work. It has not been conducted with any other person. I assert fair dealing exceptions for the uses of the following artistic works embodied as album cover art:

- The Avalanches – Since I Left You
- The Avalanches – Wildflower
- Sly and the Family Stone – There’s a Riot Goin’ On
- Gorillaz – Demon Days

Word count: 58,589 words

Alan Hui

Acknowledgements

I would like to acknowledge:

- My supervisory panel—Desmond Manderson, Dilan Thampapillai and Catherine Bond—and my previous supervisor Matthew Rimmer for bringing equal measures of intellectual heft and kind support;
- My academic friends and colleagues over the years at the ANU College of Law—including Michelle Worthington, Justine Poon, Peter Burnett, Camille Goodman, Carol Lawson, Alice Taylor, Sarah Bishop, Scott Joblin, Amy Constable, Johannes Krebs, Caroline Compton, Likim Ng and Bal Kama—for the many stimulating conversations, HDR morning teas and lunches, writing sessions, corridor chats and our inaugural HDR forum;
- My academic colleagues dotted around the world, especially Tami Gadir, Ragnhild Brøvig-Hanssen and Carys Craig, for generously sharing their research in music and law;
- The successive Higher Degree Research directors and support staff at the ANU College of Law—particularly Mark Nolan, Tim Bonyhady, Leighton McDonald and Codi De Veau, for their support through supervision changes, college funding support processes, administration and submission;
- The Australian Government for supporting this research with an Australian Research Training Program (RTP) Scholarship;
- My family for their support and advice, especially my parents who remind me through genetics that creation is incremental, not absolute;
- My piano teacher Lily Chang and school music teacher Pamela Herring who inspired a lifetime of music;
- Brad Sherman and Lionel Bently for inspiring the research question for this thesis; and
- The Avalanches for being my virtual writing partner and an inspiration for this thesis, especially Darren Seltmann for sharing his insights one fine day in Geelong.

Abstract

This legal policy thesis asks: Is sampling so inconsistent with copyright that it warrants a unique system? Sampling is the musical practice of arranging new recordings from existing recordings. Often, it conflicts with copyright, a legal system that aims to encourage progress and innovation, primarily by granting exclusive rights as incentives to create and distribute original works.

Two countervailing positions in existing literature articulate the conflict between sampling and copyright. The first views sampling as an appropriative practice that subverts copyright safeguards against unauthorised copying and adaptation. If this is true, then appropriation art cannot be reconciled with copyright law in any stable, lasting or meaningful manner. The second views copyright as an excessive restraint on creativity, a leash on artists. Scholars holding this position point to copyright's longstanding discrimination against sampling, evident from US copyright cases restricting 1990s hip-hop artists and admonishing one sampling artist with biblical commandment: 'Thou shalt not steal'.

This thesis argues that sampling can align with the purpose of copyright to encourage progress and innovation. It shows how sampling is consistent with originality, the core concept that separates the copyright wheat from the unprotected chaff. Originality calls not for the conjuring of material from thin air, but rather the rearrangement of prior works, genres and conventions. By locating rearrangement at the heart of originality, we can see that sampling can contribute to the body of original works and therefore the purpose of copyright.

In doing so, this thesis shows that sampling conflicts with the operation of copyright, as expressed in international treaty, national laws and industry conventions. While amending the operation of copyright is difficult, it is possible and indeed desirable to reform copyright to encourage rearrangement, not because it enables sampling, but because it promotes originality.

Building on the concept that the rearrangement of past material is the foundation of originality, this thesis explains two potential policy responses to promote

originality. Encouraging transformative use, as a conceptual foundation for fair use exceptions, can promote the rearrangement of existing original works into new original works. Likewise, *ex post* monitoring, as an alternative to *ex ante* licensing, can enable tolerated uses, incremental originality and distributed innovation at the scale of digital platforms.

Table of contents

I. INTRODUCTION: COUNTER POINT OR COUNTERPOINT?	9
Counter point between sampling and copyright's operation	9
Counterpoint between sampling and copyright's purpose	23
Framing the piece	29
II. MAIN THEME: ORIGINALITY AS REARRANGEMENT	37
Sampling and originality in <i>Vogue</i>	43
Originality beyond <i>ex nihilo</i>	49
Divisibility of original works	57
Sound recordings as lesser of equals	64
Reimagining originality as rearrangement	74
III. FIRST VARIATION: SOUND RECORDING AS REARRANGEMENT	80
Rearrangement in popular music recording	83
Gorillaz recording as rearrangement	90
Gorillaz remixing as rearrangement	97
More Gorillaz in the jungle	101
IV. SECOND VARIATION: INTEGRITY AS WHOLENESS OF ARRANGEMENT	108
Relationship between originality and integrity	109
Carl Orff and debasement	117
Pitbull and integrity	125
Bridge from originality to morality	132
V. DEVELOPMENT: TRANSFORMATIVE USE AND ORIGINALITY	135
Rearrangement in transformative use	138
Transformative use in the four factors	142
Mashups and the four factors	149
Bridge from infringement to subsistence	160
VI. DEVELOPMENT: <i>EX POST</i> MONITORING AND ORIGINALITY	163
Shortcomings of <i>ex ante</i> licensing for remixes	166
Content identification and <i>ex post</i> monitoring	173
<i>Harlem Shake</i> and distributed originality	187
From <i>ex-post</i> monitoring to originality	193
VII. RECAPITULATION: HARMONY BETWEEN SAMPLING AND ORIGINALITY	202
A reprise of counter point	202
Towards a revised theory of originality	208
VIII. CODA: ONE TALE OF 99 PROBLEMS	217

IX. BIBLIOGRAPHY OF REFERENCED WORKS	228
Judgements and court documents	228
Legislation, treaties and legislative documents	230
Other government documents	230
Journal articles	232
Books and chapters	234
News, magazine and non-audiovisual web sources	237
Audio	244
Audiovisual	246
Other	248
APPENDIX A: RESEARCH QUESTION AND THESIS STRUCTURE	250
Research question	250
Parts of the thesis	250
Chapters of the thesis	250

Table of figures

Figure 1: Album cover from <i>Since I Left You</i>	9
Figure 2: Photo of <i>The Sinking of the USS President Lincoln on 31st May 1918</i>	10
Figure 3: Remixing the Marsh image into an album cover	10
Figure 4: The Brasilia font	11
Figure 5: Main parts of this thesis	30
Figure 6: Structure of this thesis	32
Figure 7: Versions in the 40-year evolution of a horn hit	45
Figure 8: Horn hits in <i>Love Break</i> and <i>Vogue</i>	72
Figure 9: Album cover from <i>Demon Days</i>	81
Figure 10: Comparing fair use factors with select reasonableness factors	115
Figure 11: 44 years of rearrangement of <i>Tu vuò fà l'Americano</i>	128
Figure 12: Incentives for transformative use	141
Figure 13: Transformative value of mashups	152
Figure 14: YouTube comments, <i>The Harlem Shake v1 (TSCS original)</i>	191
Figure 15: Album covers from <i>There's a Riot Goin' On</i> and <i>Wildflower</i>	203
Figure 16: From rights and exceptions to a chain of originality	211
Figure 17: Chronology of select versions of <i>99 Problems</i>	217

I. Introduction: Counter point or counterpoint?

Counter point between sampling and copyright's operation

The story of The Avalanches forms a précis to the clash between sampling and copyright. At the turn of the millennium, this band of musicians was embarking on their maiden voyage. This musical odyssey led The Avalanches through many mixtape iterations, culminating in an album entitled *Since I Left You*. Appropriation permeated not only the musical philosophy of The Avalanches, but also their words, sights and sounds. Even the name of the band was appropriated from an Australian band that released the 1963 surf-rock album *Ski Surfin'*.¹

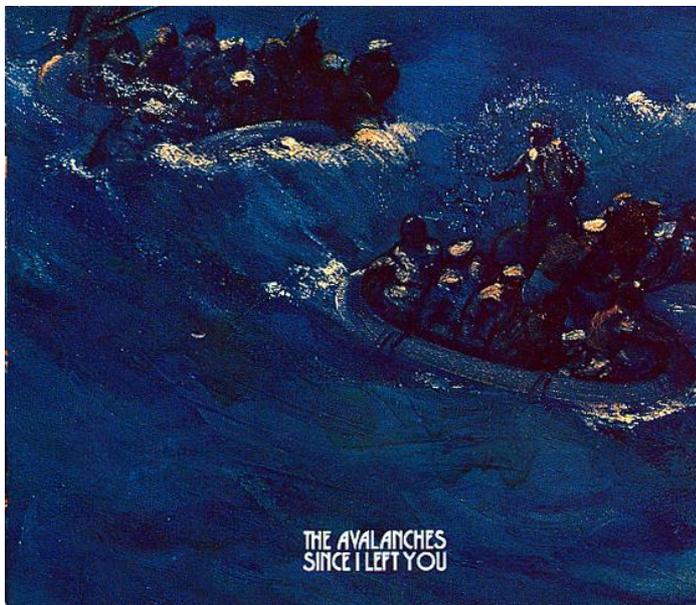


Figure 1: Album cover from *Since I Left You*²

Since I Left You's album cover counters the common caution against judging a text by its cover. Here, appropriation on the cover points to appropriation within. The cover appropriates and transforms a photo of a painting of sinking warship USS President Lincoln by early twentieth century artist Fred Dana Marsh. In *The Sinking of the USS President Lincoln*, a procession of lifeboats retreats from the sinking ship. Size contrasts between the towering ship and lifeboats and scattered positions of the lifeboats and their passengers speak to the danger and chaos of

¹ The Avalanches. *Ski Surfin'*, (Warner Bros. Records, 1963)

² The Avalanches. *Since I Left You*, (Modular, 2001)

war. The *USS President Lincoln* looms in the horizon, covering the width of top of the painting, while tiny ropes drape the port side of the ship to lifeboats like spider webs. Likewise, waves stretch down from the sinking ship, towering over lifeboats that span from the *USS President Lincoln* to the foreground.



Figure 2: Photo of *The Sinking of the USS President Lincoln on 31st May 1918*³

Select (as marked in Fig. 2)

Flip

Recolour and reshade



Figure 3: Remixing the Marsh image into an album cover

The cover of *Since I Left You* transforms the Marsh image, telling a different story of separation and reaching towards others. The *USS President Lincoln* is nowhere

³ Frederick Dana Marsh. *The Sinking of the USS President Lincoln on 31st May 1918*, (Naval History and Heritage Command, 1920), <<http://www.history.navy.mil/our-collections/photography/wars-and-events/world-war-i/incidents--1918/uss-president-lincoln-torpedoed-and-sunk-by-u-90/uss-president-lincoln.html>>

to be seen; gone too are most of the lifeboats. Also excluded are the muted greys and mustard hues that shroud the horizon and evoke the fog of war in the earlier version. What remains is the story of a wave separating two lifeboats, with one person in each lifeboat reaching towards one another. The overtones of wartime are replaced by a smaller narrative of the separation of two lifeboats. These amendments are approximated above for indicative purposes.

In true appropriation art fashion, even the font of the album cover for *Since I Left You* was rearranged and laden with references. In addition to wider spacing between letters, a light shadow applied to the bottom right of letters helps them stand out from the image.⁴ The album cover mixed the extracted image with the 1994 Brasilia font developed by Cologne-based type design house Brendel Informatik. The combination of a German font with the image is potentially controversial and subversive, given the *USS President Lincoln's* passage through World War One. Purchased in 1906 by German firm Hamburg America Line, and seized by the United States in 1917, it was fatally torpedoed by a German submarine in 1918.⁵



Figure 4: The Brasilia font⁶

With *Since I Left You*, The Avalanches broke the mold of earlier sampling artists. As their album cover implies, The Avalanches were not bound by previous versions or existing music genres, opting instead to straddle and transcend. Though their works were original, their sampling process was no more remarkable than the

⁴ The common term for character spacing in typography is kerning

⁵ See Alvin B Feuer. 'The Death of the *USS President Lincoln*', *The U.S. Navy in World War I: Combat at Sea and in the Air*, (Greenwood Publishing Group, 1999), 55-62. See also the account of the sinking by the *USS President Lincoln's* Commanding Officer. Commander P. W. Foote. 'Narrative of the "President Lincoln", (1922), 48(7) *Proceedings of the United States Naval Institute* 1073 (online),

<<https://archive.org/stream/proceedingsofuni192248712unit#page/n9/mode/2up>>

⁶ Brendel Informatik. *Brasilia* (font), (Cologne, c1994)

already common use of instruments or studio engineering.⁷ Their choice of sounds was eclectic, reflected in an extensive use of small samples, creating new musical stories and settings. Though based upon sampling, their musical practice was one grounded in research, selection and arrangement. As one music journalist recounted, 'each member of the band owned a sampler and would spend hours raiding op shop record bins. They'd make tapes of prospective samples to play to each other.'⁸

Though based in late 1990s Melbourne, The Avalanches' collaboration through time and space was the essence of their creative philosophy. In the traditional musical vernacular, one might describe their use of partial, transposed and decelerated melodic and rhythmic phrases to construct new harmonies and rhythms. But the creative whole exceeded the sum of its sonic parts. Through the selection and rearrangement of samples, The Avalanches formed a critically and popularly acclaimed album. What made *Since I Left You* original was not use of samples alone but also rearrangement of those samples in a new context.

The Avalanches also brought the practice of sampling to the foreground of Australian musical culture. Though The Avalanches were by no means the first Australian sampling artists, 1990s Australia did not possess the critical mass of musical sampling enjoyed by the US through hip-hop, or Jamaica through reggae and dub.⁹ Sydney's hip-hop group Sound Unlimited and emerging hip-hop artist MC Opi were two of a small hip-hop cohort in Australia. One could argue that the absence of a strong Australian hip-hop or other sampling culture freed The Avalanches to build their own constellation of music samples. By drawing from

⁷ 'During the 1970s, hip-hop DJs used the turntable as an instrument that could manipulate sound, and thus transformed the record player from a technology of consumption to one of musical production.' Kembrew McLeod and Peter DiCola. *Creative License: The Law and Culture of Digital Sampling*, (Duke University Press, 2011), (hereinafter McLeod and DiCola, *Creative License*), 4

⁸ Double J. *The Avalanches* (online), (ABC, 2014), <<http://doublej.net.au/programs/jfiles/the-avalanches>> (hereinafter 'Double J, *The Avalanches*')

⁹

music not typically sampled in these genres, The Avalanches broke out of sample choice conventions in these genres.

As foreshadowed by the borrowed named of the band and the nostalgic album name, the album begins with a selection of mostly forgotten songs from the 1960s and 1970s. The first two minutes of the album feature samples from no fewer than seven recordings from these two decades; some of these samples themselves appropriate from earlier songs.¹⁰

Opening the album is a pitch-lowered sample of energetic chatter and funk music from the outro of Rose Royce's *Daddy Rich*, transitioning from party conversation to music.¹¹ On the soundtrack for the film *Car Wash*, the sampled section operates as a transition between *Daddy Rich* and dialogue from the film, showing the end of one work can herald the beginning of the next. This first sample gives way to a lowered, rubato and arpeggiated guitar melody from prolific American guitarist Tony Mottola's *Anema E Core*, which is itself a cover of the same song recorded and released by 1950s Neapolitan tenor Tito Schipa.¹² A vocal sample from the film *Club Med* cues in a sped-up and pitch-raised vocal harmony from doo-wop group The Duprees' *The Sky's The Limit*.¹³ A sparse, swung drum beat from Lamont Dozier's *Take Off Your Make-Up* is layered to provide more depth to the percussion.¹⁴ A string arrangement from Tony Mottola's *By the Time I Get to Phoenix*, itself a cover of Johnny River's recording of the same name, is also added to the mix.¹⁵

¹⁰ See Bandstand. 'Every Sample From The Avalanches Since I Left You', *YouTube* (online), (28 June 2017), <<https://www.youtube.com/watch?v=MFEZiMyfSYI>>. See also Rickydowns Kanal. 'The Avalanches – Since I Left You (The Samples)', *YouTube* (online), (8 September 2009), <<https://www.youtube.com/watch?v=zehvICx-Rsg>>

¹¹ Rose Royce. *Car Wash*, (Geffen Records, 1976)

¹² Tony Mottola. *Roman Guitar, Vol. 2*, (Command, 1962)

¹³ Bob Giraldi. *Club Med*, (Lorimar Telepictures, 1986). The Duprees. *The Sky's The Limit*, (Legacy Music, 1968)

¹⁴ Lamont Dozier. *Take Off Your Make-Up*, (ABC Records, 1973)

¹⁵ Tony Mottola. *Warm, Wild & Wonderful*, (Project 3 Total Sound Stereo, 1968)

The first two minutes also features one of two vocal samples that provide the album's name. The Main Attraction's *Everyday* provides a loop of slightly husky, tenor vocals, with a melody spanning only four notes and the lyrics 'Since I met you, I found the world so new, e- e- e- everyday' at a higher pitch and speed.¹⁶ The *Everyday* sample is echoed by the sample that ends the album, a vocal couplet from Mormon family band The Osmonds' *Let Me In*: 'But I just can't get you, since the day I left you'.¹⁷ Together, the two samples frame the album as a story of a relationship, from meeting to leaving one another. Despite its central importance to the album, the *Everyday* vocal sample was added as an afterthought and not originally envisioned as part of the album. As band member Robbie Chater said:

"That piece of music was actually finished for quite a long time without a vocal and it was just luck that one day you happen to pick up this record and the vocal fits with the music," Chater said. "If that hadn't have happened, that song wouldn't have been what it was, the album would have had a different name, nothing might have been the same if those records didn't fit together."¹⁸

The opening two minutes of the album are rounded out with a sample from Klaus Wunderlich's *Let's do the Latin Hustle*.¹⁹ This sample features a mellow Moog synthesizer melody with and subtle synthesised strings. In *Since I Left You*, they are lowered in pitch, slightly slowed and mixed with the string arrangement from the second Mottola sample. The congas in the sample also contribute to the percussive syncopation in *Since I Left You*.

The Avalanches' reliance on sampled instrumentals, vocals and sounds did not prevent music experts from recognising the originality in their rearrangement. One critic for music magazine *NME* compared The Avalanches to sampling contemporaries Daft Punk, who also rearranged samples of hits from decades past

¹⁶ The Main Attraction, *And Now The Main Attraction*, (Tower, 1967)

¹⁷ The sample reorders lyrics from the original couplet. 'Ever since the day I left you, I try but I just can't get you out of my mind.' The Osmonds. *The Plan*, (MGM, 1973)

¹⁸ Double J, *The Avalanches*

¹⁹ Klaus Wunderlich And His New Pop Organ Sound. *Südamericana 3 - Latin Festival*, (Telefunken 1976). This is a cover of a song from the preceding year. Eddie Drennon B.B.S. Unlimited. *Let's Do The Latin Hustle*, (Friends & Co., 1975)

to create new dance music, describing *Since I Left You* as a ‘joyous, kaleidoscopic masterpiece of sun-kissed disco-pop’.²⁰ Another critic opined, ‘The Avalanches have managed to build a totally unique context for all these sounds, while still allowing each to retain its own distinct flavor. As a result, *Since I Left You* sounds like nothing else.’²¹

Music industry charts and awards also speak to the cultural and commercial impact of *Since I Left You*. The Australian Recording Industry Association (ARIA) recognised The Avalanches in 2001 with nine nominations. The Avalanches ultimately won ARIA awards for Producer of the Year, Best Dance Release, Breakthrough Artist for the album *Since I Left You*, as well as Breakthrough Artist for their single *Frontier Psychiatrist* which featured in the album. *Since I Left You* also received awards from MTV Europe Music Award and best live act by the UK’s *Muzik* magazine.²² The album also broke the Top 30 on the ARIA Albums Chart and listed twelfth on the VG-lista Top 40 Albums Chart in Norway.

Even seventeen years after its release, *Since I Left You* continues to make its mark. Recognition has sometimes taken the form of imitation. There have been live performances of the album by Sydney artist Jonti and his collaborators at the 2013 OutsideIn Festival and the 2014 Vivid Festival. The Avalanches encouraged Jonti’s

²⁰ Christian Ward. ‘Avalanches: Since I Left You’, *NME* (online), (12 September 2005), <<http://www.nme.com/reviews/avalanches/4828>> (hereinafter ‘Ward, ‘Avalanches: Since I Left You’’)

²¹ Matt LeMay. ‘The Avalanches’, *Pitchfork* (online), (31 October 2001), <http://web.archive.org/web/20080618093953/http://www.pitchforkmedia.com/article/record_review/15136-since-i-left-you> (hereinafter ‘LeMay, ‘The Avalanches’’)

²² Lars Brandle and Christie Eliezer. ‘Dance Surges Down Under’, *Billboard*, (24 November 2001), <<http://larsbrandle.com/dance-surges-down-under>>, 90

versioning, providing vocal samples and sampled records.²³ Remi also created a rap cover of *Since I Left You* for Triple J's *Like a Version* segment in 2013.²⁴

However, while the creation, release and cultural impact of *Since I Left You* is a tale of celebration, The Avalanches' experience with copyright is another story. In this case, the operation of copyright failed to provide incentive to creators, burdening The Avalanches and their record label Modular Records. This is particularly ironic, given ARIA recognised the importance of *Since I Left You* with awards but its recording industry members contributed to the album's sampling clearance woes. Perhaps, the experience would have been different if The Avalanches had been signed to a major record label, rather than the independent Australian label Modular Records.

Copyright burdened The Avalanches with staggering sample licensing costs and extensive delays. One band member estimated licensing costs exhausted all revenue generated from the distribution of the album.²⁵ Copyright licensing also delayed the release of the album by almost two years.²⁶ The delay reflected The Avalanches' diligent effort in seeking sampling licences for an estimated 3,600 samples in *Since I Left You*. In an interview, band member Robbie Chater recalled, 'Squinting back, most tracks had at least two S2000 programs full of samples... That's 100 keygroups per program, one sample per keygroup, multiplied by 18 songs'. This effort stands apart as a rare attempt to seek copyright permission for

²³ As Jonti notes, 'Robbie and Tony gave me a bunch of vocal stems [samples] and they gave me a lot of records that are on there'. Darren Levin. 'Was the Avalanches' *Since I Left You* too good to follow up?', *The Guardian* (online), (23 May 2014), <<http://www.theguardian.com/music/australia-culture-blog/2014/may/23/was-the-avalanches-since-i-left-you-too-good-to-follow-up>> (hereinafter 'Levin, 'Was the Avalanches' *Since I Left You* too good to follow up?')

²⁴ Remi. 'Remi covers The Avalanches "Since I Left You" for Like A Version', *YouTube* (online), (ABC, 21 November 2013), <<https://www.youtube.com/watch?v=2Js1bNb-eqA>>

²⁵ Personal communications with Darren Seltmann of The Avalanches, *Remix Culture* (conference), (Deakin University, July 2012)

²⁶ 'As far as the "band" (sample sultans Robbie Chater and Darren Seltmann, plus their mates) are concerned, this record is two years old'. Ward, 'Avalanches: *Since I Left You*'

thousands of uses embodied in a single album.²⁷ The delay of such an original, popular and critically acclaimed album is concerning and points to the conflict between sampling and the operation of copyright.

Beyond deterring The Avalanches, copyright licensing may have harmed the originality of the album. The Avalanches had to make compromises to exclude samples that were difficult to clear, removing samples from an earlier mixtape to yield the album as released. As one interviewer noted, *Since I Left You* is

‘in many ways a diluted version of the “Gimix” mix tape - an hour-long cut-up of tracks as diverse as The Smiths’ “The Boy With The Thorn In His Side” and Cyndi Lauper’s “Girls Just Want To Have Fun” that The Avalanches created as the perfect party soundtrack, and which became the blueprint for “Since I Left You”. Copyright laws being what they are, the finished product is a different beast, with subtler samples, a slicker flow, still crazy but not as brilliantly shambolic as its predecessor.’²⁸

These costs, delays and compromises suggest that copyright discouraged the creation and distribution of an original album, and a new way of making music. Unlike some appropriation artists, The Avalanches did not sample with the intent or purpose of rebelling against copyright law. They were simply making music. As band member Robbie Chater notes, The Avalanches did not even feel that their status as sampling artists preceded their role as musicians and recording artists: ‘Sometimes I feel like so much of the focus is on the fact that it’s all samples that I get like, “Well, what about the songs?” I think that people really just respond to the atmosphere and the feeling.’²⁹ Chater’s intended emphasis on the atmosphere and feeling of the songs is borne out in the listening, as one critic notes:

‘And while many of these songs rely heavily on the repetition of beats and samples, no single part of the record is allowed to stagnate. Something is always being mixed up—a sample transposed up or down a few steps, a beat chopped up into little pieces and seamlessly restructured, an unexpected vocal sample popping up

²⁷ Mark Pytlik. ‘The Avalanches’, *soundonsound* (online), (November 2002), <<http://www.soundonsound.com/sos/nov02/articles/avalanches.asp>> (hereinafter ‘Pytlik, ‘The Avalanches’)

²⁸ *Ibid*

²⁹ LeMay, ‘The Avalanches’

out of nowhere before being swallowed up by the massive sound the Avalanches have concocted.’³⁰

Band member Darren Seltsman reinforces the focus on creation of original songs in their process and philosophy for *Since I Left You*: ‘We use a collection of samples that will, in the end, be a new song. It’s, you know, not so much breathing life into old songs, but it’s creating something new. It’s creative. You’re not just ripping something off.’³¹

The Avalanches’ sample clearance agent attests to the discrimination they faced when seeking sample clearances. Pat Shannahan is nicknamed The Detective for her skill in identifying copyright owners for obscure samples, and has negotiated copyright licences for samples used by The Avalanches and other prominent music artists, including the Beastie Boys and Beck. She recounts:

‘Some of the things [used by the] Avalanches were just snippets of things. I’d say, “Come on, it’s just a snippet. It’s just used once.” I’d try to get people to be reasonable. A major will absolutely not agree to a buyout if it’s just one second. They absolutely want to participate with everything down the line. So you have to deal with that. You try to get them to be as reasonable as possible, and—let me tell you—sampling is where they are the most unreasonable. There’s some people out there with some real bad attitudes. They’re not music people.’³²

The Avalanches’ experience provides an opportunity to revisit copyright law’s discrimination against sampling artists, outside of the usual sampling genres and cultures that existing copyright literature discusses. The Avalanches were not part of the US hip-hop community that had been cautioned against sampling freely by 1990s judgements against hip-hop artists who sampled without permission. Nor were The Avalanches influenced by growing up in Jamaica in established reggae and dub communities. In fact, sampling was rare in their Melbourne home and,

³⁰ Ibid

³¹ Phillippe Charluet. *The Avalanches* (film), (ABC Videos, 1999)

³² Jonny Coleman. ‘Meet The Woman Who Helps The Beastie Boys, Beck And The Avalanches Clear Their Samples’, *LAist* (online), (19 October 2016), <http://laist.com/2016/10/19/pat_shannahan_detective_sampling_interview.php> (hereinafter ‘Coleman, ‘Meet the Woman Who Helps The Beastie Boys, Beck And The Avalanches Clear Their Samples’”)

more broadly, Australia at the time. In the absence of a well-versed sampling community, The Avalanches gorged innocently on samples, only to discover the copyright's reaction to such extensive sampling. As Robbie Chater said, 'We had no idea the record would get such a wide-scale release so we saw no need to keep track of what we were using – we were definitely guilty of harbouring a “No-one's going to listen to it anyway” sort of attitude’.³³ It is safe to say that two years of copyright clearance delay and costs, along with international popular acclaim, changed this attitude.

Having revisited the experience of The Avalanches, it is natural to question: How have copyright's operation and creative musical practice strayed so far apart?

Some view sampling as a cultural practice, an aural variety of the long tradition of appropriation art, that subverts the logic of copyright law. As Emily Myers describes, appropriation art is the 'practice or technique of reworking images or styles contained in earlier works of art, especially (in later use) in order to provoke critical re-evaluation of well-known pieces by presenting them in new contexts, or to challenge notions of individual creativity or authenticity in art.'³⁴ Others claim the centrality of appropriation in cultural production poses a problem for the operation of copyright as 'appropriation art virtually renders the [US] Copyright Act's insistence on creativity and originality obsolete.'³⁵ If appropriation art subverts copyright's notions of originality or individual creativity, sampling cannot be reconciled with copyright law in any stable, lasting or meaningful manner.

Though not the focus of this thesis, we should acknowledge that some sampling is intended to conflict with copyright. Through interviews with mashup and remix artists, Aram Sinnreich traces active resistance against copyright, finding 'ample

³³ Pytlik, 'The Avalanches'

³⁴ Emily Myers. 'Art on Ice: The Chilling Effect of Copyright on Artistic Expression' (2007), 30 *Columbia Journal of Law and Arts* 219, 220

³⁵ Lynne Greenway. 'The Art of Appropriation: Puppies, Piracy and Post-modernism' (1992), 11 *Cardozo Arts & Entertainment* 1, 33

evidence that configurable music engenders resistance to musical regulation at every intersection of institutional site... and community site.’³⁶ Negativland and Biz Markie are foremost examples of sampling artists openly subverting copyright, amongst other legal and cultural institutions; the latter artist titled his fourth studio album *All Samples Cleared!*, implying samples in previous albums were used without copyright permission.³⁷ Such subversion continues in the digital age, with some artists obscuring samples to confound content identification software used to discover unauthorised sampling.³⁸

Composer Johannes Kreidler provides a particularly infamous example of pitting sampling against copyright. He formed his sound recording *Product Placement* by mixing 70,200 samples into a recording spanning a mere 33 seconds. The clash between copyright and sampling came to a head when Kreidler attempted to clear the samples with the German recording industry rights clearinghouse GEMA. The system at the time required a separate paper form for each of the 70,200 samples. Chaos and ridicule ensued when Kreidler delivered 70,200 forms by truck to a GEMA office in Berlin.³⁹ Kreidler proudly refers to the attempted registration of *Product Placement* as piece of performance art, taking bureaucracy to new heights:

‘For me, music never exists alone; a composer must always deal with interrelationships. Music deals with technology and the politics of technology, with consumer behaviour, and the cultural and economic value of art. These things play a role in my creative work; I use them as artistic material. In this musical composition, the essay, the sculpture, the performance, and the entire discussion surrounding are materials: One could say it’s a multimedia theatre work.’⁴⁰

³⁶ Configurable music is Sinnreich’s term for sampling and other forms of music appropriation. Aram Sinnreich. *Mashed Up: Music, Technology, and the Rise of Configurable Culture*, (University of Massachusetts Press, 2010) (hereinafter ‘Sinnreich, *Mashed Up*’), 182

³⁷ Biz Markie. *All Samples Cleared*, (Cold Chillin’, 1993)

³⁸ Sinnreich, *Mashed Up*, 130

³⁹ Johannes Kreidler. ‘Person’, *Johannes Kreidler Composer* (online), (c2015), <<http://www.kreidler-net.de/english/CV.htm>>

⁴⁰ Johannes Kreidler. ‘Johannes Kreidler GEMA-Aktion product placements Doku’, *YouTube* (online), (27 February 2009), <http://www.youtube.com/watch?time_continue=6&v=EAptRZlwziA>, 1:48

Equally, many cultural studies and legal scholars view copyright as a legal leash on creative contributors. At the turn of the millennium, Siva Vaidhyanathan lamented that the 'practice of sampling without permission has all but ended'.⁴¹ He observed that this was a consequence of *Grand Upright v Warner Bros. Records*, a 1991 US judgement which ruled that Biz Markie's use of a sample from Gilbert O'Sullivan's sound recording of *Alone Again (Naturally)* had infringed O'Sullivan's copyright.⁴² Shortly after the judgement, a lawyer for O'Sullivan characterised sampling as plain theft: 'Sampling is a euphemism that was developed by the music industry to mask what is obviously thievery... This represents the first judicial pronouncement that this practice is indeed theft.'⁴³

Some go as far as to characterise copyright's feud against music sampling as a matter of racial discrimination, targeting genres of sampling strongly associated with African-American artists. Dubin cites *Campbell v Acuff-Rose* as an example of copyright law's discriminatory treatment against rap, which 'springs directly from the urban Black ghetto'.⁴⁴ Greene goes further, arguing in

'the arena of music, there is no need to assume mass appropriation and disparate treatment of black composers and performers. Time after time, foundational artists who developed ragtime, blues, and jazz found their copyrights divested, and through inequitable contracts, their earnings pilfered.'⁴⁵

⁴¹ Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*, (New York University Press, 2003) (hereinafter 'Vaidhyanathan, *Copyrights and Copywrongs*'), 15

⁴² *Grand Upright v Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991). Gilbert O'Sullivan. *Gilbert O'Sullivan*, (Music For Pleasure, 1978)

⁴³ Chuck Philips. 'Songwriter Wins Large Settlement in Rap Suit: Pop music: Following a court ruling, Biz Markie and Warner Bros. agree to pay Gilbert O'Sullivan for rapper's "sampling" of "Alone Again (Naturally)."', *Los Angeles Times* (online), (1 January 1992), <http://articles.latimes.com/1992-01-01/entertainment/ca-1136_1_biz-markie>

⁴⁴ Stevin C. Dublin. *Arresting Images: Impolitic Art and Uncivil Actions*, (Psychology Press, 1994), 304. *Campbell v Acuff-Rose Music*, 510 U.S. 569 (1994) (hereinafter '*Campbell v Acuff-Rose*')

⁴⁵ Kevin J. Greene. 'Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues', (2008), 16(3) *American University Journal of Gender, Social Policy & the Law* 365, 370

The fears of Vaidhyathan and others about copyright's stance against sampling are amplified by the volume of uses in the Internet age. This age has seen an explosion of unauthorised uses of prior sound recordings distributed on online music and video content platforms such as SoundCloud and YouTube. Unauthorised uses in the digital age permeate private homes into the public sphere of the Internet, potentially increasing visibility of such uses. Certainly, the US Sixth Circuit's infamous opinion in *Bridgeport v Dimension Films* would validate Vaidhyathan's fears.⁴⁶ The opinion features this passage, which is oft-quoted as an example of copyright's unfair treatment of sampling:

'To begin with, there is ease of enforcement. Get a license or do not sample. We do not see this as stifling creativity in any significant way. It must be remembered that if an artist wants to incorporate a "riff" from another work in his or her recording, he is free to duplicate the sound of that "riff" in the studio. Second, the market will control the license price and keep it within bounds.'⁴⁷

Despite its infamy, the *Bridgeport v Dimension Films* authority is still renewed by some US circuit courts. For example, Silverman CJ's dissent in *VMG Salsoul v Ciccone* applied the *Bridgeport v Dimension Films* position:

'The plaintiff alleges that the defendants, without a license or any sort of permission, physically copied a small part of the plaintiff's sound recording — which, to repeat, is property belonging to the plaintiff — and, having appropriated it, inserted into their own recording... In any other context, this would be called theft. It is no defense to theft that the thief made off with only a "de minimis" part of the victim's property.'⁴⁸

More recently, video mashup artist Elisa Kreisinger has drawn attention to the threat of extensive copyright subsistence and incomplete copyright exceptions to remixes. Self labelled the Pop Culture Pirate, Kreisinger has found many of her creations taken down by YouTube. Though she fights YouTube takedowns, she has

⁴⁶ *Bridgeport Music, Inc v Dimension Films*, 410 F.3d 792 (2005) (hereinafter '*Bridgeport v Dimension Films*')

⁴⁷ *Ibid*, 801

⁴⁸ *VMG Salsoul, LLC v Ciccone*, 824 F.3d 871 (9th Cir. 2016) (hereinafter '*VMG Salsoul v Ciccone* (9th Cir.)'), 888

also taken to Vimeo as an alternative platform for hosting her videos. Some of Kreisinger's works are intended to recontextualise parts of work into new wholes. Her work includes remixes of footage from television series *The Real Housewives* and *Sex In The City*, selectively editing their suburban and metropolitan stories from scenes into queer stories. Likewise, she remixes excerpts from television series *Mad Men* to highlight gender inequalities in the period drama.

Copyright's insistence that creators seek permission to sample has sometimes rewarded inspiration with perspiration. This is ironic because copyright has sometimes denied protection for mere effort, what courts sometimes refer to as 'sweat of the brow'.⁴⁹ Rewarding original works with red tape or towering walls is counter to copyright's purpose. This thesis traverses many examples of this ironic outcome, including the experience of The Avalanches which opened this chapter.

The countervailing views collected above challenge the application of copyright to sampling and other appropriation practices. In practice, copyright typically seeks permissions for uses of prior creations, and artists commonly sample and appropriate without permission. Copyright operates by deterring copying and other uses. By starting with the copying of prior material, sampling is counter to the operation of copyright. If this view is accepted, then fundamentally sampling and copyright will never be kindred souls.

Counterpoint between sampling and copyright's purpose

This thesis observes the twofold relationship between sampling and counterpoint. In Baroque music vernacular, counterpoint refers to rhythms and melodies of contrasting or independent shapes that nonetheless combine to form harmony. Sampling continues this tradition of counterpoint by rearranging melodies and rhythms from musical works and sound recordings to form new harmonies. Although the creative practice of sampling and the operation of copyright often take contrasting paths, there is some counterpoint in their purposes.

⁴⁹ For an authoritative case rejecting sweat of the brow, see *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) HCA 14 (hereinafter '*IceTV v Nine Network*'). For an earlier case accepting sweat of the brow, see *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* (2002) FCAFC 112

Sampling is a relatively new practice in the development and history of music but its roots stretch deep into the history of appropriation art. Appropriation provides the foundation for several branches of creation beyond music. Kembrew McLeod and Rudolf Kuenzli note that '[w]hether we are talking about Dada, Cubism, Futurism Surrealism, Situationism, or Pop Art, creators across artistic movements have long acknowledged the centrality of appropriation in their creative practices.'⁵⁰ Likewise, Henry Jenkins notes 'the story of American arts in the 19th century might be told in terms of the mixing, matching and merging of folk traditions taken from various indigenous and immigrant populations'.⁵¹ Martha Woodmansee provides one further example from the literary world: 'From the Middle Ages right down through the Renaissance new writing derived its value and authority from its affiliation with the texts that preceded it, its derivation rather than its deviation from prior texts.'⁵²

Brianna Chesser points out that copyright law has ignored the role of appropriation art in western musical practice: 'The law has long disregarded the social context of music-making, where "borrowing" or appropriation was traditionally sanctioned in western musical practices, through the use of compositional techniques such as theme and variation, the *cantus firmus* mass setting, troping and certain types of improvisation.'⁵³

Several examples throughout the history of western music suggest that rearrangement is an inseparable part of musical creation. Culturally, these new creations are recognised as original contributions to their respective cultures,

⁵⁰ Kembrew McLeod and Rudolf Kuenzli, *Cutting Across Media: Appropriation Art, Interventionist Collage, and Copyright Law*, (Duke University Press, 2011), 1

⁵¹ Henry Jenkins. *Convergence Culture: Where Old and New Media Collide*, (NYU Press, 2006), 135

⁵² Martha Woodmansee, 'On the Author Effect: Recovering Collectivity', in Martha Woodmansee and Peter Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature*, (Duke University Press, 1994), 17

⁵³ Footnotes omitted. Brianna Chesser. 'The Art of Musical Borrowing: A Composers Guide to the Current Copyright Regime Five Years on from Larrikin' (2015), 37(1) *Musicology Australia* 60 (hereinafter 'Chesser, "The Art of Musical Borrowing"'), 60-61

despite their rearrangement of earlier creations, genres and movements. For example, composers have long rearranged their own arrangements in the form of theme and variations. As Desmond Manderson writes: 'From the Bach Chaconne and the *Goldberg Variations*, to the symphonies and late piano sonatas of Beethoven, to a great part of the jazz tradition, the theme and variations has proved a fundamental form in the history of music'.⁵⁴

Of course, rearrangement need not be confined to one's own compositions. Ronald Rosen details J. S. Bach's appropriation of an earlier concerto by Vivaldi to create *Concerto for Four Harpsichords*, in an era when musical borrowing was commonplace.⁵⁵ Brahms' *Variations on a Theme of Paganini* is a set of studies based on a caprice by Niccolò Paganini. William Patry provides another example in Renaissance masses which commonly appropriated prior compositions. He points to Giovanni Pierluigi da Palestrina who 'wrote fifty-three parody masses, of which thirty-one were based on music by other composers.'⁵⁶ Lydia Goehr's essay on the philosophy of music likewise chronicles the centrality of rearrangement and reuse in a time where the concept of the musical work had not yet taken hold:

'Imitation, for example, understood as copying, involved imitation of another composer's style, as well as the use or recomposition of existing melodies or musical structures. These practices were an accepted way of modelling one's own music upon that of a past master. Corelli adapted for his sonatas themes from Lully's opera; Bach used themes of Vivaldi, Albinoni, Corelli, and Legrenzi. Again, these were not exceptional cases.'⁵⁷

A recent class action has reminded us that even *Happy Birthday to You* is a product of appropriation.⁵⁸ This speaks to the centrality of appropriation in popular music,

⁵⁴ Footnotes omitted. Desmond Manderson. *Songs Without Music: Aesthetic Dimensions of Law and Justice*, (University of California Press, 2000), 131

⁵⁵ Ronald S. Rosen. *Music and Copyright*, (Oxford University Press, 2008) (hereinafter 'Rosen, *Music and Copyright*'), 161

⁵⁶ William Patry. *How to fix copyright*, (Oxford University Press, 2011), 99

⁵⁷ Lydia Goehr. *The Imaginary Museum of Musical Works: An Essay in the Philosophy of Music*, (Oxford University Press, 2007) (hereinafter 'Goehr, *The Imaginary Museum of Musical Works*'), 181

⁵⁸ A US District Court judgement noted that plaintiffs and defendants agreed that there was not a musical work in *Happy Birthday to You* separate from the musical work in *Good*

as *Happy Birthday to You* is the most frequently sung English-language song, ahead of *He's a Jolly Good Fellow* and *Auld Lang Syne*.⁵⁹ The story of *Happy Birthday to You* started with a late nineteenth century song, *Good Morning to All*. A young Kentucky girl, having heard guests combine *Good Morning to All* with alternative lyrics, told the story to her kindergarten teacher. The teacher then celebrated birthdays in the kindergarten by singing *Good Morning to All* with the lyrics now associated with *Happy Birthday to You*.⁶⁰ Since its rearrangement from *Good Morning to All*, *Happy Birthday to You* has now been translated into many languages and is the subject of countless rearrangements.

The primacy of appropriation in music continued through the twentieth century. As Aufderheide and Jaszi write, 'every blues musician has done it, jazz depends on it.'⁶¹ Musical appropriation in the twentieth century stretches beyond any particular genre. For example, *Good Morning to All* has also been appropriated by twentieth century classical composers including Igor Stravinsky and Aaron Copland.⁶² Stravinsky's 1955 *Greeting Prelude* for conductor Pierre Monteux's 80th birthday and Copland's 1971 *Happy Anniversary* both rearrange *Good Morning to All*. The many hip-hop, electronic dance music and other popular music appropriations chronicled in this thesis confirm the reach of appropriation in music.

Morning to All, which had already entered the public domain. The Court also opined that that the Warner Chappell do not hold a valid copyright in the lyrics of *Happy Birthday to You*. A settlement between parties has been reached. *Rupa Marya, et al. v Warner/Chappell Music Inc., et al.*, CV 13-04460-GHK, (C.D. Cal., 2016)

⁵⁹ Mark C. Young. *The Guinness Book of World Records 1998*, (Mass Market, 1997), 180

⁶⁰ Elizabeth Hafkin Pleck. *Celebrating the Family: Ethnicity Consumer Culture and Family Rituals*, (Harvard University Press, 2000), 293

⁶¹ Patricia Aufderheide and Peter Jaszi. *Reclaiming Fair Use: How to Put Balance Back in Copyright*, (University of Chicago Press, 2010) (hereinafter 'Aufderheide and Jaszi, *Reclaiming Fair Use*'), 91

⁶² For a rich account of the rearrangement of *Good Morning to All* *Happy Birthday to You*, and the rise and fall of copyright recognition for the latter piece, see Robert Brauneis. 'Copyright and the World's Most Popular Song', (2009), 56 *Journal of the Copyright Society of the U.S.A.* 335, 351

Put simply, this thesis tackles this research question: Is sampling so inconsistent with copyright that it warrants a unique system? This is a version of the question posed by Brad Sherman and Lionel Bently: Does sampling warrant a ‘special sui generis treatment’ or should ‘the fate of sampling should be left to the general principles of copyright law’?⁶³

This thesis argues sampling is sufficiently consistent with the purpose of copyright to avoid a *sui generis* regime. While the practice of sampling is at odds with the operation of copyright, it is aligned with the purpose of copyright to encourage progress and innovation.⁶⁴ The Development of the thesis identifies potential refinements to the operation of copyright laws that assist the creation of all works, and better reflect the complementarity between sampling and copyright’s purpose. Rather than a fundamental clash between copyright and appropriation, this thesis narrows the cause of the tension between copyright and sampling to the current operation of copyright, both in subsistence and in infringement. Copyright operates by providing incentives for creation and distribution of original works. As such, originality is at the core of copyright in many jurisdictions including Australia. At times, these incentives for past originality come at the cost of future originality. For example, the exclusive rights of reproduction and adaptation reserved to prior creators can dull the creative spark of future creators by deterring future originality.

⁶³ Brad Sherman and Lionel Bently. ‘Cultures of copying: digital sampling and copyright law’ (1992), 3(5) *Entertainment Law Review* 158, 163

⁶⁴ ‘To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’ *Constitution of the United States of America*, Art 1, §8, Cl 8. The UK Hargreaves Review noted that intellectual property, including copyright, has ‘the express purpose of creating economic incentives for innovation’. Ian Hargreaves. *Digital Opportunity: A review of Intellectual Property and Growth* (online), (UK Government, 2011), <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf>, 5. Similarly, the Australian Law Reform Commission has noted ‘most submissions espoused the “innovation incentive” theory of copyright’. Australian Law Reform Commission. *Copyright and the Digital Economy: Final Report* (online), (ALRC, 2013), <http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf> (hereinafter ‘ALRC, *Copyright and the Digital Economy Final Report*’)

The thesis argues that sampling is a contemporary example of the appropriation that has yielded much of the very material that copyright encourages and protects. Though copyright finds fault with the process of appropriation, it approves of the product. This thesis echoes Greg Tate's argument that 'sampling isn't a copycat act but a form of reanimation'.⁶⁵ Though sampling is a relatively novel development that may conflict with the operation of copyright, it is also a contemporary example of a tradition of appropriation that has coexisted with copyright.

Noting not all artists wish their work to be appropriated, this thesis argues that appropriation is consistent with the purpose of copyright while respecting that there are individual cases where creators object to appropriation. The late Prince is one prominent objector to appropriation in the context of covers created under compulsory licensing. His objections are more than rhetoric, having triggered the *Lenz v Universal* litigation in the US over the use of a Prince recording in the background of a home video.⁶⁶ Unfortunately, this litigation outlived Prince, with US Supreme Court briefs filed by the United States and petitioner Lenz in 2017 after Prince's passing. Though the US Supreme Court ultimately declined to grant *certiorari*, one can speculate the posthumous litigation would have been consistent with Prince's views of appropriation, which he set out in a talk show interview:

'I don't mind fans singing the songs. My problem is when the industry covers the music. See, covering the music means that your version doesn't exist anymore. A lot of times, people think that I'm doing Sinead O'Connor's song and Chaka Khan's song when in fact I wrote those songs.'⁶⁷

Mirroring the operational logic of copyright, this thesis first considers subsistence matters prior to infringement matters. Copyright asks jurists and legal scholars to first consider what copyright protects before considering how others may infringe the protected material. This logic guides this thesis to revisit the concept of

⁶⁵ Greg Tate. 'Diary of a Bug', *Village Voice*, (22 November 1988), 73

⁶⁶ *Lenz v Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015) (hereinafter '*Lenz v Universal*')

⁶⁷ *Lenz v Universal Music Corp.*, 582 US __ (2017), 2. George Lopez. 'Prince at Lopez Tonight', *Lopez Tonight* (online), (15 April 2001), <https://www.youtube.com/watch?v=rQbqNl_lacg>, 7:30-7:51

originality, which provides a framework for copyright subsistence. In separating the original wheat from the common chaff, originality helps copyright fulfil one of its core purposes to progress culture through the creation, distribution and reuse of works.

By deepening our understanding of originality and its relation to other copyright concepts, this thesis considers the extent to which sampling practices are consistent with copyright's purposes. This thesis highlights inconsistencies between copyright's operation and core copyright concepts, and points to reforms that could help adapt copyright to a digital age of remix and distributed production.

Framing the piece

At its heart, this is a legal policy thesis that articulates views about copyright policy. It speaks through law to propose a potential resolution to the conflict between sampling and the operation of copyright. Policies set out in statute, and interpretation of statutes by courts and other authorities inform this thesis. Looking ahead, the thesis also builds upon legal and cultural scholarship to help explain the conflict between sampling and copyright's operation.

The substantive arguments of this thesis are argued through the three main parts of the sonata form, which is common in music associated with the Classical era of western music.⁶⁸ The form expresses and makes one or more variations on a main theme through an exposition. A development then alters or develops this theme. Finally, a recapitulation restates the main theme. These three parts are optionally bookended by an introduction and a coda.

⁶⁸ For a discussion of the sonata form, see James Hepokoski and Warren Darcy. *Elements of Sonata Theory: Norms, Types, and Deformations in the Late-Eighteenth-Century Sonata*, (Oxford University Press, 2006)



Figure 5: Main parts of this thesis⁶⁹

In this thesis, a three-chapter Exposition follows this Introduction. It tackles the conflicts and consistencies between copyright and sampling at the intersection of practice and core copyright concepts. It explores how originality can provide an overarching narrative for copyright protection of music, which is fragmented across rights in literary and musical works, and in sound recordings.

Chapter II expresses the main theme of the thesis, that rearrangement has long been central to originality. Originality is a core copyright concept, taking precedence as the primary conceptual framework for separating copyright works from unprotected material. It has also proven to be a thorn in the side of sampling artists, impeding both their access to material necessary for their creations and recognition of their creations as original copyright works. By understanding rearrangement's role in originality, we can reconcile sampling's apparent creativity with the purpose of copyright and explain sampling's conflict with the operation of copyright law.

Chapter III extends the Exposition by considering how originality is achieved through rearrangement in the context of sound recordings. It demonstrates the centrality of sampling and rearrangement to the creation of a series of recordings created by the band Gorillaz. By tracking the meandering evolution of Gorillaz recordings, the chapter demonstrates role of rearrangement in the creation of sound recordings, in both sampling and non-sampling recording. Moreover, it demonstrates the possibility for unauthorised future creators to continue rearrangement to yield further original sound recordings.

⁶⁹ See Appendix A for a summary of arguments made in each chapter

Chapter IV then relates originality to the moral right of integrity. This moral right is part of the copyright regime in Australia and other common law jurisdictions, including the UK. It is intended to safeguard the integrity of original works, and the honour and reputation of creators. By showing the importance of wholeness of arrangement to the moral rights concept of integrity, this chapter explains synergies between originality and the moral right of integrity in cases of adaptation, derivative work and appropriation.

The Development adapts the concept of originality as rearrangement into new policy perspectives that bring the operation of copyright closer to its purpose. Each response is intended not only to sooth the conflict between sampling and the operation of copyright, but also to adapt copyright for a digital age in which appropriation and rearrangement are common in music, text and image.

The Development opens with Chapter V considering how transformative use complements originality in achieving the incentive purpose of copyright. Just as rearrangement is essential to originality, transformative use is often essential to the fair use doctrine which applies in US and other jurisdictions. Close review of the fair use doctrine reveals that rearrangement not only underpins originality but also transformative use. As such, rearrangement provides a bridge from merely reproductive uses to transformative uses, revealing fair use's potential to encourage uses that enhance the body of originality.

Chapter VI extends the Development to consider how *ex post* monitoring may be better aligned with originality than *ex ante* licensing. Because many original works are also rearrangements of prior original works, *ex ante* licensing can introduce transactions costs that outweigh copyright incentives. At the scale of offline uses, this balance between costs and incentives has been workable, if not ideal. Whereas *ex ante* licensing has provided a workable system offline, it has not scaled efficiently with the explosion of uses on YouTube, SoundCloud and other content platforms. To fill the void, content identification systems have been designed and deployed to compare the similarity of new uploads and prior works. Ultimately, this chapter considers how these systems enable *ex post* monitoring of uses,

opening the possibility of tolerated uses, trade courtesies, licensing and other means of allocating copyright incentives.

Finally, the Recapitulation in Chapter VII builds on the theme of originality as rearrangement to suggest a novel view of copyright that enriches the chain of originality, rather than trading off rights and exceptions. This new theory provides a theoretical framework for adapting copyright to samples and other rearrangements of parts of copyright works. By applying the lens of the sampling artist, we focus not solely on whole works but also on uses of parts of works. This helps to translate originality to the digital era, where rearrangements such as retweets on Twitter and search engine results are commonplace. It closes by suggesting the relevance of this thesis to the field, beyond just the sphere of music, and to areas of potential future research.

The Coda in Chapter VIII closes the thesis with the tale of *99 Problems*, a conspicuous example of originality as rearrangement, featuring prominent and emerging sampling artists. It echoes many of the themes in the Exposition, Development and Recapitulation of the thesis.

Part	Chapter
Introduction	I. Counter point or counterpoint
Exposition	II. Originality as rearrangement (main theme)
	III. Sound recording as rearrangement (first variation)
	IV. Integrity as wholeness of arrangement (second variation)
Development	V. Transformative use and originality
	VI. <i>Ex post</i> monitoring and originality
Recapitulation	VII. Harmony between appropriation and copyright
Coda	VIII. One tale of <i>99 Problems</i>

Figure 6: Structure of this thesis

In making legal policy arguments, the thesis takes the normative view that copyright's purposes remain relevant and should remain in place to serve the digital age. This view has been reached primarily through doctrinal research, particularly relating and finding coherence between the core concepts of originality, the sound recording and the moral right of integrity and transformative use. This doctrinal approach enables the thesis to articulate the harmony between

rearrangement practices and copyright's purpose, despite the surface-deep conflict between sampling and copyright's operation.

In articulating this legal policy thesis, I also express the normative view that laws should, at least in part, reflect contemporary practice. This desire to reflect contemporary practice in music and digital production leads naturally to a case study approach. As a form of empirical research, case studies tie the thesis to contemporary musical practices and, where court cases have been reported, to the developing body of common law precedents dealing with music and copyright. As such, the thesis deploys a selection of sampling and court cases dealing with sampling. Where possible, it brings theory closer to practice by quoting directly from sampling artists, a form of primary evidence. This empirical approach helps identify refinements to copyright's operation that better reflect both copyright's ideals and contemporary music practices. Moreover, a thorough case study approach is consistent with the sampling artist's aesthetic, which attempts to identify and build patterns across disparate works and cases. The use of sampling as a lens for studying law is appropriate as a lateral approach to a contested and conflicted area of law. The rise of remixes and mashups in a digitally connected time presents an ideal moment to reconfigure this age-old conflict.

As is often the case with intellectual property research which both governs and shapes its subject matter, this thesis deploys a cross-disciplinary approach which applies both cultural studies and legal studies techniques. This is appropriate for a thesis that is first and foremost about the relationship between copyright and music. Though it contributes a new theory of originality in relation to all works, it does not attempt a nuanced review of this lens as it applies to the diverse categories of subject matter recognised by copyright.

Noting that copyright is international in many senses, this thesis focusses on analysis of statute and case law from English-language common law jurisdictions: the United States, the United Kingdom, Canada and Australia. This focus is intended to bring coherence to the thesis, bridging legal jurisdictions that share some

precedents in their consideration of core copyright concepts, and implementation of international treaties.⁷⁰

While similarities and differences between these jurisdictions are not a focus here, the thesis is nonetheless cognizant of the legal histories and traditions of these jurisdictions. As Chapter II will discuss, originality is a unifying force across these jurisdictions. That said, some differences persist. For example, the United States bases its copyright on enumerated powers in its constitution, which empowers Congress to make copyright laws within the limits of the Progress Clause and the First Amendment, amongst other constitutional provisions.⁷¹ By contrast, the Australian Constitution grants the Commonwealth parliament the power to make laws with respect to ‘copyrights, patents of inventions and designs, and trade marks’ but places no comparable limits to the United States’ Progress Clause.⁷² The United Kingdom originated modern copyright with the *Statute of Anne*, but continues to be affected by harmonisation with European Union (EU) Directives and recourse to EU jurisprudence, at least until it exits the EU. The future link between UK and EU law remains a matter of negotiation and speculation. While Canada’s constitution is explicitly “similar in Principle to that of the United Kingdom”, its copyright statute has been reinterpreted over time to depart from its British and Australian counterparts. One notable example is the Supreme Court of Canada’s significant broadening of statutory fair dealing exceptions in 2012.⁷³

⁷⁰ For example, see Elizabeth Adeney’s monograph on moral rights. Elizabeth Adeney. *The moral rights of authors and performers: an international and comparative analysis*, (Oxford University Press, 2006) (hereinafter ‘Adeney, *The moral rights of authors and performers*’)

⁷¹ Ginsburg J recounted the US Supreme Court’s view of the interaction between freedom of speech and copyright: ‘We then described the “traditional contours” of copyright protection, i.e., the “idea/expression dichotomy” and the “fair use” defense. Both are recognized in our jurisprudence as “built-in First Amendment accommodations.” ... Concerning the First Amendment, we recognized that some restriction on expression is the inherent and intended effect of every grant of copyright.’ *Golan et al. v Holder, Attorney General, et al.* 132 S. Ct. 873 (2012), 889

⁷² *An Act to constitute the Commonwealth of Australia 1990*, s 51(xviii)

⁷³ See preamble of *Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.). See also *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* SCC36 (2012). This was one of five landmark copyright judgements by the Supreme Court of Canada. See also Geist’s compilation of *inter alia* five chapters by various researchers on implications for

While the thesis devotes significant time to US sources and examples, this is not intended to signal a pre-existing interest in or intentional emphasis upon US copyright law. Instead, the focus on the US is a byproduct of an endeavour to build upon relevant statute and common law authorities, contemporary musical and industry practices and digital developments. This focus is unsurprising because many of copyright law's stakeholders in the sphere of music have a US connection.

The US features many of the important statutory and common law influences on sampling. The US features the fair use doctrine which stands out as an influential approach to copyright exceptions that, as Chapter V will discuss, has spread beyond the US. It is also the jurisdiction with a high number of copyright cases against sampling artists. Though Australia and other jurisdictions do not commonly adopt positions from US sampling cases, their music communities are affected by the outcomes of these cases through digital consumption and creation of music.

Many of the musical and industry practices affecting sampling have strong roots in the US. As Chapter III shows, this may be a byproduct of the US historical role in the development of studio recording and the licensing arrangements for sampling. The Big Three global music conglomerates continue to spread US influence, noting the dominance of US-based Sony Music, US-based Warner Music Group and the US-French Universal Music Group. Though much literature has been devoted to US licensing complications for sampling, the US also presents licensing solutions, even for 1990s hip-hop artists. For example, the 1990 funk and rap track *Groove is in the Heart* features licensed samples from television and music stars such as Eva Gabor and Herbie Hancock.⁷⁴ These US industry influences continue into the digital age. Google, Apple and many other companies behind the largest music platforms such as YouTube and Apple's iTunes continue to be based in the US.

Canadian fair dealing following this case. Michael Geist. *Copyright Pentology: How the Supreme Court of Canada shook the foundations of Canadian Copyright Law*, (University of Ottawa Press, 2013)

⁷⁴ Deee-Lite. *Groove is in the Heart*, (Elektra, 1990)

Finally, I draw attention to my normative belief that harmony between the operation of copyright and musical practice can promote a mutually respectful and productive relationship between laws and cultures. I reflect this belief in arguments throughout this thesis.

II. Main theme: Originality as rearrangement

This chapter clarifies the core copyright concept of originality, the primary theoretic framework for defining the copyright work. The work is shorthand for copyright subsistence and the product of authorship. Symbiotically, what copyright protects is works, and each work is defined by what is copyrightable. Being a core concept in the *Berne Convention*, it now features in the copyright laws of many *Berne* countries including Australia.⁷⁵ However, the concept of the work is rarely clear, and perplexes legal scholars and cultural theorists alike. Brad Sherman notes that '[d]espite the pivotal role that the work plays in modern copyright law, it has attracted remarkably little attention.'⁷⁶ Sam Ricketson has expressed a similar view: 'there should be a clearer understanding and appreciation of the role of the concept of originality in our copyright law'.⁷⁷ Likewise, Foucault has observed: 'A theory of the work does not exist, and the empirical task of those who naively undertake the editing of works often suffers in the absence of such a theory.'⁷⁸

The concept of originality separates copyright works from one another and from the public domain. While Australian copyright statute does not set out any explicit purpose for copyright, authorities support the view that originality helps copyright maintain a delicate balance between prior and future creation. The High Court of Australia has opined 'the purpose of a copyright law respecting original works is to balance the public interest in promoting the encouragement of "literary", "dramatic", "musical" and "artistic works", as defined, by providing a just reward for the creator, with the public interest in maintaining a robust public domain in

⁷⁵ *Berne Convention for the Protection of Literary and Artistic Works*, revised at PARIS on July 24, 1971, and amended on September 28, 1979 (hereinafter '*Berne Convention*'), 2

⁷⁶ See Brad Sherman. 'What is a Copyright Work?', (2011), 12 *Theoretical Inquiries in Law* 99 (hereinafter 'Sherman, 'What is a Copyright Work?'), 102

⁷⁷ Sam Ricketson. 'The Concept of Originality in Anglo-Australian Copyright Law', (1992), 39 *The Journal of the Copyright Society of the U.S.A.* 265, 288

⁷⁸ Michel Foucault. 'What Is an Author?', Paul Rabinow and Nikolas Rose (eds), *The Essential Foucault: Selections from The Essential Works of Foucault, 1954-1984*, (The New Press, 2003) (hereinafter 'Foucault, 'What Is An Author?'), 377-391, 379

which further works are produced.⁷⁹ The Australian Law Reform Commission has echoed the High Court of Australia, arguing copyright has ‘primary purpose of providing creators with *sufficient* incentive to create’.⁸⁰ This balance is also recognised explicitly in the US copyright system. ‘To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.’⁸¹

Though a fixture in modern copyright, the work has not always been a concept in the history of copyright and music. For example, US copyright statute did not include music compositions until 1831.⁸² Lydia Goehr suggests the musical work began to gain popularity as a concept around 1800.⁸³ Before this time, the concept of the work did not yet have a profound impact on the practice, ownership and regulation of music. Goehr’s research surfaces perspectives of musicians and practices of rearrangement before the turn of the nineteenth century:

‘Rarely did musicians think of their music as surviving past their lifetime in the form of completed and fixed works. When musicians thought about repeatability, they thought more of the multiple uses of themes and parts for various different occasions, than of one and the very same whole composition being repeated in performances dedicated to the performing of that very composition.’⁸⁴

By the early twentieth century, the concept of the musical work began to gain traction. For example, the first Australian copyright statute in 1905 recognised a musical work as ‘any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced’ though a sheet of music was still recognised as a ‘book’.⁸⁵ Sherman points to the commencement of the *Copyright Act 1911 (UK)* as another significant milestone in the Anglo-Australian history of copyright.⁸⁶ It marked the ubiquity of the work as

⁷⁹ *IceTV v Nine Network*, 71

⁸⁰ Emphasis added. ALRC, *Copyright and the Digital Economy Final Report*, 22

⁸¹ *Constitution of the United States of America*, Art 1, §8, Cl 8

⁸² *An Act to Amend the Several Acts Respecting Copyrights 1831*

⁸³ Goehr, *The Imaginary Museum of Musical Works*

⁸⁴ *Ibid*, 186

⁸⁵ *Copyright Act 1905 (Cth)* (No 25 of 1905), 4

⁸⁶ Sherman, ‘What is a Copyright Work?’, 100-101

a concept in copyright, formally unifying separate systems of copyright protection for visual, written, musical and other material.

Courts often do not articulate or invoke a clear concept of the work. They often provide an imprecise definition of the work at hand, before proceeding to consideration of infringement.⁸⁷ At best, Courts have clarified that low originality material such as phone directories and television guides are not copyright works. For example, the High Court of Australia case of *IceTV v Nine Network* and the US Supreme Court case of *Feist v Rural Telephone Service* considered the nature of originality but only to the extent of rejecting copyright protection of ‘sweat of the brow’ and mere facts.⁸⁸ Consequently, many copyright cases turn on infringement issues, on the assumption of subsistence. While this assumption may be reasonable in many cases, considering whether and how copyright subsists could provide all parties greater confidence in consideration of infringement matters. The poor articulation of the copyright work impedes clear consideration of not only subsistence, but also infringement, licensing and exceptions.

When skipping over subsistence to infringement matters, jurists may risk reaching undesirable outcomes. Using an ‘original’ work as an anchoring point downplays the importance of prior works that contribute to the ‘original’. An original song might draw on earlier material such as conventions of a genre or common lyrics; these materials are common and not part of the song. In the US context, Irina Manta has identified the phenomenon of anchoring bias where ‘jurors or judges are asked to compare an allegedly infringing piece to the original... [and] decision makers are likely to overfocus on similarities to the original and gravitate toward a finding of liability’.⁸⁹

⁸⁷ For example, see *Newton v Diamond*, 349 F. 3d 591, 1249 (9th Cir. 2003) (hereinafter *Newton v Diamond*). The judgement discusses an infringement of a composition before defining the composition at hand.

⁸⁸ See *IceTV v Nine Network* and *Feist Publications, Inc., v Rural Telephone Service Co.*, 499 U.S. 340 (1991) (hereinafter *Feist v Rural Telephone Service*)

⁸⁹ Irina D. Manta. ‘Reasonable Copyright’, (2012), 53 *Boston College Law Review* 1303 (hereinafter ‘Manta, ‘Reasonable Copyright’”), 1342. See also Jeffrey J. Rachlinski. ‘The

Taylor Swift's *Shake It Off* provides a scenario where such anchoring bias could occur. In 2015, R&B artist Jesse Braham claimed that Taylor Swift's *Shake It Off* copied his phrases 'haters gone hate', 'playas gone play' from a musical work he released in 2013.⁹⁰ Braham demonstrated absolute confidence in his claim: 'If I didn't write the song 'Haters Gone Hate,' there wouldn't be a song called 'Shake It Off.'⁹¹ Braham's confidence proved to be ill-founded, as it ignored the phrases in dispute being part of popular parlance before his song. The phrase 'haters gonna hate' had existed in community slang from at least 2009, being the joint expression of an online community that held disregard towards hateful remarks.⁹² In addition, a 2001 track by girl group 3LW, *Playas Gon' Play*, had included the lyrics 'the playas gon' play, them haters gonna hate'.⁹³ Denying Braham's request to proceed in District Court, Standish J noted that several sources suggested that 'the lyrics "Haters gone hate" and "Players gone play" are not original components of Braham's 2013 work'.⁹⁴ Standish J foreshadowed further litigation with a humorous allusion: 'At least for the moment, Defendants have shaken off this lawsuit'.⁹⁵ The songwriters for 3LW's *Playas Gon' Play* have lodged a complaint in the same venue against Taylor Swift in September 2017.⁹⁶ It is unclear whether these complaints will succeed, as they will have to establish the originality of their work, separate from Ice-T's 1999 *Don't Hate Tha Player* which features an earlier version of the lyric.⁹⁷

"New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters', (2000), 85 *Cornell Law Review* 739, 751 n.60

⁹⁰ Taylor Swift. *1989*, (Big Machine, 2014). Jesse Braham. *Sexy Ladies*, (Southern Soul, 2013)

⁹¹ Meera Jagannathan. 'R&B artist sues Taylor Swift for \$42 million, claims she ripped off "Shake It Off" lyrics', *New York Daily News* (online), (31 October 2015), <www.nydailynews.com/entertainment/music/musician-sues-taylor-swift-42-million-shake-article-1.2418802>

⁹² See zerosozha. 'Haters Gonna Hate', *KnowYourMeme* (online), (8 February 2010), <<http://knowyourmeme.com/memes/haters-gonna-hate>>

⁹³ 3LW. *3LW*, (Epic, 2000)

⁹⁴ 'Order re Request to Proceed *in Forma Pauperis*', *Jessie Braham v Sony/ATV Music Publishing et al.*, 2:15-cv-8422-MWF (GJSx) (C.D. Cal., 2015), 7-8

⁹⁵ *Ibid*, 12

⁹⁶ 'Complaint for Copyright Infringement, Demand for Jury Trial', *Sean Hall, Nathan Butler, et al. v Taylor Swift et al.*, (C.D. Cal., 2017)

⁹⁷ Ice-T. *The Seventh Deadly Sin*, (Atomic Pop, 1999)

In part, the lack of jurisprudential articulation of the concept of the work is a consequence of removing compulsory copyright registration in most copyright jurisdictions. Copyright's patent and trademark cousins benefit from mandatory documentation of the material protected through respective application and registration processes. Copyright does not benefit from equivalent documents and thus lacks this key source of evidence for claims of subsistence which provides patent and trademark systems with some, albeit imperfect, clarity. For example, Australian patent law requires both complete and provisional applications to disclose an invention in a manner 'clear enough and complete enough for the invention to be performed by a person skilled in the relevant art'; this necessarily allows exclusion of part of the invention to the extent it overlaps with a patent examiner's skill.⁹⁸ Likewise, Australian trademark law requires applications to 'specify, in accordance with the regulations, the goods and/or services in respect of which it is sought to register the trade mark'.⁹⁹ However, as the Federal Court has recently highlighted in *Qantas Airways Limited v Edwards*, specifications that are neither too broad nor too narrow are sometimes difficult to define.¹⁰⁰

This chapter journeys down the third of Sherman's three paths towards clarifying the copyright work:

1. 'Where the work coincides with the tangible'
2. 'The work as a natural legal kind' and
3. 'Subject matter and originality'.¹⁰¹

This third path is deployed here to leverage the legal authorities and literature on originality. The first path is less useful here because digital compositions and sound recordings are often intangible and can be divided almost *ad infinitum*. Likewise, the second path does not lend itself to a cohesive understanding of works, for the natural law explanations are disparate. As Brad Sherman notes,

⁹⁸ *Patents Act 1990* (Cth), s 40(1),(2)(a)

⁹⁹ *Trade Marks Act 1995* (Cth), s 27(3)

¹⁰⁰ See also *Qantas Airways Limited v Edwards* (2016) FCA 729

¹⁰¹ Sherman, 'What is a Copyright Work?', 108, 110, 115

natural law approaches draw variously on industry norms, a requirement that a work have a start, beginning and end, and a rejection of *ad infinitum* divisibility.¹⁰²

This chapter first considers originality in the context of the *VMG Salsoul v Ciccone* litigation, applying US copyright law to sampling. This recent US litigation provides rare judicial guidance on copyright subsistence concepts in relation to musical works and sound recordings. The core question in the case was whether a horn hit comprising a four-note chord was sufficiently original to be considered a musical work or sound recording. The District Court's decision is notable for giving weight to subsistence matters. This ensured that if there was a finding of no subsistence, the case would not proceed to allegations of infringement. The subsequent parts of this chapter discuss two themes that emerge from the case and assist in the recognition of music as original copyright works: 1) divisibility and 2) differing recognition between musical works and sound recordings.

Secondly, this chapter explores the fractured concept of the copyright work by exploring copyright's interpretation of originality. It builds upon existing jurisprudence in cases including *VMG Salsoul v Ciccone*, filling a void left by superior court decisions dealing with copyright subsistence.¹⁰³ While these decisions provide little guidance in relation to more creative material such as music, film and art, focusing instead on low originality, low creativity material such as directories and television program guides the status of the copyright work.

Thirdly, it considers the divisibility of works, which can be a deciding factor when determining both subsistence and infringement. Divisibility refers to the extent to which a whole work can be divided into parts that are afforded the status of the work. For example, we may consider a sonata to be highly divisible, as its exposition, development and recapitulation could each stand alone as a work. How we consider a work to be divisible is instructive in refining our understanding of originality. The threshold issue of whether to recognise parts of high originality

¹⁰² *Ibid.*, 112-114

¹⁰³ *VMG Salsoul v Ciccone*, CV 12-05967 (C.D. Cal., 2013) (hereinafter '*VMG Salsoul v Ciccone*')

works as copyright works is central to and often absent from the copyright debate. This part compares the divisibility issues present in *VMG Salsoul v Ciccone* to those faced recently by courts and legislators. Divisibility is rarely considered in copyright cases by superior courts in common law states. A rare example of such consideration was the High Court decision in *Network Ten v Channel Nine*, which confirmed that each frame of a television broadcast is not a separate broadcast in which copyright subsists.¹⁰⁴

Fourthly, it considers the difficulty in separating musical works and sound recordings from one another, as an example of the difficulty in separating creations that bridge copyright subject matter categories. Any assumption that a musical work must pre-exist any sound recording, is challenged by sampling which by simultaneously creates both. As the US Copyright Office notes:

‘A musical recording encompasses two distinct works of authorship... Because of this overlap, musical works and sound recordings are frequently confused... Which is more important, the song or the sound recording? “It begins with a song,” runs the oft-cited refrain; but then again, the song is brought to life through a sound recording.’¹⁰⁵

The chapter closes by articulating a tentative, new theory of the copyright work through the concept of originality as rearrangement. This theme will be further articulated in the subsequent Exposition chapters dealing with the concepts of the sound recording and the moral right of integrity.

Sampling and originality in *Vogue*

The *VMG Salsoul v Ciccone* litigation provides a rare judicial articulation of how copyright subsists in works that have more than the minimal originality.¹⁰⁶ In

¹⁰⁴ *Network Ten Pty Limited v TCN Channel Nine Pty Limited* (2004) HCA 14

¹⁰⁵ Footnotes omitted. US Copyright Office. *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, (2015), 18, 135

¹⁰⁶ *VMG Salsoul v Ciccone*. In May 2014, the District Court ruling was appealed to the Ninth Circuit which upheld the ruling on copyright matters and reversed on the awarding of attorneys’ fees. *VMG Salsoul v Ciccone* (9th Cir.). For an example from another US circuit court dealing with sampling by N.W.A., see *Bridgeport v Dimension Films*. For a civil law jurisdiction example, see also the German federal case dealing with the sampling

doing so, it set itself apart from other copyright battles between established record labels and commercially successful sampling artists. This litigation considered whether the creation of the 1990 hit recording *Vogue*, popularly associated with Madonna, infringed the copyright in a short horn hit. A key question in the case was whether this horn hit constituted a standalone musical work or a sound recording.¹⁰⁷

VMG Salsoul v Ciccone focuses on a horn hit in the *Love Break* remix of *Chicago Bus Stop* (hereinafter '*Love Break*'), remixed by Shep Pettibone for release by Salsoul Records in 1983. The horn hit in *Love Break* is almost indistinguishable from horn hits in two earlier recordings, MFSB's 1973 *Love is the Message* and the Salsoul Orchestra's 1975 *Chicago Bus Stop (Ooh, I Love It)* (hereinafter '*Chicago Bus Stop*').¹⁰⁸ The three sound recordings also exhibit similar timbre and balance between instruments, perhaps reflecting the recurring use of session musicians who performed as part of MFSB and later as part of the Salsoul Orchestra.¹⁰⁹ Had

of a Kraftwerk recording: *Metall auf Metall*, Bundesgerichtshof [German Federal Court of Justice], I ZR 112/06, (20 November 2008)

¹⁰⁷ On appeal, the Ninth Circuit agreed with the District Court that 'neither the composition nor the sound recording of the horn hit was "original" for purposes of copyright law'. *VMG Salsoul v Ciccone* (9th Cir.), 876

¹⁰⁸ The Salsoul Orchestra was one of the most popular and popularly acclaimed ensembles of its time and place. As an advertisement placed in the *Billboard Magazine* gushed at the time: 'The awards garnered by The Salsoul Orchestra are almost too numerous to mention and include "Disco Band of the Year," "Top Instrumental Orchestra of the Year," and "Top Disco Orchestra of the Year." Vincent Montana Jr. was dubbed "Outstanding Producer of the Year," and drummer Earl Young was named "Disco Drummer of the Year."' *Billboard*, (Billboard Publications, 22 January 1977). The 1980s also saw the release of a popular remix of *Love is the Message*. See Danny Krivit. [untitled biography], (online), c2014, <<http://www.dannykrivit.net/biography.html>>

¹⁰⁹ This was confirmed by a deposition of Pettibone: 'So I called the original bass player and drummer from *Love is the Message* from the group MFSB and asked them if they would come into the studio and lay down those tracks over *Chicago Bus Stop*.' 'Deposition of Robert Pettibone, Vol. 1' *VMG Salsoul v Ciccone*, 16. One of the defendant's memorandum provides a further explanation: 'MFSB also recorded many other songs in the 1970s that contained these same horns and Philly Sounds, including "T.S.O.P.," "Ferry Avenue," "Get Down With the Philly Sound," and "Plenty Good Lovin"''. 'Memorandum of points and authorities in support of defendants Shep Pettibone and Lexor Music, Inc's motion for summary judgment', *VMG Salsoul v Ciccone*, 11. See also Tim Lawrence. *Love Saves the Day: A History of American Dance Music Culture, 1970-1979*, (Duke University Press, 2004), 168. The use of the same session musicians across multiple recordings in this era is comparable to the use of similar analog synthesisers in the same era and the use of digital synthesisers today. In all cases, the timbre of sound is recognizably similar

the Court considered an earlier version to be the original VMG Salsoul may have lost standing as a plaintiff.



Figure 7: Versions in the 40-year evolution of a horn hit

In 1990, a similar horn hit appeared in *Vogue*, a track popularly associated with the recording artist Madonna. Shep Pettibone, the creator of *Love Break*, was also wrote the underlying musical work and produced the sound recording of *Vogue*. Apart from the original version of *Vogue*, Sire Records also released several remixed, rearranged and extended versions of *Vogue*. These versions were accompanied by a music video of *Vogue* as well as a live performance at the 1990 MTV Music Awards. *Vogue* continues to attract commercial success, more recently featuring in the 2006 film *The Devil Wears Prada* and the 2012 Super Bowl half-time show.

The lead plaintiff in the litigation, VMG Salsoul, was what Tim Wu terms a ‘sample troll’, a company which uses ‘lawsuits to extort money from successful music artists for routine sampling, no matter how minimal or unnoticeable’.¹¹⁰ As is common amongst record labels, executives of VMG Salsoul’s parent company, Verse Music Group (VMG), were themselves successful musicians and studio engineers. Notably, in this case, they were involved in the creation on *Vogue*.¹¹¹ CEO Curt Frasca was an assistant engineer on the sound recordings of *Vogue* and

¹¹⁰ VMG Salsoul has also instigated filed similar complaints against Kylie Minogue, Edwin Birdsong and Richard Melville Hall. Justia. ‘Cases matching “VMG Salsoul”’, *justia.com*, (online), 14 March 2015, <dockets.justia.com/search?filters=&query=vmg+Salsoul>. Wu points to *Bridgeport v Dimension Films* as a prototypical sample troll. Tim Wu. ‘Jay-Z versus the Sample Troll’, *Slate* (online), 16 November 2006, <http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html>. See also *Bridgeport v Dimension Films*

¹¹¹ Other prominent examples of musicians doubling as executives include DFA Records cofounder James Murphy of LCD Soundsystem fame and Ed Banger Records founder Pedro Winter, better known as DJ and music producer Busy P

later remixes while Vice President Tony Shimkin was involved in the writing of the musical work and assistant engineer on the sound recording of *Vogue*.

The defendants were the creators and holders of the copyright in the musical recording and sound recording of *Vogue*. The first, Madonna, needs little introduction as a multi-diamond recording artist and a pop culture icon spanning three decades.¹¹² She has often been the subject of sampling discussions, both as an artist whose tracks have been the product and subject of sampling.¹¹³ The second, Shep Pettibone, was a prolific producer, remixer and disc jockey (hereinafter 'DJ') who mixed and produced hundreds of tracks for Madonna, Run D.M.C., David Bowie, and VMG Salsoul artists. Pettibone worked in the 1980s and 1990s which saw studio producers and remixers gain significant cultural stature. As Tankel notes, 'Remix producers, such as... Shep Pettibone, are now allowed, even asked, to (re)create a finished product from the original recording (tapes) of a given artist.'¹¹⁴ The remaining defendants were entities under the Warner Music umbrella, one of the Big Six global record labels at the time of *Vogue* and now one of the Big Three.

VMG Salsoul claimed that Madonna *et al.* had infringed copyright in the *Love Break* musical work and sound recording by creating the sound recording and underlying musical work of *Vogue*. Specifically, the alleged infringements arose from *Vogue's*

¹¹² The Recording Industry Association of America (RIAA) classifies an album as 'diamond' when it is certified to have sold 10 million copies. See RIAA. *Diamond Awards*, (online), (c2014), <http://riaa.com/goldandplatinum.php?content_selector=top-diamond-awards>. To put this in perspective, the sales of these two albums exceed sales for the top 100 albums released in Australia in 2013. ARIA. *ARIA End of Year Top 100 Album Chart - 2013*, (online), (6 January 2014), <<http://www.ariacharts.com.au/chart/top-100-albums>>

¹¹³ Another instance of a Madonna track incorporating a sample is her 2005 hit *Hung Up*, which sampled the 1979 ABBA hit *Gimme, Gimme, Gimme (A Man After Midnight)*. *Hung Up* was subsequently the subject of sampling in a mashup with the band Gorillaz at the 2006 Grammy Awards. Even when sampling is not at play, Madonna has been the subject of appropriation; for example, Jay-Z's 2003 single *Justify My Thug* is a nod to Madonna's 1990 single *Justify My Love*

¹¹⁴ Jonathan David Tankel. 'The Practice of Recording Music: Remixing as Recording', (1990), 40(3) *Journal of Communication* 34 (hereinafter 'The Practice of Recording Music'), 42. See also Paul Théberge. "'Plugged in": technology and popular music', in Simon Frith, Will Straw and John Street (eds), *The Cambridge Companion to Pop and Rock*, (Cambridge University Press, 2001), 3-25, 10

sampling of the four-note chord and the recording of the Salsoul Orchestra playing the horn hit from *Love Break* without permission of the copyright owners.

Madonna *et al.* sought summary judgement against the plaintiffs on five defences:

1. Plaintiffs did not possess copyright registration for the allegedly infringed musical work or sound recording of *Love Break* and therefore did not have standing to bring the suit.
2. Pettibone was a co-author of the *Love Break* sound recording and musical work. If the claim was accepted, it followed that he could not infringe copyright in his own works.
3. Frasca and Shimkin, the Plaintiff's senior executives, had acquired unclean hands by assisting in the production of the *Vogue* sound recording and musical work which they now claimed to infringe the *Love Break* sound recording and musical work.
4. The horn hit and four-note chord from the *Love Break* sound recording and musical work, respectively, lacked the originality required for copyright protection.
5. Any copying of these elements was *de minimus*.

The first defence based on copyright registration is notable in the US context, as works of US origin must be registered before infringement suits can proceed, except in limited circumstances.¹¹⁵ As this chapter has noted, registration can aid in defining the work at hand and the relevant copyright holders. While there were copyright registrations for the musical work and sound recording of *Chicago Bus Stop*, there were not equivalent registrations for the musical work and sound recording of *Love Break*. In the absence of such registrations, Madonna *et al.* claimed that Pettibone as a studio producer held the copyright in the musical work and sound recording of *Love Break*.

Ultimately, the District Court agreed with Madonna *et al.*, accepting their fourth argument that the four-note chord played as a horn hit lacked the requisite originality to merit the status of a copyright work.¹¹⁶ This was fatal to the plaintiffs' claims for no copyright subsistence meant there could be no infringement. The

¹¹⁵ 17 U.S.C. §412. See also United States Copyright Office. *Copyright Basics* (online), (2012), <<https://www.copyright.gov/circs/circ01.pdf>>, 7

¹¹⁶ *VMG Salsoul v Ciccone*. For completeness, the Court also considered infringement issues in its decision, though this arguably has no material effect on the outcome

judgement presents interesting clues about the nature of copyright subsistence in musical works and sound recordings, which are discussed in greater depth in the next part.¹¹⁷

On appeal, the Ninth Circuit agreed with the District Court's view, opining:

'A reasonable jury could not conclude that an average audience would recognize an appropriation of the Love Break composition... Even if one grants the dubious proposition that a listener recognized some similarities between the horn hits in the two songs, it is hard to imagine that he or she would conclude that sampling had occurred.'¹¹⁸

For emphasis, the Ninth Circuit added:

'a highly qualified and trained musician listened to the recordings with the express aim of discerning which parts of the song had been copied, and he could not do so accurately. An average audience would not do a better job.'¹¹⁹

While Verse Music Group litigated against the unauthorised sampling of *Love Break*, it has since celebrated that sampling. Even before the Ninth Circuit case, Verse Music Group updated its webpage for The Salsoul Orchestra to include reference to the sampling of *Love Break* in *Vogue*: 'For those that haven't heard of The Salsoul Orchestra; you can hear their song "Love Break (Ooh I Love It)" which has been sampled in Madonna's "Vogue," 50 Cent's "Candyshop," and Eric B & Rakim's "Paid in Full."'¹²⁰

Closing a story arc for the litigation, the alleged infringement has generated a promotional opportunity for owners of the prior work. To revise the common

¹¹⁷ The segments of the judgement which opine that even if copyright subsisted there would be no infringement on the facts are not discussed in this chapter

¹¹⁸ *VMG Salsoul v Ciccone* (9th Cir.), 879-880

¹¹⁹ *Ibid*, 880

¹²⁰ Verse Music Group. *The Salsoul Orchestra*, (online), (c2013), <<http://versemusicgroup.com/the-salsoul-orchestra>>

agrarian metaphor in intellectual property, ‘reap what you have sown’, the stolen fruit has spawned a tree for the aggrieved farmer.¹²¹

Originality beyond *ex nihilo*

Originality is foundation of copyright subsistence. As O’Connor J opined in *Feist*, ‘the *sine qua non* of copyright is originality.’¹²² *VMG Salsoul v Ciccone* illustrates the virtues of understanding originality as the rearrangement of prior musical material, rather than the creation of new material, to articulate how new copyright works can be arranged from parts of prior copyright works. The District Court demonstrated in *VMG Salsoul v Ciccone* that no examination of copyright subsistence is complete without originality. The District Court found ‘neither the chord nor the horn hit sound sufficiently original to merit copyright protection’.¹²³

But what did the Court mean by ‘original’? At the outset, we should note that there are many potential constructions of originality. Perhaps the purest formulation is *ex nihilo* originality, or the creation of a work from nothing.¹²⁴ One could accept that compositions arise from nothing, if she could ignore the languages of music that separate music from mere noise.¹²⁵ Even if music producers can arrange or transform noise into music, noise alone is not music. Without culturally agreed building blocks such as musical notes and notation, it would not be possible for any composition, let alone the product of appropriation such as *Love Break* to be recognised as a work. Few works can be divorced entirely from the body of prior works.

¹²¹ Patricia Loughlan provides a critical discussion of agrarian and other common metaphors in intellectual property discourse. Patricia Loughlan. ‘Pirates, Parasites, Reapers, Sowers, Fruits, Foxes... The Metaphors of Intellectual Property’ (2006), 28 *Sydney Law Review* 211. See also William Patry. ‘The Role of Metaphors in Understanding’, *Moral Panics and the Copyright Wars*, (Oxford University Press, 2009), 43-56

¹²² *Feist v Rural Telephone Service*, 345

¹²³ *VMG Salsoul v Ciccone*, slip op 2

¹²⁴ In his four-part documentary, Kirby Ferguson universally rejects an *ex nihilo* construction of originality, going as far as to claim that ‘Everything is a Remix’, citing examples from folk music and Hollywood films. Kirby Ferguson. *Everything is a Remix* (online), (2011), <<http://everythingisaremix.info/about/>> (hereinafter ‘Ferguson, *Everything is a Remix*’)

¹²⁵ It is this same logic that supports the *scènes à faire* doctrine that excludes material that is mandatory in a particular genre or form from copyright protection

Though this thesis is not persuaded by the *ex nihilo* construction of originality, it recognises the potential benefits of works being truly discrete. This copyright utopia would allow the clear separation of prior and latter expressions. Perhaps unfortunately for industries and communities seeking bright line boundaries in copyright, it is unclear how a pure *ex nihilo* originality could be sustained in logic or practice. Nevertheless, *ex nihilo* originality serves as a useful point of theoretical comparison.

A second, more moderate form of originality operates by excluding material that relies primarily on parts already used in prior works. The District Court in *VMG Salsoul v Ciccone* invoked this ‘by exclusion’ originality by citing an earlier decision by the same court: ‘an excerpt of a song could not be protected plaintiff’s copyright ‘because the sequence of three notes and the lyrics lack the requisite originality’’.¹²⁶ This form of originality favours creations, including sampling and other appropriation art, that use less prior material or rely more on new creative inputs.

A work may also be original by originating from an author. This differs from *ex nihilo* originality because it does not preclude drawing on some prior material. Instead, ‘from the author’ originality requires that the author invest an independent effort in the creation of the material. Such originality can recognise the works of sampling artists and other downstream creators by separating their additions and modifications from pre-existing sound recordings and musical works.¹²⁷ In a 1916 UK case involving copyright in examination papers, Peterson J concisely articulated ‘from the author’ originality:

¹²⁶ *VMG Salsoul v Ciccone*. The cited judgement opines ‘The HCS Phrase is unprotectible [sic] because it uses common musical and lyrical phrases that have been used in other recordings. In other words, the HCS Phrase lacks the requisite originality.’ *Jean v Bug Music, Inc.*, No. 00 Civ 4022(DC), 2002 WL 287786 (S.D.N.Y., 2002), 11

¹²⁷ There is a caveat to this under US copyright law: ‘protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.’ 17 U.S.C. §103(a)

'The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author... If an author, for the purposes of copyright, must not draw on the stock of knowledge which is common to himself and others who are students of the same branch of learning, only those historians who discovered fresh historical facts could acquire copyright for their works.'¹²⁸

A fourth type of originality that sets an arguably higher bar is the notion that material must possess a 'creative spark', or some application of creative skill or beyond what is required to compile a phone directory or television guide.¹²⁹ The creator must invest some intellectual effort in the creation of the work. The threshold created by this type of originality has not yet been fully tested by courts, which have tended to apply it only to set a low threshold of creativity, separating facts and processes from the realm of works. In Australia, the High Court has invoked the phrase 'independent intellectual effort' to describe the Australian standard of originality, which combines the 'independent' third form and 'intellectual' fourth form described above.¹³⁰

It is also important to consider the impact of technology on originality. Where machines have been involved during creation, that material can struggle to be recognised as an original work. For example, the Federal Court rejected a claim of originality in *Telstra v Phone Directories* in part because 'much of the contribution to each Work... was not the result of human authorship but was computer generated'.¹³¹ By contrast, the UK has the benefit of a specific provision overcoming this issue: 'In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.'¹³²

¹²⁸ *University of London Press Ltd v University Tutorial Press Ltd*, (1916), 2 Ch 601, 609

¹²⁹ For discussions of creative spark, see *IceTV v Nine Network* and *Feist v Rural Telephone Service*

¹³⁰ See *IceTV v Nine Network*, 33 citing *Sands & McDougall Pty Ltd v Robinson* (1917) HCA 14; (1917) 23 CLR 49. See also the *IceTV* standard applied in *Telstra Corporation Limited v Phone Directories Company Pty Ltd* (2010) FCA 44 (hereinafter '*Telstra v Phone Directories*'), 2.1

¹³¹ *Telstra v Phone Directories*, 2.3

¹³² *Copyright, Patent and Designs Act 1998* (UK), s 9(3)

The use of technology can particularly affect the ‘creative spark’ and ‘from the author’ strands of originality. As Simon Frith has argued:

‘[T]echnology is opposed to art... One effect of technological change is to make problematic the usual distinction between ‘musician’ and ‘sound engineer’, with its implication that musicians are creative artists in a way that engineers are not. What matters here is not the difficult issue of creativity itself but, rather, the idea of self-expression.’¹³³

The use of technology can inhibit copyright’s recognition of the original contributions of studio producers who may be undervalued as mere accurate recorders of creative performances rather than creators in their own right. The increasing sophistication of content identification on content platforms, as Chapter VI discusses, helps prove whether a recording has samples.¹³⁴ As a result, sampling artists must make ever-greater efforts to demonstrate their creations are original art, over and above the mere craft of sampling. This distinction between art and craft is perhaps best articulated by Howie Becker:

‘[M]aking art requires technical skills that might be seen as craft skills, but they also typically insist that artists contribute something beyond craft skill to the product, something due to their creative abilities and gifts that gives each object or performance a unique and expressive character’.¹³⁵

The technical act of sampling is also an act of reproduction, which can inhibit remixes and other products of sampling from being original for the purposes of copyright. We might ask: Does this prevent recognition of sound recordings as original creations? Does the status of sound recordings as reproductions deny their creators the reward that copyright normally grants to creators? To answer these questions, it is useful to consider several cultural and legal perspectives.

¹³³ Simon Frith. ‘Art vs Technology: The Strange Case of Popular Music (1986)’, *Taking Popular Music Seriously: Selected Essays*, (Ashgate, 2007), 79

¹³⁴ Such content identification systems provided by YouTube, Zefr and Dubset are considered in Chapter VI

¹³⁵ Howard S. Becker. *Art Worlds*, (University of California Press, 1982), 272

Referring to sampling artists as ‘configurable musicians’ who reconfigure prior music to create new music, Aram Sinnreich notes that some creators do not subscribe to copyright’s distinction between originals and copies:

‘Despite the many shades of gray emerging between the poles of the modern framework’s original/copy binary, stylistic originality remains a vital concern for many configurable musicians... [who] also invest a great deal of significance in the relationship of their work to the material they sample.... Unfortunately, these rich emerging aesthetic and ethical conventions are not matched by any similar degree of subtlety in our legal treatment of sample-based production.’¹³⁶

Small samples of sound also contributed to original songs by The Avalanches. As Robbie Chater describes:

“Instead of loops or grooves we’ve both amassed large collections of chords and notes which in the past we would have ignored. These are pieced together to slowly create small sections—our new loops and grooves—with which we can construct songs.”¹³⁷

Greg Gillis of Girl Talk also describes his intention to create original works through sampling: ‘I’m trying to separate myself from other people by having songs that would be considered—technically—original things.’¹³⁸ Speaking of *Night Ripper*, his album which rearranges a collection of rap and hip-hop samples, Gillis adds: ‘I think it’s promoting the whole history of rap. Throughout hip-hop people have been putting different elements with different types of music. It’s not about who created this source originally, it’s about recontextualizing—creating new music.’¹³⁹

¹³⁶ Sinnreich, *Mashed Up*, 146

¹³⁷ Pytlik, ‘The Avalanches’

¹³⁸ Ryan Dombal, ‘Interviews: Girl Talk’ (online), *pitchfork.com*, (30 August 2006), <<http://pitchfork.com/features/interviews/6415-girl-talk/>>

¹³⁹ Ibid

In Gillis' philosophy, originality is not limited to new material. Instead, originality can be reached by recontextualising existing material in new arrangements. As Jacques Attali has noted, modern musical culture has long recognised that the musician can be simultaneously a reproducer and creator of original material: 'The musician, like music, is ambiguous. He plays a double game. He is simultaneously musicus and cantor, reproducer and prophet. If an outcast, he sees society in a political light. If accepted, he is its historian, the reflection of its deepest values.'¹⁴⁰

Jane Ginsburg eloquently clarifies how reproductions can be original in copyright's eyes: 'Reproductions requiring great talent and technical skill may qualify as protectable works of authorship, even if they are copies of pre-existing works. This would be the case for photographic and other high-quality replicas of works of art.'¹⁴¹ For example, one UK case has confirmed that photographic reproductions of three dimensional objects, in this case antiques, can be original and qualify for separate copyright.¹⁴²

Scrutiny of the logic of copyright's originality helps us reconcile the concepts of originality held by copyright and sampling. In the context of musical works, originality excludes building blocks of music, such as scales and common chord progressions which precede any individual author.¹⁴³ For example, the use of a perfect cadence, a common chord progression that marks the end of a melody, section of music or piece of music in many genres of music, is neither original nor copyrightable.

¹⁴⁰ Jacques Attali. *Noise*, (University of Minnesota Press, 1985), 12

¹⁴¹ Jane Ginsburg. 'The Concept of Authorship in Comparative Copyright Law', *Public Law Research Paper No. 03-51*, (online) (Columbia Law School, 2003), 21, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=368481>. See also Mummery LJ's opinion which cites this passage from Ginsburg. *Hyperion Records Ltd v Sawkins*, (2005), EWCA Civ 565 (hereinafter '*Hyperion Records v Sawkins*'), 83. This case considered whether copyright subsists in modern performing editions of the out-of-copyright music

¹⁴² *Antiquesportfolio.com plc v Rodney Fitch & Co Ltd* (2001) FSR 345

¹⁴³ In the context of sound recordings, it is less clear what building blocks originality would exclude. In part, the lack of a common and accepted system of notation for sound recordings impedes a common language about the building blocks of sound

However, accepting that building blocks are expressed within works creates a problem for copyright's concept of originality. How can copyright separate these building blocks from the work? Originality is neither incisive nor decisive about the parts of a work that are original. This vagueness hinders not only an understanding of copyright subsistence but also the inquiry into whether there is infringement.

To attack this problem, it is useful to imagine the creation of an original work as a *rearrangement* or *transformation* of the building blocks. As Aufderheide and Jaszi have observed, musicians often rearrange material of the past: 'Musicians actively or accidentally incorporate bits and pieces of previous music into their own.'¹⁴⁴ In western music culture, a song is a rearrangement of melody, harmony and rhythm.¹⁴⁵ But what is a harmony or melody but a rearrangement of notes that exist as part of an accepted scale? What is a rhythm but an rearrangement of sound and space? It is the quality of the rearrangement that matters in originality, not the quality of the arranged parts.

The transformation of the prior parts through the act of arranging is the primary means of creating new and original works. In the context of studio music production, what is a master recording but a rearrangement of the recordings, melodies, harmonies and rhythms of individual instrument and voice recordings? Likewise, a remix is a rearrangement of previous master recordings. This parallel process in the creation of master recordings and remixes is evident in the many examples of studio production discussed in Chapter III.

Having reimagined originality as rearrangement, we can revisit the original/copy binary that prevents recognition of appropriation as original creation. Recognising that original works are rearrangements draws out the fallacy in the original/copy binary. All originals are at least in part copies, for little is created *ex nihilo*.

¹⁴⁴ Aufderheide and Jaszi, *Reclaiming Fair Use*, 91

¹⁴⁵ Rosen, *Music and Copyright*, 152. This construction of the musical work is also invoked in this case by the District Court. 'An analysis of originality takes into account a work's melody, harmony and rhythm.' *VMG Salsoul v Ciccone*, citing *Newton v Diamond*

Originality is less about what ‘originates’ from the author in a figurative sense, and more about what the author arranges. Indeed, Article 12 of the *Berne Convention* separately recognises adaptations, arrangements and alterations from mere reproductions: ‘Authors of literary or artistic works shall enjoy the exclusive right of authorizing *adaptations, arrangements and other alterations* of their works.’¹⁴⁶ This distinction by the Berne Convention has translated in implementation by most copyright jurisdictions. As Patry notes: ‘While a few nations, such as France, regard the adaptation right as a species of the reproduction right, most provide for a separate adaptation right.’¹⁴⁷

To see original works as rearrangements is to recognise the chain of transformation that occurs in the progress of creative material through the copyright system. Though it may be convenient to treat specific works as finished and whole for most copyright transactions, the operation of originality should not hinder rearrangement, which is an engine of creativity that copyright desires.

Recognising the centrality of rearrangement to originality also helps copyright inquiries avoid preferring prior works to latter works in cases of potential infringement. Craig and Laroche have recently echoed Irina Manta’s warning about anchoring bias in copyright inquiries, ‘whereby the plaintiff’s original work becomes the “anchor” against which the defendant’s work is measured’.¹⁴⁸

Each original composition or recording should be viewed as a new arrangement of disparate old and new sources. As the old works are themselves rearrangements of the building blocks of music, they can be broken apart to yield new arrangements. In other words, what comes together can come apart. The illusion that these new arrangements are original underpins the ability of new works to

¹⁴⁶ *Berne Convention*, 12

¹⁴⁷ Emphasis added. William Patry. *Copyright Law and Practice*, (Greenwood Press, 1994), 818

¹⁴⁸ Carys Craig and Guillaume Laroche. ‘Out of tune: Why copyright law needs music lessons’, in B. Courtney Doagoo, Mistrale Goudreau, Madelaine Saginur and Teresa Scassa (eds), *Intellectual property for the 21st century: Interdisciplinary approaches*, (Irwin Publishing, 2014), 43-71, 55. See also Manta, ‘Reasonable Copyright’

displace their ancestors and exploit the limited ability of audiences to discern links with prior works. This illusion is sustained as long as the rearrangement remains whole and pierced when the arrangement is broken into its parts.

Vogue provides an example of originality as rearrangement. An interview with Shep Pettibone, the studio engineer of the *Vogue* sound recording, reveals how the creation of *Vogue* itself was an iterative series of rearrangements:

‘I sent her [Madonna] a track, and that was the basic music for “Vogue.” Which she wrote her lyrics to and after she sang them, then I changed certain things about the music to fit what she sang better... the piano was added, for instance, after she sang the song. The bass lines in the verses were changed to make them go with the verse better. Before that I think it’d just been like a two-bar loop of the bass line throughout the entire song—which she liked. She didn’t want me to change it. But I was like, “I’m gonna change it anyways.” So... [Laughs.] She wanted to keep it very underground, and I was like, “Just trust me. Let me do what I do.” Which she did. She went back to L.A. after she sang the song and I got to finish it off in New York.’¹⁴⁹

The key to originality is significant rearrangement, one which brings new voice, structure and context to existing material. Not all uses of prior material should be recognised as an original work. When a composer or studio producer draws upon an existing genre, song, *leitmotif*, chord progression, scale, beat or riff, the new material may be mere reproduction unless there is a new rearrangement of that material.

Divisibility of original works

‘And I can’t tell you why
It hurts so much
To be in love with a masterpiece
'cause after all
Nothing’s indestructible’¹⁵⁰

Understanding the divisibility of works in turn refines our understanding of originality. Inevitably, works are divisible. Even when complemented by a moral

¹⁴⁹ Shep Pettibone, quoted in Keith Caulfield. “Vogue’ Producer Shep Pettibone’s First Interview in 20 Years: On Making a Madonna Classic & Why He Left Music Behind’, *Billboard* (online), (22 May 2015), <<http://www.billboard.com/articles/columns/pop-shop/6575923/vogue-producer-shep-pettibone-interview>>

¹⁵⁰ Madonna, Julie Frost and Jimmy Harry. *Masterpiece*, (Interscope, 2011)

right of integrity, copyright cannot prevent the dividing of prior works as a step towards the creation of new works. Adapted from the realm of popular music, Madonna's lyrics above critique copyright's obsession with the finality and completeness of the work.

Works must be divisible if later works are to be created by merging parts of prior works. Antecedents to modern copyright recognised such creation of new works by merging prior parts. For example, Roman law recognised property arising from the merging of things into one new thing. As Dallan notes:

'According to Roman law, ownership of property could be obtained through accession, where two things with independent existence were combined into one. By accession, the "accessory thing" would merge into the "principal thing," and the owner of the principal would be the owner of the single merged "principal thing".'¹⁵¹

Sampling is merely a recent example in a long tradition of creation by the merging of things. As Chapter III will discuss, there both sampling and studio production of recordings involve such merging. Consider, for example, the practice of overlaying that has been deployed by DJs for decades:

'Overlays are achieved by playing two records at the same time through the P.A. system for an extended period of time, often lasting minutes. The aim to synchronize two different records so as to make them sound like one piece of music (which they then become in the hands of an accomplished deejay).'¹⁵²

To recognise the merging of things as one of the means of creating copyright material is to recognise a complementary concept: divisibility.¹⁵³ Division, as the

¹⁵¹ Footnotes omitted. Craig W. Dallan, 'The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest', (2004), 44(2) *Santa Clara Law Review* 365, 369

¹⁵² See this article which quotes a lyric from the 1980s post-disco track *Last Night a D.J. Saved My Life*. Kai Fikentscher, "'There's not a problem that I can't fix, 'cause I can do it in the mix': On the Performative Technology of 12-Inch Vinyl", in René T. A. Lysloff, Leslie C. Gay, Jr. (eds), *Music and Technoculture*, (Wesleyan University Press, 2003), 299

¹⁵³ This chapter discusses the divisibility of *works*, distinct from the divisibility of *the bundle of exclusive rights*. For a discussion of the latter, see Al Kohn and Bob Kohn. *Kohn on Licensing*, (Aspen Publishers, 2010), 363-367

complementary act to merging, is recognised in modern copyright law. For example, the concept of a substantial part recognises the division of the work while the concept of a compilation recognises the creation of a work by rearrangement of parts of pre-existing works.

Divisibility poses a threshold question about the extent to which part of a larger whole should be recognised as a discrete work.¹⁵⁴ For this reason, divisibility is inextricably linked to originality. Originality asks what is required to form a work. Divisibility considers the flip side of the coin: How little of a work can be taken until the taken piece is no longer a work? In essence, the inquirer divides the work until it is no more.

It is important here to briefly discuss the link between copyright subsistence and infringement in the context of musical works and sound recording. Copyright subsistence is only of practical impact to the extent that a work or a substantial part of a work is used.¹⁵⁵ For example, under Australian copyright law:

‘In this Act, unless the contrary intention appears: (a) a reference to the doing of an act in relation to a work or other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the work or other subject-matter; and (b) a reference to a reproduction, adaptation or copy of a work shall be read as including a reference to a reproduction, adaptation or copy of a substantial part of the work, as the case may be.’

Therefore, there is no copyright protection in relation to insubstantial parts of works. In *IceTV v Nine Network*, French CJ and Crennan and Kiefel JJ set a hybrid quantitative and qualitative test for whether a part is substantial: ‘in order to assess whether material copied is a substantial part of an original literary work, it is necessary to consider not only the extent of what is copied: the quality of what is copied is critical.’¹⁵⁶

¹⁵⁴ Divisibility also relates to the moral right of integrity. For example, consider whether the performance of just one fugue from the 24 pairs of preludes and fugues from *Das wohltemperierte Klavier*, intended to be one work, would be an alteration, distortion or mutilation of that work that would have been prejudicial to J. S. Bach’s honour or reputation

¹⁵⁵ *Copyright Act 1968* (Cth), s 14(1)

¹⁵⁶ *IceTV v Nine Network*, 30

It is worth considering the threshold size for a part to be substantial and consequently protected by copyright. Though this chapter does not focus on the boundary between substantial parts of works and small works, it may be a material issue in some instances, especially where small works are involved. For example, consider whether a verse of a song, a song on an album or a movement of a Sonata, is a standalone work. A lower limit for this threshold is essential, for allowing copyright protection for a substantial part smaller than the whole of any and all works would create a loophole in the originality test. Whether one determines a sample to be a standalone work or a potentially substantial part of a larger work frames the subsequent copyright inquiries. As Laddie J puts it, 'if the copyright owner is entitled to redefine his copyright work so as to match the size of the alleged infringement, there would never be a requirement for substantiality.'¹⁵⁷ One potential threshold test to avoid this loophole would be to ask, 'Would the substantial part at hand, considered in isolation, qualify as an original work?'

Divisibility is particularly relevant in a digital copyright ecology. Distributed production and consumption of copyright works mean that many works are developed in versions or incrementally and many uses involve only parts of works. While sampling is an obvious example of this, the digital environment is replete with other examples. Consider three common examples: a partially downloaded BitTorrent sound recording which cannot be rendered as sound because the protocol does not preserve the order or playability of parts during transfer; retweets on Twitter which quote prior tweets; and parts of songs caught in the background of home videos uploaded to YouTube.¹⁵⁸

The District Court faced divisibility issues in *VMG Salsoul v Ciccone*, considering whether the horn hit was itself a standalone work or merely part of a musical work or sound recording. While it was not in dispute that the *Love Break* remix was a copyright work, the defendants questioned the extent to which the remix could be

¹⁵⁷ *Hyperion Records v Warner Music*, (unreported case, May 17, 1991) (Ch.), 8

¹⁵⁸ This last scenario is the subject of the US *Lenz v Universal* litigation

divided into smaller copyright works and argued that the horn hit would not constitute a work. The District Court agreed, ruling that the horn hit did not constitute a standalone sound recording, and the underlying chord did not constitute a standalone musical work.¹⁵⁹

VMG Salsoul v Ciccone is one example of divisibility issues in the history of music. There are numerous examples in Baroque compositions that used parts of previous creations; one can question how little of these previous compositions could be taken before the taken part would no longer constitute a work.

Divisibility is an unavoidable issue in copyright cases where the prior or infringing work is a product of sampling, or appropriation art more broadly. Some sampling cases turn on the *de minimus* principle, allowing uses of the insubstantial parts of sound recordings and musical works to avoid findings of infringement. However, the extent to which musical works and sound recordings are divisible can also avoid a finding of infringement by undertaking the earlier subsistence inquiry in the application of copyright: is the taken part a work in its own right?

Divisibility also afflicts many classes of copyright subject matter beyond musical works and sound recordings. Divisibility, for example, has plagued literary theorists in the late twentieth century. Foucault gives a hypothetical based on the life works of Nietzsche:

‘Even when an individual has been accepted as an author, we must still ask whether everything that he wrote, said, or left behind is part of his work. When undertaking the publication of Nietzsche’s works, for example, where should one stop? Surely everything must be published, but what is “everything”? Everything that Nietzsche himself published, certainly. And what about rough drafts for his works? Obviously. The plans for his aphorisms? Yes. The deleted passages and the notes of the bottom of the page? Yes. What if, within a workbook filled with aphorisms, one finds a reference, the notation of a meeting or of an address, or a laundry list: Is it a work, or not? Why not? And so on, ad infinitum.’¹⁶⁰

¹⁵⁹ *VMG Salsoul v Ciccone*, slip op 2. On appeal, the Ninth Circuit declined to affirm whether the horn hits were original. *VMG Salsoul v Ciccone* (9th Cir.), FN6

¹⁶⁰ Foucault, ‘What Is An Author?’, 379. Brad Sherman gives a similar example: ‘If we take the case of a monograph, for example, while it is clear that the book as a whole is a

Foucault's principle is clear. We may agree that there is a difference between a work and a part of a work, but quibble about the boundary between the two. This challenges legislators developing copyright and courts applying copyright. For example, Australian legislators have also broached the issue of divisibility. At the twilight of the twentieth century, the Australian Parliamentary committee considering the Digital Agenda amendments to Australian copyright legislation witnessed the following exchange with the Australian Digital Alliance:

'CHAIR —Mr Wodetzki, is there some need to further define what we mean by 'a work'? Let me take an example. If you are talking about a collection of the High Court reports, is the report of one case a work, is the collection a work or is the judgment of one judge a work? What is "a work"?

Mr WODETZKI —That is a good question. I would not mind a bit of guidance on that myself. Perhaps with cases, it is a bit tricky because there are specific exceptions that say you can copy those. To use the illustration anyway, it is difficult to know which one is the work that you are talking about. But that is not a new problem. There are already common law rules about whether you can identify a work as distinct from another work. There is probably no need to revisit that. It is not an easy question, but it is not one you can get around, I do not think.'¹⁶¹

VMG Salsoul v Ciccone yields some parallels with Australian cases that have broached issues of divisibility. For example, Australian High Court has articulated the extent to which broadcast television program schedules may be divisible.¹⁶² Another example involved a popular Australian round. In defining the musical work *Kookaburra Sits in the Old Gum Tree*, the Full Federal Court considered whether reproduction of one part of a four-part round was a reproduction of a substantial part of the round.¹⁶³ Here, the Court opined:

copyright work, what of the chapters, pages, paragraphs, sentences, words and letters that are included in the book?' Sherman, 'What is a Copyright Work?', 100-101

¹⁶¹ Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 14 October 1999, (Jamie Wodetzki). See also the Copyright Amendment (Digital Agenda) Bill 1999

¹⁶² *IceTV v Nine Network*

¹⁶³ *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* (2011) FCAFC 47 (hereinafter '*EMI v Larrikin*'). See also Brianna Chesser's thought piece applying the standard in *EMI v Larrikin* to three musical borrowing scenarios. Chesser, 'The Art of Musical Borrowing'

'I do not consider that reproduction of a substantial part of Kookaburra requires reproduction of Kookaburra as a round. The limitation of originality to a work's composition as a round does not mean that performance of that work as a round is necessary in order to reproduce that which gives the work its originality. I consider that the Impugned Recordings, in reproducing the first two phrases of Kookaburra, thereby reproduced that which constitutes Kookaburra as an original work.'¹⁶⁴

VMG Salsoul v Ciccone also comes after *Bridgeport v Dimension Films*, where the US Sixth Circuit controversially found that 'even when a small part of a sound recording is sampled, the part taken is something of value... When those sounds are sampled, they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one'.¹⁶⁵

The District Court's position in *VMG Salsoul v Ciccone* ensures that the horn hit and underlying chord are not recognised as works separate from *Love Break*. Rejecting the divisibility of these elements from the larger works is instrumental in enabling the many downstream uses of *Vogue* that employ the horn hit and associated chord in new contexts. For example, in the official music video for *Vogue*, one of the pair of horn hits is synchronised with two jump cuts of a male dancer; the rough and sudden transition of the jump cuts is an appropriate visual translation of the abrupt attack and rapid decay and release of the horn hit's sound.¹⁶⁶ Similarly, a video of the performance of *Vogue* at the 1990 MTV awards shows choreographic elements synchronised to the horn hit; for example, the quick closing of a hand fan by Madonna and two female dancers synchronised with the horn hit.¹⁶⁷ The horn hit features even more prominently in the 2008 version of *Vogue* performed during Madonna's *Sticky and Sweet Tour*, used over fifty times throughout a four minute recording.

VMG Salsoul v Ciccone demonstrates some parts of a sound recording or musical work, such as a horn hit or chord, should not be recognised as a standalone

¹⁶⁴ Ibid, 84

¹⁶⁵ *Bridgeport v Dimension Films*, 801-802

¹⁶⁶ Madonna. 'Madonna – Vogue (video)', *YouTube* (online), (26 October 2009), <<http://www.youtube.com/watch?v=GuJQSAiODqI&feature=kp>>, 1:20

¹⁶⁷ Madonna. 'Vogue –MTV Music Awards 1990', *YouTube* (online), (17 November 2010), <<http://www.youtube.com/watch?v=lTaXtWWR16A>>, 1:28

protectable work. Allowing such a low threshold of divisibility would undermine the originality standard.

Sound recordings as lesser of equals

VMG Salsoul v Ciccone also broaches a perennial copyright issue: the need to redefine the scope of copyright subsistence upon the emergence of new forms of creation. The emergence of new modes of production and reproduction, and new forms of literature, theatre, music and art, have always challenged the categories of copyright material and boundaries between these categories.¹⁶⁸ This includes the boundaries between different categories of copyright works, and between copyright works and other copyright subject matter.

Musical works are now a well-established category across copyright jurisdictions, but this was not always the case. In the 1777 English case of *Bach v Longmann*, the Court decided that copyright protection for printed books by the *Statute of Anne 1710* also protected notated musical compositions.¹⁶⁹ As a result, classical composers Johann Christian Bach and Carl Friedrich Abel successfully challenged the unauthorised publication of two compositions—a music lesson and a sonata—by publishers Longmann and Lukey. Crucially, copyright recognition of compositions at the time of *Bach v Longmann* was contingent on their recognition as printed books. Lord Mansfield’s judgement provides the following reasoning:

‘Music is a science; it may be written; and the mode of conveying the ideas, is by signs and marks. A person may use the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use. If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. There is no colour for saying that music is not within the Act.’¹⁷⁰

¹⁶⁸ For example, see Justine Pila’s account of the development of the categories of copyright works under British copyright law. Justine Pila, ‘Copyright and its Categories of Original Works’, (2008), 30 *Oxford Journal of Legal Studies* 229

¹⁶⁹ J.C. Bach is not to be confused with his father, the Baroque composer Johann Sebastian Bach. At the commencement of the case, the J.C. Bach and Abel held royal privileges for those compositions, providing a short term of pseudo-copyright protection that the pair sought to extend via the Statute of Anne. *Bach v Longmann*, (1777), 2 Cowper 623

¹⁷⁰ *Ibid*, 624

Consider the consequences of applying *Bach v Longmann* to other prominent compositions at the time, such as Johann Sebastian Bach's composition, *Das wohltemperierte Klavier*.¹⁷¹ J.S. Bach commonly appropriated his own compositions. Some of the preludes in *Das wohltemperierte Klavier* expanded on broken chord patterns or improvised upon a motif from Bach's earlier pieces.¹⁷² Would these parts, borrowed from his earlier works, constitute works? Or, looking forward, would individual phrases which recur as motifs throughout the individual preludes and fugues in *Das wohltemperierte Klavier* warrant the status of works when used by later composers?

Even by the time of the British *Copyright Act 1842* that finally afforded copyright protection to 'a sheet of music' as part of a 'book', some written works still struggled to be recognised as literary works.¹⁷³ For example, Lionel Bently has chronicled how newspapers struggled to be recognised as literary works.¹⁷⁴ By the latter half of the twentieth century, musical works had been recognised, but sound recordings were just gaining recognition with the protection of sound recordings under US copyright law. In 1972, Irving Horowitz wrote 'the gap between the engineering of sound and the creation of music has narrowed to a remarkable

¹⁷¹ Also known in English as *The Well-tempered Clavier*

¹⁷² See, for example, Siglind Bruhn. *J.S. Bach's Well-Tempered Clavier. In depth Analysis and Interpretation. Volume III: Preludes and Fugues on F# G Ab*, (MAINER International, 1993), 14

¹⁷³ *Copyright Act 1842*, 5 & 6 Vict. c. 45

¹⁷⁴ Bently cites an 1869 English case in which the Court inferred that references to magazines and periodic works in British copyright statute implied the exclusion of newspapers from copyright protection. He also cites the 1878 Royal Commission on Copyright which remarked that '[m]uch doubt appears to exist... as to whether there is copyright in newspapers.' Lionel Bently. 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia', (2004), 38 *Loyola of Los Angeles Law Review* 71, 92. See also *Cox v Land & Water Journal Co* (1869) 9 L.R.-Eq. 324 (Eng.) and Great Britain, *Report of the Commissioners Appointed to Make Inquiry with Regard to the Laws and Regulations Relating to Home, Colonial and International Copyright*, Parl. Paper No 163, 1878, para. 88

degree'.¹⁷⁵ This recognition of a distinction between sound recordings and musical works increased stress on the concept of the copyright work.

Today, it is the sound recording that struggles to define itself, separately from the musical work. Just as compositions were defined in the terms of literary works, sound recordings are often described in the terms of musical works. This contrasts with musical works which are recognised in Australian and other copyright laws independently of literary works.¹⁷⁶ This logic is entrenched throughout copyright law. Article 9(3) of the *Berne Convention* relevantly states: 'Any sound or visual recording shall be considered as a reproduction [of a protected work] for the purposes of this Convention'.¹⁷⁷ This article is echoed, for example, in Australia's copyright statute: 'a literary, dramatic or musical work shall be deemed to have been reproduced in a material form if a sound recording or cinematograph film is made of the work, and any record embodying such a recording and any copy of such a film shall be deemed to be a reproduction of the work'.¹⁷⁸ One consequence of this Article is that sound recordings, by default, are reproductions. Another consequence is that some copyright jurisdictions do not grant sound recordings the status of works. For example, while US, UK and NZ copyright laws recognise sound recordings as works, Australian and Canadian copyright laws do not.¹⁷⁹

At an abstract level, copyright's inability to properly separate a sound recording of music from an underlying musical work leads to a conflation of the senses. How can a work fixed and expressed for the eye (in sheet music and notation) be inseparable from a work fixed and expressed for the ear (in a sound recording)? Synaesthesia should be no prerequisite to the application of copyright.

¹⁷⁵ Irving Horowitz, 'Rock, Recordings, and Rebellion', in Charles Nanry (ed), *American Music*, (Transaction, 1972), 267-288, 269

¹⁷⁶ For example, Part III recognises literary, musical and dramatic works as separate subject matter classes. *Copyright Act 1968* (Cth), pt. III

¹⁷⁷ *Berne Convention*, 9(3)

¹⁷⁸ *Copyright Act 1968* (Cth), s 21(1)

¹⁷⁹ See 17 U.S.C. §106, *Copyright, Designs and Patents Act 1988* (UK), s 1, and *Copyright Act 1994* (NZ), s 14. See also Australian and Canadian examples: *Copyright Act 1968* (Cth), Part IV and *Copyright Act*, (R.S.C., 1985), c. C-42, s 18

Practically speaking, it is difficult in the context of music to assess the originality of a sound recording without reference to the originality of any underlying musical work. Describing the sound recording at question without conflation with a musical work is often difficult for courts and parties alike.

Hadley v Kemp illustrates some difficulties in separating musical works and sound recordings.¹⁸⁰ The case considered which members of the band Spandau Ballet held the joint copyright in a song. The lead singer wrote an initial version comprising a vocal melody and acoustic guitar. During the recording process, other members of the band added a 16-bar improvised saxophone solo and other rearrangement of the song. Park J declined to recognise joint authorship of the musical work by these other band members, providing a pertinent section in the judgement: 'But that does not mean that the whole band were creating a new and different musical work. Rather they were reducing Mr Kemp's musical work to the material form of a recording.'¹⁸¹ The recognition of the sound recording as a fixation of the musical work and not as a standalone work undervalued the original contributions of band members other than the lead singer. In denying that the improvised saxophone solo was a 'significant part' of the song, Park J's judgement contrasts particularly with *EMI v Larrikin* which found an even shorter and appropriated flute solo nonetheless was a substantial part of the whole song.¹⁸² The case serves as a cautionary tale of how conflation of sound recordings with underlying musical works may deter downstream originality. It also shows how one particular interpretation of originality deters future originality that takes the form of rearrangement. As Shane O'Connor writes, '*Hadley v Kemp* could thus be a strong authority against granting independent copyright to a new version of a pre-existing song.'¹⁸³

¹⁸⁰ *Hadley v Kemp* (1999) EMLR 589 (hereinafter '*Hadley v Kemp*')

¹⁸¹ *Hadley v Kemp*, 646

¹⁸² *Ibid*, 650. See also *EMI v Larrikin*

¹⁸³ Shane O'Connor. 'A Critical Evaluation of the Law of Copyright Authorship in Relation to Derivative Musical Works', 3(2) *Westminster Law Review*, (2012)

Equally, as this passage from Mummery LJ's opinion in *Hyperion Records v Sawkins* demonstrates, it is also difficult to define music without reference to sound:

'In the absence of a special statutory definition of music, ordinary usage assists: as indicated in the dictionaries, the essence of music is combining sounds for listening to. Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener's emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it. Music must be distinguished from the fact and form of its fixation as a record of a musical composition. The score is the traditional and convenient form of fixation of the music and conforms to the requirement that a copyright work must be recorded in some material form. But the fixation in the written score or on a record is not in itself the music in which copyright subsists. There is no reason why, for example, a recording of a person's spontaneous singing, whistling or humming or of improvisations of sounds by a group of people with or without musical instruments should not be regarded as "music" for copyright purposes.'¹⁸⁴

Mummery LJ strikes at the heart of the issue: copyright's circular logic of defining music through sound and vice versa. By being a rearrangement or organisation of sounds, music distinguishes itself from mere noise. However, music may also be fixed in sound, and music may be created without instruments or voices. If the arrangement of music begins and ends with sounds, it is little wonder that separating musical works from sound recordings proves near impossible in many cases.

The US District Court decision *Williams v Bridgeport Music* is a rare judicial attempt to articulate the boundary between a sound recording and musical work. Defendants sought to play a musical work as evidence during court proceedings, and the Court was concerned that the playing of a sound recording embodying both the musical work and a performance of that musical work would be prejudicial. Kronstadt J ruled the defendants a recording would be admissible evidence if it struck 'an appropriate balance between presenting a recording that contains what is reflected on the deposit copy, without including potentially prejudicial sounds

¹⁸⁴ *Hyperion Records v Sawkins*, 53

that are not protected.’¹⁸⁵ This ruling led to the creation and admission into evidence of two bespoke mashups.

Unsurprisingly, separating sound recordings from the underlying musical works was a challenge for both the Court and the parties in *VMG Salsoul v Ciccone*. Neither were immune to the occasional conflation of part of the musical work with part of the sound recording. At several points in the *VMG Salsoul v Ciccone* judgement, it is unclear whether the Court is referring to the horn hit chord, which would constitute a part of the musical work, or the horn hit sound, which would constitute part of the sound recording of the horn section.¹⁸⁶ For example, the Court points out that the ‘Horn Hit does not appear in the printed sheet music’.¹⁸⁷ The chord and sound are also conflated in an authority that the defendants cite in one of their briefs. As the plaintiffs rightly argue that a precedent cited by the defendants pertaining to musical works does not automatically extend to sound recordings:

‘The defense has relied on the case of *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004) for their argument that a small use, even in a music sampling case, is effectively forgivable. The *Newton* case, however, was a case in which the Beastie Boys had obtained a license to the subject recording. There, the plaintiff had retained rights to the composition and claimed copyright infringement not on the recording that was sampled, but rather on the composition rights that were retained.’¹⁸⁸

At times, parties provide greater clarity. For example, VMG Salsoul’s initial complaint filed with the District Court reads ‘Defendants, and each of them, have infringed the copyright in the sound recording of *Love Break* by incorporating it into the song *Vogue* without authorization.’¹⁸⁹

¹⁸⁵ Order regarding the admissibility of Sound Recording Evidence at Trial, *Pharrell Williams, et al. v Bridgeport Music, Inc., et al.*, Civ. No. LA CV13-06004 JAK (AGRx), (C.D. Cal., 2015), 5

¹⁸⁶ *VMG Salsoul v Ciccone*, 1

¹⁸⁷ At other points, the Court is clear: ‘The Court finds neither the chord nor the Horn Hit sound sufficiently original to merit copyright protection.’ *VMG Salsoul v Ciccone*, 19

¹⁸⁸ ‘Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment’, *VMG Salsoul v Ciccone*, (21 June 2013), I

¹⁸⁹ ‘Complaint for Copyright Infringement’, *VMG Salsoul v Ciccone*

Insufficient separation of musical works from sound recordings is common in cases dealing with sampling; it would be unfair to single out the Court and parties in *VMG Salsoul v Ciccone*. For example, consider this passage from the Ninth Circuit's judgement in *Newton v Diamond*:

'This appeal raises the difficult and important issue of whether the incorporation of a short segment of a musical recording into a new musical recording, i.e., the practice of "sampling," requires a license to use both the performance and the composition of the original recording.'¹⁹⁰

Schroeder CJ's reference to a 'performance and composition of the original recording' requires some clarification. Firstly, while US copyright law does recognise the composition of musical works, it does not recognise the composition of recordings. It is certainly true that, at least in a lay sense, note that there can be performances of sound recordings, for this is a core component of the practice of DJs—they play recordings. However, a license is never required to perform a sound recording, other than by means of digital audio transmission. US copyright statute recognises only a narrow public performance right limited solely to performance digital audio transmission: 'The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).'191

Musical works benefit from an established system of musical notation, which helps describe the copyright material at question. Notation gives form to the body of musicological knowledge that informs copyright's inspection and comparison of compositions. It provides a basis for assessing the originality of compositions, including how the composer has drawn upon the palette of notable musical elements to create a new work.

¹⁹⁰ *Newton v Diamond*, 592

¹⁹¹ 17 U.S.C. §114 (a). See also section 106 which provides, in relation to sound recordings, rights to reproduce copies, prepare derivative works, distribute copies to the public and perform publicly by means of digital audio transmission. 17 U.S.C. §106(1),(2),(3),(6). 'To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process'. 17 U.S.C. §101

As US copyright litigator and scholar Ronald Rosen has noted, the trinity of melody, harmony and rhythm and related building blocks—phrase, motif, counterpoint, tempo, expression marks, meter and song form—enable interpretation of music as, or like, a language.¹⁹² These common components of music provide a nuanced system that assists the application of copyright.

By contrast, sound recordings lack any equivalent system of notation or body of knowledge. While digital audio workstation software—such Pro Tools and Audacity—provide partial ability to visualise sound waves, samples and digital effects, this falls short of a comprehensive system of sound notation. This absence of common notation inhibits discussion of the originality and boundaries of sound recordings. Indeed, while US copyright law recognises sound recordings as works, Australian copyright law does not yet afford them such status.¹⁹³

The judgement in *VMG Salsoul v Ciccone* focuses on the comparison of musical works rather than comparison of sound recordings; this mirrored the approach in *Hadley v Kemp*. Other than time codes above the staves, the judgement makes little attempt to represent elements of the sound recording of the horn hit's appearance in *Vogue* and *Love Break*.

¹⁹² Rosen, *Music and Copyright*, 152. An alternative formula for a musical work was advanced by the plaintiff in a UK case: 'the combination of vocal expression, pitch contour and syncopation'. See *Coffey v Warner/Chappell Music Ltd. & Ors* (2005), EWHC 449 (Ch)

¹⁹³ US copyright law states: 'Works of authorship include the following categories: ... (7) sound recordings'. 17 U.S.C. §102. By contrast, Australian copyright law explicitly denies sound recordings the status of works as 'subject-matter other than works'. *Copyright Act 1968* (Cth), pt. IV

LB (INST) 3:32
LB (OR) 5:02

V 1:08 Compilation Version
V 0.51 Radio Edit

Figure 8: Horn hits in *Love Break* and *Vogue*¹⁹⁴

For a recorded song, it can be straightforward to isolate the musical work from the sound recording albeit, for the reasons discussed above, imperfectly. The converse task of isolating a sound recording from a musical work is a relative struggle. For example, it would be difficult to play the horn hit from *Love Break* without invoking the underlying four-note chord. Through the various briefs and the judgements in *VMG Salsoul v Ciccone*, discussions about the sound recording inevitably intertwine with discussions about the musical work. Aside from some quantitative discussions of the horn hit sound, the District Court does not articulate whether the sound recording is original.¹⁹⁵

While *VMG Salsoul v Ciccone* demonstrates some of the difficulties in separating sound recordings from musical works, sampling can also reconfigure originality by transforming one category of work into another. As Chapter VI will discuss further, Pogo transforms snippets of sound and vision from iconic Disney animated films

¹⁹⁴ Redrawn notation from opinion, *VMG Salsoul v Ciccone*, 12. *Vogue* transposed to same key as *Love Break* for convenience of comparison

¹⁹⁵ For example, consider this rudimentary discussion of the horn hit described in seconds, minutes and verbs such as ‘sounded’, all a far cry from the nuance of musical notation: ‘In the original version of *Love Break*, the 0.23 second Horn Hit appears in the song for only sixteen total seconds out of an approximately seven-minute recording. The Horn Hit is even less prominent in the instrumental version, where it only appears for 11.5 seconds total, and is not sounded for the first 3:11 minutes of the approximately seven minute recording.’ (references to Court documents omitted) *VMG Salsoul v Ciccone*, 20

into video mashups.¹⁹⁶ In another example, *Girl Walk* reinterprets Girl Talk's music mashup album *All Day* as a dance video set in the architecture, street art and urban spaces in New York City. Here, the creators of the dance video re-express an aural form as a physical and visual narrative of three dancers in New Yorkers.¹⁹⁷

The incorporation of two types of material into a single creation can also present its own complexities. Consider, for example, whether the lyrics and composition of *Vogue* are one musical work or two separate works—a musical work and a literary work. The *Berne Convention* requires protection of both 'books, pamphlets and other writings' and 'musical compositions with or without words'.¹⁹⁸ This requirement gives ratifying parties flexibility to determine whether to bundle together writings and compositions. And so, US copyright law treats lyrics as part of a musical work, while Australian copyright law does not.¹⁹⁹ However, in both jurisdictions, any melody to which lyrics are set remain as part of the musical work. In short, determining whether lyrics are a separate work from a composition can only be resolved within each jurisdiction.

Building upon the discussion of originality as rearrangement earlier in this chapter provides a model for distinguishing sound recordings from musical works. A test could be simple in principle: What arrangement is created only in sound but not in the underlying composition? Currently, the lack of a common and rich notation for sound recording impedes the ability to articulate the original rearrangement of sound.

¹⁹⁶ Nick Bertke. *Pogomix* (online), (c2015), <<http://pogomix.net/>>

¹⁹⁷ Wild Combination. *girlwalkallday* (online), (2011), <<http://www.girlwalkallday.com/>>

¹⁹⁸ *Berne Convention*, 1

¹⁹⁹ 'Works of authorship include the following categories: ... (2) musical works, including any accompanying words'. See 17 U.S.C. §102. See also *Copyright Act 1968* (Cth), s 10(1). Consider also the issues in separating lyrics from compositions in piano-vocal and guitar-vocal books of popular music which collocate lyrics and music, as well as written dynamic markings and written commentary on how to play the music

New forms of notation may assist in capturing the original rearrangements expressed in sound. Already, digital audio workstation software and audio recognition software function as a form of pseudo-notation.²⁰⁰ Software such as Traktor, Garageband and Ableton provide visual depictions of soundwaves and basic notation for the effects, structural changes and loops that notate and document the contributions of authors of sound recordings. For almost two decades, the New Interfaces for Musical Expression (NIME) conference has surfaced research on emerging interactive, automatic and other experimental notation.²⁰¹ For example, Mays and Faber have put forward a new system for notating including the Karlax Controller, a programmable electronic sound and music controller.²⁰² Likewise, Enström *et al.* have proposed music notation for multi-touch interfaces which are increasingly common in the era of touchscreen mobile devices.²⁰³ Dubset's content identification system discussed in Chapter VI provides further examples of new notation forms; Dubset's system identifies sound recordings separately from musical recordings for the purposes of comparing the similarity of different sound recordings and musical works embodied in sound recordings.

Reimagining originality as rearrangement

This chapter has provided a blueprint for reconceptualising originality and clarifying the copyright work. Focusing on the case of *VMG Salsoul v Ciccone*, it has examined whether a horn hit is a sufficiently original to warrant status as a

²⁰⁰ Indeed, one composer and music scholar has even attempted to notate choreography which performs a sound recording. See Mark Applebaum. 'The Scientist of Music', *ted.com*, (online), (May 2012), <http://www.ted.com/talks/mark_applebaum_the_mad_scientist_of_music?language=en>

²⁰¹ See for example NIME. *Interactive Music Notation and Representation Workshop* (online), (30 June 2014), <<http://notation.afim-asso.org/doku.php/evenements/2014-06-30-nimew>>

²⁰² Tom Mays and Francis Faber. 'A Notation System for the Karlax Controller', *Proceedings of the International Conference on New Interfaces for Musical Expression* 553, (2014), <http://www.nime.org/proceedings/2014/nime2014_509.pdf>

²⁰³ Warren Enström, Joshua Dennis, Brian Lynch and Kevin Schlei. 'Musical Notation for Multi-Touch Interfaces' *Proceedings of the International Conference on New Interfaces for Musical Expression* 83, (2015), <http://www.nime.org/proceedings/2015/nime2015_289.pdf>

standalone sound recording or standalone musical work. On both counts, it agrees with the US courts that the horn hit is not an original.

Moreover, *VMG Salsoul v Ciccone* provides an opportune moment to clarify the nature of copyright subsistence, particularly in relation to sampling. This chapter has focused on one key question in subsistence: What is originality? *VMG Salsoul v Ciccone* provides a model for sustaining the copyright concept of originality in the digital age. While it is hyperbolic to claim ‘everything is a remix’, it is true that rearrangement can often create something original.²⁰⁴ The copyright creator’s contribution takes the form of new arrangements and new voices given to pre-existing material.

An original rearrangement, rather than original material, is at the heart of copyright works. Just as the *sine qua non* of copyright is originality, we might say the *sine qua non* of originality is rearrangement. Couched as rearrangement, originality proves itself to be a more compelling guiding concept for copyright subsistence than some other explanations for originality. This refinement of originality places pressure on the idea-expression dichotomy, that material is either worthy of copyright protection or not. If we view ideas and expressions not as binaries but on a spectrum of originality, then ideas rearranged with new voice become worthier of protection and, conversely, parts of expressions with lower originality are less worthy of protection.

Fuller understanding of originality aids all copyright matters, enabling concise consideration of the scope and nature of works. It also avoids unnecessarily broad or redundant consideration of infringement matters, especially in cases where

²⁰⁴ Indeed, a 2013 green paper released by the US Department of Commerce’s Internet Policy Task Force specifically reconsidered the legal framework for the creation of remixes. Internet Policy Task Force. *Copyright Policy, Creativity, and Innovation in the Digital Economy* (online), (US Department of Commerce, 2013), <<http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>>. This was followed by a 2016 white paper. Internet Policy Task Force. *White Paper on Remixes, First Sale, and Statutory Damages* (online), (US Department of Commerce, 2016), <<https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf>>. See also Ferguson’s pithy documentary. Ferguson, *Everything is a Remix*

there is no subsistence. A clearer concept of originality also assists sampling artists who grapple with the logic of the copyright work as they make and remake works. It provides cultural and legal practitioners alike with the ability to distinguish the natural from the artificial, the original from what comes before and after, the fixed from the transient and the whole from its parts.

Categorising multi-media creations as copyright works remains a complex task. For example, the boundaries between the aural material (in musical works and sound recordings) and overlapping categories (such as film and theatre that are audiovisual in nature) are easily questioned. Likewise, if music videos are recognised as adaptations under Australian copyright law, how do we separate these adaptations from the underlying sound recordings and musical works? When music videos are mashed up by VJs who mix videos as DJs mix records, how can we separate these video mashups from their underlying works?

The inability to properly separate sound recordings from musical works inhibits the important, initial copyright inquiry of determining whether copyright subsists in the allegedly infringed material. As a result, the sound recording is often presumed to be original and worthy of the status of the copyright work simply by virtue of copyright subsisting in the musical work embodied in the sound recording. The outcome is that prior sound recordings ride on the coattails of musical works embodied in the sound recordings. When this occurs, it is often to the detriment of sampling artists and other users of sound recordings accused of copyright infringement. The nature of originality in sound recordings is discussed in greater detail in Chapter III.

This chapter has shown that the copyright work is a child of both originality and appropriation. As Goehr notes in relation to Handel, Berlioz, Scarlatti, Liszt and other composers in the eighteenth century, the relationship between originality and appropriation is strong:

‘To describe musicians as having composed so many individual works is misleading, of course. Many of their compositions would have involved significant overlap and repetition of musical material. And such overlap would not just have

existed within a single composer's output, but amongst compositions by any number of composers.'²⁰⁵

This overlap between prior material and future original material is often left unexplored before proceeding to matters of infringement. Consider the recent example concerning the use of the melody *Kookaburra Sits On The Old Gum Tree* in *Down Under*. Here, the Full Federal Court discussed original material such as melody, excerpts or phrases and unoriginal material such as building blocks and motifs. However, the Court was silent on the overlap between original and unoriginal material:

'A melody, excerpt or phrase in a completed work is capable of manifesting originality. However, the copying of musical ideas and commonplace building blocks and motifs from a musical work, which are not themselves original, will not normally constitute infringement of that musical work.'²⁰⁶

It also demonstrates that the relationship between original and derivative is more complex than the standard articulated by Nimmer:

'a work will be considered a derivative work only if it would be considered an infringing work if the material that it has derived from a pre-existing work had been taken without the consent of a copyright proprietor of such pre-existing work.'²⁰⁷

In *VMG Salsoul v Ciccone*, the District Court opined that *Vogue* is not a derivative sound recording or musical work of *Love Break*. This was because neither the horn hit nor the underlying four-note chord constituted a pre-existing work. Therefore, no use of the horn hit or underlying chord could be copyright infringement. In this way, the District Court took care to note the complexity between boundaries of related works, in separating the contributions that lead to musical works and lead to sound recordings.

²⁰⁵ Goehr, *The Imaginary Museum of Musical Works*, 183

²⁰⁶ *EMI v Larrikin*, 11

²⁰⁷ Melville B. Nimmer & David Nimmer. *Nimmer on Copyright*, (Westlaw, 2007) (hereinafter 'Nimmer and Nimmer, *Nimmer on Copyright*'), §3.01

That said, neither the District Court nor the Ninth Circuit in *VMG Salsoul v Ciccone* walked through the door left open by *Newton v Diamond* to recognise the role performers play in composition. The contention by the plaintiff's expert in *Newton* that '[t]he contribution of the performer is often so great that s/he in fact provides just as much musical content as the composer' remained unchallenged by either court in *VMG Salsoul v Ciccone*.²⁰⁸

VMG Salsoul v Ciccone provides important precedents for sampling artists and other creators seeking to use prior musical works or sound recordings. It adds to case law clarifying the circumstances under which a sound recording or musical work is not sufficiently original to warrant copyright subsistence.

It is also relevant here to briefly comment on the relationship between the subsistence concept of originality and the infringement doctrine of the substantial part. Australian copyright law reserves to copyright holders the exclusive right to make particular uses of a whole copyright work or a substantial part of such a work.²⁰⁹ It follows that uses of insubstantial parts of copyright works are not reserved to the copyright holder. As a result, sampling artists and many other productive users of copyright material may be interested in the boundary between an insubstantial and substantial part. This chapter puts forward the view that a substantial part exists if that part would itself be an arrangement that is original enough to be a standalone work. This view provides one way of setting a necessary restriction on the scope of the substantial part doctrine. Without a lower-end limit on the substantial part doctrine, originality would be a weak guard of copyright's purpose. If copyright would protect a substantial part of the smallest work recognised by copyright, the substantial part doctrine would have no effect.

The following two chapters, Chapters III and IV, extend the concept of originality as rearrangement to the concept of the sound recording and the moral right of

²⁰⁸ *Newton v Diamond*, 1251

²⁰⁹ *Copyright Act 1968* (Cth), s 14

integrity. They act as variations on originality as rearrangement, the theme of this chapter.

The Development extends the ideas of the Exposition into potential public policy reforms. It comprises two chapters that each pose a policy option for reflecting a more nuanced originality standard for uses of parts of works. The first option is extending the application of the originality concepts from copyright subsistence to copyright infringement; as Chapter V demonstrates, this mirrors the transformative use explanation of the fair use exception to copyright infringement. The second option, discussed through Chapter VI, is to complement *ex ante* licensing with *ex post* monitoring.

III. First variation: Sound recording as rearrangement

This chapter uses the music of the Gorillaz to explore how contemporary musicians create original sound recordings through rearrangement. Gorillaz continue a long tradition of virtual bands.²¹⁰

By using the music of a virtual band as a case study, this chapter peers behind ‘a 21st Century supergroup who hide behind the alter egos of the cartoon stars they have created’ to reveal the many acts of rearrangement behind their sound recordings.²¹¹ By refusing to succumb to ‘the sway of the Author’, and departing from a tradition where the ‘explanation of a work is always sought in the man or woman who produced it’, this chapter focusses on how sound recordings come to be.²¹² It seeks to separate the originality in sound recordings from the aura of the author.

The four members of Gorillaz are fictional characters that provide a façade for the contributions of many creators. These creators have gone to great lengths to imbue the band ‘members’—2D, Murdoc, Russel and Noodle—with many of the characteristics of real authors, including bodies and voices. Voice actor Phil Cornwell enabled one Gorillaz character to ‘play’ several DJ sets, announcing ‘Hello world, I’m back! Back! Live on air! It’s me, Murdoc Niccals. Broadcasting from my brand new stinking palace of sin. This is me, the Gorillaz king.’²¹³ Jamie Hewlett

²¹⁰ ‘Noteworthy antecedents include bands featuring cartoon characters, such as the Beatles of Yellow Submarine, the Archies, and Josie and the Pussycats; Cyborgs, such as Kraftwerk and Devo; fictional bands, such as the Monkees and *Sgt Pepper’s Lonely Hearts Club Band*; spoofs, such as Spinal Tap and the Rutles; and bands in which the identity of musicians is withheld, such as the Residents and Handsome Boy Modeling School (brainchild of Gorillaz producer Dan ‘The Automator’ Nakamura)’. John Richardson. “‘The Digital Won’t Let Me Go’: Constructions of the Virtual and the Real in Gorillaz’ “Clint Eastwood” (2005), 17(1) *Journal of Popular Music Studies* 1, 3

²¹¹ Ian Youngs, ‘Gorillaz pull it off’, *BBC News* (online), (23 March 2001), <<http://news.bbc.co.uk/2/hi/entertainment/1237698.stm>>

²¹² Roland Barthes. “*The Death of the Author.*” *Image / Music / Text*, Stephen Heath (trans.), (Hill and Wang, 1977), 142-148 (hereinafter ‘Barthes, *The Death of the Author*’, 143

²¹³ Adam Bychawski. ‘Gorillaz’ Murdoc “hijacks” NME Radio to play Horrors, Dead Weather’, *NME* (online), (21 January 2010), <<http://www.nme.com/news/gorillaz/49355>>

and other graphic artists have brought life to the bodies of Gorillaz, complete with characteristic animated movements in musics and live holographic performances. The cover art, below, from the second Gorillaz studio album *Demon Days*, provides one example of the shape artists give to the virtual band members.



Figure 9: Album cover from *Demon Days*²¹⁴

At times, Gorillaz become so real that even the creators of the personas become confused. Damon Albarn, one of the founding forces behind Gorillaz, struggles on one occasion: 'We—I mean they—are a complete reaction to what is going on in the charts at the moment'.²¹⁵ More knowledgeable fans may see past the virtual band and recognise key contributors, former Blur frontman Damon Albarn and Tank Girl artist Jamie Hewlett. Likewise, diligent observers of pop culture may even acknowledge other musicians contributing to Gorillaz, including Del the Funky Homosapien and Dan 'The Automator' Nakamura.

The chapter peels away these cartoon personas and delves beyond high-profile collaborators, to focus on the many acts of rearrangement that form Gorillaz sound recordings. It builds an understanding of the rearranging practices and processes

²¹⁴ Clockwise from top left: Murdoc, 2D, Russel and Noodle. Gorillaz. *Demon Days*, (Parlophone, 2005)

²¹⁵ Nick Duerden. 'Gorillaz in our midst', *The Observer* (online), (11 March 2001), <<http://www.guardian.co.uk/theobserver/2001/mar/11/featuresreview.review2>>

that lead to the creation of sound recordings, and how Gorillaz's originality stems from rearrangement.

In doing so, this chapter complements the existing cultural and legal literature which locates sampling in the context of US Jamaican reggae and dub from the 1960s and 1970s, US hip-hop of the 1980s and 1990s, and in electronic dance music. It adds to the example of Madonna's *Vogue* in Chapter II, which provides a prominent example of sampling not bound to these genres. This chapter shows the importance of sound recording to sampling within and across these genres, times and locations. The original contributions of studio producers inform the original contributions of sampling artists, because the soundtrack of the musical acculturation of sampling artists were literally mixed by studio producers.

The first part shows how recording has long been an act of original rearrangement. The rich body of literature on studio producers recognises the role they play in the creation of original works. While they rarely create alone, their contribution to the whole imbues original works with unique voice, structure and other musical features. This chapter prefers the term 'producer' to 'engineer', although the terms are used interchangeably in quoted sources. As Chapter II discussed briefly, changes in recording technology have blurred the line between authors and producers, and collapsed the distinction between the art and craft of sound. The sound engineer, a term which evokes a technical craft, is at times insufficient at capturing their original contributions in studios.

It provides a foundation for the subsequent parts which use various recordings released under the Gorillaz umbrella as an extended case study. These examples show how rearrangement features front and centre in recording, continuing a rich lineage of musical creation based on reuse and appropriation.

The second part illustrates the role that sampling, as a specific type of rearrangement and studio production, plays in the creation of Gorillaz sound recordings. It considers how particular samples have been deployed in Gorillaz sound recordings, showing how new recordings can emerge primarily from the

rearrangement of one or more existing recordings. This reveals the centrality of voice, rearrangement and remix to originality in music. Rearrangement not only severs samples from their context; it also breaks studio producers and performers free from their own cultural backgrounds and forces them to engage with the cultures of others.

Gorillaz's remixing of their prior sound recordings forms the focus of the third part. The creation of sound recordings is often iterative, and it is often unclear when a recording is 'finished', even after post-production and public release. However, copyright recognises discrete fixations, separating definitive versions from preparatory material. This part uncovers some of the tensions between these two views.

The fourth and final part considers how rearrangement of Gorillaz material continues outside the control of the creators. Through unauthorised musical and visual remixes, Gorillaz material continues to grow and become the raw material for new works. Potential rearrangements and remixes by others continue to create new works of sight and sound. Moreover, the chapter demonstrates that some of these materials attract the acceptance of prior creators, at least in some cases.

Rearrangement in popular music recording

The history of popular music is replete with studio producers known for their creative arrangement ability and their characteristic sounds. Three examples merit highlighting here.

The first is Phil Spector. In his career, Spector was the studio producer for The Beatles, Leonard Cohen, the Righteous Brothers and many others. He also promoted the rise of 1960s girl groups as a genre, including The Ronettes and The Crystals. One mark of Spector's role in the rise of girl groups is the inclusion of the characters Ronette and Crystal as part of fictional 1960s girl group in the musical *Little Shop of Horrors* based on the 1960s film of the same name.²¹⁶ He is commonly

²¹⁶ Alan Menken and Howard Ashman. *Little Shop of Horrors*, (Workshop of the Players' Art, 1982)

associated with creating the 'Wall of Sound', a collection of studio production techniques which bring lush orchestration and layered vocals to music recording. As Mark Ribowsky notes:

'From 1961 to 1965 his records made the charts twenty-seven times; seventeen of those nestled inside the Top 40. As a body of work, they were a cultural seed... It was crazy for Spector to cram two dozen instruments into his studio, but in his hands the aural effect was a tool of purpose. Thus, Spector *needed* the technology of the fifties to recast rock in the sixties. What made it *seem* advanced was his synergy in processing the old into a new formula.'²¹⁷

Bill Porter is the second iconic producer, having produced hits for Elvis, Roy Orbison and others. Nashville legend and guitarist Chet Atkins also credited Porter with his sound. When asked, 'How in the world did you get that sound?', Chet replied, 'It was Bill Porter.'²¹⁸ At times, Porter also mixed multiple recordings to produce the released recording. He recalls one such occasion:

'I remember when I edited the tape before sending back to RCA. I stretched the introduction on the tape. I thought "Oh, my God, I've messed up." So I went back and found an alternative take with a good intro and spliced it on. I did this after the session. I never told anyone about it!... You're not a good engineer until you destroy a master and hopefully live to talk about it.'²¹⁹

Porter pioneered what is known as the 'Nashville sound', which set itself apart from the rock and roll of the era through its string arrangements, crooned vocals and slower tempos. He also pre-arranged sound prior to recording, by pioneering studio design features at RCA's Nashville Music Row studios.²²⁰ These features included acoustic tiles and carefully positioned microphones, and helped to reduce echoes, interference and noise

²¹⁷ Emphasis in original. Mark Ribowsky. *He's a Rebel: Phil Spector, Rock and Roll's Legendary Producer*, (Rowman & Littlefield, 2000), 5

²¹⁸ Excerpt from interview with Bill Porter, in Chet Atkins, John McClellan, Deyan Bratic. *Chet Atkins in Three Dimensions*, (Mel Bay Publications, 2011), 150

²¹⁹ Ibid

²²⁰ Michael Kosser. *How Nashville Became Music City, U.S.A.: 50 Years of Music Row*, (Hal Leonard, 2006), 40

Modern studio producers continue to develop their own bodies of reputable works. For example, Grammy-winning sound producer Trina Shoemaker is known particularly for her ability to highlight the vocals of artists from Iggy Pop to Something for Kate. She produced for Sheryl Crow for one decade, safeguarding Crow's particular studio sound.²²¹

However, despite their cultural importance to the sound of popular music, studio producers remains an overlooked part of the copyright ecology. Copyright's poor recognition of studio production manifests in several ways.

Firstly, while studio producers can be recognised as the holder of sound recording copyright in many jurisdictions, copyright laws sometimes favour recognition of record companies that pay studio producers for their services. This is true in Australia where generally, 'the maker of a sound recording is the owner of any copyright subsisting in the recording' but payment for the maker's services can grant the record company (or other payer) copyright ownership, in the absence of a contrary agreement.²²² This is echoed in UK law, where the case of *A&M Records v Video Collection International* further limits the scenarios under which a producer is the owner of a sound recording.²²³

²²¹ Lynn Oldshue. 'The Right Notes', *The Southern Rambler* (online), (2013), <<http://thesouthern Rambler.com/3wvbp0avyx6o9n785t0fk8zoqfduof/>>

²²² '[A] person [who] makes, for valuable consideration, an agreement with another person for the making of a sound recording by the other person', where 'the recording is made in pursuance of the agreement', is 'in the absence of any agreement to the contrary, the owner of any copyright subsisting in the recording. *Copyright Act 1968* (Cth), s 97(2), (3)

²²³ The author of a sound recording is 'the person by whom the arrangements necessary for the making of the sound recording... [is] undertaken'. The author 'is in the case of a sound recording, the producer'. The "producer", in relation to a sound recording or a film, means the person by whom the arrangements necessary for the making of the sound recording or film are undertaken.' *Copyright, Designs and Patents Act* (UK), ss 2(aa), 178. Canadian copyright provides a comparable example. See *Copyright Act* (R.S.C., 1985), s 2. This case vested copyright ownership in the person who engaged an arranger and conductor, rather than the latter parties *A&M Records Ltd v Video Collection International Ltd*, (1995) EMLR 25

Secondly, the bundle of rights associated with sound recordings is generally narrower than the equivalent bundle for literary and musical works. For example, musical works attract adaptation or derivative work rights but sound recordings do not.²²⁴

Thirdly, the copyright term for sound recordings is generally shorter than the equivalent bundle for literary and musical works. For example, the UK copyright term is 50 years after the first publication for sound recordings, compared to 70 years after death of the author for musical works.²²⁵ In Australia, the equivalent durations are 70 years after first publication and 70 years after death.²²⁶ Canada provides a minor exception, with sound recording copyright lasting for 50 years after first fixation but to up to 100 years after first fixation if it is published before copyright term expires; this means that in some cases, sound recording copyright term is longer than the term for musical works which is 50 years after death.²²⁷

These examples suggest that copyright views studio producing as a secondary trade, a service to the primary creativity in the composition and performance of music. This view emphasises the utility of recording, where accuracy triumphs over aesthetics, and ascribes little creativity to studio producers. As Andrew Goodwin notes, digital recording techniques certainly made it possible to make 'perfect' recording and reproductions of sound:

'Digital recording techniques now ensure that the electronic encoding and decoding that takes place in capturing and then reproducing sound is such that there is no discernible difference between the sound recorded in the studio and the signal reproduced on the consumer's CD system. This is something new: the mass production of the aura.'²²⁸

²²⁴ *Copyright, Designs and Patents Act* (UK), s 21(1) See also *Copyright Act 1968* (Cth), ss 31(1)(a)(vi), 85 and *Copyright Act* (R.S.C., 1985), c. C-42), s 3(1)(e)

²²⁵ *Copyright, Designs and Patents Act* (UK), ss 12, 13A

²²⁶ *Copyright Act 1968* (Cth), ss 33,93

²²⁷ *Copyright Act* (R.S.C., 1985), c. C-42), s 6

²²⁸ Andrew Goodwin. 'Sample and Hold: Pop Music in the Digital Age of Reproduction', in Simon Frith and Andrew Goodwin (eds), *On Record: Rock, pop and the written word*, (Routledge, 1990), 258-273, 259

This places studio production in the realm of what Howie Becker describes as crafts, which are the product of primarily technical skills, not from the creative judgements that inform arts.²²⁹

But, studio production has long been more than a mere exercise of accurate recording and reproduction. As Kealy notes, by ‘the decade 1965-75 [incidentally around the time that reggae began to apply sampling], the process of mixing and refining tapes after the recording of the original studio performance of the musicians has become almost as complex as the editing process that regularly occurs in filmmaking’.²³⁰ Similarly, as Patrik Wikström notes:

‘the role of the studio engineer has developed parallel to the development of studio recording technologies. In the beginning of the history of recorded music, the studio engineer, was very much an engineer who was skilled at handling the equipment in the studio, making sure that the artist’s creative ideas were transferred to record as undistorted as possible. Nowadays, the studio engineer is considered to be a musician and sometimes as star, just as other musicians participating in recording session’.²³¹

For some time, sound mixing has become ‘an extension of the musician-composer’s art’.²³² *CBS v Gross* affirmed this position, recognising a sound engineer as a potential joint author of an arrangement: ‘Kirke Godfrey, a sound engineer at the Trackdown studios, made many suggestions and was responsible for the final “mix” of the many individual tracks which had been recorded’.²³³ Likewise, David Bowie’s 1974 album *Diamond Dogs* recognises sound mixing’s contribution to original art:

²²⁹ Becker, *Art Worlds*

²³⁰ Edward Kealy. ‘From craft to art: The case of sound mixers and popular music’, in Frith, Simon and Goodwin, Andrew (eds), *On Record: Rock, pop and the written word*, (Routledge, 1990) (hereinafter ‘Kealy, ‘From craft to art’), 207-220, 212

²³¹ Patrik Wikström. *Reluctantly virtual: Modelling Copyright Industry Dynamics*, (Karlstad University Studies, 2006), 24-25. See also Edward Kealy. ‘Conventions and the Production of the Popular Music Aesthetic’, 1982, 16(2) *The Journal of Popular Culture* 100 and Robert Levine and Bill Werde. ‘They’re reinventing the sound of music. And the music industry.’, *Wired* (online), (c2003), <http://www.wired.com/wired/archive/11.10/producers_pr.html>

²³² Kealy, ‘From craft to art’, 220

²³³ *CBS Records Australia Limited v Guy Gross* (1989) FCA 404, 31

'The credits make it clear that Bowie is in control of all major creative tasks in the production of the recording... The rock star thus announces to his peers, critics and audience that his sound mixing work is part of this art. The transformation of the craft to an art is complete.'²³⁴

Richard Leppert notes that with 'the advent of sound recording and, later, radio broadcasting, music's potential as a consumer product was realized'.²³⁵ Extending Leppert's analysis, we can see that with the advent of sampling unlocks sound's potential as a raw material for collaboration.

Edward Kealy notes two parallel technological innovations that made studio recording more accessible in the 1950s. The first was simpler and cheaper studio quality recording and the second was tape recording.²³⁶ These innovations led not only to decentralisation of studio recording, but also 'a new recording aesthetic that would develop in this audience an appreciation of studio recording as aesthetically desirable in itself rather than as an attempted simulation of a live performance'.²³⁷ We can extend Kealy's thesis to modern music interfaces. Simpler and cheaper sampling technology and digital audio workstation software not only further distributed the practice of studio recording; it has fundamentally created a new creative aesthetic and new modes of authorship in the form of remixes and mashups that stand alone from the studio recording sound. In essence, sampling was always part of the studio producer's art.

Studio producers can play a significant creative role and, indeed, collaborative creation arises during the studio process. Levine and Werde observe that 'the production wizards themselves are rising up from the digital underground, armed with unlimited content and unprecedented control'.²³⁸ The affordability and availability of studio production software extends these possibilities of studio

²³⁴ Kealy, 'From craft to art', 220. David Bowie. *Diamond Dogs*, (RCA, 1974)

²³⁵ Richard Leppert. 'Commentary', *Essays on Music: Theodor W. Adorno; Selected, With Introduction, Commentary, and Notes by Richard Leppert; New Translations by Susan H. Gillespie*, (University of California Press, 2002), 232

²³⁶ Kealy, 'From craft to art', 216

²³⁷ Kealy notes that 'Within five years of tape's introduction, the number of companies issuing record albums increased from 11 to nearly 200.' Kealy, 'From craft to art', 212

²³⁸ Robert Levine and Bill Werde. 'Superproducers', *Wired* (online), (10 January 2003), <www.wired.com/2003/10/producers/>

production far beyond the physical studio. Those without studio access can now rearrange sound both from the studio and the full sonic world, far beyond existing recordings.

Indeed, studio producers are the prototypical sampling artist. Much cultural studies and legal literature on the practice of sampling points to its roots in 1970s reggae and tracks its rising popularity as a creative practice in hip-hop and rap through the 1980s.²³⁹ However, prior to and independent of these genres, studio producers were already applying sampling in the process of mixing takes and tapes. Indeed, 'takes' and 'tracks' in the studio production are industry terms for recordings that will be sampled, mixed and mastered.

We can view the authorial practices of studio producers and, by extension sampling artists, as a form of active, creative listening. Such listening is the precursor to and trigger for playing and recording. Studio production and sampling combine the two musics identified by Roland Barthes: 'the music one listens to, the music one plays'.²⁴⁰ Listening and playing are symmetric music gestures. Each informs the other. The practice of sampling merges the two musics; in doing so, it salvages the active music that one plays. Here, it is important to note this thesis does not intend to invoke Roland Barthes' *La mort de l'auteur*, which questioned author made meaning and embraced the birth of the reader who held the only keys to 'a text's unity'.²⁴¹ However, we can note that even Barthes cannot escape appropriation, recasting the title of Sir Thomas Malory's fifteenth century text *Le morte d'Arthur*, which is itself a reworking of folk tales.

Today, we can see the practice of recording reach beyond the recording studio. Computers that occupied buildings are now superseded by ones that fit in our

²³⁹ See, for example: Kembrew McLeod. 'How Copyright Law Changed Hip-Hop: An Interview with Public Enemy's Chuck D and Hank Shocklee', *Cutting Across Media: Appropriation Art, Interventionist Collage, and Copyright Law*, (Duke University Press, 2011), 152-157; Dick Hebdige. *Cut 'n' Mix: Culture, Identity and Caribbean Music*, (Routledge, 1987); and Vaidhyanathan, *Copyrights and Copywrongs*, 134-135

²⁴⁰ 'La mort de l'auteur' was originally published in 1967 and translated in a compilation of Barthes' essays. Barthes, *The Death of the Author*, 149-154

²⁴¹ Ibid

pockets and bags. As a consequence, the recording studio has shrunk and become much more portable. Many of the modern producers create entire studio albums from their bedrooms; DJ Danger Mouse's *Grey Album* is but one example. Girl Talk takes his studio with him on tour, presenting a live mashup album to audiences around the world. In addition, the studio production of music is ever more fragmented and distributed. The following parts show how Gorillaz use a distributed studio as a virtual venue for sampling and other rearrangement.

Gorillaz recording as rearrangement

The story of rearrangement behind Gorillaz starts with the rearrangement of personnel from Blur. Jason Cox and Tom Girling reprised their roles as studio producers, and Blur frontman Damon Albarn again took a leading role. As the discussion below will demonstrate, rearrangement continued through a recording process that spanned two studios in London and Jamaica. As Albarn notes, the use of rearrangement, cultural referencing and sampling has an important generational impact:

‘The coolest thing is that kids are catching the references we put in the music and the visuals, and then they’re going out to learn about the original pieces of culture we were inspired by. The payoff is that the next generation of artists and writers might say, ‘I learned a lot from listening to the Gorillaz when I was 15.’²⁴²

Rearrangement in Gorillaz continues with their first hit, *Clint Eastwood*, part of their first and eponymous album, *Gorillaz*. The name of the recording references the theme song to the 1966 film *The Good, the Bad and the Ugly*, which stars Clint Eastwood: ‘We called the first single “Clint Eastwood” because it had a kind of The Good, the Bad, and the Ugly feel to the melodic line. Kind of like Ennio Morricone.’²⁴³ The Clint Eastwood references continue on the album, with another track on the album named *Dirty Harry* after the film starring the famed actor.

²⁴² Neil Gaiman. ‘Keeping It (Un)real’, *Wired*, (1 July 2005), <<https://www.wired.com/2005/07/gorillaz-2/>> (hereinafter ‘Gaiman, ‘Keeping It (Un)real’)

²⁴³ Ennio Morricone is the Italian composer who composed the film score for *The Good, the Bad, and the Ugly*. Entertainment Weekly. ‘The return of Gorillaz’, *Entertainment Weekly* (online), (25 November 2005), <<http://ew.com/article/2005/11/25/return-gorillaz/>>

As is often the case in contemporary music recordings and albums, the creation of the composition and sound recording of *Clint Eastwood* was simultaneous. It begins with Albarn recording instrumentals on drum machine and guitar on a four-track recorder. This solo effort formed the basis for subsequent changes to the composition and recordings. As music journalist Sam Inglis notes: 'Damon Albarn's initial four-track efforts with a drum machine and guitar were recreated in [sound production software] Logic at [the London recording studio] 13, before the other basic instrumental elements and guide vocals were added.'²⁴⁴ As studio producer Girling recounted, the initial structure of *Clint Eastwood* was recorded in the studio within one day.²⁴⁵ But, the recording would go through many more versions before release.

Studio producers Girling and Cox speak to the use of sampling to rearrange versions of *Clint Eastwood*. Their account of the percussion they created for the arrangement, demonstrates a seamless use of synthesised, sampled, and prepared percussion to alter timbre in unexpected ways:

'There's no real drums on here. One's off a drum machine, and there's a sample I got from somewhere. Apart from that there's some live percussion on there. You know on a bass drum you've got the lug nuts that hold the skin on? It's actually a load of those in a carrier bag being shaken. It sounds like it's pitched down, too, but it's just EQ'd.'²⁴⁶

Their account of the bass and piano sounds is similarly rich in rearrangement, mixing a range of synthesizers with acoustic instruments:

'The bass is a keyboard bass, which is the Moog Rogue, and on the big fills it's got a low sub-note which is off a Roland JV. There's a piano in there, which is our little cheesy upright in the other room. The strings came from one of our string machines, the Solina String Ensemble.'²⁴⁷

²⁴⁴ Sam Inglis. 'Recording Gorillaz's "Clint Eastwood": Tom Girling & Jason Cox', *Sound on Sound* (online), (September 2001), <http://www.gorillaz-unofficial.com/media_archive/sosinterviewsep01.htm>, (hereinafter, 'Inglis, *Recording Gorillaz's Clint Eastwood*')

²⁴⁵ Girling quoted in Inglis, *Recording Gorillaz's Clint Eastwood*

²⁴⁶ Ibid

²⁴⁷ Ibid

Even the harmony vocals are created by remixing Albarn's main vocal part:

'On "Clint Eastwood", a harmony part was also created from the lead vocal using a Boss Voice Transformer. "It's just a harmonised copy of Damon's main vocal," explains Tom. "For each chorus bit, there is a bit of that underneath the main chorus vocal."'248

Girling notes that audio production software like Logic overcomes the constraints of tape, opens new possibilities for rearrangement, creation and transformation:

'It's not a conscious effort to work in a different way... I think the reason why we worked in a different way is because we've got this whole Logic thing going on, so instead of working in a linear world where you're using tape, you've got a hell of a lot more flexibility. I think it gears itself more towards this kind of thing, where you haven't necessarily got a specific goal you're after. It just gives you a chance to experiment, basically chuck a whole load of paint at the canvas and see what sticks, and weed out all the drips of paint that you don't want! I know that Damon loves working in this way.'249

Studio producer Dan the Automator was an important influence on the rearrangement of the *Gorillaz* album in the Jamaica studio. With his addition to Girling and Cox in the studio, *Clint Eastwood* saw further versioning and additional samples:

'All the samples came into it when Dan turned up, really. They were mainly drum loops... Pretty much on every song he added one or two drum loops. He put an extra kick and snare on "Clint Eastwood", when we were in Jamaica, and the other main drum thing Dan put on there is a sort of skip loop which comes in in the chorus. He also recorded a new rap on "Clint Eastwood". We actually recorded a rap here, but after our first two-week session he took our mixes back to America with him and got a guy to do a rap out there, then brought the rap on CD to us in Jamaica, and we stuck it on the record.'250

Dan the Automator's introduction of drum loops in the studio production of *Clint Eastwood* and *Gorillaz* parallels the use of ostinatos in classical musical composition, which are persistent rhythmic or melodic patterns, often

248 Ibid

249 Ibid

250 Ibid

accompanying another melody. Many classical music composers have arranged ostinatos into their musical works. For example, Gustav Holst uses a string and percussion 5/4 ostinato in the *Mars* movement of *The Planets* suite to evoke the presence of war; the ostinato builds with the addition of brass at the climax of the piece. The *Confutatis* movement of Mozart's *Requiem* uses a string ostinato to echo the lyrics which place the subject at the edge of purgatory. The use of loops is similarly common in sampling.

While a version of *Gorillaz* had mostly been recorded, the album was irrevocably changed by the discovery of a new bass player. Junior Dan was 'one of the original Studio One musicians that has worked with everyone from Bob Marley, Pablove Black, to Lee Perry to King Tubby and from that point on his sort of heavy basslines would sort of appear in all the tracks'.²⁵¹ By coincidence, Junior Dan was recording in a different part of the same studio. By Albarn's estimation, Junior Dan's basslines set the tone for three-quarters of the album.²⁵² Junior Dan himself claims that the addition of his bass lines to the recording of *Gorillaz* triggered significant re-recording:

'So I went down the next day and we did four songs and then he ran out of the studio and came back with about five guys in suits with attaché cases saying, 'these are the top guys from EMI'. Apparently they knew about me before—I don't know how it was done—but they knew about me before I got there. They all met me and then he said, 'We have to re-record this whole album now because the way you took those three or four songs makes all the rest sound rubbish now'. So we did that.'²⁵³

The unplanned incorporation of recordings of Junior Dan's playing is empirical evidence of Jonathan Tankel's contention that '[m]odern music recording technology allows for the continual manipulation of recorded sounds, so there is no finished product. Record mixing is a two-part process. The sounds may be

²⁵¹ Levy, *Bananaz*

²⁵² *Ibid*

²⁵³ Angus Taylor. 'Interview: Junior Dan', *United Reggae* (online), (28 May 2010), <<http://unitedreggae.com/articles/n388/052810/interview-junior-dan-part-2>>

manipulated during the recording session (the “rough” mix) and during postproduction.’²⁵⁴

In all, *Clint Eastwood* features many stages of versioning and rearrangement. It begins with Albarn recording instrumental tracks, which are then rerecorded by Girling and Cox (using a mix of samples, synthesisers and physical instruments), and complemented by lead vocals, then harmony vocals. With Dan the Automator, comes rearrangement through additional drum parts and a new rap. With Junior Dan, a session musician triggered the recasting of a whole album in a dub mold. Very little was created without copying from the previous step. Even the name of the track was borrowed from a famed actor.

Bananaz, Ceri Levy’s documentary about Gorillaz, filmed during the making of their first two albums, *Gorillaz* and *Demon Days*, also shows how rearrangement permeates much creation behind the Gorillaz name. The documentary depicts Damon Albarn playing a guitar riff in a recording studio during the production of *Gorillaz*. He listens back to a recording of that riff, then comments to the studio producer Jason Cox ‘aw it sounds great, don’t it, sounds fuckin’ wicked, what’ve you done to it?... I’ll just get a woo woo [gesturing towards a synthesiser keyboard] with an echo. Come on, come on, come on Jason, come on, you know what I’m saying now’.²⁵⁵

The scene is instructive. Albarn plays the guitar, the sound from the guitar is recorded, and then mixed by Cox. Listening to the mixed version of the guitar recording, Albarn is inspired into asking for a synthesiser keyboard sound to complement the sound of the guitar recording. In Albarn and Cox, we see two creators fluidly switching between the roles of performer, composer and producer.

²⁵⁴ Tankel, ‘The Practice of Recording Music’, 36

²⁵⁵ Ceri Levy. *Bananaz*, (Head Film Ltd, 2008) (hereinafter Levy, *Bananaz*)

Rearrangement also features in the creation of the later album, *Plastic Beach*. Albarn's suggestion of the name for the album had a dramatic impact on the direction of the album. Jamie Hewlett notes that Albarn

'said to me, probably about three weeks after we started [recording *Plastic Beach*], "I wanna call it *Plastic Beach*." And that was the sort of catalyst for everything... when he said *Plastic Beach* it suddenly just went ding dong. And I went okay, we can do so much with that.'²⁵⁶

Albarn's title for the album inspired Jamie Hewlett, who later inspired Mos Def with sketches of a plastic beach to Mos Def who was working on the recording of the track *Sweepstakes* on *Plastic Beach*:

Jamie Hewlett: [showing Mos Def the sketch of a plastic beach] OK, that's *Plastic Beach*.

Mos Def: Wow... so is this a film, this is a movie?²⁵⁷

By likening *Plastic Beach* to a film, Mos Def suggests that the album introduces and rearranges conventions from film scores to popular music. As Mos Def reflects in a later interview with Albarn: 'We're trying to create something that has no references to, kind of, rock music whatsoever, it's more like a sort of film score revisited, you know, with some reference points of the film around it but it's kind of, very much, a program of music.'²⁵⁸

One studio producer for Gorillaz goes further, likening studio producers in music to auteurs in film. Danger Mouse, who had produced the iconic *Grey Album* but had little formal production training or experience, helped create *Demon Days* as studio producer. Danger Mouse recounts how his affinity with Woody Allen as an auteur shaped his approach to creating music:

²⁵⁶ Peter Macia. 'Interview: Damon Albarn and Jamie Hewlett', *thefader* (online), (30 April 2010), <<http://www.thefader.com/2010/04/30/interview-damon-albarn-and-jamie-hewlett-of-gorillaz/>>

²⁵⁷ Gorillaz. *The Making of Plastic Beach*, (Parlophone and Virgin, 2010)

²⁵⁸ Levy, *Bananaz*

'When I got to college, I saw "Manhattan" and "Deconstructing Harry." I thought to myself: Why do I relate so much to this white 60-year-old Jewish guy? Why do I understand his neurosis? So I just started watching all of his movies. And what I realized is that they worked because Woody Allen was an auteur: he did his Thing, and that particular Thing was completely his own. That's what I decided to do with music. I want to create a director's role within music, which is what I tried to do on this album [St Elsewhere, an earlier album produced by Danger Mouse as one half of Gnarls Barkley].'²⁵⁹

Danger Mouse departs from the tradition of studio producers who 'injected specific, recognizable qualities into the records they superstruct'.²⁶⁰ Danger Mouse's value to Gorillaz lies in his ability to seamlessly recontextualise samples through mixing and recombination, the very skills that are valuable in studio production. Indeed, the fact that *Demon Days* integrates a sample from the *Dawn of the Dead* soundtrack into its first track indicates how seamlessly samples can be mixed with tracks recorded in the studio.

Danger Mouse's creation of futuristic art by appropriating existing recordings embodies the concept of originality as rearrangement. As Albarn says of Danger Mouse, 'I loved the idea... that you can take the past and present and make something futuristic'.²⁶¹ Danger Mouse engages in the kind of sampling that Sanjek describes as 'a process with a distinct history, a developed aesthetic, and a set of auteurs who have defined the parameters of its use... [which] proceeds from a belief in the innovative potentialities of technology and the use of a recording *itself* as a musical instrument'.²⁶²

²⁵⁹ Chuck Klosterman. 'The D.J. Auteur', *The New York Times* (online), (18 June 2006), <www.nytimes.com/2006/06/18/magazine/18barkley.html?mcubz=3> (hereinafter 'Klosterman, "The D.J. Auteur"')

²⁶⁰ 'It will be interesting to see if anything akin to a "Danger Mouse Sound" eventually emerges... He doesn't have a clear sonic signature. That might be... because his aspirations don't necessitate a signature; if he's able to find artists who actively want to be directed — rather than just produced — then every Danger Mouse production will be a creation unto itself.' Klosterman, 'The D.J. Auteur'

²⁶¹ Sanjiv Bhattacharya. 'Plain crazy', *guardian.co.uk* (online), (23 April 2006), <<http://www.guardian.co.uk/music/2006/apr/23/urban.popandrock>>

²⁶² David Sanjek. "Don't Have to DJ No More": Sampling and the "Autonomous" Creator', in Martha Woodmansee and Peter Jaszi (eds), *The construction of authorship: Textual appropriation in law and literature*, (Duke University Press, 1994), 343-360, (hereinafter 'The construction of authorship'), 346

As this chapter has mentioned, sampling artists often use loops of sound which are akin to ostinatos in classical music composition. Recognising recording as a musical instrument, for example by using loops to form ostinatos, further blurs the copyright's boundaries between musical works and sound recordings which, as Chapter II has discussed, are already under challenge.

As the next part reveals, the released versions of *Clint Eastwood*, *Gorillaz* and other Gorillaz recordings are by no means final. Few tracks created under the Gorillaz umbrella enjoy a permanent luxury of fixation.

Gorillaz remixing as rearrangement

Tankel has argued that music recording introduces two characteristics into cultural production: 'replicability', the ability to mass reproduce musical works and sound recordings; and 'plasticity, the ability to manipulate sound physically.'²⁶³ It is Tankel's plasticity that enables studio producers to manipulate recordings and samples of recordings, to exert creative influence. As Tankel puts it, the 'process of music recording—the technology of plasticity—is the site of the musician's interaction with the administrators of mass culture industries, who desire replicability.'²⁶⁴ The current configuration, which favours replicability over plasticity, hinders one of the purposes of copyright to encourage the creation of new work. It is through both plasticity and replicability that the process of sampling enables creativity. As Simon Frith interprets Tankel's thesis:

'[the] remix engineer creates a new work in reconceptualising a record's "sonic atmosphere." This is a more drastic act than rearranging an existing tune because it changes the essence of what we hear—a remix is, in this respect, akin to a jazz player's improvisation on a standard tune'.²⁶⁵

The rearranging role of the remix producer persists throughout the Gorillaz catalogue, as does the influence of reggae, particularly the dub subgenre. Notably,

²⁶³ Ibid

²⁶⁴ Ibid

²⁶⁵ Simon Frith, *Performing Rites: On the Value of Popular Music*, (Harvard University Press, 1996), 242

the record labels representing Gorillaz copyright material—EMI, Virgin and Parlophone—along with some of the key creators of the material, have consistently encouraged sampling of Gorillaz material.²⁶⁶ Not only are many Gorillaz recordings themselves the product of sampling and rearrangement; they become the subjects of remixes and rearrangement.

We see this model of remix production throughout Gorillaz’s compositions and recordings. *Clint Eastwood (Ed Case and Sweetie remix)* (hereinafter ‘*Ed Case remix*’) is a remix by garage music producer Ed Case. The lurching andante of *Clint Eastwood* is lifted to an allegro of over 130 beats per minute in the *Ed Case remix*. It brings Ed Case’s signature high-pass filtered sound, with light and crisp cymbals. It also brings influences of reggae from the recording in the Jamaica studio, including a half-sung, half-spoken rap. Complementing the hidden creators behind Gorillaz, the *Ed Case remix* was included as a hidden last track.

Several Gorillaz albums have also featured versioning and rearrangement in their production. Foremost amongst these albums is *Laika Come Home*, a dub remix of *Gorillaz* by three remix artists aptly named Spacemonkeyz.²⁶⁷ In many ways, dub was a natural genre for a remix album, given the formative influence of Junior Dan.²⁶⁸ Junior Dan’s reggae basslines not only set the tone for *Gorillaz* but infect *Laika Come Home*. *Laika Come Home* is an extension of the long-established tradition of appropriating albums and recordings to create new versions.²⁶⁹ Even the title of the album remixes two earlier names: Laika, the Soviet space dog famed for being the first animal to orbit Earth, and the iconic novel and film *Lassie Come Home*.

²⁶⁶ For example, EMI has represented Belgian DJs Soulwax, Virgin has represented Massive Attack and Parlophone has represented Kraftwerk

²⁶⁷ Darren Galea, one of the three members of Spacemonkeyz, had previously remixed an earlier Gorillaz track *Tomorrow Comes Today* into a remix called *Tomorrow Dub*

²⁶⁸ Levy, *Bananaz*

²⁶⁹ “As new dance forms or performance styles come into fashion, mixer—many of whom began, and on occasion still act as club DJs—are hired to produce alternate versions of a given recording in that style.” Sanjek, ‘*The construction of authorship*’, 351

The tracks on *Laika Come Home* have titles that relate to primates and reggae, reflecting both influences outlined above. *Clint Eastwood* is remixed into *Fistful of Peanuts*. But for a melodic line being preserved, almost all other parts are replaced with a new bass line, guitar and piano comping lines, and reggae vocals. *19-2000* becomes *Jungle Fresh*. *19-2000* features a light bass line, a shuffling drum beat, childish verse vocals from Albarn, chorus vocals from Tina Weymouth of Talking Heads and Miho Hatori of Cibo Matto. *Jungle Fresh* slows the earlier version, adding a light echo to verse vocals and an oscillating filter to backing vocals. The instrumentation is changed to a dominating reggae bass line with a slight reverb, accompanied by tuned percussion including timbales, cowbells, synthesised brass and a Hammond B3-style organ. Likewise, *5/4*, a guitar driven rock piece on *Gorillaz*, becomes *P45* on *Laika Comes Home*. *5/4* features a guitar riff played on acoustic and electric guitar with a basic rock beat on drums. In *P45*, the low bass line at times echoes the vocal melody, but no other guitar sounds exist. A repitched piano chord with some light synth brass patterns on off beats accompanies the repitched vocals, with longer instrumental sections featuring a space synth pad and vinyl scratching sounds.

Further examples of Gorillaz rearrangement come courtesy of mashup icon Danger Mouse, who produced Gorillaz's second studio album *Demon Days* after realising the highly controversial *Grey Album*. Unsurprisingly, *Demon Days* features sampling and other rearrangement. For example, the introduction to *Demon Days* contains a sample of *Dark Earth* from the *Dawn of the Dead* soundtrack.

Another sanctioned example of remixing of Gorillaz material appeared at the 2006 MTV Grammy Awards. Here, a holographic projected animation allowed Gorillaz to 'perform' side-by-side with Madonna in a live mashup performance. One side of the mashup is an acoustic version of Gorillaz's *Feel Good Inc.* transposed down from the original E flat minor to D minor; the other is Madonna's *Hung Up*.²⁷⁰ The

²⁷⁰ Musion. *Gorillaz & Madonna: Grammy Awards* (online), (c2006), <http://www.eyeliner3d.com/gorillaz_madonna_grammy_awards.html>

mashup forms a transition between a holographic performance by Gorillaz and a live performance by Madonna. Adding to the example in Chapter II, *Hung Up* is itself a work of remix, including a sample from ABBA's *Gimme! Gimme! Gimme! (A Man After Midnight)*.²⁷¹

In some cases, Gorillaz material has even been made available for others to sample and reuse. For example, London indie radio station XFM ran competitions where creators were invited to remix Gorillaz tracks *19/2000* and *Clint Eastwood*.²⁷² The winning tracks were later released on compilation albums along with other remixes.

Another example encourages new forms of arrangement from outside the music establishment. Gorillaz and XFM ran the *Search for a Star* competition, where contestants submitted their own creative material for a chance to collaborate with Gorillaz.²⁷³ In launching the competition, XFM stated:

'We are hoping that this will throw up some truly creative fresh talents, and provide an open forum for people who would normally have no outlet to display their work... We're not looking for people to send in the slickest most, professional formats. It's much more about the execution of simple ideas, however bizarre, dark, funny, ingenious or off the wall. The nature and content of the submission is entirely up to you.'²⁷⁴

The three winners of the competitions, chosen by public vote, created rearrangements of Gorillaz material. One winner created an animation of the recording *Don't Get Lost in Heaven (Original Demo Version)* that was released on the DVD version of the its single. Another created a remix of *Dirty Harry* called *Uno*

²⁷¹ See interview with two members of ABBA confirming Madonna and ABBA shared the copyright ownership on *Hung Up*. Seth Rudetsky. 'ABBA Respond to Madonna's Sample', *YouTube* (online), (25 September 2009),

<<https://www.youtube.com/watch?v=a6Mcc8qMy7A>>

²⁷² Ben Brown. '19-2000 (Ben Brown's UKFUNK.COM Remix As Chosen By Gorillaz', *XFM - the Remix Vol.1*, (Virgin, 2002)

²⁷³ XFM. *Gorillaz Launch 'Search For A Star' Competition* (online), (1 December 2014), <<http://gorillaz-news.livejournal.com/6114.html>>

²⁷⁴ Ibid

Quatro that featured on the Gorillaz website. The third adapted the recording of *El Mañana* into an art insert released on the DVD of the single.

More recently, Gorillaz and electronic instrument manufacturer Korg have collaborated to provide create a special Gorillaz version of iELECTRIBE, the electronic beat-making, remix and sampling application for iPads.²⁷⁵ The application allows users to sample and manipulate 128 Gorillaz sounds and 64 pre-programmed Gorillaz patterns, including samples from Gorillaz album *The Fall*. This bespoke application encourages the sampling and reuse of Gorillaz material, encouraging remix, mashup and rearrangement by others.

The Gorillaz Edition of the iELECTRIBE application restricts users to only making music and sounds with the limited set of Gorillaz sounds included in the application; there is no built-in capability to use samples from other Gorillaz work or works of other artists. However, this does not prevent ambitious users from mixing outputs from iELECTRIBE with other Gorillaz recordings. Indeed, as the next part demonstrates, third parties are taking the ongoing creation of Gorillaz material into their own hands.

More Gorillaz in the jungle

Beyond sanctioned Gorillaz collaborators lies a universe of independent rearrangements of Gorillaz material. In considering current recording practices, Tankel argues that it is necessary ‘to account for possibilities of independent mixing of sound, the *remix* when a producer takes a completed work and reworks that material’.²⁷⁶

We see reworking throughout the development of Gorillaz material. In part, this reworking is enabled by contemporary mixing software with increasingly powerful sampling and audio manipulation capability. This is blurring the boundary between studio producers, sampling artists and live performance. These

²⁷⁵ Gorillaz and Korg. *Remix Gorillaz on the iELECTRIBE* (online), (2011), <<http://gorillaz.com/KORG-iELECTRIBE-Gorillaz-Edition>>

²⁷⁶ Emphasis in original. Tankel, ‘The Practice of Recording Music’, 38

music production tools liberate opportunities for creators making unauthorised rearrangements. For example, digital music production software and equipment company Native Instruments has released Traktor Remixed which includes 'innovative Remix Decks, which allow DJs to creatively remix and rearrange tracks before and during their actual performance'.²⁷⁷ Similarly, the Apple DJ Mix Pro app gives users the ability to 'mix your media library items'.²⁷⁸ Djay 2 takes this a step further by allowing its premium users to remix millions of tracks from Spotify. The Novation Launchpad, a MIDI controller with 64 pads is commonly used to play samples in studio and live contexts, enabling pre-recorded and live mashups.

Through such remix software and hardware, Gorillaz's *Dare* ends up as one track used in the creation *Pop Culture*, a mashup of 39 popular recordings ranging from Britney Spears to French electro DJs Justice.²⁷⁹ The mashup also coincidentally reunites Gorillaz and Madonna, who performed a live mashup at the 2006 Grammy Awards. Madeon, the creator of *Pop Culture*, prepared the samples on equipment and software that replicates the functionality of a studio at a fraction of the cost. For the price of a notebook computer, Madeon acquired production software (FL Studio and Ableton Live) and the sample controllers (Novation Launchpad and Novation Zero SL MKII). *Pop Culture* has received over 42 million views, almost half as many as the official video for Gorillaz's *Dare*.²⁸⁰ The popularity of *Pop Culture* is remarkable, given Madeon was seventeen years old when he made *Pop Culture*.

²⁷⁷ Native Instruments. *Press Release: Native Instruments today announced Traktor Remixed* (online), (Native Instruments, 3 April 2012), <<http://www.musicradar.com/news/tech/native-instruments-announces-aktor-remixed-537952>>

²⁷⁸ Apple. *Lady DJ Mix Pro* (online), (Apple, 2016), <<http://itunes.apple.com/us/app/dj-mix-pro/id483255235?mt=8>>

²⁷⁹ Madeon. 'Madeon - Pop Culture (live mashup)', *YouTube* (online), (11 July 2011), <<http://www.youtube.com/watch?v=lTx3G6h2xyA>>

²⁸⁰ Gorillaz. *Dare*, *YouTube* (online), (Parlaphone, 7 September 2010), <<http://www.youtube.com/watch?v=uAOR6ib95kQ&ob=av2e>>

It is also remarkable that *Pop Culture* has spawned cover mashups.²⁸¹ The concept of a cover mashup perhaps forces conflation of copyright subject matter categories. It suggests that a rearrangement of sound recordings has yielded a new musical work. They also provide practical challenges in the form of overlapping rights and ownership. To what extent are the mashup and the cover mashup an adaptation of prior works? Should any of the authors of the 39 sampled works be considered authors of the mashup or cover mashup? Accommodating a cover mashup may require rearrangement of copyright itself.

It is useful to briefly visit the mashup culture that permeates the boundary between audio and visual works. Gorillaz founder Jamie Hewlett is no stranger to rearrangement of his works. His comic *Tank Girl*, co-created with Alan Martin, has been redrawn by many other artists.

Albarn and Hewlett embrace reuse of their work, paying tribute to some unauthorised and transformative uses of Gorillaz visual work. In one example, Albarn recalls: 'South America really embraced us last time. I went to one of the open-air markets, and there were loads of paintings of the Gorillaz characters for sale. It was really cool.'²⁸² Albarn and Hewlett not only accept some unauthorised rearrangements to create new Gorillaz material. By their assessment, unauthorised remixers can be authentic Gorillaz creators that deserve creative and economic recognition. Gorillaz arrangements are not indelible, but edited, rearranged and improved. Hewlett recounts seeing unauthorised rearrangements of Gorillaz's virtual band member Murdoc with comic and cartoon characters: '[T]here were paintings of Murdoc as Wolverine right there along with Homer Simpson as King Kong. The fake merchandise we saw on that tour was better than our own stuff. We went out and bought a bunch of it.'²⁸³

²⁸¹ See Jon Selfridge, 'Madeon - Pop Culture (Half) Cover by Jon Selfridge', *YouTube* (online), (16 September 2011), <<http://www.youtube.com/watch?v=lWcfpwLFw8g&feature=related>>. See also Ed Rollo, *Madeon - Pop Culture (Live mashup cover) by Ed Rollo* (online), (16 December 2011), <<http://www.youtube.com/watch?v=jvqOqLpry40&feature=related>>

²⁸² Gaiman, 'Keeping It (Un)real'

²⁸³ *Ibid*

This chapter began by establishing that sampling and rearrangement have long been an essential part of the commercial music recording, ever since the rise of the track recorders and master tracks. It tracked the rise of the studio producer into authorial functions of creating and transforming. Many of these original compositions and recordings are formed by the merging and transformation of prior material, and enabled by the divisibility of works. This is true of the Gorillaz albums that have been created through transformation, rearrangement, iteration and versioning.

What emerges is that the various creators behind Gorillaz compositions and recordings perform acts of rearrangement, re-recording, sampling and other appropriation practices. In doing so, it demonstrates that the path to originality is a cumulative and not necessarily linear process.

The creative practices behind Gorillaz are strikingly similar to the practice of versioning in dub. As Dick Hebdige says in relation to dub versioning, 'no one has the final say. Everybody has a chance to make a contribution. And no one's version is treated as Holy Writ.'²⁸⁴ Or as Michael Chanan notes, 'sampling produces the effect that existing pieces are no longer fixed nor clearly authored; nor is sample music notated... sampling thus brings the manipulated echo of previous records, as if the new is simply another possible version of the old.'²⁸⁵ It is no surprise, then, that Gorillaz exhibit the centrality of remixing to music production, even when outside of the genres of rap, hip-hop, reggae, dub and jazz that are often associated with sampling and appropriation.

When Damon Albarn and Jamie Hewlett cease to collaborate on Gorillaz, it will be far from the death of Gorillaz. Gorillaz will continue to exist through rearrangement by others. For Albarn and Hewlett, it may be as Kembrew McLeod has said, that sampling practices 'give the "death of the author" a new meaning,

²⁸⁴ Dick Hebdige. *Cut 'n' mix: Culture, identity and Caribbean music*, (Routledge, 1987), 14

²⁸⁵ Michael Chanan. *Repeated Takes: A Short History of Recording and Its Effects on Music*, (Verso, 1995), 162

especially when authors really do die but are then resurrected in advertisements and songs'.²⁸⁶

The Gorillaz case study helps validate of Tankel's argument that '[t]he remix recording... is *prima facie* evidence of Benjamin's contention that to 'an ever greater degree the work of art reproduced becomes the work of art designed for reproducibility''.²⁸⁷

Gorillaz provides a useful means of envisioning the contemporary works that could be protected and encouraged by copyright and moral rights. As Barthes states: 'a text's unity lies not in its origin but in its destination'.²⁸⁸ The Gorillaz universe extends far beyond those authorised to participate in the sounds of Gorillaz. With sampling, there are no limits to the number of creators who can and will use expressions associated with Gorillaz to create transformative and original works.

New creators using Gorillaz material may reinforce a network of links back to the original through rearrangements such as the mashup paintings from the market. Others may obscure the recognisability of Gorillaz arrangements through extensive slicing and recombining of fragments of Gorillaz material, creating wholly new original works, progress in culture and innovation.

This chapter has shown that prior creators, be they instrumentalists, studio producers or sampling artists, are not required for the continued production and reproduction of original Gorillaz material. Moreover, the various creators of Gorillaz are cognizant that recordings and compositions hold the building blocks for future creation, and have exercised restraint in using adaptation or derivative work rights to prevent unauthorised reuse. Of course, most other creators do not display such restraint, often to their own detriment.

²⁸⁶ Kembrew McLeod. *Freedom of Expression®: Overzealous Copyright Bozos and Other Enemies of Creativity*, (Doubleday, 2005), 167

²⁸⁷ Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' (1935), translated in Harry Zohn (ed), *Illuminations: Essays and reflections*, (Schocken, 1968), 217-252, 224. See also Tankel, 'The Practice of Recording Music', 44

²⁸⁸ Barthes, *The Death of the Author*, 148

The conduct of the creators and owners of Gorillaz material should not only give hope to sampling artists; it also serves as a model for other creators and owners of copyright material to better exploit rich catalogues of prior music for rearrangement into new works. While existing creators of Gorillaz material may be moving on to new projects, new creators can exploit cheaply and widely available music production software to reinterpret and reinvigorate Gorillaz material.

At the time of writing, Gorillaz are releasing their new album *Humanz*. Rearrangement is more a part of their philosophy than before. With remixes of songs from the album released as part of its promotion, remixes are seen to enhance, not detract from, the originality of forthcoming material. Reflecting on a recording on the album, *Andromeda*, Damon Albarn speaks of the continuing role of inspiration and rearrangement in their creations:

‘We were talking about two of the greatest 80s pop songs and we decided that *Billie Jean* by Michael Jackson and *I Can’t Go For That* by Hall and Oates were two of our favourite tunes in their tempo and their kind of pop sensibilities. And how could we somehow chemically channel the greatness of those into our own music. So we had a title for this song before we actually started it which was *I Can’t Go For Billie Jean*. For copyright purposes, I want to emphasise that the eventual outcome bears no resemblance and any resemblance is purely fictitious.’²⁸⁹

The same interview with Albarn reveals the significant rearrangement and versioning in the creation of the song and recording. For example, earlier versions featured lead vocals by singer Christine & the Queens, and then rapper D.R.A.M., but were ultimately performed by Albarn himself in the released version.

The launch of the album also featured augmented reality, bringing the virtual world of *Humanz* to life. Pop-up Spirit Houses in Brooklyn, Berlin and Amsterdam brought attendees into the world of music videos from the album.²⁹⁰ In addition,

²⁸⁹ Hrishikesh Hirway. ‘GORILLAZ (feat. D.R.A.M.), *Song Exploder* (online), (12 April 2017), <<https://soundcloud.com/hrishihirway/song-exploder-gorillaz-feat-dram>>

²⁹⁰ Mandi Dudek. ‘A Look Inside The Gorillaz x Sonos “Spirit House” in Brooklyn’, *Baeble Music* (online), (25 April 2017), <<http://www.baeblemusic.com/musicblog/4-25-2017/a-look-inside-the-gorillaz-x-sonos-spirit-house-in-brooklyn.html>>

an augmented reality app allowed audiences in 500 locations across the world to see and hear the album upon its launch. Sanctioned promotional remixes, appropriation from previous tracks, and the augmented reality app demonstrate the importance of rearrangement; not only is *Humanz* intrinsically a work of rearrangement, but it is itself a rearrangement of the sensory realities of its audiences.

The centrality of rearrangement to Gorillaz creation is captured by Neil Gaiman's observation that Gorillaz 'exists enough to make music, to produce videos, to remix, and to be remixed.'²⁹¹ We can make a similar observation about the originality of sound recordings: that it exists enough to produce sound recordings, to record and remix.

²⁹¹ Gaiman, 'Keeping It (Un)real'

IV. Second variation: Integrity as wholeness of arrangement

This chapter argues that an understanding of originality as the rearrangement of parts is essential to the application of the Australian moral right of integrity. Chapters II and III articulated how rearrangement is central to originality and the sound recording, both at a conceptual level and in the practice of sampling. Through two Australian cases, this chapter considers how rearrangement of works informs, supports and impacts the integrity of musical works and performances.

In Australia, the right of integrity is one of the bundle of three moral rights, the other two being the rights of attribution and against false attribution.²⁹² Unlike copyright, moral rights are conferred only on individuals.²⁹³ While not the case in all jurisdictions, moral rights form part of the Australian copyright regime.²⁹⁴

The statute provides, in relation to certain works and performances, ‘the right not to have the work subjected to derogatory treatment’.²⁹⁵ Derogatory treatment includes the ‘material distortion of, the mutilation of, or a material alteration’ to a work that is prejudicial to an author’s honour or reputation, or to a performance that is prejudicial to a performer’s reputation.²⁹⁶ Derogatory treatment is broader for authors than for performers, also including ‘the doing of anything else [other than a distortion, mutilation or alteration] in relation to the work that is prejudicial to the author’s honour or reputation’.²⁹⁷

Issues of integrity arise easily in music sampling. By using parts of existing musical works to form new works, sampling artists associate prior creators with new

²⁹² ‘The author of a work has a right of attribution of authorship in respect of the work.’ *Copyright Act 1968* (Cth), s 193(1). ‘The author of a work has a right not to have authorship of the work falsely attributed.’ *Copyright Act 1968* (Cth), s 195AC(1). ‘The author of a work has a right of integrity of authorship in respect of the work. The author’s right is the right not to have the work subjected to derogatory treatment.’ *Copyright Act 1968* (Cth), s 195AI

²⁹³ *Copyright Act 1968* (Cth), s 190

²⁹⁴ Moral rights form a neighbouring body of law to copyright in some other jurisdictions, such as France

²⁹⁵ *Copyright Act 1968* (Cth), ss 195AI(2), 195ALA(2)

²⁹⁶ *Copyright Act 1968* (Cth), ss 195AJ(a), 195ALB

²⁹⁷ *Copyright Act 1968* (Cth), s 195AJ(b)

contexts and one another, sometimes without their consent. These associations have the potential to affect the reputation and honour of these prior creators.

The chapter is presented in four parts. The first part sketches a bridge between the copyright concept of originality and the moral rights concept of integrity. It considers how integrity is linked to originality both by statute and conceptually, and shows how a nuanced understanding of originality aids the application of the right of integrity. The second and third parts translate the conceptual discussion of the first part to explain the outcomes of two Australian music sampling cases dealing with the right of integrity and its conceptual predecessor, the right against debasement. This helps to illustrate the influence of originality and arrangement in these moral rights cases. The fourth and final part considers how the link between integrity and originality points to the relevance of moral rights to other concepts in copyright law.

Relationship between originality and integrity

Australia's copyright statute ties the moral right of integrity, and indeed all three moral rights, to copyright subsistence. Because the right of integrity subsists in relation to certain literary, dramatic, musical and artistic works (as well as cinematograph films and certain performances), it is often linked to originality, which copyright works must possess.²⁹⁸ This link is particularly strong in the Australian context because, as Elizabeth Adeney notes, there is no assertion requirement for Australian moral rights.²⁹⁹ This has the effect of making the Australian moral rights subsist in a broader base of works and recorded performances than in some other jurisdictions. In doing so, the right of integrity often becomes intertwined with originality.

This relationship between originality and integrity exists at a deeper level. Because originality governs how material is arranged and rearranged into works, it also

²⁹⁸ Part IX describes 'Moral Rights Of Performers And Of Authors Of Literary, Dramatic, Musical Or Artistic Works And Cinematograph Films'. *Copyright Act 1968* (Cth), pt. IX

²⁹⁹ Assertion is required in some other jurisdictions, such as the United Kingdom. *Copyright, Designs and Patents Act 1998* (UK), s 78. See Adeney, *The moral rights of authors and performers*, 576

helps to explain the integrity of works. This link has been discussed in the context of literary works. For example, Robert Macfarlane has described how nineteenth century British writer Charles Reade 'devised an intellectual rationale for his use of textual sources: that is to say, like all of the major writers discussed in this study, self-consciously theorized literary appropriation, literary resemblance, and literary reuse'.³⁰⁰

Like Dickens, Eliot and other contemporaries, Reade found appropriation, originality and integrity to be compatible, mutually beneficial and inextricable. For Reade, creativity was based on 'a theory of integrity or, more precisely, disintegrity. Underpinning Reade's vision of creativity was the presumption that most literary works could first be taken to bits, and those bits could then be reused to create new literary works.'³⁰¹

Ironically, despite making appropriation and reuse central to his creations, Reade at times opposed reuse of his work by others. In *Reade v Conquest*, Reade unsuccessfully asserted a dramatisation right in his play adaptation of his novel, *Gold*.³⁰² Although Reade's play reused unchanged passages from *Gold*, he argued that the play held separate copyright which prevented an unauthorised, further dramatisation by Conquest. The court made no decision on Reade's claim to a dramatisation right, though Reade prevailed on other grounds. Reade's concerns about third-party dramatisation of novels were not unique at the time. As Catherine Seville writes, the 'practice of dramatisation had enraged novelists for years, since they lost control of both their plots and any money flowing from their exploitation'.³⁰³ Though not recognised in Reade's time under British law, current Australian law grants an adaptation right that supplements the right of integrity. If

³⁰⁰ Robert Macfarlane. *Original Copy: Plagiarism and Originality in the Nineteenth Century Literature*, (Oxford University Press, 2007), 137

³⁰¹ *Ibid*, 137-138

³⁰² *Reade v Conquest* (1861) 9 CB (NS) 755. See also Catherine Seville. *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century*, (Cambridge University Press, 2006) (hereinafter 'Seville, *The Internationalisation of Copyright Law*'), 266

³⁰³ Seville, *The Internationalisation of Copyright Law*, 266

made under current Australian copyright statute, copyright would subsist in Reade's dramatisation of *Gold*, separate from copyright in the novel.³⁰⁴

Elizabeth Adeney notes the role of the adaptation right as a supplement to the Australian right of integrity, preventing certain actions that could affect the integrity of a work.³⁰⁵ As Adeney contends, the adaptation right provides some protection of the integrity of a musical work, being

'limited by the very narrow definition of adaptation within the Copyright Act 1968... The author of a musical work may control its arrangement or transcription. No other alterations will count as adaptations. The control offered by the Act does not depend on the adaptation amounting to an independent work.'³⁰⁶

Despite its narrow definition, the adaptation right supplements the right of integrity in the context of sampling and other forms of musical creation through rearrangement. It guards integrity against a spectrum of appropriative uses which span from incremental revisions to new works, operating as one of several bridges between copyright and moral rights.

The link between copyright's adaptation right and the moral right of integrity is also evident in early moral rights disputes in relation to buildings in Australia. These cases show that some prior creators view changes as adaptations affecting integrity of adapted works, rather than as separate works. In 2001, architect Col Madigan objected to the addition of a glass enclosure to the front of the National Gallery of Australia: 'Madigan didn't accept the design by others for the National Gallery; he believed they were at odds with the "evolutionary" thinking and disciplines his team had set out to offer.'³⁰⁷ The next year, Harry Seidler objected

³⁰⁴ An adaptation is 'in relation to a literary work in a non - dramatic form a version of the work (whether in its original language or in a different language) in a dramatic form'. *Copyright Act 1968* (Cth), s 10(1)

³⁰⁵ Adeney, *The Moral Rights of Authors and Performers*, s 18.185, 613

³⁰⁶ Ibid

³⁰⁷ Angelo Candalepas. 'Sense of place permeated works of great designer', *theage.com.au* (online), (21 September 2011), <<http://www.theage.com.au/comment/obituaries/sense-of-place-permeated-works-of-great-designer-20110921-1kljp.html>>

to alterations—including a wind-shielding canopy and glass fence, and neon signage featuring a trumpet-playing pig—to the Riverside Centre in Brisbane; the case was settled and the alterations remained in place.³⁰⁸ 2003 saw Richard Weller object to proposed alterations to his Garden of Australian Dreams landscape architecture at the National Museum of Australia. The alterations included the addition of lawn, trees, a sundial and indigenous rock art.³⁰⁹ In the face of Weller's vocal objections, the plan was abandoned.

Originality also helps to explain how the right of integrity can interact with the rights of attribution and against false attribution.

The right of attribution arises when a person undertakes one or more attributable acts.³¹⁰ Attribution can increase the likelihood that a use becomes prejudicial to an author's reputation or honour, and to a performer's reputation, by making audiences aware of the connection between uses and used works and performances. For example, many listeners of a remix may be unaware that it is a remix at all; they may instead believe that it is a standalone musical work or recording. Lack of attribution may keep the originality of a use and a used work separate; by contrast, attribution can establish or strengthen the link between uses and the authors and performers of used copyright materials.

³⁰⁸ Elizabeth Farrelly. 'Genius doesn't mean pleasure', *smh.com.au* (online), (11 November 2003),

<<http://www.smh.com.au/articles/2003/11/10/1068329493877.html>>

³⁰⁹ See Matthew Rimmer's rich account of the dispute. Matthew Rimmer. 'The Garden of Australian Dreams: The Moral Rights of Landscape Architects', in Fiona Macmillan and Kathy Bowrey (eds), *New Directions in Copyright Law: Volume 3*, (Edward Elgar Publishing, 2006), 132-168

³¹⁰ The acts exclusively reserved to the copyright holder are: to reproduce the work in a material form, publish the work, perform the work in public, communicate the work to the public or make an adaptation of the work. See Revised Explanatory Memorandum, Copyright Amendment (Moral Rights) Bill 1999 (Cth), 21. See also *Copyright Act 1968* (Cth), ss 193, 195ABB

The right of integrity also interacts with the right against false attribution, which carries through two limbs from the text of the original *Copyright Act 1968*.³¹¹ In the context of authorship, noting similar provisions apply for performers, one limb is the author's 'right not to have authorship of the work falsely attributed' and the other limb is the right 'not to have a person being associated with a work that no longer entirely his own'.³¹² Sampling artists, and other copyright participants who do not preserve the exact form of parts upon use, face a conundrum. These creators may need to guess whether prior authors and performers wish to be associated or disassociated with the work of sampling. On one hand, she should attribute used works. On the other, she should not associate an author or performer of a used work that is no longer entirely their own. Originality presents one potential conceptual solution to this conundrum. If sampling makes relatively minor alterations in a rearrangement that does not yield a separate original work, such as altering the pitch and tempo of songs, the artist should attribute.³¹³ If sampling yields a separate original work, the artist might not attribute on the basis that the used material has been transformed.

Under Australian law, integrity also relates to substantiality. As the Chapter II discussed, copyright subsistence links inextricably to the substantial part threshold for infringement; copyright regulates only the use of substantial parts. This link helps ensure that copyright is focused on protection of original material, noting originality and substantiality are complex and sometimes contested concepts. The moral rights regime for authors and performers similarly limits their rights to uses of substantial parts.³¹⁴ Uses of insubstantial parts cannot lead to an

³¹¹ *Copyright Act 1968* (Cth) (as passed), s 190. A third limb from the earlier statute, which applies to knowing misrepresentations of authorship in the contexts of publication, commercial dealing or distribution of artistic works, was not retained. See Adeney, *The moral rights of authors and performers*, 545

³¹² *Copyright Act 1968* (Cth) (current text), ss 195AC to 195AF, 195AH

³¹³ Artists using copyright works in Australia do not enjoy explicit moral rights exceptions for alteration of key or pitch provided by Germany's *Urheberrecht*. s 62 of the Act creates *inter alia* a moral rights exception for transposing a musical work into another key or pitch if this is required by the purpose of the use. *Gesetz über Urheberrecht und verwandte Schutzrechte* [Author's and Related Property Rights Act] 1965 (Germany). See Adeney's discussion of this German exception. See Adeney, *The moral rights of authors and performers*, 252

³¹⁴ *Copyright Act 1968* (Cth), ss 195AZH, 195AZP

infringement of moral rights. This is a useful limitation to moral rights, as it draws on the large body of copyright case law for what constitutes a substantial part of works; unfortunately, there is no comparable common law guidance on what constitutes a substantial part of a recorded performance.

In addition to substantiality, the moral right of integrity is limited by the condition of materiality. In relation to certain copyright works, the moral right of integrity prevents 'the doing, in relation to the work, of anything that results in a *material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation*'.³¹⁵ Not all alterations and distortions can infringe the moral right of integrity; only *material* alterations and distortions, or mutilation, can rise to the level of infringement. This helps explain why the Australian Copyright Council recognises a high threshold for derogatory treatment in the context of sampling:

'It is the moral right relating to derogatory treatment of the source material that may be relevant when remixing, re-cutting or otherwise using material. The threshold for this is fairly high and the creator can't raise an issue if they are merely unhappy with the way in which their work was used.'³¹⁶

As Adeney notes, the materiality requirement is unique to Australia and not required for the implementation of the *Berne Convention*.³¹⁷ Adeney infers that this requirement appears to be based on a 1911 judgement which called for assessment of an alteration or distortion 'by reference to the purpose of the right, in this case its object of protecting the credit and reputation of the artist.'³¹⁸ As such, materiality makes it harder to prove infringement of the moral right of integrity.

³¹⁵ Emphasis added. *Copyright Act 1968* (Cth), s 195A)(a)

³¹⁶ Australian Copyright Council. *Information Sheet G118v4 Mashups & Copyright* (online), (December 2014), <http://www.copyright.org.au/acc_prod/AsiCommon/Controls/BSA/Downloader.aspx?iDocumentStorageKey=e8ff34fd-32c7-4c19-b67e-2d5afd92244d&iFileTypeCode=PDF&iFileName=Mashups,%20Memes,%20Remixes%20&%20Copyright>

³¹⁷ See Adeney, *The Moral Rights of Authors and Performers*, s 18.57, 582

³¹⁸ *Ibid*, 583. See also *Carlton Illustrators v Coleman & Co Ltd* (1911) 1 KB 771

Reasonableness also limits the right of integrity. In the context of remixes, Fitzgerald and O'Brien note the 'issue of moral rights, particularly the moral right of integrity and the notion of reasonableness also need to be considered.'³¹⁹ Derogatory but reasonable treatments do not infringe the right of integrity.³²⁰

The reasonableness defence bears a resemblance to the fair use doctrine and the concept of transformative use discussed in Chapter V. This resemblance could be relevant if Australia adopted a fair use regime. Davison *et al.* note reasonableness requires consideration of the 'purpose, manner and context in which the work was used'.³²² The first four moral rights reasonableness factors overlap with the four US fair use factors. Notwithstanding meagre Australian case law on moral rights reasonableness, some fair uses under US law may also be reasonable uses under Australian moral rights law.³²³

Moral rights reasonableness	Fair use
Nature of the work	Nature of the copyrighted work
Purpose for which the work is used	Purpose and character of the use
Manner in which the work is used	Amount and substantiality of the portion taken
Context in which the work is used	Effect of the use upon the potential market

Figure 10: Comparing fair use factors with select reasonableness factors³²⁴

Reasonableness may ensure that parody and satire, which enjoy a fair dealing exception, do not infringe the moral right of integrity.³²⁵ This would be consistent

³¹⁹ Damien O'Brien and Brian Fitzgerald. 'Mashups, remixes and copyright law', 9(2) *Internet Law Bulletin* (online), (LexisNexis, 2006), <<http://eprints.qut.edu.au/4239/1/4239.pdf>>, 17-19

³²⁰ *Copyright Act 1968* (Cth), ss 195AS(2), 195AXE(2)

³²² Mark Davison, Ann Monotti and Leanne Wiseman. *Australian Intellectual Property Law*, (Cambridge University Press, 2016), 341, citing *Copyright Act 1968* (Cth), ss 195AR(2)(b)-(d), 195AS(2)(b)-(d)

³²³ Four of the reasonableness factors are discussed briefly in *Perez v Fernandez*. Reasonableness is mentioned in passing in *Pocketful of Tunes Pty Ltd v Copyright Tribunal* (2015) FCAFC 146

³²⁴ For all factors, see *Copyright Act 1968* (Cth), ss 195AS(2), 195AXE(2), 17 U.S.C. §107

³²⁵ For the fair dealing provision in relation to parody and satire, see *Copyright Act 1968* (Cth), s 41a. For a discussion of parody and satire which avoids straying into the moral

with the Australian Parliament's intent for the moral right of integrity: 'the introduction of moral rights, in particular the right of integrity, is not intended to impede or adversely affect the time-honoured practices of parody and burlesque. The moral right of integrity is not intended to stifle satire, spoof or lampoon any more than does the existing law of defamation.'³²⁶ This helps address Adeney's concerns about tension between the right of integrity and copyright exception for parodies and satires: 'It is arguable, however, that an alteration or transposition for parodic or satirical purposes could not by definition be reasonable... How can it be reasonable, in a moral rights context, to undermine a person's reputation in the way that parody or satire is apt to do?'³²⁷

The alignment between the reasonableness and fair use factors addresses fears that the introduction of a transformative use exception would increase infringement or assertion of moral rights. Several bodies have expressed such fears. The Australian Law Reform Commission has suggested that '[a]llowing new transformative uses of copyright materials may lead to more frequent assertion of moral rights'.³²⁸ APRA and AMCOS 'anticipate that such an exception (that allowed transformative uses) would result in an increased amount of litigation involving the definitions of "transformative" and "non-commercial", and involving infringement of authors' moral rights.'³²⁹

Two further reasonableness factors relating to industry practices bolster the second and third factors above, and allow moral rights to adapt to changing industry practice. If music artists are more accepting of distortions and alterations

right of integrity, see Nicolas Suzor. 'Where the bloody hell does parody fit in Australian copyright law?', (2008), 3 *Media and Arts Law Review* 218, 218-238

³²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 June 1997, 5547-8, (Daryl Williams, Attorney-General)

³²⁷ Elizabeth Adeney. 'The Sampling and Remix Dilemma: What is the Role of Moral Rights in the Encouragement and Regulation of Derivative Creativity?' (2012), 17(2) *Deakin Law Review* 335, 346-47

³²⁸ Australian Law Reform Commission. *Discussion Paper 79: Copyright and the Digital Economy*, (ALRC, 2013), 10.30

³²⁹ APRA and AMCOS. 'Submission', *Copyright and the Digital Economy Issues Paper*, (2012), 52-53

of works and performances, the reasonableness defence becomes stronger. The two additional factors are:

- 'any practice, in the industry in which the work is used, that is relevant to the work or the use of the work', and
- 'any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work'.³³⁰

Together, the concepts of originality, materiality and reasonableness reveal several insights about the moral right of integrity. If originality governs which arrangements form a work, the moral right of integrity protects the wholeness of that arrangement. Materiality sets a high bar for distortions and alterations before they can be found to infringe the moral right of integrity. In effect, materiality places distance between distortions and alterations, and the wholeness of arrangements. In addition, reasonableness makes the moral right of infringement cognizant of contemporary industry practice, including whether a use would be a transformative and therefore fair use. To the extent that a use is transformative, it is more likely to yield a new arrangement and work that forms an overlapping but distinct whole.

Carl Orff and debasement

Schott v Colossal was the first Australian litigation applying the concept of debasement to music sampling. It provided an early view of the relationship between appropriation, originality and moral rights in Australia.³³¹ In Australia, debasement was the prototypical right of integrity, preceding the introduction of a moral rights regime. The statute created a compulsory licence for rerecording musical works, an act of adaptation, excluding uses that debased the musical

³³⁰ For brevity, only factors in only relation to works are quoted here. Almost identical factors exist in relation to performances. *Copyright Act 1968* (Cth), ss 195AS(2)(e),(f), 195AXE(2)(e),(f)

³³¹ *Schott Musik International GMBH & Co & Ors v Colossal Records of Australia Pty Ltd & Ors* (1997) FCA 531 (hereinafter *Schott v Colossal* (Full Federal Court)). See also *Schott Musik International GMBH & Co & Ors v Colossal Records of Australia Pty Ltd & Ors* (1996) FCA 1033 (hereinafter *Schott v Colossal* (Federal Court))

work.³³² Recording artists FCB used this compulsory licence to make the *Excalibur* remixes of the *O Fortuna* chorus.³³³ In 1995, Colossal Records released these remixes.³³⁴

The core question in *Schott v Colossal* was whether the *Excalibur* remixes had debased the original musical work of *O Fortuna*, part of the *Carmina Burana* cantata. Colossal argued that *Excalibur* did not debase *O Fortuna* and FCB were therefore entitled to make and release these four remixes under the compulsory licence.³³⁵ Schott, representing the copyright interests in *O Fortuna*, contended *Excalibur* had debased *O Fortuna*, and was therefore not entitled to the licence. Ultimately, the Full Federal Court upheld the Federal Court's finding that *Excalibur* did not debase *O Fortuna*.

O Fortuna composer Carl Orff was an intriguing character in music history, providing a rich historical example of originality as rearrangement. In a life spanning almost one century to 1982, Orff contributed some of the most innovative and multidisciplinary pieces to his time.³³⁶ Educated in piano, cello and organ, Orff was also exposed to theatre and opera early in his life. These influences preceded a lifetime of cross-disciplinary composition across music, theatre, dance and education. Orff not only composed for the performance stage, but was also

³³² Under certain specified circumstances, 'the copyright in a musical work is not infringed by a person (in this section referred to as 'the manufacturer') who makes, in Australia, a record of the work'. *Copyright Act 1968* (Cth), s 55(1). 'The last preceding subsection does not apply in relation to a record of an adaptation of a musical work if the adaptation debases the work.' *Copyright Act 1968* (Cth), s 55(2), later amended by *Copyright Amendment (Moral Rights) Act 2000*, Sch 1, s 1A

³³³ For a selection of their discography, see Discogs. *Colossal Records*, (2017), <<http://www.discogs.com/label/Colossal+Records>>

³³⁴ FCB was an Italian electronic music outfit, named after the surnames of the artists Carlo Favilli, Maurizio Cristofori and Alex Bresil. One of these remixes reached number 30 on the annual Australian music chart. ARIA. 'End of the year charts: Top 50 singles.', *aria.com.au* (online), (Sydney: ARIA, 1995), <<http://www.aria.com.au/pages/aria-charts-end-of-year-charts-top-50-singles-1995.htm>>

³³⁵ Under certain specified circumstances, 'the copyright in a musical work is not infringed by a person (in this section referred to as "the manufacturer") who makes, in Australia, a record of the work'. *Copyright Act 1968* (Cth), s 55(1)

³³⁶ See, for example, Schott. *Carl Orff* (online), (Schott, c2016) <<http://www.schott-music.com/shop/persons/az/carl-orff/>>

commissioned to create a piece for the 1936 Summer Olympics in Berlin. He also designed a body of work for social and therapeutic education.

O Fortuna was both a product and subject of appropriation. Orff often appropriated medieval texts, Greek dramas, fairy tales and old German dialects. He would adapt or arrange them into works of his own. *Carmina Burana* was one, a 1930s adaptation of a selected Goliardic poems from thirteenth century manuscript recording poems from street poets.³³⁷ *Carmina Burana* formed the first of three cantatas in Orff's *Trionfi* procession which spanned three decades. The two later, less-known cantatas also featured musical adaptation of Greco-Roman texts, including Latin poems by Roman poet Catullus and Greek poems by Sappho and Euripides.

O Fortuna, as a chorus in *Carmina Burana*, is a brooding tale of fortune and fate, and was often reused in popular culture in dramatic or exciting scenarios. Michael Steinberg describes *O Fortuna* as 'a brief exordium, then a crescendo and acceleration built over nearly a hundred measures, all of them glued to the insistent tonic, D'.³³⁸ *O Fortuna* is one of the most used and recognisable cultural assets, spanning film, theatre and popular culture, featuring in advertisements, a dating show and a Nobel Peace Prize concert.³³⁹ Even at the time of the case, *O Fortuna* held cultural and commercial importance. As Tamberlin J noted:

³³⁷ 'Sometime in the late thirteenth century or soon thereafter, a Benedictine monk at the monastery of Beuron in Bavaria collected about 200 Goliardic poems into an anthology known as the *Carmina Burana*... Out of this anthology, Carl Orff selected certain *carmina* composed in Latin, or Latin mixed with French and German, which he set to music in 1937.' Judith Sebesta. 'Medieval Latin Poetry', *Carmina Burana: Cantiones Profanae*, (Bolchazy-Carducci Publishers, 1996), 5-6

³³⁸ Michael Steinberg. *Choral Masterworks: A Listener's Guide*, (Oxford University Press, 2005), 235

³³⁹ See, for example, the award-winning Carlton Draught beer commercial. George Patterson Y&R. *Big Ad* (online), (George Patterson Y&R, c2005), <http://www.youtube.com/watch?v=eH3GH7Pn_eA>. The chorus is played when a prospective bachelor is rejected by all 24 women. Jiangsu Satellite Television, *If You Are The One*, (JST, c2010). The chorus also underscored a short video montage of previous Peace Prize Winners. World Youth Choir. *O Fortuna* (online), (Nobel Peace Prize, 2011), <<http://www.youtube.com/watch?v=ixNnHc7ecmA>>

'Evidence was adduced as to the use of the "O Fortuna" chorus, in advertisements for a range of products including Nescafé, a Michael Jackson concert, an Arnold Schwarzenegger film and an advertisement for Sea World. In addition, the theme has been used in films such as "The Doors", "The Omen", "Excalibur" and advertisements for other films. Some of these were authorised, and some were unauthorised. The chorus has been licensed in respect of advertisements for "Old Spice" and "Nestle" products and for modern versions of the work such as that by Ray Manzarek.'³⁴⁰

Evidence from Australian composer and musician Richard Meale demonstrated the influence of originality and materiality on the moral right of integrity. In an affidavit, Meale claimed there was debasement, listing the alterations made by *Excalibur*. Meale focussed on more significant alterations, such as structural reordering or contraction of musical phrases and timbral changes, including the adding of voices or instrumentals to bolster existing melodies or create new harmonies.³⁴¹ There were also material changes to time signatures. Whereas small changes to key might be overlooked by a lay listener, these alterations would not.

Under cross examination, Meale equated debasement with destroying the wholeness of arrangement, echoing the link made in the previous part of this chapter. He was asked to clarify what types of adaptation other than a techno remix would debase a piece of classical music. In response, he drew a link between the debasement and integrity on one hand, and originality and the wholeness of a work on the other:

'One that would destroy aspects of its what I have called integrity, that is, its wholeness or one-ness – I don't mean wholesomeness; I mean its one-ness. One that destroys the form of the piece. One that injures the composer's emotional intentions. One which veers far enough away from the original to change its nature, its structure and message.'³⁴²

Despite initially stating that *Excalibur* had debased *O Fortuna*, Meale later conceded under cross examination that his 12 months of analysing *O Fortuna* and *Excalibur* had raised his opinion of *O Fortuna*.³⁴³ Rearrangement helps to explain

³⁴⁰ *Schott v Colossal* (Federal Court), 71

³⁴¹ *Schott v Colossal* (Federal Court), 49

³⁴² *Schott v Colossal* (Federal Court), 52

³⁴³ *Schott v Colossal* (Federal Court), 52

the reasons for this change of heart. In a letter to the solicitor for Schott, Meale suggested that some *Excalibur* remixes provided only simple rearrangements of *O Fortuna*, meaning that their essence was still similar to *O Fortuna*. The letter included the following excerpt, was only made public posthumously, and was not available to the Court during the case:

‘analysis of the Radio Mix was not easy to do. It is so simple, once it is put down... I have almost completed [analysis of] Skitz Mix, and it really tells a similar story, i.e. the only bits of interest are Orff’s. But I guess it all depends upon what it is one wants to hear.’³⁴⁴

Meale’s letter and private notes also demonstrate, as Chapter II discussed, the difficulty of capturing the techniques of sampling in classical notation.³⁴⁵ This makes it difficult to distinguish remixes from remixed works, and impedes inquiries into originality, debasement and integrity. Meale’s analysis of the *Excalibur* remixes attempts to frame electronic, sampled music in the language of classical music with vague terms such as ‘distorted gliss’ and ‘goofy voices’.³⁴⁶ Many of the characteristics of the techno remixes were simply beyond the vocabulary of classical notation. This helps explain why Meale was unable to recognise the separate originality in the *Excalibur* remixes which would have separated them from *O Fortuna* and Orff’s reputation and honour.

By contrast to Meale, the Colossal music expert and chair of the Sydney Conservatorium of Music’s Musicology Unit Richard Toop maintained that *Excalibur* preserved the essence of *O Fortuna* and therefore did not debase *O Fortuna*. In part, Toop saw *Excalibur* as an adaptation of an original work into another genre, from 1930s German concert work to a 1990s techno setting. As Tamberlin J noted: ‘Mr Toop saw the essential affect of the original as being

³⁴⁴ Emphasis in original. Richard Meale. untitled and undated letter to Peter Banki of Banki Palobi Haddock & Fiora (c1995), *Papers of Richard Meale*, National Library of Australia, MS 10076, Series 6, Folder 10

³⁴⁵ Ibid

³⁴⁶ ‘Gliss’ is musical shorthand for glissando, the musical term for a phrase of music that slides up or down a consecutive series of notes. Ibid

“celebratory”, “ceremonial” and somewhat “ritual in character”. He did not believe that this element disappeared in the adaptation.’³⁴⁷

Tamberlin J endorsed Toop’s approach, which focused not on detailed musicological analysis, such as the kind performed by Mr Meale, but looked for ‘widespread perception of reduction in the quality, rank or dignity of the work as a result of Excalibur’.³⁴⁸ In Toop’s view, the integrity of musical works could endure multiple and varied alterations if the character of the original was not lost in translation. He pointed to a parallel example of Beethoven’s popular and highly recognisable Ninth Symphony, which has survived many arrangements including an electronic version in Stanley Kubrick’s film adaptation of Anthony Burgess’ novella *A Clockwork Orange*, a film filled with disturbing, dystopian themes. He also noted that many of the types of alterations noted by Meale in relation to the techno remixes, such as changes in tempo and key, were common in interpretations of classical music.

Upon appeal, the Full Federal Court upheld Tamberlin J’s decision, setting out tests for debasement, that invoked notions of integrity and originality. A common theme for the Full Federal Court was the dual nature of alterations, which could not only debase but also yield adaptations or arrangements with new integrity.

Hill J’s approach to debasement involved a two-step test. Firstly, because the compulsory licence permitted adaptations that did not debase, the alterations merely yielding an adaptation could not constitute a debasement. Secondly and consequently, only those alterations beyond adaptation could constitute debasement. Hill J considered a reasonable person would be able to distinguish the Excalibur techno version from the original. For Hill J, the proper test was whether

³⁴⁷ *Schott v Colossal* (Federal Court), 65

³⁴⁸ Tamberlin J noted “The question of whether an adaptation “debases” “Carmina Burana” is one on which both expert and non-expert members of the community may vary greatly. Therefore, it is not appropriate to take a narrow analytical view based on a minute comparison of the adaptation with the work.’ *Schott v Colossal* (Federal Court), 74

the adaptation had caused a reasonable person to think less of the original work.³⁴⁹ At the time, Hill J envisioned that debasement could be the result of parody or other objectionable associations with the original.³⁵⁰

Wilcox J drew a link between the integrity of an adaptation and debasement. He noted former Attorney-General Nigel Bowen's view that the original *Copyright Act 1968* excluded debasing adaptations from the statutory licence scheme. In Wilcox J's view, it was clear from the former Attorney-General's second reading speech that the purpose 'was to exclude from the statutory licence scheme an adaptation that constitutes a "muck up" of the original work. Attention is to be concentrated on the adaptation'.³⁵¹ Because the *Excalibur* remixes had integrity and character separate from the *O Fortuna*, they could not muck up or debase of the original work. As Wilcox J explained: "Debase" is a strong term. It requires much more than an opinion, even an expert opinion, that the adaptation is musically inferior. For the term to be applicable, the adaptation must be so lacking in integrity or quality that it can properly be said to have degraded the original work'.³⁵² This approach requires jurists to consider and form boundaries between prior and latter works: Does an adaptation of prior material yield a separate original work? We might

³⁴⁹ Hill J articulated several points that supported this view:

- '...the adaptation has some characteristic which in some way affects the way the original work is regarded'
- 'It will probably be rare for an adaptation of a work, no matter how different the adaptation from the original, to be a debasement of the original'
- 'A reasonable person, in my view, would distinguish the techno version from the original as different in style and approach', and
- 'Perhaps a parody might bring about the result that one could not recall the original without the parody coming to mind in such a way as to diminish the value of the original.'

Schott v Colossal (Full Federal Court). No paragraph references are provided as none were provided in the judgement

³⁵⁰ This echoed an example from the Australia Council's code of practice for moral rights: 'A composer's song is used in an advertisement. New lyrics have been written to advertise the product in a blatantly sexist manner.' Georgia Blain. *Moral Rights of Artists: A Code of Practice*, (Australia Council, 1991), 5

³⁵¹ *Schott v Colossal* (Full Federal Court)

³⁵² *Ibid*

summarise the Wilcox test this way: if an adaptation has sufficient integrity to yield a separate original work, that adaptation does not debase the adapted work.

Lindgren J added a third approach that tied the wholeness of a work or arrangement to genre, subculture, time and location. For Lindgren J, the same phrase deployed in songs of two different contexts might create different original works, with distinct voice and character. Potential debasement must be considered 'in the context of the musical technology, societal phenomena and musical genres of the 1990s'.³⁵³ Lindgren J's approach to debasement foreshadowed the future right of integrity, asking 'whether the arrangement is an impermissible distortion, mutilation or other modification'.³⁵⁴ An adaptation was less likely to debase a prior work if it made that work available to a different time or sub-culture: '[A]n arrangement will be less likely to be a debasement where, as here, it is an arrangement which "makes available" the original musical work to the musical tastes of a different period of time or of a different sub-culture'.³⁵⁵ This helps explain Lindgren J's conclusion: 'A reasonable person, in my view, would distinguish the techno version from the original as different in style and approach, while recognising that the techno version in no way detracted from the original.'³⁵⁶

What *Schott v Colossal* shows is the concept of debasement exhibited strong connections to the concept of originality. Though *Schott v Colossal* was an antecedent to moral rights in Australia, the influence of the wholeness of both works and adaptations was already present. That said, debasement was at best a partial substitute for the moral right of integrity. For example, Anthony Hutchings argues that the *Schott v Colossal* judgement shows that the debasement was an 'unsatisfactory test for compulsory licencing of musical works'.³⁵⁷ Adeney has

³⁵³ Ibid

³⁵⁴ Ibid

³⁵⁵ Ibid

³⁵⁶ Ibid

³⁵⁷ Anthony Hutchings. 'Authors, Art, and the Debasing Instinct: Law and Morality in the Carmina Burana Case' (1997), 19(3) *Sydney Law Review* 21 (hereinafter 'Hutchings, 'Authors, Art, and the Debasing Instinct'), 385

noted the concept of debasement was unique to Australia; in the interests of harmonisation with law from other jurisdictions, it was desirable to have adopted the more common right of integrity.³⁵⁸ And, as Tamberlin J noted, only copyright owners could exercise their rights in relation to debasement, whereas moral rights generally attach to authors.³⁵⁹ Nonetheless, *Schott v Colossal* complements the later common law guidance on applying the right of integrity to musical works.

Pitbull and integrity

Perez v Fernandez demonstrates the complexity of applying the right of integrity to contemporary sampling and appropriation art, especially when those asserting their moral rights have not respected others' moral rights. This is unsurprising given the case is the first time an Australian court had considered the application of moral rights to musical works, despite the regime being introduced more than one decade before.

Perez v Fernandez provides early guidance on the application of the Australian right of integrity of authorship to music.³⁶⁰ Plaintiff Perez claimed *inter alia* that defendant Fernandez breached the right of integrity of authorship by making an unauthorised use of a musical work authored by Perez.³⁶¹ The Court ultimately found that Fernandez infringed the moral right of integrity of authorship.³⁶²

³⁵⁸ Elizabeth Adeney. 'O Fortuna! On the vagaries of litigation and the story of musical debasement in Australia', in Andrew T. Kenyon, Megan Richardson and Sam R (eds), *Landmarks in Australian intellectual property law*, (Cambridge University Press, 2009), 171-190

³⁵⁹ '[T]he exception provided for in subs55(2) is not concerned with providing any artistic rights to the author as such but with the rights of the copyright owner'. *Schott v Colossal* (Federal Court), 74

³⁶⁰ *Perez v Fernandez* is by no means the first Australian dispute featuring moral rights issues in music. In 1982, Men at Work was releasing *Down Under*, which would later be the subject of copyright litigation in *EMI v Larrikin*, and moral rights was still being developed through the influential Martin and Bick report. While the case focused on copyright, the use of *Kookaburra* was unattributed in the release of *Down Under*, which raises separate moral rights questions that were not considered in the case

³⁶¹ Though Perez did not claim breaches of the moral right of integrity of performership, the removal of only some of the lyrics performed would have been a *prima facie* infringement of Perez's moral right of integrity of performership in the *Bon, Bon* recording

³⁶² See *Perez v Fernandez*, 66

Perez v Fernandez provides insights about the relationship between integrity, originality and arrangement. These related concepts help to explain the outcome in *Perez v Fernandez*, and what alterations might infringe the moral right of integrity, an issue that several stakeholders found still unclear after the judgement. The Australian Copyright Council said ‘the moral right of integrity is still not clear-cut as the decision doesn’t add significant guidance in terms of what will, and what won’t be considered “prejudicial”.’³⁶³ Lawyers for Minter Ellison writing on the case commented that: ‘Unfortunately, Driver FM engaged in little explicit consideration of the legal principles relevant to determining whether or not alteration of a work is prejudicial to the author’s honour or reputation, most likely because limited relevant evidence appears to have been placed before the court.’³⁶⁴

Arrangement cohesively explains the outcome in *Perez v Fernandez*, linking the originality and integrity of a series of incremental creations. This is perhaps unsurprising, given the chain of rearrangement that led to the creation of the allegedly infringed work in the case.

The chain of rearrangement began with lyricist Nicola Salerno, who collaborated on several occasions with Italian crooner Renato Carosone. Salerno provided lyrics to Carosone, which he arranged into the 1956 hit song *Tu vuò fà l’Americano* (hereinafter *l’Americano*).³⁶⁵ The popularity of *l’Americano* was sustained in western popular culture by covers of the song in films set in Italy, such as *It Started in Naples* and *The Talented Mr. Ripley*. In February 2010, Australian artists Yolanda Be Cool and DCUP released *We No Speak Americano* (hereinafter *Americano*),

³⁶³ Australian Copyright Council. ‘A case involving the moral right of integrity’, *News & Policy* (online), (Australian Copyright Council, 2012), 29 February 2012, <<http://www.copyright.org.au/news-and-policy/details/id/2047/>>

³⁶⁴ Paul Kallenbach and Nicole Reid. ‘Rappers, moral rights and infringement’, *Intellect: Minter Ellison’s technology, media, communications and IT blog* (online), (Minter Ellison, 1 March 2012), <http://minterstmt.blogspot.com.au/2012_03_01_archive.html>

³⁶⁵ As the Court noted: ‘The Bon, Bon Song is an arrangement created by Mr Perez in 2010 of two earlier songs known as “We No Speak Americano” and “Tu Duo Fa L’Americano” [sic].’ *Perez v Fernandez*, 8. Pitbull. *Bon, Bon*, (Sony Music Latin, 2010). Renato Carosone and Nicola Salerno. ‘Tu vuò fà l’Americano’, in Mario Mattoili, *Totò Peppino e le fanatiche*, (Titanus, 1958)

which sampled *l'Americano* and was a chart hit across the Australia, Europe, North America and Latin America.³⁶⁶ Shortly after the release of *Americano*, Dutch DJ Alvaro made an unauthorised remix of *Americano* known as the *Alvaro Bootleg*.³⁶⁷ Then, in August 2010, Cuban-American artist Armando Perez released *Bon, Bon* which sampled the *Alvaro Bootleg*. Perez is popularly known as Pitbull, and is a commercially successful recording artist, having made several chart hits including *Bon, Bon*. At the time of proceedings and adjudication of *Perez v Fernandez*, Perez only admitted to sampling *Americano* and early versions, but not the *Alvaro Bootleg*.

One further and unauthorised rearrangement triggered the dispute in *Perez v Fernandez*. In 2008, Perez made an audio recording for the purpose of promoting a tour organised by Jamie Fernandez and another promoter; this type of promotional recording is also known as an audio drop. Although the tour was cancelled, Fernandez later mixed the audio drop with *Bon, Bon* without Perez's copyright or moral rights permission, altering the *Bon, Bon* musical work.³⁶⁸ The audio drop replaced about 10 seconds of lyrics from the *Bon, Bon* recording. Fernandez then streamed this altered *Bon, Bon* recording on his website and played it at clubs, adding to the infringement of the moral right of integrity.

We can distill several insights about the rearrangements and outcome in *Perez v Fernandez*. Firstly, the rapid and successive rearrangements of *l'Americano* validate Roberta Kwall's fears that the digital age could harm the integrity of works. She argues that in the digital environment, 'violations of textual integrity can occur with unprecedented ease, and the results can be disseminated to

³⁶⁶ The band name Yolanda Be Cool appropriates a line of dialogue from the iconic final scene from Quentin Tarantino's *Pulp Fiction*. Yolanda Be Cool and DCUP. *We No Speak Americano*, (Ultra Music, 2009). Quentin Tarantino. *Pulp Fiction*, (Miramax Films, 1994)

³⁶⁷ DJ Alvaro. 'Pitbull - Bon Bon | How it's Made (DJ ALVARO)', *YouTube* (online), (6 October 2010), <<http://www.youtube.com/watch?v=jJaJ59pysEs>> (hereinafter 'Alvaro, 'Pitbull - Bon Bon | How it's Made')

³⁶⁸ The tour was itself the subject of NSW Supreme Court proceedings regarding breach of contract. See *Fernandez v Perez* (2012) NSWSC 1242. See also *Fernandez v Perez* (No 2) (2012) NSWSC 1602

countless recipients with the mere press of a key'.³⁶⁹ Here, a hit of four decades past saw four new rearrangements by artists scattered across the world—Yolanda and DCUP in Australia, Alvaro in The Netherlands, Pitbull in the US and then Fernandez in Australia—in six months.



Figure 11: 44 years of rearrangement of *Tu vuò fà l'Americano*

Another insight we can draw from *Perez v Fernandez* is the line between the alterations that subject an original work to derogatory treatment, and alterations that form an adaptation or otherwise separate work. The former act infringes the moral right of integrity, but the latter may be permissible. The Court's judgement implies that alterations are more likely to infringe the right of integrity if they form 'part of the original work':

'The combination of the Audio Drop with *Bon, Bon* makes it sound to the listener like Mr Perez is positively referring to Mr Fernandez at the beginning of the song, and that this reference *forms part of the original work*... It was an act designed both to avenge Mr Fernandez's grievances with Mr Perez arising from the subject matter of the NSW Supreme Court proceedings, and to promote Mr Fernandez.'³⁷⁰

If we accept this, it follows that an alteration is less likely to infringe the right of integrity if it forms part of a separate work, such as an adaptation. This reasoning is consistent with Hill and Wilcox JJ's positions in *Schott v Colossal*, that a finding of debasement would be less likely where an adaptation had its own integrity. If Fernandez had demonstrated that his altered *Bon, Bon* yielded a new musical work, rather than an alteration of prior copyright material, he may have avoided infringement of the right of integrity.

Perez v Fernandez also offers insights into the importance of artist associations to both copyright damages and the moral right of integrity. In assessing whether

³⁶⁹ Roberta Rosenthal Kwall. 'Originality in Context' (2007), 44(4) *Houston Law Review* 871 (hereinafter 'Kwall, 'Originality in Context'), 898

³⁷⁰ Emphasis added. *Perez v Fernandez*, 65

Perez deserved additional copyright damages, the Court treated an artist association as evidence of a benefit accrued to Fernandez:

'Mr Fernandez's use involved creating a direct association between the artist and himself, through the alteration of the work, and its prominent use as the first work which streamed each time the website was visited. That use should be presumed to have involved the exercise of commercially valuable rights.'³⁷¹

Likewise, in rejecting a reasonableness defence for Fernandez, the Court highlighted the importance of artist associations to the moral right of integrity. The Court specifically considered 'the nature of the work, which is one existing in a genre in which associations between artists is of considerable significance... [and] the purpose for which the work was used, which in this case was to either promote Mr Fernandez for his own benefit, or to mock Mr Perez as an act of retribution'.³⁷² As noted earlier in this chapter, consideration of these reasonableness factors would also be relevant to a fair use inquiry. The Court accepted Perez's argument that artist associations are central to their reputations:

'...associations between artists and DJs in the hip-hop/rap genre are highly significant. Artists go to great lengths to choose whom they associate with, and these associations form a central part of their reputation. In those circumstances, I accept that the fact that the reference to Mr Fernandez in the altered version of the song had not been authorised by the author should be regarded as prejudicial to him *per se*.'³⁷³

Looking across the integrity of different rearrangements in the chain yields an overarching insight: A use which creates a rearrangement possessing its own wholeness and integrity is more likely to attract its own moral right of integrity and avoid infringing prior integrity. We can witness this in practice through the rearrangements leading up to *Perez v Fernandez*.

³⁷¹ Ibid, 78. '[A]ny benefit shown to have accrued to the defendant by reason of the infringement' is a relevant consideration for additional copyright damages. *Copyright Act 1968* (Cth), s 115(4)(b)(iii)

³⁷² Ibid, 89

³⁷³ Ibid, 68

Alvaro made no claim to copyright, integrity or attribution in the *Alvaro Bootleg*, in part because it was a minor rearrangement of *Americano* and undeserving of moral rights.³⁷⁴ Alvaro admitted that the *Alvaro Bootleg* merely bolsters features of *Americano* to make it more danceable, accentuating existing percussion and synthesizer sounds: 'There's not a lot what I did on the remix... it just made the original song more for the club, and more vibe, and more dancing and everything. I think that's the reason also why Pitbull used my version of course'.³⁷⁵

In Alvaro's view, Perez 'made his own song', rearranging prior compositions including the *Alvaro Bootleg* into the original rearrangement, *Bon, Bon*.³⁷⁶ This rearrangement created added new verses and lyrics, as well as new synthesizer and drum parts. It also featured a new structure that transforms synthesizer hooks from *Americano* and *Alvaro Bootleg*, and Renato Carosone's vocals and the saxophone riff from *l'Americano*, from being to central parts of earlier works to being less prominent parts of a new arrangement.

Perez's rearrangement of earlier material created a new voice and in doing so yielded a new, and therefore original, arrangement. The new voice can be found in the change of lyrics. Perez's *Bon, Bon* replaced the Italian lyrics of *l'Americano*, which mock an Italian's fruitless efforts to impress by mimicking American habits and bravado, with Spanish lyrics of an American man boasting of his sexual conquests. Italian lyrics that mock American behaviour are transformed into an expression of that very behavior. While ironic, the course of events does demonstrate rearrangement leading to a separate work, with separate integrity.

Turning to Fernandez's altered *Bon, Bon* version, we can find little rearrangement. Other than the opening seconds of the version, in which Perez's lyrics are replaced with the audio drop, there are no other alterations. As such, the altered *Bon, Bon* attracts no separate originality, and the alterations remain attached to *Bon, Bon* and its integrity.

³⁷⁴ Alvaro, 'Pitbull – Bon Bon | How it's Made'

³⁷⁵ Ibid

³⁷⁶ Ibid

Notwithstanding the relationship between wholeness of arrangement and integrity, an unclean hands defence may have been available to Fernandez. While *Perez v Fernandez* was adjudicated on the assumption that Perez's *Bon, Bon* was based on *Americano* and *l'Americano*, the Court was not aware of, and did not take into account, Perez's unauthorised use of the *Alvaro Bootleg*. Several music news outlets raised moral rights concerns. For example, Dancing Astronaut expressed concern 'that Pitbull is taking a production from Alvaro and not giving him any credit.'³⁷⁷ With this additional evidence of Perez's unattributed takings, the Court may have found Fernandez did not infringe the moral right of integrity. If part of *Bon, Bon* was in fact the *Alvaro Bootleg*, then Fernandez may have altered less of Perez's arrangement and more of the *Alvaro Bootleg*. In addition, for Perez's honour or reputation to be harmed requires that he had honour and reputation in the first place. By infringing another creator's copyright and moral rights, Perez may have lowered his own honour or reputation. A Court could reasonably have taken a lower view of Perez's honour or reputation for having unclean hands.

Two factors may remain in Perez's favour. Firstly, Alvaro conceded that he deserves no moral rights or copyright claim because his bootleg was made without copyright or moral rights permission: 'he just grabbed my bootleg of *Americano* and just used it in his video... there's nothing to do about it, I think, because I just made it as a bootleg.'³⁷⁸ Secondly, being a relatively unknown artist, Alvaro might also struggle to claim infringement of his moral right of integrity; in *Confetti Records v Warner Music*, the Court declined to find infringement of the moral right of integrity because the nature of the honour or reputation of the allegedly infringed artist could not be established.³⁷⁹

³⁷⁷ This echoes Chapter III's discussion of the poor recognition of the contributions of studio producers. Senthil Chidambaram. 'Is Pitbull's "Bon, Bon" a heist? Alvaro speaks the truth!', *Dancing Astronaut* (online), (10 December 2010), <<http://www.dancingastronaut.com/2010/12/is-pitbulls-bon-bon-a-heist-alvaro-speaks-the-truth/>>

³⁷⁸ *Ibid*

³⁷⁹ The *Perez v Fernandez* Court did not consider the specific nature of Fernandez's honour or reputation, noting only the general importance of honour and reputation to artists in the genre. *Confetti Records & Ors v Warner Music UK Ltd* (t/a East West Records) (2003) EWHC 1274 (Ch)

Bridge from originality to morality

This chapter has drawn a link between originality and moral rights in Australian law. First and foremost, moral rights subsist mainly in relation to original works. In addition, uses that form new arrangements and new wholes are less likely to infringe the moral right of integrity. If a use of an original work is transformative or yields another original work, it should be less likely to infringe the right of integrity. This is especially true if the use does not substitute for the earlier work or affect the market for that work. If listeners can separate a remix from the remixed, the remix is less likely to affect the honour or reputation of the prior author. This logic is evident both in *Schott v Colossal* and *Perez v Fernandez*. As such, sampling artists and artists who succeed in making more original arrangements are likely to lower the risk of infringement of the moral right of integrity. In addition, the reasonableness factors echo some of the fair use factors, which would be relevant should Australia adopt the US fair use regime.

By articulating the coherence between originality and the moral right of integrity, this chapter provides an alternative perspective to Hutchings, who has questioned compatibility of moral rights with copyright law:

‘Moral rights theory is particularly problematic if we consider the promotion and advancement of artistic endeavour as one of the major aims of intellectual property law. Art strides forward by continually looking over its shoulder, so that new trends and genres comment and build on what preceded them. Sometimes the comments can be harsh, but this often makes them all the more valid.’³⁸⁰

While conceptually coherent, the link between originality and integrity is incomplete in practice because Australian law does not recognise originality or moral rights of authorship in sound recordings. This exacerbates an issue discussed in Chapter III, that the sound recording is a second-class citizen amongst copyright subject matter categories. Sampling artists must abide by others’ moral rights in relation to musical works and literary works, such as lyrics or other

³⁸⁰ Hutchings, ‘Authors, Art, and the Debasing Instinct’, 385

accompanying words.³⁸¹ However, their sound recordings attract no moral rights of authorship.

In addition, performers enjoy a narrower right of integrity than authors, which may disadvantage DJs and other improvising appropriation artists. Furthermore, the dearth of Australian case law in relation to the moral rights of performers makes uncertain the protection offered by these rights, especially when there is live sampling and manipulation of sounds of performances.³⁸² Though Australian legislators made clear that moral rights for performers should 'apply in a similar way' to moral rights for authors, performers' moral rights apply in fewer circumstances.³⁸³ The right of integrity protects the honour of authors but not performers. In any case, the right perishes with a performer, but lasts for 70 years after the death of an author. In the context of musical works, the right of integrity of authorship last for until copyright ceases to subsist in the work, which is generally 70 years after the death of the author.³⁸⁴ Performers of live and recorded performances enjoy protection only until the death of the performer of the work.³⁸⁵

Finally, it is worth noting the importance of tolerated uses in respect of moral rights. Two unauthorised versions discussed above were tolerated. Yolanda Be

³⁸¹ For a contrasting boundary between musical works and literary works, consider the US example where musical works include any accompanying words. Notably, in the US, music that accompanies a dramatic work are part of that dramatic work, rather than a separate musical work. 17 U.S.C. §102(a)(2),(3)

³⁸² For an example, see this video of Kimbra recording live loops of her voice, then layering and manipulating her voice with a range of effects. Kimbra. 'Settle Down', *YouTube* (online), (South by Southwest, 16 May 2012), <<http://www.youtube.com/watch?v=sd7GLvMYSHI>>. See also this video of Reggie Watts demonstrating a much more complex set of live looping. Reggie Watts. 'Reggie Watts disorients you in the most entertaining way', *YouTube* (online), (25 May 2012), <http://www.youtube.com/watch?v=BdHK_r9RXTc>

³⁸³ Commonwealth of Australia, Explanatory Memorandum, US-Australia Free Trade Agreement Implementation Bill 2004

³⁸⁴ 'An author's right of integrity of authorship in respect of a work other than a cinematograph film continues in force until copyright ceases to subsist in the work.' s 195AM(2)

³⁸⁵ 'A performer's right of integrity of performership in respect of a recorded performance continues in force until the performer dies.' *Copyright Act 1968* (Cth), s 195ANA(3)

Cool and DCUP raised no moral rights or copyright objections to Alvaro's unauthorised bootleg of *Americano*, made in The Netherlands which grants a right of integrity and an additional right against certain changes.³⁸⁶ Likewise, Alvaro raised no moral rights objections to Pitbull's unauthorised remix, perhaps because there is no moral rights regime in the US. Both tolerated uses enabled the creation of *Bon, Bon*. Although any moral right of integrity that Alvaro held in the *Alvaro Bootleg* may have been infringed, his reputation and honour have likely been lifted through this series of tolerated uses. Pitbull retrospectively acknowledged Alvaro as a producer of *Bon, Bon*, and commissioned Alvaro to make authorised remixes of Pitbull recordings and perform live together. Thus, tolerated uses created conditions that likely enhanced Pitbull and Alvaro's reputations. Whereas Adeney has suggested that a present use could be prejudicial and infringe the right of integrity, we see here that Pitbull and Alvaro's tolerated uses actually enhance reputations of prior creators.³⁸⁷ While tolerated use research typically focuses on economic rights, as discussed in Chapters V and VI, the examples above show how tolerated uses can be consistent with the moral rights of creators.

³⁸⁶ *Auteurswet 1912* (Netherlands), art. 25(1)(c),(d)

³⁸⁷ Adeney, *The moral rights of authors and performers*, 582

V. Development: Transformative use and originality

While the preceding chapters have refined our understanding of copyright subsistence, this chapter draws attention to the relationship between transformative use, a concept that is sometimes used to explain the fair use copyright exception, and originality. This chapter particularly complements Chapter II which focused on copyright subsistence. It also shows how copyright exceptions can also serve copyright's purpose.

Without careful calibration of subsistence and exceptions, copyright creations can be underused or overused. Both subsistence and exceptions have a role in defining what copyright encourages and discourages. They give shape to copyright as a policy response to the tragedy of the commons, whereby the cost of copying works of value is near-zero, scuttling incentive for the creation of those works. Though copyright does address the tragedy of the commons, it can perpetuate its own tragedy of the anti-commons, 'when too many parties have actual or potential vetoes on the creation of an economically valuable object, that object will tend to be under-produced'.³⁸⁸ We can view these tragedies, as Buchanan and Yoon point out, as symmetrical problems.³⁸⁹ The challenge for lawmakers and policymakers is to navigate between these two extremes.

This chapter argues that transformative use is a close cousin of the subsistence concept of originality. It shows that transformative use, like originality, is founded on rearrangement. The Second Circuit has noted that the work of appropriation artists 'inherently raises difficult questions about the proper scope of copyright protection and the fair-use doctrine'.³⁹⁰ By linking transformative use with originality, this chapter attempts to address some of these difficult questions.

³⁸⁸ George A. Akerlof *et al.*, *Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, Eldred v Ashcroft*, 537 U.S. 186 (2003) (No. 01-618)

³⁸⁹ James M. Buchanan and Yong J. Yoon, 'Symmetric Tragedies: Commons and Anticommons', (2000), 43(1) *The Journal of Law & Economics* 1

³⁹⁰ See the concurring opinion of Katzmann J in *Blanch v Koons*, 263

The opening part below shows that the presence of transformative use in fair use's history and how rearrangement helps explain both transformative use and originality.³⁹¹ The second part illustrates how transformative use underpins the four fair use factors. It demonstrates this link beyond the first fair use factor, which explicitly considers whether a use is transformative as part of an inquiry into the purpose and character of the use. The third part demonstrates how the fair use factors encourage mashup artists to transform samples, and therefore create original material. Finally, the chapter articulates how originality and transformative use exist on the same spectrum, helping copyright material add to the body of originality.

Before moving to the following part, it is useful to briefly consider the relevance of fair use to Australia: Will and should fair use be introduced in Australia? While the *Australia-United States Free Trade Agreement* brought several pro-owner aspects of the US copyright system to Australia, such as a longer term of copyright, the US fair use regime was not imported. At the time of writing, Australia's system of fair dealing exceptions remains in place.

It is unclear that fair use will be introduced in Australia in the future. Both the Australian Law Reform Commission and the Productivity Commission have recommended that Australia replaces fair dealing with fair use.³⁹² While these commissions were conducted under two different governments led first by the Labor Party and then by the Liberal-National Coalition, neither major political party has indicated an intention to support, let alone implement, fair use. At the time of writing, the Coalition Australian Government has noted the Productivity

³⁹¹ This chapter focuses on intrinsically transformative use, where the transformation of the use can largely be demonstrated primarily by reference to the new work. It does not attempt to explain extrinsically transformative uses; that is, where the transformativity of the use requires reference to context around the work, but not the work itself

³⁹² Recommendations 4 and 5. ALRC, *Copyright and the Digital Economy Final Report*, 13-14. Recommendation 6.1. Productivity Commission. *Intellectual Property Arrangements*, no. 78, (2016), <<https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>> (hereinafter PC, *Intellectual Property Arrangements*), 33

Commission's recommendation and will further consult on fair use in early 2018.³⁹³

Whether fair use should be introduced in Australia remains a matter of debate between its opponents and proponents.

Opponents of fair use—primarily copyright owners, distributors and their representatives—argue that existing exceptions are sufficient, that consumers have never had such great access to copyright works as in the digital age, and that fair use does not provide users the certain access to works they desire.³⁹⁴ Some argue that fair use is inconsistent with the *Berne* 'three-step test', which confines copyright exceptions and limitations to: 1) 'certain special cases', which 2) do 'not conflict with a normal exploitation' of the copyright material, and 3) do 'not unreasonably prejudice the legitimate interests' of the rights holder.³⁹⁵ However, this argument is arguably weakened by the continued presence of fair use in the US and other countries, the shared view of the Productivity Commission, Australian Law Reform Commission and Department of Foreign Affairs and Trade that fair use would meet the three-step test, and the absence of successful legal challenges to fair use.³⁹⁶

Proponents of fair use—including most copyright user groups, cultural and collecting societies, online content platforms, and notably the Productivity Commission and Australian Law Reform Commission—consider it allows 'Australia's copyright arrangements to adapt to new circumstances, technologies and changes over time.'³⁹⁷

³⁹³ Commonwealth of Australia. *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements* (online), (2017), <https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf>, 7

³⁹⁴ The PC provides a succinct table comparing the perspectives of proponents and opponents of fair use, based on submissions and hearings to the commission. PC, *Intellectual Property Arrangements*, 170

³⁹⁵ *Berne Convention*, s 9(2)

³⁹⁶ PC, *Intellectual Property Arrangements*, 184

³⁹⁷ PC, *Intellectual Property Arrangements*, 9

Regardless of whether fair use is adopted by Australian copyright law, Australian copyright stakeholders will be affected by fair use adopted in other jurisdictions. This is simply a reality in a digitally connected world that spans multiple copyright jurisdictions. Many of the digital platforms that Australians and others use are affected to some extent by the US fair use regime. Many of the copyright materials Australians enjoy were authored, produced or distributed in the US and other jurisdictions where a fair use copyright exceptions regime exists. Equally, many copyright materials created by Australians are available in these jurisdictions with fair use. For these reasons, it is inevitable that fair use, and by extension transformative use, are relevant to Australian copyright consumers and creators.

This chapter observes that transformative use is conceptually consistent with originality. It would follow that fair use can, at least in some instances, promote the creation of new and original works. It is possible that refining other copyright mechanisms, such as an amended adaptation right or an additional fair dealing exception for quotation, might also promote transformative uses. Indeed, applying the fairness factors for fair dealing exceptions for ‘persons with a disability’ and ‘research and study’ under Australian copyright law, may mirror fair use to an extent by promoting transformative uses.³⁹⁸

Rearrangement in transformative use

Fair use provides a system of copyright exceptions that stands side-by-side with originality in the pursuit of copyright’s purpose. As Leval J opined in his seminal article:

‘Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.’³⁹⁹

³⁹⁸ Four of these five Australian fairness factors bear strong resemblance to the US fair use factors. *Copyright Act 1968* (Cth), ss 40, 113E

³⁹⁹ Pierre Leval. ‘Toward a Fair Use Standard’ (1990), 103 *Harvard Law Review* 5 (hereinafter Leval J, ‘Toward a Fair Use Standard’), 1107

Just as rearrangement has long underpinned originality, transformative use has provided the foundation for fair use. Transformative use features from the beginning of the history of fair use, starting with the prototypical fair use case, the 1740 UK case of *Gyles v Wilcox*.⁴⁰⁰ Gyles had published Matthew Hale's *The History of the Pleas of the Crown*, a book for which he had the exclusive publishing rights. Shortly after, publishers Wilcox and Nutt had arranged for an abridgement of this book which they published as *Modern Crown Law*. Gyles sought and received an injunction against the publication. The Court ruled that the abridgement had not sufficiently transformed the work, qualifying only as a 'coloured shortening' and not a 'real and fair abridgement' of books; in doing so, the Court established the doctrine of fair abridgement.⁴⁰¹

Importantly, *Gyles v Wilcox* linked transformation and originality, with the Lord Chancellor equating a fair abridgement with a new book: 'abridgements may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgement of the author is shown in them'.⁴⁰²

Just over one century later in *Folsom v Marsh*, Story J set out a test for a fair abridgement that again encouraged transformative use: 'In short, we must often... look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.'⁴⁰³ Folsom and his colleagues had published a 12-volume book edited by Jared Sparks, comprising letters written by the late President George Washington. Marsh *et al.* had published a two volume 866-page book that quoted parts of Folsom's book. Noting that 388 pages of Folsom's book had been quoted verbatim and therefore without transformation, Story J ruled that Marsh had not engaged in a fair abridgement and

⁴⁰⁰ Perhaps ironically, the judgement in *Gyles* rejected a fair use defence, despite setting out underpinnings for the later US fair use regime. *Gyles v Wilcox* (1740) 26 ER 489

⁴⁰¹ *Ibid*, 490

⁴⁰² *Ibid*, 490

⁴⁰³ *Folsom v Marsh*, 9 F. Cas. 342, No. 4901 (C.C.D. Mass. 1841) (hereinafter *Folsom v Marsh*)

had infringed Folsom's copyright. Almost three centuries later, *Folsom v Marsh* remains an authority for fair use.⁴⁰⁴

A link between transformative use and originality began to develop with Leval J's construction of fair use, which could be summarised by recasting a famous line from *Feist*: 'the *sine qua non* of fair use is transformation.'⁴⁰⁵ As Leval J argues,

'the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of *new information, new aesthetics, new insights and understandings*—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.'⁴⁰⁶

Of course, 'new information, new aesthetics, new insights and understandings' are not only core to transformative use; they are also at the heart of originality and the purpose of copyright. A use becomes more transformative with every step towards originality. As the US Supreme Court articulated in *Campbell v Acuff-Rose*, a use is more likely to be fair if it is transformative by 'altering the first [work] with new expression, meaning, or message'.⁴⁰⁷ This bolstered a Second Circuit judgement that distinguished transformative works from mere derivative works:

'If the secondary work sufficiently transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work

⁴⁰⁴ 'Of the 306 opinions sampled for this study 47 opinions (15.4%) cited to Folsom, with 26.1% of the appellate opinions doing so, and 42.9% of the Supreme Court opinions doing so.' Barton Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005', (2008), 156 *University of Pennsylvania Law Review* 3 (hereinafter 'Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions)'), 560 note 42

⁴⁰⁵ *Feist v Rural Telephone Service*, 345

⁴⁰⁶ Footnotes removed, emphasis added. Leval J, 'Toward a Fair Use Standard', 1111

⁴⁰⁷ *Campbell v Acuff-Rose*, 579

is not a derivative work and, for that matter, does not infringe the copyright of the original work'.⁴⁰⁸

By considering originality and fair use side-by-side, we can see how they provide graduated incentives for copyright users. A reproduction of an original work that does not rearrange that work requires copyright permission or is otherwise an infringing use. A derivative work that rearranges an original work to a moderate extent still requires copyright permission but attracts some incentives in an original work confined to any 'editorial revisions, annotations, elaborations, or other modifications'.⁴⁰⁹ A transformative work that rearranges an original work significantly may require no permission for that use and a greater copyright incentive; the more the prior work is rearranged, the more that rearrangement forms part of the new work.

Type of use	Rearrangement	Incentive
Reproductive	Minimal	None, permission required for use
Derivative	Some	Some, permission required for use
Fair	Transformative	More, no permission required

Figure 12: Incentives for transformative use

Here, we can explicitly link transformative use to Chapter II by extending the argument that originality in its purest form is rearrangement. The more a use relies on that prior rearrangement, the more it encroaches on the prior originality. Conversely, the more a use generates a new arrangement, the more likely it is to add to copyright's body of originality. Furthermore, the more transformative the new arrangement, the more likely it is to be fair use. This helps to explain why a use that transforms can be fair use, rather than a mere derivative work that is

⁴⁰⁸ The Court ruled that a trivia quiz book testing recollection of scenes from US television series *Seinfeld* infringed copyright in *Seinfeld* and did not constitute fair use. *Castle Rock Entertainment v Carol Publishing Group*, 150 F. 3d 132 (2nd Cir. 1998), 143 n 9

⁴⁰⁹ 17 U.S.C. §101

based on ‘one or more pre-existing works... [including] any other form in which a work may be recast, *transformed* or adapted’.⁴¹⁰

Transformative use in the four factors

As Leval J has noted, the US Copyright Act of 1976 largely adopted Justice Story’s summary of the fair use factors:

‘In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.’⁴¹¹

Transformation bears a clear relationship to each fair use factor.⁴¹²

The first factor has evolved to explicitly encourage transformative uses. The statute requires consideration of ‘the purpose and character of the use’, which includes *inter alia* whether the ‘use is of a commercial nature or is for non-profit educational purpose’.⁴¹³

⁴¹⁰ Emphasis added. ‘A “derivative work” is a work based upon 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. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”’. 17 U.S.C. §101

⁴¹¹ Leval J. ‘Toward a Fair Use Standard’, 1105. 17 U.S.C. §107

⁴¹² This chapter focuses on cases from Second and Ninth Circuit Court of Appeals, and the District Court for the Southern District of New York. Second Circuit. Beebe’s quantitative analysis of fair use case citations from other circuits found an overwhelming concentration of citations of decisions from these courts. See Beebe, ‘An Empirical Study of U.S. Copyright Fair Use Opinions’

⁴¹³ Ibid

In *Sony v Universal*, the US Supreme Court established the *Sony* presumption that ‘every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright’.⁴¹⁴ The direct outcome in the case was that certain time-shifting of television programming is a fair use. However, the *Sony* presumption affected scenarios with different facts and circumstances, and was much criticised as a result. As Leval J noted:

‘It is not suggested in any responsible opinion or commentary that by reason of this clause all educational uses are permitted while profitmaking uses are not. Surely the statute does not imply that a university press may pirate whatever texts it chooses. Nor can it mean that books produced by a commercial publisher are excluded from eligibility for fair use... This clause, therefore, does not establish a clear distinction between permitted and forbidden users.’⁴¹⁵

Campbell v Acuff-Rose marked the moment when the US Supreme Court established transformative use as a central consideration in the first factor, overriding commercial considerations: ‘The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.’⁴¹⁶ *Campbell v Acuff-Rose* all but rejected the *Sony* presumption, clarifying as follows: ‘[A]s we explained in *Harper & Row*, *Sony* stands for the proposition that the “fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.”’⁴¹⁷ As a result in studying the correlation between the first factor and findings of fair use, Beebe finds the commerciality of a use may have ‘no significant influence on the outcome’.⁴¹⁸ As Leval J noted shortly after the *Campbell v Acuff-Rose* decision:

⁴¹⁴ The Court defined time-shifting as ‘the practice of recording a program to view it once at a later time, and thereafter erasing it’. *Sony Corporation of America v Universal City Studios, Inc.*, 464 US 417 (hereinafter *Sony v Universal*), 423, 448-449 (footnote references removed)

⁴¹⁵ Leval J, ‘Toward a Fair Use Standard’, FN53

⁴¹⁶ *Campbell v Acuff-Rose*, 579

⁴¹⁷ *Ibid*, 585

⁴¹⁸ Beebe, ‘An Empirical Study of U.S. Copyright Fair Use Opinions’, 549

'The first factor looks primarily at whether the use made of the original seeks to *transform* the taken material into a new purpose or message, distinct from purposes of the original.'⁴¹⁹

The US Supreme Court ruled that the use of a musical work was a fair use because it was a transformative use, in this case a parody. *Oh, Pretty Woman* depicted a man seeking and gaining the attention of a beautiful woman. The first verse of the parody, *Pretty Woman*, begins with lyrics similar to the original that quickly degenerate into increasingly ludicrous advances on women. As the US Supreme Court describes, '2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility.'⁴²⁰

The second factor encourages users of creative works, such as sampling artists, to be more transformative. This factor directs courts to consider the nature of the used work, setting a higher bar for use of works that 'are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.'⁴²¹ Courts have recognised characteristics of works that bring them closer to the core of intended copyright protection. Fiction is closer than fact.⁴²² Motion pictures are closer than television news broadcasts.⁴²³ Likewise, creative works are closer than compilations of facts.⁴²⁴

The creative nature of a copyright work does not prevent someone from making a fair use of that work. However, if the work is more creative, the user must *ceteris*

⁴¹⁹ Emphasis in original. Pierre Leval. 'Campbell v. Acuff-Rose: Justice Souter's rescue of fair use', (1995), 13 *Cardozo Arts and Entertainment Law Journal* 1 (hereinafter Leval J), 'Campbell v Acuff-Rose: Justice Souter's rescue of fair use', 22

⁴²⁰ *Campbell v Acuff-Rose*, 583

⁴²¹ *Campbell v Acuff-Rose*, 586

⁴²² *Stewart v Abend*, 495 US 207 (1990). 'The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.' *Harper & Row, Publishers, Inc. v Nation Enterprises*, 471 U.S. 539, 563 (1985) (hereinafter '*Harper & Row v Nation*')

⁴²³ *Sony v Universal*

⁴²⁴ *Feist v Rural Telephone Service*. See also *College Entrance Examination Board v Pataki*, 889 F. Supp. 554 (N.D.N.Y. 1995)

parabis make a more transformative use. For example, in *Blanch v Koons*, the Second Circuit found transformative and therefore fair use because ‘the use of an existing image [a magazine photograph] advanced his [the latter artist’s] artistic purposes’.⁴²⁵ Recontextualisation and rearrangement are key. As Jeff Koons described: ‘By recontextualizing these fragments as I do, I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media.’⁴²⁶

In other words, the second factor works with the first factor. If a work is more creative in nature and therefore closer to the core of copyright protection, the use needs a more transformative purpose and character to qualify as fair use. The Second Circuit has opined in *Bill Graham Archives v Dorling Kindersley*, ‘even though BGA’s images are creative works, which are a core concern of copyright protection, the second factor has limited weight in our analysis because the purpose of DK’s use was to emphasize the images’ historical rather than creative value.’⁴²⁷ Reading this with the same court’s opinion in *Blanch v Koons*, we can see the second factor encourages users of creative works to transform. Together the first and second factors encourages users of copyright be more transformative, which is therefore more likely to yield original works.

The third factor also promotes transformation, requiring the consideration of the amount and substantiality of the use in relation to the earlier work as a whole. One reasonable summary of the third factor’s interaction with the first factor is ‘use more, transform more’. The third factor is commonly considered in tandem with the first factor.⁴²⁸ As Leval J notes, a ‘solid transformative justification may exist for taking a few sentences that would not, however, justify a taking of larger quantities of material.’⁴²⁹ Leval J goes on to note that ‘extensive takings may

⁴²⁵ *Blanch v Koons* 467 F. 3d 244 (2nd Cir. 2006) (hereinafter ‘*Blanch v Koons*’), 257

⁴²⁶ *Ibid*, 247

⁴²⁷ *Bill Graham Archives v Dorling Kindersley, Ltd.*, 448 F.3d 605, 612-13 (2d Cir. 2006)

⁴²⁸ Beebe, ‘An Empirical Study of U.S. Copyright Fair Use Opinions’, 615

⁴²⁹ Leval J, ‘Toward a Fair Use Standard’, 1110

impinge on creative incentives'.⁴³⁰ This is supported by the Beebe study, which showed a strong correlation between insubstantial takings and findings of fair use: '79 opinions that found that factor three favored fair use, 76 subsequently found fair use, and 72 of these also found that factor four favored that result.'⁴³¹ The study also showed that it does not necessarily follow that a more substantial taking decreases the likelihood of a fair use finding.⁴³² There are several possible explanations for this anomaly. Possibly, more extensive uses were also more transformative; hence uses of whole works were still fair use.

The third factor operates as an extension of the *de minimus* exception to infringement; the Ninth Circuit has ruled *de minimus* applies 'only if it [the use] is so meager and fragmentary that the average audience would not recognize the appropriation.'⁴³³ The Ninth Circuit affirmed this position in the aforementioned case of *VMG Salsoul v Ciccone*.⁴³⁴ Mazzone also links *de minimus* to fair use: 'The doctrine of de minimis copying is a judge-made rule. In the final analysis, it is the prerogative of courts to tailor the doctrine as they see fit. Fair use, however, is a statutory provision that binds judges.'⁴³⁵

One can express the parable of the fourth factor in four words: 'complements good, substitutes bad'. This echoes the perspectives of Leval and Story JJ who both distinguished between *substitutes* which supersede existing objects, and *complements* which do not. The fourth factor encourages uses which are

⁴³⁰ Leval J, 'Toward a Fair Use Standard', 1112

⁴³¹ Ibid, 615

⁴³² 'Of the 99 opinions that addressed facts in which the defendant took the entirety of the plaintiff's work, 27.3% found fair use (albeit with 9 of these 27 opinions finding a transformative use, and 4 finding a nontransformative use). The story is more extreme in situations where the court finds that the defendant did or did not take the "essence" or the "heart" of the plaintiff's work. Courts explicitly found that the defendant took the heart of the plaintiff's work in 37 opinions, and found no fair use in 35 of these.' Ibid, 616

⁴³³ *Fisher v Dees*, 794 F. 2d 432 (9th Cir. 1986), 434

⁴³⁴ 'A reasonable jury could *not* conclude that an average audience would recognize an appropriation of the Love Break composition... a reasonable juror could *not* conclude that an average audience would recognize the appropriation of the horn hit.' *VMG Salsoul v Ciccone* (9th Cir.), 879-880

⁴³⁵ Mazzone, *Copyfraud*, 59

transformative, preferring uses that do not shrink the potential market for or value of the prior copyrighted work. The *Harlem Shake* provides one prominent example of such a use in Chapter VI, rising in popularity after unauthorised reuse by a constellation of transformative uses. Because a transformative use changes the used work, it is likely to fulfil a different need in the market.

By promoting transformative and therefore complementary uses, the fourth factor goes to the heart of the incentive purpose of copyright. In *Harper & Row v Nation*, the US Supreme Court described the fourth factor as ‘undoubtedly the single most important element of fair use’.⁴³⁶ The US Supreme Court affirmed these views in *Campbell v Acuff-Rose*, citing Story J:

‘The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersede[s] the objects” of the original creation... or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message’.⁴³⁷

Because the fourth factor favours complementary uses, even commercial uses can be considered fair as long as they do not merely substitute for used works. In *Campbell v Acuff-Rose*, the US Supreme Court expressly rejected the ‘if commercial, then unfair’ presumption: ‘the [Sixth Circuit] court resolved the fourth factor against 2 Live Crew, just as it had the first, by applying a presumption about the effect of commercial use, a presumption which as applied here we hold to be error.’⁴³⁸

Transformative use bridges the first and fourth factors, showing that a use of a transformative purpose and character is also likely to be a complementary use. Given this relationship of the first and fourth factors, it is unsurprising that judges tend to afford greater consideration to the first and fourth factors in fair use judgements.⁴³⁹ This is an alternative view to Thampapillai, who notes: ‘The first

⁴³⁶ *Harper & Row v Nation*

⁴³⁷ Square brackets in original. *Campbell v Acuff-Rose*, 579

⁴³⁸ *Campbell v Acuff-Rose*, 591

⁴³⁹ Beebe, ‘An Empirical Study of U.S. Copyright Fair Use Opinions’, 587

and fourth factors embody two different approaches to fair use. The first factor sets the basis for the transformative use approach to fair use. The fourth factor underpins the market failure approach to fair use.⁴⁴⁰

Because it helps to explain each of the four factors, transformative use provides a cohesive explanation for fair use. Matthew Sag goes as far as to argue that transformative use almost supplants the four factors:

‘The dominance of the transformativeness test makes the actual statutory language regarding noncommercial and educational uses largely irrelevant. Also, “transformativeness” is clearly a meta-factor: the extent to which a use transforms the work cannot be determined without reference to the other factors, such as the nature of the original work, the quantitative and qualitative similarity between the works and the effect of the use on the value of the original work.’⁴⁴¹

To argue that transformative works are consistent with the goal of copyright is not to argue that only transformative works should qualify as fair use. As Nimmer notes, transformative use does not explain all fair uses:

“Those Second Circuit cases appear to label a use “not transformative” as a shorthand for “not fair,” and correlatively “transformative” for “fair.” Such a strategy empties the term of meaning—for the “transformative” moniker to guide, rather than follow, the fair use analysis, it must amount to more than a conclusory label.’⁴⁴²

In *Campbell v Acuff-Rose*, the US Supreme Court confirmed the link between originality, transformative use and the purpose of copyright: ‘the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works’.⁴⁴³ Transformative uses should be recognised as not only consistent with copyright, but yielding the creation of original works.

⁴⁴⁰ Dilan Thampapillai. ‘The Novel As Social Satire: 60 Years Later, The Wind Done Gone And The Limitations Of Fair Use’, (2012) 17(2) *Deakin Law Review* 425, 442

⁴⁴¹ Matthew Sag. ‘God in the Machine: A New Structural Analysis of Copyright’s Fair Use Doctrine’, (2005) 11 *Michigan Telecommunications Technology Law Review* 381, 434

⁴⁴² Nimmer and Nimmer, *Nimmer on Copyright*, §13.05, 13-206

⁴⁴³ *Ibid*, 579

Mashups and the four factors

This part considers how mashups interact with the fair use factors, and demonstrates how sampling of sound recordings can be transformative. While mashups of sound recordings are a phenomenon of the last decade, they build on previous forms of musical collage.⁴⁴⁴ For example, the A v B mashups described in this part bear a strong relationship to the collage of *Waltzing Matilda* and *Advance Australia Fair* played by the Australian Army's massed bands at the 1956 Melbourne Olympics.⁴⁴⁵ The collage takes what would be described in classical music terminology as an extended ternary form (ABABA), in which three verses of *Waltzing Matilda* (A) are alternated with two truncated verses of *Advance Australia Fair* (B).

Fair use has rarely provided an effective copyright exception for the use of sound recordings. As Pamela Samuelson notes, there has been a dearth of successful claims for fair use of sound recordings.⁴⁴⁶ Similarly, Rebecca Tushnet observes:

'[W]here sound recordings are at issue, for example, courts have found sampling brief excerpts for use in other recordings to be infringement or potential infringement, and record companies now require artists to obtain permission for any sample. One court has even found that unrecognizable, de minimis sampling of a sound recording infringes the copyright owner's absolute right against any physical reproduction of protected material.'⁴⁴⁷

US case law suggests that those who rely on use of sound recordings, including sampling artists, are at a significant disadvantage to their creative counterparts

⁴⁴⁴ As McLeod and DiCola note '[t]his expansion of creative possibility has resulted in the MP3 "mash-ups" of today, where thousands of bedroom composers are creating new songs by smashing together two different songs and putting them on the Internet for free.' See McLeod and DiCola, *Creative License*, 72

⁴⁴⁵ Massed Bands of the Australian Army, conducted by Major R. A. Newman. *Waltzing Matilda*, (online), (Melbourne Olympics, 1956),

<<http://www.nfsa.gov.au/collection/sound/sounds-australia/waltzing-matilda/>>

⁴⁴⁶ Pamela Samuelson. 'Unbundling Fair Uses' (2009), 77 *Fordham Law Review* 2537 (hereinafter 'Samuelson, 'Unbundling Fair Uses')

⁴⁴⁷ Rebecca Tushnet. 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It', (2004) 114 *Yale Law Journal* 535, 582 (hereinafter 'Tushnet, 'Copy This Essay')

who seek to use other copyright materials. In *Bridgeport v Dimension Films*, the Sixth Circuit found that the sampling and looping of a sound recording of a three-note guitar riff from Funkadelic's *Get Off Your Ass And Jam* did not qualify as fair use.⁴⁴⁸ This was despite the Sixth Circuit admitting that using three notes from the underlying composition would likely not constitute copyright infringement. William Patry similarly criticises *Bridgeport v Dimension Films* for 'the failure to find the use either de minimis or transformative use deals another blow to copyright in the Sixth Circuit. At this point, to use a boxing metaphor, any hope for a rational approach to copyright seems down for the count in that court.'⁴⁴⁹

Considering the interaction of mashups with each of the four factors reveals some of the ways in which they are transformative, and therefore likely to be fair use of sound recordings and musical works.

With regards to the first factor, mashups can attain a transformative purpose and character in many ways which are discussed in further detail in this part. As McLeod and DiCola summarise, mashups 'involve artists layering a vocal melody line from one song on top of an instrumental melody from another song'.⁴⁵⁰ A mashup typically yields a musical work and sound recording that is materially different from the mashed-up works. This is because a mashup cannot completely preserve similarity to its component works; by definition, it has similarity to both works. To the extent is similar to the first sampled work, it is less similar to the second sampled work. Mashups are neither more nor less than the sum of their parts; they are not an exercise in arithmetic. They are an exercise in rearrangement, juxtaposition and manipulation. It would be difficult to mistake a mashup for its underlying works.

⁴⁴⁸ Funkadelic. *Get Off Your Ass And Jam*, (Funkadelic Invasion Force, 1975)

⁴⁴⁹ William Patry. *Patry on Fair Use*, (Westlaw, 2012) §2:8

⁴⁵⁰ This definition is imperfect and is by no means intended to capture or fix what is a culturally negotiated practice. This chapter does not seek to address issues of agency in recognisability, nor does it answer questions about when a voice is an instrument and when sound is music, however worthy these subjects may be for others to investigate. See McLeod and DiCola, *Creative License*, 173

Some mashups are arguably commercial uses. For example, mashups distributed via YouTube have the potential to be commercial through advertising revenue. However, as the Second Circuit found in *NXIVM Corporation v Ross Institute*, a use that is ‘substantially transformative’ allows the discounting of the ‘secondary commercial nature of the use’.⁴⁵¹

Mashups tend to use popular musical works and sound recordings which are of a creative and published nature under the second factor. As McLeod describes, ‘mashups allow people to participate in—to make and remake—the pop culture that surrounds them’.⁴⁵² *Ceteris parabis*, mashups need to be more transformative than uses of more factual works to be fair use.

Under the third factor, mashups are subject to a high bar because they are made wholly from third-party sound recordings and compositions. Because they use extended vocal and instrumental samples, sometimes representing the whole length of musical works and sound recordings, mashup artists are encouraged to transform. The more substantial the borrowing, the higher the bar for transformation.

Turning to the fourth factor, some mashups can reach adjacent markets which avoids impact on value in and markets for sampled works. The fourth factor only comes into play where the used copyright work has value or a potential market. Mashups tend to use popular works and sound recordings with a strong commercial market: ‘because they depend on the recognizability of the original, mashups are circumscribed to a relatively narrow repertoire of Top 40 pop songs.’⁴⁵³ At times, mashups bring together material from two or more different genres, yielding a work that lies outside of either genre; in these cases, there is a weaker case for an effect on the value or potential market for a used work.

⁴⁵¹ *NXIVM et al. v The Ross Institute et al.*, 364 F. 3d 471 (2nd Cir. 2004)

⁴⁵² Kembrew McLeod. ‘Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist-Academic’ (2005), 28(1) *Popular Music and Society* 79, 86

⁴⁵³ *Ibid*, 79. See also Sinnreich, *Mashed Up*, 130

Looking beyond the four factors, the many types of mashups transform sampled works in their own ways and create a cohort of original works. Mashups transforms prior works through rearrangement, distillation of voice and recontextualisation. The following figure summarises the types of mashups, which are discussed below in greater detail to illustrate transformative mashing up of prior recordings.

Type of mashup	Transformative value
A v B	Uses complementary elements of two recordings to make new rhythms, harmonies and lyrics to forge a new rearrangement.
Collage	Repurposes many short samples to create entirely novel associations and sounds in a new recording that is distinct from original recordings.
Version v version	Creates an eclectic and new arrangement that maintains the recognisability of the underlying musical work but exploits the timbral range of versions.
Chart almanac	Creates an aural record of a year in popular music
Artist catalog	Creates an aural record of the works in a popular artist's career
Live mashup	Transforms recordings into instruments, allowing the playing of samples and the application of effects

Figure 13: Transformative value of mashups

A v B mashups are perhaps the most common form of mashup. They create a seamless whole from two separate tracks, while preserving the recognisability of long sections of both underlying tracks. The creative spark of A v B mashups is often the marriage of unlikely partners. They bring together contrasting genres, timbres and cultures. Great skill goes the selection of the two tracks, which must fit together without significant reordering. There is often also significant skill in the rearrangement of the tracks, creating one cohesive chorus from multiple choruses or layering selected elements.

Smash's *Slow Angel* is one example of an A v B mashup. The title of the mashup is an inevitable portmanteau of its two component sound recordings. The first is Kylie Minogue's *Slow* which features her suggestive, whispered lyrics on a light pop

arrangement.⁴⁵⁴ The second is Massive Attack's instrumental track *Angel* which features a percussive, bass-heavy and industrial sound.⁴⁵⁵ *Slow Angel* layers the Kylie's whispered voice on top of Massive Attack's intense sound, bringing the latter track to life. The mashup achieves greater dynamic contrast than its component tracks. The mashup opens with the opening of Massive Attack's *Angel*, a sparse figure of kick drum and monotone bass line. It builds slowly with a rim shot and high-hat cymbal to complete a swung rock beat. A slight swell of this rhythm section combined with a highly reverbed electric guitar to the opening lyrics. Kylie's slow and whispered melodies, accentuated by the addition of reverb, draw attention to the rhythmic, bass-heavy chorus of *Angel*. By juxtaposing these two contrasting recordings, *Slow Angel* lifts the intensity of the underlying recordings.

DJ Lobsterdust's *Stayin' Hot* is another example. It combines two chart toppers from different genres, released a quarter century apart. One is the Bee Gees disco hit *Stayin' Alive* which topped the 1977 Billboard Hot 100 chart after featuring in the film *Saturday Night Fever*.⁴⁵⁶ The other is Nelly's rap track *Hot in Herre* which topped the 2002 Billboard Hot 100 chart.⁴⁵⁷ *Stayin' Hot* combines these two genres through the common theme of the struggles of two men. *Stayin' Alive* describes the struggle of being a man coping with the pressures of life and gender stereotypes. *Hot in Herre* describes the struggle of a man trying to draw the attention of a woman. *Stayin' Hot* layers Nelly's rapping in tune with the instrumental hook of *Stayin' Alive*. The rhythm of Nelly's lyrics syncopates over the Bees Gees hook during the verse. In the chorus, the Bee Gees and Nelly take turns to sing, providing alternating vocals that form a new vocal track for the chorus. *Stayin' Hot* is structured to encourage reuse by DJs, starting and ending with the bassline from *Stayin' Alive* and simple drum beat to enable layering with other tracks.

⁴⁵⁴ Kylie Minogue. *Slow*, (Parlophone, 2003)

⁴⁵⁵ Massive Attack. *Angel*, (Circa, 1998)

⁴⁵⁶ Bee Gees. *Stayin' Alive*, (RSO, 1977)

⁴⁵⁷ *Hot in Herre* itself features a lowered sample of the hook from Chuck Brown and The Soul Searchers' *Bustin' Loose*. Nelly. *Hot In Herre*, (Universal, 2002)

Another notable and extensive example of A v B mashups is Danger Mouse's *Grey Album*, a mashup of the vocal track (also known as acapellas) from Jay Z's *The Black Album* and The Beatles *White Album*.⁴⁵⁸ For example, one track on the *Grey Album* layers Jay-Z's *What More Can I Say* over the guitar hook from *While My Guitar Gently Weeps*, also using some of the Beatles lyrics in the chorus and parts of some verses.

The collage is another form of mashup that transforms small samples from differing genres into cohesive original arrangements. Collage mashups juxtapose and layer snippets of melody, rhythm, instrumentals and vocals. They often transition quickly from one set of samples to the next, making fleeting associations between recordings. Samples in collage mashups can be as short and generic as the crescendo roll on a crash cymbal with mallets and can be barely recognisable.

Gimix, a pre-release mixtape version of The Avalanches' *Since I Left You*, which formed a case study at the beginning of this thesis, provides another example of the collage mashup form. One segment of *Gimix* sees De La Soul's *A Roller Skating Jam Named Saturdays* (hereinafter *Saturdays*) mixed with samples from other tracks.⁴⁵⁹ *Saturdays* features the following lyrics which celebrate the end of the working week:

'Now is the time
To act the fool tonight
Forget about your worries
And you will be all right
It's Saturday, Saturday
Saturday, it's Saturday'⁴⁶⁰

The Avalanches' juxtaposition of samples with *Saturdays* liberates new meaning, painting a range of different Saturdays, as well as new harmonies and additive rhythms. *Saturdays* combined with Jimi Hendrix paints a tortured Saturday for a

⁴⁵⁸ Jay-Z. *The Black Album*, (Roc-A-Fella Records, 2003) The Beatles. *The Beatles*, (Apple Records, 1968). This album is popularly called *White Album*, a reference to its minimalist white album cover

⁴⁵⁹ De La Soul. *A Roller Skating Jam Named "Saturdays"*, (Tommy Boy, 1991)

⁴⁶⁰ Ibid

guy with a girl ‘just like crosstown traffic’.⁴⁶¹ *Saturdays* played with Cyndi Lauper celebrates a girls’ night out.⁴⁶² Thus, each sample played with the segment of *Saturdays* creates new musical connections. In addition, *Saturdays* is itself a rich example of remixing, being a rearrangement of several prior recordings and new bespoke recordings. It features samples spanning three decades including Mighty Ryeders’ *Evil Vibrations*, Frankie Valli’s *Grease*, Chic’s *Good Times*, Tower of Power’s *Ebony Jam* and Chicago’s *Saturday in the Park*.⁴⁶³ It also features a horn section opening from Instant Funk’s *I Got My Mind Made Up*.⁴⁶⁴

Another example of the collage mashup from more recent times album is *All Day*, from remix artist Girl Talk who is known for mashups combining so many recognisable samples that one commentator describes his mashups as ‘a lawsuit waiting to happen’.⁴⁶⁵ The opening of the album features a call and response between the vocal lines from Black Sabbath’s *War Pigs* and Ludacris, Mystikal and I-20’s *Move Bitch*:

Call (Black Sabbath)	Response (Ludacris <i>et al.</i>)
Generals gathering in their masses	get out the way
Just like witches at black masses	get out the way, bitch, get out the way
Evil minds that plot destruction	get out the way
Sorcerer of death’s construction	get out the way, bitch, get out the way ⁴⁶⁶

This call and response is set to a sample of heavy combination of bass drum and floor toms from JC’s *Vote 4 Me*, followed by a drum riff from the opening of Jay-Z

⁴⁶¹ Jimi Hendrix. *Electric Ladyland*, (Polydor, 1968)

⁴⁶² Cyndi Lauper. *Girls Just Want To Have Fun*, (Portrait, 1983)

⁴⁶³ Mighty Ryeders. *Help Us Spread The Message*, (Sun Glo Records, 1978). Frankie Valli. *Frankie Valli...Is The Word*, (Warner Bros. Records, 1978). Chic. *Good Times*, (Atlantic, 1979). Tower of Power. *In The Slot*, (Warner Bros. Records, 1975). Chicago. *Chicago’s Greatest Hits*, (CBS, 1975). Instant Funk. *I Got My Mind Made Up / Wide World Of Sports*, (Salsoul Records, 1978)

⁴⁶⁴ Both *Saturdays* and *I Got My Mind Made Up* are sampled by the aforementioned *Gimix* mixtape by The Avalanches

⁴⁶⁵ Rob Walker. ‘Mash-Up Model’, *The New York Times*, (20 July 2008), <<http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?partner=rssnyt&emc=rss&r=0>>

⁴⁶⁶ Black Sabbath. *Paranoid*, (Vertigo, 1970). Ludacris *et al.*. *Saturday (Oooh Oooh!)*, (Def Jam South, 2001)

and Alicia Keys' *Empire State of Mind*.⁴⁶⁷ But, this opening also features many other short samples. A short snare drum riff from 2Pac's *How Do U Want It* introduces the *Vote 4 Me* drums.⁴⁶⁸ A short vocal snatch of Jay-Z's *99 Problems* precedes the Ludacris vocal line.⁴⁶⁹

The combination of these elements creates a collage of an ancient battle and a ghetto showdown. The narrated action of gathering armies forms a call and response with lyrics of Ludacris and a musical army of drums. As Black Sabbath amasses their army, Ludacris throws down the gauntlet while the other various artists commentate from the sideline. This is a significant departure from the creative direction of any of the individual sampled pieces. While maintaining the shared theme of a battle, the mashup is detached from times and places.

The version v version mashup is another type of mashup that preserves the recognisability of the main melody of the musical work while exploiting the timbral range in versions of a song. By rearranging covers and other versions of songs to create an eclectic whole, the version v version mashup can break down the barriers between genres and create a snapshot across time. Version v version mashups tend to be arranged for a breadth of instruments that would rarely be heard in individual recordings.

A recent and prominent example of a version v version mashup was *Somebodies*, Gotye's mashup of covers and parodies of his 2011 hit with Kimbra, *Somebody I Used to Know*.⁴⁷⁰ One parody featured lyrics that relate to Star Wars, replacing

⁴⁶⁷ JC. *Vote 4 Me*, (Swagg Team, 2010). Jay-Z + Alicia Keys. *Empire State of Mind*, (Roc Nation, 2009)

⁴⁶⁸ 2Pac. *How Do U Want It*, (Death Row Records, 1996)

⁴⁶⁹ This track is discussed in greater detail in the Coda of this thesis. Jay-Z. *The Black Album*, (Roc-A-Fella Records, 2003)

⁴⁷⁰ *Somebody That I Used to Know* features a xylophone solo that covers the melody of eighteenth century French song *Ah! Vous dirai-je, Maman* and a sample of Luiz Bonfá's *Seville*. *Ah! Vous dirai-je, Maman* has also been matched to other children's ditties including *Baa Baa Black Sheep*, *Twinkle Twinkle Little Star* and the *Alphabet song*. Gotye. *Somebody That I Used To know*, (Eleven, 2011)

Gotye's reflection on past relationships with the relationship between George Lucas and a Star Wars character. Some covers featured multiple singers and musicians playing on a single guitar. Other cover recorded as part of radio station Triple J's *Like a Version* program featured a vocal solo for an Apple Macintosh computer. In August 2012, Gotye released his mashup of a selection of these covers and parodies in *Somebodies*.⁴⁷¹ The mashup is a timbral feast, featuring some sections that match samples of acapella, saxophone and piano covers, and others that place samples of acoustic and electric guitars side-by-side, as if to create a guitar orchestra. The mashup is punctuated by an instructional video demonstrating how to play *Somebody I Used to Know* on guitar.⁴⁷² *Somebodies* not only juxtaposes earlier versions but pays homage to these earlier creators.

Two further types of mashups—the chart almanac and the artist catalog—show how the transformation of copyright expressions into facts warrants a finding of fair use. Here, it is appropriate to invoke the Second Circuit's judgement in *Blanch v Koons*, in which the Court accepted a reasonable amount and substantiality of copying because 'artistic goals led him [Koons] to incorporate preexisting images such as Blanch's photograph into his paintings in order to reference certain "fact[s] in the world."⁴⁷³

A chart almanac is a compilation of musical data in a year. It rearranges popular sound recordings into a mashup. Almanacs are distinct from other mashups as they seek to transform an annual music chart from a list into a composition and recording. By creating a record of the hits of the year, they continue the tradition of almanacs which are annual compilations of statistical and other data from a field,

⁴⁷¹ For a full listing of the versions of the original song used in this mashup, see Gotye. *Original videos used in Somebodies* (online), (Gotye, 2012)
<<http://gotye.com/reader/items/original-videos-used-in-somebodies-a-youtube-orchestra.html#blog.html>>

⁴⁷² Describing the impetus for making this mashup, Gotye posted: 'Reluctant as I am to add to the mountain of interpretations of *Somebody That I Used To Know* seemingly taking over their own area of the internet, I couldn't resist the massive remixability that such a large, varied yet connected bundle of source material offered.' Gotye. 'Somebodies: A YouTube Orchestra', *YouTube* (online), (12 August 2012),
<<http://www.youtube.com/watch?v=opg4VGvyi3M>>

⁴⁷³ *Blanch v Koons*

discipline or area of interest. For example, almanacs are common for sporting results and for farming.

DJ Earworm is one the most prominent chart almanac producers, having mashed up the top 25 recordings according to Billboard Magazine each year since 2007. Each year's *United State of Pop* is launched in late December, making for a saccharine celebration of pop hits. Daniel Kim's annual *Pop Danthology* provides another example of the chart almanac. Likewise, Australian DJ Nina Las Vegas gifted listeners *LISTMAS*, a festive mashup of 10 of the most popular dance hits played on Triple J radio in 2013.⁴⁷⁴

The artist catalog mashup is a category of mashups typically reserved for those artists with multiple chart toppers, focusing on the works of a single artist. It provides an aural catalog of the sound of an artist, providing an opportunity to understand the breadth of their life's work and the evolution of their sound.

An example of an artist catalog mashup is *Alive 2007*, Daft Punk's album-length mashup of their own works.⁴⁷⁵ *Alive 2007* forged associations across previously unrelated tracks by Daft Punk, released on different albums and at different times. Like Gotye with *Somebodies*, Daft Punk used *Alive 2007* to breathe new creative and commercial life into their catalog. Tracks from the album *Homework*, which was released a decade earlier, were given a second life.⁴⁷⁶ In another part of the album, *Human After All* is juxtaposed with *Robot Rock* creating a rivalry between man and machine.⁴⁷⁷

⁴⁷⁴ Nina Las Vegas. *LISTMAS* (online), (13 December 2013), <<https://www.youtube.com/watch?v=ynN5iHN5SRM>>

⁴⁷⁵ Daft Punk's recordings, including many of those sampled in *Alive 2007*, often features samples from funk and soul records

⁴⁷⁶ Daft Punk. *Homework*, (Virgin, 1996)

⁴⁷⁷ Both sound recordings appear on the same album. Daft Punk. *Human After All*, (Virgin, 2005)

Of course, an artist catalog mashup is not only made by the artists associated with the mashed-up recordings. Michael Jackson, amongst the most successful and famous recording artists, makes a natural target for a third-party artist catalog mashup. Harry Coade's *MJ Mash-up*, made two years after the artist's passing, mixes together 40 Michael Jackson tracks in just under four minutes.⁴⁷⁸

The mashup condenses Michael Jackson's career into the length of a single track. In one section, vocals from the first verse of *Billie Jean* are seamlessly mixed with the instrumental intro to *Don't Stop Till You Get Enough*.⁴⁷⁹ In another section, the vocals from *Remember The Time* are laid onto top of the bass and organ riff from The Jackson Five's *I Want You Back*.⁴⁸⁰ Later, the vocals from *I Want You Back* are laid on the drum and bass riff from *Bad*.⁴⁸¹ The mashup ends with multiple instrumental and vocal samples from *Thriller* played on top of one another.⁴⁸²

The live mashup is unique in that samples are prepared before performance, such that the samples become the instrument. Armed with a rich set of prepared vocal and instrumental samples, a live mashup artist can deploy recordings at will. In his *Pop Culture* mashup, Madeon triggers samples like a keyboardist does notes. At one point, he triggers a Daft Punk instrumental sample with Madonna vocals, creating new harmonies from old melodies and layering samples as if they were instruments in a band or an orchestra.⁴⁸³ In live performances of the mashup, Madeon experiments with different, improvised rearrangements.

⁴⁷⁸ Harry Coade. '40 MJ tracks in 3minutes Mashup by Harry Coade @ Westend Production', *YouTube* (online), (Westend Productions TV, 26 October 2011), <<http://www.youtube.com/watch?v=E1ST8C0dcko>>

⁴⁷⁹ Michael Jackson. *Billie Jean*, (Epic, 1982). Michael Jackson. *Don't Stop Till You Get Enough*. (Epic, 1979)

⁴⁸⁰ Michael Jackson. *Remember The Time*, (Epic, 1991). The Jackson Five, *I Want You Back*, (Motown, 1969)

⁴⁸¹ Michael Jackson. *Bad*, Epic, (1987)

⁴⁸² Michael Jackson. *Thriller*, (Epic, 1982)

⁴⁸³ See, for example, his *Pop Culture* mashup which has been performed live on several occasions. Madeon. 'Pop Culture', *YouTube* (online), (11 July 2011), <<http://www.youtube.com/watch?v=lTx3G6h2xyA>>

The transformative value of live mashups also lies in the possibility of accommodating and responding to elements that only exist at the time of a performance. The live performance of mashups opens new possibilities from existing production techniques, allow mashup artists to collaborate in live time and to respond to audiences when playing in live venues. This blurring between recording and performance is enabled by affordable and user-friendly software and hardware (at the time of writing, the Novation Launchpad multi-pad controller and digital audio workstation software Ableton Live are a common combination). Artists like the Jane Doze and Girl Talk have performed many live mashups and represent an emerging part of mashup culture.⁴⁸⁴

Bridge from infringement to subsistence

This chapter has shown how transformative use has accompanied originality from its inception in common law, and its enshrinement in statute, to contemporary common law interpretations. Transformative use is the cousin of originality, showing how the concept of rearrangement manifests in copyright exceptions as well as copyright subsistence.

Whereas originality sets a baseline for copyright incentive, by rewarding creators of original arrangements, transformative use extends that baseline to copyright users. While consumptive uses that do not rearrange require permission, productive uses that rearrange to the extent of transformative use can garner their own copyright incentives, in the form of fair use exceptions and recognition of a separate copyright work.

Transformative use encourages those who could engage in infringing uses to instead transform what they use. As such, it bridges copyright infringement and copyright subsistence, both conceptually and in practice. The mashups discussed in this chapter—ranging from collages to chart almanacs—provide rich illustrations of how mashups can meet the standards of originality and fair use, and

⁴⁸⁴ Jane Doze have created an entourage including their mashup album with a name that borrows from remix artist Girl Talk, *Girls Talk*. Jaze Doze. *Girls Talk*, (2012), <<http://www.thejaneDoze.com/>>

how transformative use can yield original works. In a sense, transformative use creates a system of pre-emptive restorative justice, whereby those who might otherwise be copyright infringers or seekers of permission to become transform prior works and step towards originality.

Through fair use, copyright encourages sampling artists and other appropriation artists to make transformative uses that are ‘of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.’⁴⁸⁵ Where sampling is a transformative use, it not only stimulates productive thought but produces further original works.

Given that the concept of transformative use fair use enhances the copyright incentive provided by originality, it is unsurprising that some jurisdictions have already adopted the US fair use regime and its four factors. Israel, The Philippines and South Korea are three such jurisdictions.⁴⁸⁶ In addition, as the ALRC recognises, ‘Canada and India retain the expression “fair dealing” in their legislation but have arguably moved toward a fair use approach, largely because the judiciary in these countries have interpreted the “fair dealing” exceptions broadly.’⁴⁸⁷ Singapore’s fair dealing regime goes further, explicitly adopting the four US fair use factors and adding a fifth, ‘the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price’.⁴⁸⁸ Australia is considering whether to adopt a fair use regime, as recommended by the ALRC

⁴⁸⁵ Leval J, ‘Toward a Fair Use Standard’, 1110

⁴⁸⁶ See *Copyright Act 2007* (Israel), s 19, *Intellectual Property Code of the Philippines (Republic Act No. 8293)* (the Philippines), *Copyright Act 1967* (South Korea) art 35–3

⁴⁸⁷ ALRC, *Copyright and the Digital Economy Issues Paper*, (ALRC, 2012) (hereinafter ‘ALRC, *Copyright and the Digital Economy Issues Paper*’), 74

⁴⁸⁸ *Copyright Act (Cap 63, 2006 Rev Ed)* (Singapore), s 35(2). See David Tan. ‘The Transformative Use Doctrine and Fair Dealing in Singapore’ (2012), 24 *Singapore Academy of Law Journal* 832

and the PC.⁴⁸⁹ As the ALRC has recognised, mashups will not ‘usually fall within the scope of these [fair dealing] exceptions’.⁴⁹⁰

Fair use provides an incentive to transform and rearrange to sampling artists and other creators, even in jurisdictions without fair use. This is because the US fair use regime has enabled creation and distribution of transformative works on US-based online content platforms that reach beyond the US. As Chapter VI will discuss, *ex post* monitoring complements fair use by enabling tolerated uses for sampling artists and other creators.

⁴⁸⁹ *Copyright Act 1968 (Cth)*, ss 40-42, 103A-103C. See Recommendations 4 and 5. ALRC, *Copyright and the Digital Economy Final Report*, 13-14. See also Recommendation 6.1 that ‘Australian Government should accept and implement the Australian Law Reform Commission’s final recommendations regarding a fair use exception in Australia’, PC, *Intellectual Property Arrangements*, 33

⁴⁹⁰ ALRC, *Copyright and the Digital Economy Issues Paper*, 37

VI. Development: *Ex post* monitoring and originality

Thus far, this thesis has revisited the core concept of originality and related concepts in copyright and moral rights law. The previous chapter considered how the concept of transformative use, often used to explain parts of the fair use doctrine, offers an alternative policy lever for promoting originality, particularly original rearrangements. In other words, fair use exceptions for transformative uses encourage the creation of transformative and original works, adding to the body of originality.

This chapter considers another part of the copyright ecology that interacts with originality at the scale of online content platforms. Whereas the previous chapter considers a legislative policy response that codified a common law doctrine, this chapter considers how market- and technology-based mechanisms may be promoting originality. Specifically, it considers how content identification is supporting the creation of remixes and other original works in the arrangements between music platforms, copyright owners and copyright users.

Though it is common to refer to YouTube, SoundCloud and others as ‘user-generated’ content platforms, this understates material overlap between the groups of stakeholders considered to be copyright users and copyright creators. Indeed, it is often through use and reuse of original material that creation occurs. As one quantitative study of YouTube videos found ‘users do not just copy content, but they augment it.’⁴⁹¹ Equally, creators are naturally and unavoidably users of prior original material.

Monitoring uses of original material in new creations, and distinguishing between original and other uses, is a core challenge to maintaining the copyright balance between protections of existing works and incentives for future works. This challenge is amplified by the sheer number of musical works and sound recordings

⁴⁹¹ Lassi A. Liikkanen and Antti Salovaara. ‘Music on YouTube: User engagement with traditional, user-appropriated and derivative videos’, (2015) 50 *Computers in Human Behaviour* 108, 116

and the growing number of uploads by content platform users. This scale makes it impractical to rely on human detection or bespoke review of each use.

A second challenge is minimising transaction costs in copyright clearance to ensure that copyright revenues are targeted as incentives to those who distribute and create original works. While collective licensing of uses of copyright material have assisted in the past, the scale and breadth of uses of copyright material on online content platforms challenges the operation and scope of these licenses.

Addressing these policy challenges and balancing the interests of prior and future originality in the digital age requires a system that operates at the scale of online content platforms. While much policy debate has been devoted to the important issues of safe harbour, and notice and takedown, little attention has been given to the roles of content identification and *ex post* monitoring.⁴⁹²

This chapter describes how *ex post* monitoring, enabled by automated content identification, is providing a complementary system to *ex ante* licensing. Content identification systems enable sampling artists, and copyright creators generally, to help content platforms automatically identify uses of their creations. This helps lower transactions costs, a key economic issue in copyright policy. By identifying uses, content identification also allows a form of collective licensing that does not require each user to engage with the licensing system; instead, it is triggered automatically upon use. Though not the focus of this chapter, some time is devoted towards the end of the chapter to other cultural, commercial and policy implications of *ex post* monitoring.

This chapter is presented in four parts. The first part considers how *ex ante* licensing systems provide attempt to support creation of remixes as a form of

⁴⁹² This chapter notes that US courts and researchers have written extensively on safe harbor issues and notice and takedown issues as they relate to YouTube. Discussion of these issues is not repeated here. See *Lenz v Universal* and *Viacom Intern., Inc. v YouTube, Inc.*, 676 F. 3d 19 (2nd Cir. 2012), See also Peter Decherney. *Hollywood's Copyright Wars: From Edison to the Internet*, (Columbia University Press, 2013), 223

original creations. At a high level, *ex ante* licensing authorises certain categories of uses of copyright material in advance of specific uses; one example is the compulsory licence for recording covers of musical works. There are also commercially negotiated licences for use of musical works and sound recordings.

The second part considers how both collective licensing and specific use licensing arrangements fall short of supporting the creation of remixes and addressing acute challenges faced by sampling artists seeking licences.

Three content identification systems form the focus of the second part, which outlines how these systems operate. These systems equip content platforms to detect use of audiovisual copyright material at scale. The first system is YouTube's Content ID system, which matches audio and video in YouTube users uploads with a catalogue of prior audio and video creations provided on behalf of copyright owners. YouTube's system is the most prominent system, being developed in-house and operating on the world's second most visited website.⁴⁹³ The second system is Zefr, which provides third-party content identification to supplement YouTube Content ID and systems on other content platforms. The third system is Dubset, which enables Spotify, Apple Music and others to identify uses of musical works and sound recordings. Dubset stands out amongst the three systems considered, with bespoke mechanisms to detect samples.

The third part considers the example of the *Harlem Shake* meme, which provides insight into how a content identification system provided the foundation for *ex post* monitoring, the retrospective negotiation of licences and the sharing of advertising revenues with upstream and downstream users.

The chapter concludes by exploring how content identification improves the provision of financial copyright incentives and promotes an originality-friendly copyright ecology on content platforms. It also considers how content ID and *ex*

⁴⁹³ Alexa. *YouTube Traffic Statistics* (online), (2017), <<http://www.alexa.com/siteinfo/youtube.com>>

post monitoring change the context for cultural production, commercial distribution and copyright policy.

Shortcomings of *ex ante* licensing for remixes

'Thou shalt not steal. Get a license or do not sample.'⁴⁹⁴ Though infamous, this quote from the Sixth Circuit's judgement in *Bridgeport v Dimension Films* stands for a position that is *prima facie* reasonable. Copyright is designed to create copyright incentives by reserving exclusive rights to copyright owners. A necessary consequence is that others seek and receive copyright permission from copyright owners.

The issue with this position in the context of sampling is that neither collective nor specific use licensing provide sampling artists with efficient or effective means to seek permission. By requiring *ex ante* permission that is often not granted or only offered with onerous conditions, such as the payment of all downstream royalties, licences are often not reached. As Mazzone notes, 'while the Internet has created new distribution streams, smaller artists cannot usually sell through many mainstream channels such as iTunes or Best Buy unless their works have been cleared.'⁴⁹⁵ This both blocks incentives for prior creators and raises barriers for future creators, which fits poorly with uses of copyright material to create new and original works. 'Thou shalt not steal' loses its biblical virtues and morphs into 'thou shalt not use'.

Licensing that promotes prior originality to the detriment of latter originality disadvantages sampling artists and is counter to one of the purposes of copyright, which is to promote the creation and distribution of original works. Such licensing is detrimental to the music industry, increasing transaction costs for reaping the rewards of prior investments.

Both collective and specific use licensing approaches tend to set conditions on downstream creators *prior* to the relevant uses. Such *ex ante* licensing can be

⁴⁹⁴ *Bridgeport v Dimension Films*, 801

⁴⁹⁵ Mazzone, *Copyfraud*, 61

impractical for remix artists, and other creators, as the lead time required for this type of licensing can be significantly before the release of remixes. Remix artists may wish to continue to modify, recreate or improve their work prior to release, but are hindered by the conditions of their granted licence and the need to seek a separate or amended licences for the changed uses.

Collective licensing, including commercial and statutory variants, provides workable compromises in some copyright industries. Collective licensing systems can be desirable as they reduce transaction costs for copyright users, owners and their representatives. The promise of lower transaction costs has long been a virtue of bulk licensing in copyright systems across the world. As Daniel Gervais concisely articulates in the context of radio broadcast of compositions and sound recordings:

‘What is needed, therefore, to make the copyright system work is a licence to use *all the right fragments* (reproduction, communication, etc.) for the copyright work(s) (music and lyrics) and the objects of related rights (performance and sound recording). The licence must be for all or as close to all existing works, performances and recordings that the radio station might use, which in practice means a worldwide license. This is exactly what collective management organisations (CMOs) do.’⁴⁹⁶

In the digital era of user generated content, with the explosion of creation and uses of copyright material, collective licensing systems gain potential to lower transactions costs and ultimately make a larger proportion of copyright revenues available to copyright participants. Likewise, for sampling artists who use a range of copyright material to create original works, collective licensing can improve access to works for sampling and reduce the delays associated with releasing remixes.

However, collective licences have not traditionally provided sampling artists or other creators using prior copyright material with simple licensing of the creation of remixes. At best, collective licences are only available to cover some but not all

⁴⁹⁶ Emphasis in original. Daniel Gervais. ‘Collective Management of Copyright’, in Daniel Gervais (ed), *Collective Management of Copyright and Related Rights (3rd Edition)*, (Wolters Kluwer, 2016) (hereinafter ‘Gervais, ‘Collective Management of Copyright’”), 5

copyright uses triggered by sampling. For sampling artists publishing and distributing remixes via content platforms, a constellation of licences may be required in relation to a range of exclusive copyright rights under Australian copyright law:

- The rights to reproduce a musical work, a sound recording and any literary work such as lyrics. In the context of video content platforms such as YouTube, this includes synchronisation rights, which are the rights to synchronise a musical work and a sound recording with a visual medium such as video,⁴⁹⁷
- The right to make an adaptation of a musical work, which includes any arrangement or transcription of that work,⁴⁹⁸ and
- The right to communicate to the public a musical work, a sound recording and any literary work.⁴⁹⁹

In the context of music, there is collective licensing for certain free-to-air radio broadcast of sound recordings, covers of previously recorded musical works (i.e. a mechanical licence), and public performances of sound recordings, amongst other uses.⁵⁰⁰

However, sampling artists cannot seek collective licences for sampling of sound recordings and can only seek a collective licence for certain reproductions of musical works under limited circumstances. For example, a remix qualifies for a mechanical licence under Australian law only if it does not materially alter the remixed musical work.⁵⁰¹ The situation is similar under US copyright law, where

⁴⁹⁷ *Copyright Act 1968* (Cth), ss 31(1)(a)(i), 85(1)(a)

⁴⁹⁸ *Copyright Act 1968* (Cth), ss 10(1), 31(1)(a)(vi)

⁴⁹⁹ *Copyright Act 1968* (Cth), ss 31(1)(a)(iv), 85(1)(c)

⁵⁰⁰ *Copyright Act 1968* (Cth), ss 55, 108, 135ZZK

⁵⁰¹ The relevant part of the statute states that under certain conditions, 'may make records of musical work'. *Copyright Act 1968* (Cth), s 55. This statutory wording implies a limit on the mechanical licence, permitting only recording of musical works that do not materially alter that musical work. This view is supported by information published by APRA AMCOS: 'If a remix does not include additional original composition, and the song

remixes that ‘change the basic melody or fundamental character’ of an original work do not qualify for the equivalent mechanical licence.⁵⁰²

Likewise, sampling artists DJing in live music venues can only access licences that permit no alterations. In relation to musical works, the relevant APRA AMCOS licence permits the ‘use of APRA AMCOS Works for the purpose of dancing’ but does not define ‘use’ or ‘dancing’.⁵⁰³ Likewise, the PPCA licence for ‘public use of sound recordings and/or music videos’ is silent on alterations.⁵⁰⁴ This is a significant grey area, given DJs commonly alter songs that they play at clubs. Typically, the role of a DJ is not to play a string of unaltered recordings; otherwise, a mere playlist would suffice. DJs routinely rearrange parts of recordings. To transition from one recording to another, more than one recording is played simultaneously. To achieve smoother flow through a set, DJs also change the tempo and key of tracks to fit one another. Such acts are alterations, ones that are not expressly permitted by collecting society licences but are nonetheless industry practice.

In any case, a mechanical or dance use licence may be undesirable for many sampling artists. Firstly, it may restrict their creativity, preventing the artist from adding to existing compositions or changing the basic melody or fundamental

has had a previous commercial release, it may be that the making of the remix is covered by the statutory mechanical licence provisions of the Copyright Act. In this case, separate additional clearances from the owners of the musical work are not required to create the remix so long as the manufacture of the recording or any digital exploitation is licensed by the copyright owner(s) and you have obtained permission from the owner of the original sound recording(s).’ APRA AMCOS. ‘What’s a remix and how do copyright and royalties apply to remixes?’, *Music Creators* (online), (2016), <<http://apraamcos.com.au/about-us/faqs/music-creators/>> (hereinafter ‘APRA AMCOS, ‘What’s a remix’’)

⁵⁰² ‘2 Live Crew concedes that it is not entitled to a compulsory license under §115 because its arrangement changes “the basic melody or fundamental character” of the original. §115(a)(2).’ See *Campbell v Acuff-Rose*, 575

⁵⁰³ APRA AMCOS. *Recorded Music for Dance Use Licence Application* (online), (2016), <http://apraamcos.com.au/media/Customers/GFN_Recorded-Music-Dance-Use.pdf>, 2

⁵⁰⁴ PPCA. *Licence Application Form: For public use of protected sound recordings and/or music videos* (online), (2015), <http://www.pcca.com.au/IgnitionSuite/uploads/docs/PPCA_LICENCING_25-10-11-V7.pdf>

character or prior works.⁵⁰⁵ After all, such additions or modifications are arguably the basis of making a remix, mashup or any original work. Secondly, it may prevent them from claiming musical work copyright royalties for their remix; these are passed on to the copyright owners of the sampled musical work. As APRA AMCOS states: ‘Please be aware that you cannot register or claim APRA AMCOS royalties for cover songs. The royalties for cover songs are paid to the original songwriter(s) and music publisher.’⁵⁰⁶

In other words, a remix has two unattractive paths to copyright permission: 1) seek a licence but limit originality to avoid any material alterations to the covered musical work, or 2) be recognised as original work but be excluded from a mechanical licence. This situation discourages the exact kind of rearrangement that is central to originality. In the absence of collective licensing for remixes, sampling artists must turn to specific use licences, which may take a variety of forms. Whitney Bousard has outlined five common forms: ‘gratis; buyouts; royalties; co-ownership; and an assignment of the copyright’.⁵⁰⁷

Indeed, even the sample clearance specialist behind The Avalanches, Pat Shannahan, espouses the common industry view that licensing should be a pre-requisite to sampling:

‘I looked at it [sampling] as a new, creative source of revenue. A source of revenue, but also a new, creative art form. There are a lot of people who have a real problem with it – they always have and they still do. They get very grumpy about sampling and go, “Why don’t they write their own stuff?” You know? I have tried to explain

⁵⁰⁵ The possibility of such as restriction was confirmed in *Perez v Fernandez*: ‘I reject his suggestion that he was entitled to “mix songs” (ie. [sic] overlay drops onto sound recordings) at the clubs where he works as a DJ by virtue of collecting societies licences. It is illogical that a collecting society would licence the alteration of works, particularly where this would involve an infringement of the artist’s moral rights (such rights being incapable of assignment in any event).’ *Perez v Fernandez*, 59

⁵⁰⁶ APRA AMCOS, ‘What’s a remix’

⁵⁰⁷ Whitney C. Broussard, ‘Current and Suggested Business Practices for the Licensing of Digital Samples’, (1991), 11 *Loyola of Los Angeles Entertainment Law Review* 479, 498

to people for years that this is a very interesting art form, and as long as people are licensing the rights, it's a very, very interesting thing'.⁵⁰⁸

However, there is empirical evidence that specific use licensing is costly and ultimately an *ex ante* deterrent for remix artists. Sample clearance specialist Pat Shannahan notes 'With every project I've done over the years... the publishers and labels want more and more money. It has literally knocked the smaller artists out of the game altogether. Only the ones who are very, very well off can afford to sample anymore.'⁵⁰⁹

In some cases, specific use licensing is not an option at any cost. Shannahan articulates the common view in the recording industry that copying is a binary opposite to creating:

'And when you're dealing with samples, I'll get the old, "Why don't they write their own stuff?" attitude. They don't get it at all... It's a non-existent idea. Even at the beginning, they don't understand it's a different type of art form. It's a different animal. It's like a collage. I try to explain it like, "The kids love to try to guess who's being sampled", but often they don't get it. You're not dealing with creative people, and that's the number one thing you have to realize.'⁵¹⁰

Sampling artists that use multiple recordings and musical works in their creations experience particularly acute barriers; McLeod and DiCola's empirical study of remixes noted, mashups 'present unique licensing problems'.⁵¹¹ McLeod and DiCola list problems commonly faced by artists seeking to license mashups:

- mashup artists are unlikely to have the resources and contacts to secure licences,⁵¹²

⁵⁰⁸ Aaron Gonsher. 'Sample Clearance Expert Pat "The Detective" Shannahan is The Avalanches' Secret Weapon', *Red Bull Music Academy Daily* (online), (18 August 2016), <<http://daily.redbullmusicacademy.com/2016/08/pat-the-detective-shannahan-interview>>

⁵⁰⁹ McLeod and DiCola, *Creative License*, 159

⁵¹⁰ Coleman, 'Meet the Woman Who Helps The Beastie Boys, Beck And The Avalanches Clear Their Samples'

⁵¹¹ McLeod and DiCola, *Creative License*, 173

⁵¹² It is often argued that an open-ended, principles-based fair use regime creates a similar access to justice problem. See for example ALRC, *Copyright and the Digital Economy Issues Paper*, 77. This is the flip side of the flexibility of such a fair use regime.

- royalties sought for a mashup may exceed 100 per cent of the revenue associated with the mashup,
- a mashup may sample works which themselves include samples, which adds complexity to identifying, seeking and gaining necessary permissions,⁵¹³ and
- each copyright owner approached for licensing has veto power.⁵¹⁴

Difficulty in licensing sound recordings for use in mashups and other forms of remixes is not a problem unique to the US. For example, in the Australian case of *Universal v Miyamoto*, Wilcox J recognised that remixes of sound recordings faced licensing difficulties.⁵¹⁵

Even if it were possible to reach commercial licensing arrangements for mashups, such arrangements may well set undesirable precedents in a fair use regime. As Mazzone notes, when the industry norm is licensing, this can have a significant effect on the fourth fair use factor by expanding the potential market for or value of the copyright work.⁵¹⁶ Likewise, Aufderheide and Jaszi note that outlier US fair use cases have discriminated against sampling cases, creating a vicious cycle: 'Judges make economically based judgements; musicians and their agents and distributors embraced a licensing model; then fair use was undermined by the pervasiveness of that model.'⁵¹⁷

Codes of practice by artist communities, appropriate intermediary policies, and no action policies by copyright owners may ensure that flexibility does not block access to justice.

⁵¹³ As Samuelson notes, '[m]any studios would, moreover, be unable to give amateurs permission to engage in remixes and mashups of their content because permitting reuses of this sort would implicate a web of contractual obligations to stars and other creative contributors to these works. Transaction costs would overwhelm the ability to clear rights efficiently.' Samuelson, 'Unbundling Fair Uses', 2555

⁵¹⁴ McLeod and DiCola, *Creative License*, 181-182

⁵¹⁵ 'Evidence adduced on behalf of the applicants satisfies me it is unlikely that any of the applicants would have granted a licence to any of the respondents to reproduce its copyright sound recordings on a compilation CD.' *Universal Music Australia Pty Ltd v Miyamoto* (2004) FCA 982, 14

⁵¹⁶ Mazzone, see note 435, 41

⁵¹⁷ Aufderheide and Jaszi, *Reclaiming Fair Use*, 92

James Gibson argues that the interaction between several factors in the copyright system 'cause copyright users to seek licenses even when they have a good fair use claim'.⁵¹⁸ These factors are:

1. 'Core doctrines' that create ambiguity such as the idea-expression dichotomy, the substantial similarity test and the fair use
2. New creative works that almost invariably borrow from old creative works
3. Severe monetary penalties that far exceed licence costs and injunctions, and
4. Risk-averse behaviour in copyright industries.⁵¹⁹

These forces steer copyright users to overuse licensing as a risk-management measure, even where copyright exceptions are likely to apply. This creates an ever-stronger licensing market; in turn the seeking of licences is considered in fair use which considers *inter alia* the effect of a use on a market.

As Chapter V has argued, the US fair use regime is strongly linked to originality because transformative uses in many cases also yield an original work. As such, a system that causes copyright users to seek unnecessary licences is counter to the creation of original works. As the next section discusses, content identification and *ex post* monitoring help to break this cycle of inefficient licensing.

Content identification and *ex post* monitoring

Content identification systems have been a key part of a new balance struck between copyright owners and content platforms since the early days of YouTube. By automating the identification of uses of copyright material, they lower transaction costs sufficiently for monitoring uses after they occur, providing an alternative to *ex ante* licensing.

⁵¹⁸ As Gibson notes, 'the decision-makers in the real world of copyright practice are typically risk-averse. New works of creativity often require high upfront investment, with the prospect of profit only after the work is completed. With so much at risk, those who work with copyrighted materials try hard to avoid potential pitfalls, and understandably so. They approach legal issues very conservatively, particularly issues like copyright liability, which have the potential to delay or even destroy the entire project.' James Gibson. 'Risk Aversion and Rights Accretion in Intellectual Property Law', (2007), 116 *Yale Law Review* 882, 891

⁵¹⁹ *Ibid*

This part discusses three systems for content identification: YouTube's Content ID, Zefr's VideoID and Dubset MixSCAN. Each of these systems applies a different combination of content matching and pattern recognition techniques to match sound recordings and musical compositions with one another.⁵²⁰

YouTube's Content ID system relies on two key sets of inputs, which it attempts to match: reference files from rightsholders including record labels and music publishers, and videos uploaded by YouTube users.

Rightsholders provide reference files to YouTube for their content; these files are typically low-resolution videos. YouTube first splits the videos into a video track and an audio track. For each of the video and audio track, YouTube creates a digital fingerprint.⁵²¹ These fingerprints are essentially a sample of each track. For example, an image with 10,000 pixels may be reduced to a sample of just 400 pixels. Similarly, a recording with a high bitrate may be reduced a sample with a low bitrate. Despite being too low a resolution for viewing or listening, these fingerprints are usually distinct enough for matching uploaded videos with copyrighted content. Being much smaller files than the original video or audio

⁵²⁰ These three systems are only part of a community of such systems. Another prominent content identification systems is Audible Magic's Content ID which is also used for SoundCloud, Vimeo and others. It is worth noting that Audible Magic Content ID was previously licenced to Google for content identification on YouTube before it developed its own system. Audible Magic has been pursuing a US trademark claim through the USPTO against Google for use of the Content ID mark for YouTube's content identification system. While the focus of this part is on content identification systems for music platforms populated with a high proportion of user generated content, Shazam and Soundhound provide two further examples of content identification systems. These two systems are notable for being based on 'query by humming', a technique which focuses on melodies rather than other characteristics of music. *Audible Magic Corporation v Google Inc.*, USPTO, (9 December 2014), Registration Number 4651405

⁵²¹ The technical term for such a fingerprint is 'perceptual hash'. Li Weng and Bart Preneel. 'A Secure Perceptual Hash Algorithm for Image Content Recognition', in Bart De Decker *et al.* (eds), *Communications and Multimedia Security*, (Springer, 2011), 108-121. For a digestible exploration of perceptual hashing in identifying audiovisual and other content, see also the PhD thesis of Li Weng, which was supervised by Professor Preneel. Li Weng. *Perceptual Multimedia Hashing*, (September 2012) (hereinafter 'Weng, *Perceptual Multimedia Hashing*')

tracks, these fingerprints enable YouTube to efficiently assess the level of matching between uploaded content and rightsholders' audiovisual material.

When YouTube users upload videos, these videos are also fingerprinted by YouTube. With the fingerprint of the uploaded video in hand, YouTube's Content ID system seeks the most similar fingerprint from audio or video tracks provided by rightsholders to YouTube.⁵²² This comparison seeks to determine the 'distance' between two fingerprints, by considering how similar they are across a range of attributes.⁵²³ If the distance falls below a set threshold, the uploaded video is treated as a positive match. At this point, instructions from the rightsholder for the video are applied.

YouTube Content ID's matching process is extensive but imperfect. YouTube has checked hundreds of millions of uploaded videos against 50 million works provided by copyright owners, representing literally quadrillions (or thousand million millions) of attempted matches over time. However, the system is geared towards detecting uses of whole works. For example, remixes that are uploaded to YouTube are often not matched by YouTube Content ID with copyrighted sound recordings or musical works. As ASCAP notes: 'YouTube Content ID doesn't automatically detect or give you a way to claim uses of your music that last less than 30 seconds. However, you or your partner service can still find such uses and submit claims manually.'⁵²⁴

⁵²²Google. 'Statistics', *YouTube* (online), (2016), <<https://www.youtube.com/yt/press/statistics.html>>

⁵²³ As Weng notes, 'the most widely used distance metrics in perceptual hashing are the Euclidean distance and the Hamming distance. Another useful distance is the Hausdorff distance.' Weng, *Perceptual Multimedia Hashing*, 10. According to YouTube Europe's Engineering Director, YouTube Content ID measures the Hamming distance between two fingerprints to assess similarity. Oliver Heckman. 'YouTube: A peek inside', (Streaming Media Europe, 2011), 23:56

⁵²⁴ Jim Koch. 'How to Make Money with Your Music on YouTube', *ASCAP* (online), (2015), <<https://www.ascap.com/help/royalties-and-payment/make-money-youtube>>

In-house content identification systems for YouTube, SoundCloud and other platforms are typically supplemented by third-party systems. For example, YouTube provides its Content ID system to third-party YouTube Partners, who supplement YouTube's matches with further content identification. There are many such YouTube Partners, such as Vydia, which reviews over one billion monthly streams, and onerpm which reviews over two billion monthly views.⁵²⁵

The most prominent YouTube Partner is Zefr. Zefr manages over 275 million YouTube videos for the Big Three record labels and other copyright representatives, with 31 billion monthly views.⁵²⁶ Zefr also provides third-party content recognition services for not just YouTube, but also SoundCloud, Snapchat, Facebook, Vine and Twitter.⁵²⁷

Zefr's content identification system uses metadata of video files, rather than video files themselves, to match content.⁵²⁸ As the patent for Zefr's system states: 'The characteristics include one or more of keywords, views, comments, subscriptions to content channels, uploaded content, likes, user followings, and user identities'.⁵²⁹ This enables Zefr to 'identify images, words, music, and the like from the video'.⁵³⁰

By focusing on metadata, Zefr VideoID complements the content identification systems of YouTube and others which are often based on the matching of audio or video files. For example, YouTube's Content ID system allows multiple versions of video files to be uploaded. For example, multiple recordings of *Vogue* performed

⁵²⁵ See Vydia. *Vydia* (online), (2016), <<http://vydia.com/>>. See also onerpm. *onerpm*, (2016), <<https://onerpm.com/>>

⁵²⁶ Zefr. *Careers* (online), <<http://zefr.com/careers/>>

⁵²⁷ Zefr. 'Our Deep Tech', *Technology* (online), (2017), <<http://zefr.com/technology/>>

⁵²⁸ In a presentation, ZEFR founder Rich Raddon says, 'the only way we do it is via the comments and the descriptors, we don't do visual recognition.' Silicon Valley Bank, 'ZEFR', *Amplify Mentor Series* (online), (20 May 2013), <<https://www.youtube.com/watch?v=hNvAl21WR9M>>, 46:16. See also ZEFR's granted US patent for its content identification system. Zacharias James. *Identifying matching video content*, US 20150278292 A1, (USPTO, filed 31 March 2014, published 1 October 2015) (hereinafter 'James, *Identifying matching video content*')

⁵²⁹ James, *Identifying matching video content*

⁵³⁰ Silicon Valley Bank, 'ZEFR'

by Madonna exist. Some uploaded recordings are identical, but for different still images that accompany the recordings. Other recordings are different, being variously live, studio or rereleased versions of the song. Zefr's Video ID helps copyright owners find and control these versions.

By building a rich database of metadata, Zefr is also able to provide insights about usage patterns across usage platforms and across markets. Zefr uses this metadata to help artists manage not only their copyright but also how their brand interacts with fans and other users on these content platforms.

The third content identification system discussed here is Dubset MixBANK, which provides content identification services for Spotify and Apple Music. Dubset MixBANK stands out amongst content identification systems that identify sound recordings in uploaded audio files, as it is tailored to identify sound recordings sampled in remixes and DJ mixes. It can identify individual sound recordings in files, even if they overlap with one another.⁵³¹ As Dubset states: 'We've created a platform... that pulls apart this content – remixes or long-form mixes – and figures out what content has been used'.⁵³²

In testing MixBANK over the two years to 2015, Dubset identified over 20,000 artists whose recordings appeared in over five million DJ mixes and had been streamed over one billion times without revenue or royalties to copyright owners.⁵³³ Recordings of several artists, including Madonna, Lady Gaga, Kanye West and John Legend, had been streamed over 100 million times each. Having

⁵³¹ Overlapping recordings is common in sampling, especially when blending or transitioning from one recording to the next in a DJ set or studio mix

⁵³² Stuart Dredge. 'Dubset's MixBANK Licenses Remixes – And Apple Music Is Its First Client', *Music Ally* (online), (15 March 2016),

<<http://musically.com/2016/03/15/dubset-mixbank-licenses-remixes-apple-music/>> (hereinafter 'Dredge, 'Dubset's MixBANK Licenses Remixes')

⁵³³ Dubset Media Holdings. *Dubset's MixSCAN® Technology Platform Identifies Over 20,000 Artists Being Streamed and Not Receiving Royalties* (online), (9 March 2015), <<https://static1.squarespace.com/static/5435df50e4b0193dcc7e1d97/t/54ff15d4e4b0a23095bd0609/1426003412112/%5BDubset%5D+MixSCAN+Trial+Release+Final+3-9-15.pdf>>

moved from testing to deployment, MixBANK allows Spotify, Apple Music and others to generate returns to upstream and downstream creators.

Dubset's patent application for its system articulates several ways that works of sampling can be original:

'With the advent of digital processing technology, users can now easily combine, compile or mix media contents of different origins to achieve a unique and desired effect. This compilation or mix attains its unique identity or personality through an artist's creative selection and blending of media contents. Typically, the selection is based on contents of shorter duration but have the appropriate characteristics or elements (e.g. tempos) for blending so as to create an integral mix that is varied, but yet imparts a particular mood collectively.'⁵³⁴

The patent application also sets out the methods with which Dubset can match uploaded files with sampled sound recordings.⁵³⁵ Dubset chief executive and former Gracenote CEO Stephen White provides a useful summary of these methods:

'MixBANK matches the recordings used in the remix or DJ mix against a database of three-second audio snippets from Gracenote, where White was CEO prior to joining Dubset. He says fingerprinting is a "brute force" tool that can provide MixBank with up to 100 possible matches for each three-second match. The more difficult final step is performed by MixScan, proprietary piece of software that pulls apart the mixes and figures out what's inside. MixScan identifies the recording and its stop and start point in each mix, then finds the corresponding rights holders in a dataset together through multiple partnerships and direct feeds.'⁵³⁶

MixScan improves upon Gracenote matches in two ways. Firstly, it uses a list of tracks sampled in a remix. The list is generated by DJ software (Serato or Traktor)

⁵³⁴ See the filed patent application. David Stein. *Method and System for Analyzing Copyright Information in a Mixed Long-Format Audio File*, US 20120323800 A1, (USPTO, filed 18 May 2012, published 20 December 2012) (hereinafter 'Stein, *Method and System for Analyzing Copyright*')

⁵³⁵ Ibid. The full name of the Gracenote systems is Gracenote SDK, which is compatible with the Android and iOS mobile operating systems to underpin music recognition

⁵³⁶ Dredge, 'Dubset's MixBANK Licenses Remixes'. See also one of Gracenote's granted patent for its content identification software. Maxwell Wells. *Automatic identification of sound recordings*, US 7328153 B2, (USPTO, filed 22 July 2002, granted 5 February 2008)

or iTunes and known as a cratefile.⁵³⁷ When a sampling artist provides a remix to Dubset for upload to a content platform, she can also provide a cratefile for that remix. Dubset processes the cratefile to create a map of samples in a remix. This complements the Gracenote matches, helping identify more accurately where each sample starts and ends in a remix. The second way is a tool that allows users to see and edit the map. MixScan also provides uploaders with a tool to manually fine tune the map generated by Gracenote and cratefiles.⁵³⁸

The combination of Gracenote, cratefiles and manual fine-tuning allows Dubset to qualitatively and quantitatively match uploaded and prior recordings. The ability to identify where samples appear in remixes helps address one of the problems identified in Chapter III, which is the lack of a common system of notation for sampling (and sound recordings more broadly). Such a system assists both copyright clearance and allocation of royalties.

The content identification systems provided by YouTube, Zefr and Dubset enable *ex post* monitoring of uses, which in turn enabled nuanced remedies. If one can summarise the current *ex ante* logic of collective licensing as ‘first licence, then use’, then the *ex post* alternatives enabled by content identification systems might be described as ‘first use, then monitor’. This *ex post* collective monitoring may encourage creativity on content platforms. As copyright maven William Patry has written:

‘the explosion in video creativity, seen on YouTube, and in written creativity, seen in web writing, including blogs, has not been driven by the dramatic expansion of exclusive rights; quite the contrary. What was the cause of this new creativity, and what can policymakers do to further encourage and support it? These examples suggest that limitations and exceptions, such as fair use and the safe harbors in the Digital Millennium [sic] Copyright Act (DMCA) can sometimes be at least as powerful an incentive as rights.’⁵³⁹

⁵³⁷ Stein, *Method and System for Analyzing Copyright*

⁵³⁸ Ibid

⁵³⁹ William Patry. ‘Who’s Afraid of an evidence-based Copyright Law’ (2013), 1(15) *Suffolk University Law Review Online* 55, 60. Noting that the title of Edward Albee’s play *Who’s Afraid of Virginia Woolf?* is inspired by song *Who’s Afraid of the Big Bad Wolf?* from a Disney cartoon, Patry himself is not immune to inspiration in titling his own article. Ibid, 55

One of the advantages of *ex post* monitoring is that they enable nuanced remedies for copyright uses. Speaking from the US perspective, Leval J has articulated why nuanced remedies may be warranted for appropriative works:

'We have tended to think of appropriative works as falling into two categories: (i) those that infringe, and (ii) those that pass the fair use test and therefore do not infringe. I would suggest that we should revise that thinking and divide appropriative works into *three zones*:

- (i) At one extremity are the works properly described as acts of piracy, those that deserve to be enjoined.
- (ii) At the other end is the band that satisfies the fair use test and achieves immunity from any judicial remedy because there is no infringement.
- (iii) In the center is a numerically small but important band encompassing works which, although they fail the fair use test, have originality and independent value, and represent a sufficiently small threat to the economic entitlements of the author of the original, so that the public-enriching objectives of the copyright law are better served by withholding injunctive relief. Such infringements should be compensated only by damages. And the damages should be in a carefully measured amount, an amount designed to provide reasonable compensation to the initial author for the use of her material and to compensate for any modest loss of market opportunity.⁵⁴⁰

Leval J places appropriative works on a spectrum of low to high originality, as an alternative to a binary view of infringing and fair uses. Translating this to the current Australian context, one could imagine the same argument holding true on the spectrum between infringing uses and uses qualifying for fair dealing. This chapter is interested in these appropriative creations falling into the third category. While they may not qualify for a copyright exception, they nonetheless contribute some originality that, in some cases, may warrant the status of a standalone work. Enabling their creation is consistent with copyright's purpose of promoting originality.

With content identification systems, content platforms can provide copyright owners with choices more nuanced than the binary states of infringement and copyright exception, and the binary choices of enjoining or allowing uploads. For example, YouTube provides four choices:

⁵⁴⁰ Leval J, 'Campbell v. Acuff-Rose: Justice Souter's rescue of fair use', 24-25

- **Mute** audio that matches their music
- **Block** a whole video from being viewed
- **Monetize** the video by running ads against it; in some cases sharing revenue with the uploader
- **Track** the video's viewership statistics'⁵⁴¹

From an allegedly leaked draft agreement between Zefr and Sony Pictures Television, it appears Zefr provides the latter three of the four choices above in relation to content uploaded to YouTube.⁵⁴² However, Zefr CEO Rich Raddon has expressed doubt about the effectiveness of blocking: 'Trying to simply block consumer uploads is not an option; we've learned that for every video that gets pulled down, 10 show up in its place.'⁵⁴³

Dubset also provides a similar range of choices, with the additional nuance of being able to create a rule to 'limit the length of a song used in a remix or mix'.⁵⁴⁴ This

⁵⁴¹ Emphasis in original. Google. 'How Content ID works', *How to manage your copyrights on YouTube* (online), (c2016),

<https://support.google.com/youtube/answer/2797370?hl=en&ref_topic=2778544> (hereinafter 'Google. 'How Content ID works'')

⁵⁴² The document refers to fan content metadata, monetisation, blocking and taking down. See Zefr and Sony Pictures Television, Inc.. *Content Services Agreement* (online), (Wikileaks, c2014),

<[https://wikileaks.org/sony/docs/031_03/Legal_Dept/Corporate%20Legal/Former%20Staff%20Directories/TFreed/Crackle/Syndication/ZEFR/ZEFR%20-%20Content%20Services%20Agreement%20\(Sony\)\(SPT%20Comments%2010.23.14\).docx](https://wikileaks.org/sony/docs/031_03/Legal_Dept/Corporate%20Legal/Former%20Staff%20Directories/TFreed/Crackle/Syndication/ZEFR/ZEFR%20-%20Content%20Services%20Agreement%20(Sony)(SPT%20Comments%2010.23.14).docx)> (hereinafter 'Zefr and Sony Pictures Television, *Content Services Agreement*')

⁵⁴³ Rich Raddon. 'ZEFR CEO on How Mayweather-Pacquiao Fight Exposed Periscope's Copyright Problem (Guest Blog)', *The Wrap* (online), (5 May 2015), <<http://www.thewrap.com/zefr-ceo-on-how-mayweather-pacquiao-fight-exposed-periscopes-copyright-problem-guest-blog/>>

⁵⁴⁴ 'Any file submitted to Dubset is required to jump through a number of hoops before it is distributed to a digital service. Once an uploaded mix is analyzed, a process White says takes about 15 minutes for a 60-minute file, MixBank checks the recordings, as well as its underlying composition, against the controls and restrictions set by rights holders. For example, rights holders can blacklist an artist, album, or track. They can create a rule to limit the length of a song used in a remix or mix. Rights holders can prevent an artist from being associated with certain other artists and they can control which territories will and will not get the content. Then there's an optional review process at the end so a rights holder can give a final approval for the file before it is distributed.' Dredge, 'Dubset's MixBANK Licenses Remixes'

nance is possible only because Dubset MixBANK enables the firm to identify small samples and distribute royalties accordingly.

Because content platforms are often able to discern the copyright jurisdiction of their users, it can tailor access rules by country.⁵⁴⁵ YouTube notes: 'Any of these actions can be country-specific. A video may be monetised in one country, and blocked or tracked in another.'⁵⁴⁶ Likewise, Zefr provides a country-specific blocking to copyright owners: 'Block claims can be geospecific based on rights'.⁵⁴⁷

The ability to tailor rules by country helps content owners set different rules across countries through a single entity. For example, Google claims that YouTube enables creators to manage content uploaded from over 80 countries.⁵⁴⁸ This contrasts with the limited scale and reach of collective rights organisations, which typically provide collective licensing for only one country. In addition, these organisations often rely on manual content identification processes that cannot operate at the scale of content platforms. For example, Australian music rights body APRA only considers the 4,000 YouTube videos most viewed by Australian users when allocating YouTube royalties.⁵⁴⁹

Content identification systems have also allowed content platforms to reach agreements with licensing representatives in relation to sampling. For example, Zefr has enabled SoundCloud to reach agreements with record labels and music publishers to provide blanket permission for user uploaded DJ mixes, even without

⁵⁴⁵ Content platforms cannot always identify locations of users, as Internet addresses do not always match with geographic addresses or copyright jurisdiction boundaries. In addition, users may engage in the practice of geododging to feign another location, for example by using Virtual Private Networks (VPNs)

⁵⁴⁶ Google, 'How Content ID works'

⁵⁴⁷ 'Zefr and Sony Pictures Television, *Content Services Agreement*'

⁵⁴⁸ Google. *How Google Fights Piracy* (online), (2016),

<<https://drive.google.com/file/d/0BwxyRPFduTN2cl91LXJ0YjIYSjA/view>> (hereinafter 'Google, *How Google Fights Piracy*), 6

⁵⁴⁹ 'APRA includes in its current distribution practices, the music used in the most viewed 4,000 videos'. APRA AMCOS. *YouTube and You*, (APRA AMCOS, 2013),

<<http://apraamcos.com.au/news/2014/past-aprap-articles/youtube-and-you/>>

being granted specific permission for individual cases.⁵⁵⁰ Likewise, Dubset has reached agreements with approximately 35,000 independent record labels and music publishers for unofficial remixes on Spotify and Apple Music.⁵⁵¹ As of August 2017, Dubset has also reached a similar agreement with Sony, paving the way further deals with the two remaining Big Three industry players, Universal and Warner.⁵⁵²

While *ex post* monitoring provides a promising model for sharing copyright incentives and promoting originality at scale, they present several issues that are still being resolved by industry players.

One is the presence of false positives; that is, content identification systems incorrectly identifying uses of copyright content. There are also missed positives; that is, content identification systems missing actual uses of copyright content. By transforming the material sampled, at times beyond recognition, sampling may be particularly challenging for content identification. As Google admits 'Content ID is

⁵⁵⁰ Ben Dandridge-Lemco. 'SoundCloud Founder Says DJ Mixes Will No Longer Be Removed For Copyright Infringement', *Fader* (online), (12 December 2016), <<http://www.thefader.com/2016/12/12/soundcloud-no-longer-remove-dj-mixes-for-copyright-infringement>>. See also original German interview with SoundCloud founder Eric Wahlforss. Heikko Hoffman. 'SoundCloud Go', *Groove* (online), (7 December 2016), <<http://groove.de/2016/12/07/soundcloud-go-eric-wahlforss-tantiemen-gema/>>

⁵⁵¹ See Dubset. *Sony Music Partners with Dubset To Monetize and Manage Song Uses In Streaming DJ Sets and Remixes* (online), (22 August 2017), <<https://static1.squarespace.com/static/5435df50e4b0193dcc7e1d97/t/599c47868419c23da1282c76/1503414151183/dubset+sme+press+release++2017-08-07.pdf>>. This is a notable increase on the 'deals with 14,000 independent labels to date (predominantly worldwide agreements, including direct contracts with members of Merlin).' Rhian Jones, 'Dubset signs deal for indie publisher rights with NMPA', *Music Business Worldwide* (online), (18 May 2016), <<http://www.musicbusinessworldwide.com/dubset-signs-deal-for-indie-publisher-rights-with-nmpa/>>

⁵⁵² John Constine. 'Dubset makes Sony the first major label legalized for remixing', *Techcrunch* (online), (22 August 2017), <https://techcrunch.com/2017/08/22/dubset-makes-sony-the-first-major-label-legalized-for-remixing/?lipi=urn%3Ali%3Apage%3Ad_flagship3_feed%3B6r3zZ4FNS5uEFuaeJGCLgQ==>>

not perfect, sometimes mistakenly ascribing ownership to the wrong content and sometimes failing to detect a match in a video.’⁵⁵³

Content identification systems are improving at identifying matching material, but are imperfect at separating infringing and non-infringing uses. At least one US court has opined that matches by Audible Magic, a prominent content identification system used on platforms including content platforms Veoh and SoundCloud, cannot justify automatic termination of user accounts on Veoh.⁵⁵⁴ In other words, content identification requires further development to substitute for case-by-case consideration of exceptions. It brings to attention one of the key challenges of bringing automated *ex post* collective licensing to scale: balances that are possible to achieve in individual cases are not yet accommodated by automated recognition systems.

False positives are particularly insidious if they suppress copyright exceptions. Rebecca Tushnet points out that ‘the most disturbing thing about large-scale compulsory licensing is it eliminates unfair uses by eliminating fair uses and gets rid of infringement by getting rid of non-infringing acts’.⁵⁵⁵ This is certainly a concern if copyright exceptions, particularly the highly-contested US fair use regime, cannot be reflected in *ex post* monitoring systems.

Another concern with *ex post* monitoring has been the cost of automatic content identification systems. Such costs can be borne by digital giants such as YouTube,

⁵⁵³ Google. ‘Testimony of Katherine Oyama, Senior Copyright Policy Counsel, Google Inc.’, *Hearing on s.512 of Title 17 Before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary*, 113th Congress, (2014), (hereinafter ‘Testimony of Katherine Oyama’)

⁵⁵⁴ ‘UMG contends that Veoh’s policy is inadequate because it does not automatically terminate users who upload videos that are blocked by the Audible Magic filter. As discussed below, this argument is unpersuasive because however beneficial the Audible Magic technology is in helping to identify infringing material, it does not meet the standard of reliability and verifiability required by the Ninth Circuit in order to justify terminating a user’s account.’ *UMG Recordings, Inc. v Veoh Networks Inc.*, 665 F. Supp. 2d 1099, (C.D. Cal., 2009)

⁵⁵⁵ Tushnet, ‘Copy This Essay’, 589-590

being the second most visited website by Australians and users globally.⁵⁵⁶ However, its Content ID system is unlikely to become pervasive in the foreseeable future given the costs of more than \$US60 million.⁵⁵⁷ As YouTube owner Google admits:

‘Content ID is not a one-size-fits-all solution for every sort of service or all kinds of service providers. So, for example, YouTube could never have launched as a small start-up in 2005 if it had been required by law to first build a system like Content ID. Nor does such a system work for a service provider that offers information location tools (like search engines and social networks) but does not possess copies of all the audio and video files that it links to.’⁵⁵⁸

The rise of content identification systems that are not tied to scale or existing platforms have the potential to lower market barriers to content identification. If the transaction costs of content identification are shared across platforms, this could enable the scale required for collective licensing for music sampling on content platforms. Given Dubset estimates that the ‘average DJ mix is 64 minutes long, minutes long and contains 22 songs, with interests held by more than 100 different rights holders’, one can imagine manual identification and licensing lead to prohibitive costs and delays.⁵⁵⁹ This chapter has discussed Zefr and Dubset, just two of the many systems that operate on multiple platforms and provide an essential building block to new platforms that wish to bring collective licensing to scale. Other providers such as Audible Magic also enable start-up and other content platforms to access content identification.

Furthermore, the licensing arrangements enabled by *ex post* monitoring do not currently cover all necessary permissions. For example, they do not broach or attempt moral rights permissions. In addition, licences between YouTube and

⁵⁵⁶ YouTube has a global and Australian Alexa ranks of 2. See Alexa. *The top 500 sites on the web* (online), (2017), <<http://www.alexa.com/topsites>>

⁵⁵⁷ Google, *How Google Fights Piracy*, 6

⁵⁵⁸ Testimony of Katherine Oyama, 6

⁵⁵⁹ Anne Steele. ‘Now in the Mix for Sony Music Artists: Royalties From DJ Sets’, *The Wall Street Journal* (online), (22 August 2017), <https://www.wsj.com/article_email/now-in-the-mix-for-sony-music-artists-royalties-from-dj-sets-1503406803-1MyQjAxMTI3MTI3MjgyNTI5Wj/>

collective management organisations typically do not provide YouTube users with synchronisation permission for the initial reproduction of a musical work when making a video; for example, APRA AMCOS notes that their licence with YouTube does not cover YouTube users for the synchronisation right.⁵⁶⁰

The 2016 expiration of the initial terms of licensing agreements with the Big Three music conglomerates—Sony, Warner and Universal—raised a question for YouTube and Spotify: How should these agreements be reshaped to take advantage of *ex post* monitoring?⁵⁶¹

One commentator has asked: ‘The labels do have deals with YouTube. If they don’t like those deals, why not negotiate better ones or walk away? All of them expire this year.’⁵⁶² In the context of these negotiations, RIAA head Cary Sherman has raised a key industry concern with *ex post* monitoring, and notice and takedown schemes:

‘The way the negotiation goes is something like this: “Look. This is all we can afford to pay you,” YouTube says. “We hope that you’ll find that reasonable. But that’s the best we can do. And if you don’t want to give us a license, okay. You know that your music is still going to be up on the service anyway. So send us notices, and we’ll take ‘em down as fast we can, and we know they’ll keep coming back up. We’ll do what we can. It’s your decision as to whether you want to take our deal, or whether you just want to keep sending us takedown notices.” That’s not a real negotiation. That’s like saying, “That’s a real nice song you got there. Be a shame if anything happened to it.”’⁵⁶³

The appointment of the former head of Warner Music Group Lyor Cohen as YouTube’s Global Head of Music suggests YouTube’s intention to reach licensing

⁵⁶⁰ APRA AMCOS, *Q&A with Frank Rodi, APRA AMCOS Online & Mobile Licensing Manager*, (2013)

⁵⁶¹ Stuart Dredge, ‘It’s not just YouTube with expired major-label deals – Spotify has too’, *Music Ally* (online), (12 April 2016), <<http://musically.com/2016/04/12/its-not-just-youtube-with-expired-major-label-deals-spotify-has-too/>>

⁵⁶² Peter Kafka, ‘Here’s why the music labels are furious at YouTube. Again.’, *recode* (online), (11 April 2016), <<http://www.recode.net/2016/4/11/11586030/youtube-google-dmca-riaa-cary-sherman>>

⁵⁶³ *Ibid*

agreements in the future.⁵⁶⁴ This appointment may have precipitated Warner's new, albeit shorter than usual term, licensing agreement with YouTube in May 2017.⁵⁶⁵

***Harlem Shake* and distributed originality**

The distributed creation of the *Harlem Shake* meme serves as a prominent example of a contemporary meme, and the value of *ex post* monitoring and nuanced remedies for appropriative uses.⁵⁶⁶ While memes are now prevalent across digital communities, Richard Dawkins coined the term 'meme' forty years ago:

'We need a name for the new replicator, a noun that conveys the idea of a unit of cultural transmission, or a unit of *imitation*... Examples of memes are tunes, ideas, catch-phrases, clothes fashions, ways of making pots or of building arches. Just as genes propagate themselves in the gene pool by leaping from body to body via sperms or eggs, so memes propagate themselves in the meme pool by leaping from brain to brain via a process which, in the broad sense, can be called imitation.'⁵⁶⁷

In May 2012, American DJ Baauer and his record label Mad Decent released the track *Harlem Shake* as a free download. Then in early 2013, several creators spread across the world turned the *Harlem Shake* into a meme. On 30 January 2013, a New York student with the user name Filthy Frank uploaded a 19 second YouTube video of himself and three friends dancing in spandex in a dorm room to a sample of the

⁵⁶⁴ Dan Rys. 'Lyor Cohen Named YouTube's Global Head of Music', *Billboard* (online), (28 September 2016), <<http://www.billboard.com/articles/business/7525695/lyor-cohen-named-youtube-global-head-of-music>>

⁵⁶⁵ In an internal memo, Steve Cooper from Warner Music Group described the agreement as the 'best possible deals under very difficult circumstances', adding: 'There's no getting around the fact that, even if YouTube doesn't have licenses, our music will still be available but not monetized at all.' Tim Ingham. 'Warner and Youtube sign new deal... 'under very difficult circumstances'', *Music Business Worldwide* (online), (5 May 2017), <<https://www.musicbusinessworldwide.com/warner-youtube-sign-new-deal-difficult-circumstances/>>

⁵⁶⁶ One useful description of an Internet meme is provided by Shifman: '(a) a group of digital items sharing common characteristics of content, form, and/or stance, which (b) were created with awareness of each other, and (c) were circulated, imitated, and/or transformed via the Internet by many users'. Limor Shifman. *Memes in Digital Culture*, (MIT Press, 2014), 41

⁵⁶⁷ Emphasis in original. Richard Dawkins. *The Selfish Gene*, (Oxford University Press, 1976), 207

Harlem Shake.⁵⁶⁸ Days later, a group of high school students from Australia's Gold Coast under the TheSunnyCoastSkate username uploaded their own 31 second video of themselves dancing to *Harlem Shake*. *The Harlem Shake v1 (TSCS original)* also featured dancing in spandex in a dorm room, but jump cuts from a single person pelvic thrusting to a room of people dancing as the song hits a climax. Just two hours later, Filthy Frank uploaded to YouTube a longer version of the video he uploaded days earlier, entitled *DO THE HARLEM SHAKE (ORIGINAL)*.⁵⁶⁹

Over the coming months, the *Harlem Shake* meme spread widely, with thousands more videos uploaded to YouTube, featuring variations of the dance in different locations and costumes. Despite being released in 2012, the *Harlem Shake* found a new audience after the *Harlem Shake* meme of 2013. Coinciding with the inclusion of YouTube views in the Billboard chart formula, the *Harlem Shake* debuted in 2013 at the top of the Billboard Hot 100; only 20 other songs had achieved this feat in the chart's 50-year history.⁵⁷⁰

Audience measurement firm Visible Measures calculated that various versions of the meme contributed to 1.2 billion views by April 2013.⁵⁷¹ But the meme continued to grow over time; using its Content ID system, YouTube was able to identify 2.3 million separate meme videos accounting for 4.7 billion views by May 2015.⁵⁷² Without YouTube Content ID and other content identification systems, it

⁵⁶⁸ Michael Soha and Zachary J. McDowell. 'Monetizing a meme: YouTube, Content ID, and the Harlem Shake' (2016), 2(1) *Social Media + Society* 1 (hereinafter 'Soha and McDowell, 'Monetizing a meme'), 3

⁵⁶⁹ Filthy Frank's YouTube user name is DizastaMusic

⁵⁷⁰ Gary Trust. 'Baauer's "Harlem Shake" Debuts Atop Revamped Hot 100', *Billboard* (online), (20 February 2013), <<http://www.billboard.com/articles/news/1549388/baauers-harlem-shake-debuts-atop-revamped-hot-100>>

⁵⁷¹ Mallory Russell. 'The Harlem Shake Hits 1 Billion Views!', *Visible Measures* (online), (4 April 2013), <<http://www.visiblemeasures.com/2013/04/04/the-harlem-shake-hits-1-billion-views/>>

⁵⁷² The official YouTube blog estimated 40,000 *Harlem Shake* meme videos existed by 15 February 2013. Kevin Allocca. 'The Harlem Shake Has Exploded (Updated)', *YouTube Trends* (online), (12 February 2013), <<http://youtube-trends.blogspot.com.au/2013/02/the-harlem-shake-has-exploded.html>>. By May 2015, that had increased to 2.3 million videos with over 4.7 billion views. Kevin Meenan. 'D is

would not be possible to link the hundreds of *Harlem Shake* meme videos with copyright owners. Copyright owners would be unable to efficiently track the 4.7 billion views, monetise these videos or distribute royalties.

Only after the *Harlem Shake* meme did it emerge that the *Harlem Shake* itself had been created without sample clearances. This omission is particularly noteworthy as two of the most distinct parts of *Harlem Shake* are vocal samples. The vocal sample of the lyrics 'con los terroristas' from Philadelphia's *T&A Breaks 3: Moombahton Loops and Samples* (which itself samples and isolates vocals from Hector Delgado's *Los Terroristas*) provides the opening audio in the *Harlem Shake* meme. Likewise, the vocal sample 'then do the Harlem Shake' from rapper Plastic Little's *Miller Time* provides a key marker in the song's structure and also provides the name for the recording. As the head of Baauer's record label confirmed, sampling clearance happened retrospectively: 'We didn't know there were any samples in the song to begin with... But when it came to clear the samples—because otherwise he would make negative money—we wanted to help him out.'⁵⁷³

Despite the lack of copyright clearance, the copyright environment on YouTube enabled *inter alia* by content identification allowed the creation and distribution of the *Harlem Shake* meme to generate copyright revenues. Some of these revenues went to Baauer and his record label. As Diplo explains: 'Honestly, that record was the thing that saved the label, because a year ago we were going to fold because we couldn't figure out how to make money... Then we just started giving music out for free and it worked out.'⁵⁷⁴ Diplo also confirms that the sampled artists also shared

for Dance: #10YearsofYouTube', *YouTube Trends* (online), (5 May 2015), <<http://youtube-trends.blogspot.com.au/2015/05/d-is-for-dance-10yearsofyoutube.html>>

⁵⁷³ Kia Makarechi. "'Harlem Shake' Samples Cleared By Diplo After Unlicensed Use Attracted Complaints', *The Huffington Post* (online), (25 April 2013), <http://www.huffingtonpost.com/2013/04/25/harlem-shake-samples-diplo_n_3157430.html>

⁵⁷⁴ Ibid

in copyright revenues with artists sampled by Baauer: Hector Delgado and Jayson Musson from Plastic Little.⁵⁷⁵

While it is unclear that any *Harlem Shake* meme video creators received any revenue from their videos, it is notable that their video and other meme videos were not blocked from YouTube. From an economic standpoint, this ensured that social benefits flowed, even if the distribution of those benefits was not ideal.

Regardless of the allocation of revenues, the *Harlem Shake* meme gives a prominent example of the link between *ex post* monitoring and originality. Recent comments on TheSunnyCoastSkate's YouTube page for *The Harlem Shake v1 (TSCS original)* provide a remarkable articulation of two views: one that arbitrarily anchors itself to a chosen version, and one that tolerates uses that contribute incremental originality in a sequence of works.

As the first comment in the figure below shows, user Whatlez's anger at TheSunnyCoastSkate is palpable. Whatlez overlooks Filthy Frank's appropriation of Baauer's track, but takes great issue with TheSunnyCoastSkate for 'stealing Frank's meme'. Another user, We Remotely Low, acknowledges Frank's original contribution in starting the meme but also acknowledges the additional original contributions of TheSunnyCoastSkate.

⁵⁷⁵ Ibid

 **whatlez** 3 months ago
I had this video liked. Fuck you guys for stealing Frank's meme.
REPLY 11  

Hide replies ^

 **We Remotely Low** 2 months ago
They added to it, and that's what everyone else copied.
REPLY 1  

 **whatlez** 2 months ago
Considering Frank's video has like twice the views that doesn't make sense.
REPLY  

 **We Remotely Low** 2 months ago
Also, it doesn't need a lot of views. Even if 2 people saw this and made their own videos, 2 more people could see each of those, and so on, multiplying, and becoming huge. Not everyone saw the original and got inspired. Probably each and every person got exposed to the harlem shake from a different video.
REPLY  

 **whatlez** 2 months ago (edited)
At the end of the day Filthy Frank did it first and then these guys copied so Frank posted it in a separate video which blew up more than this one. At least most people see Frank as the originator and just see these guys as copycats. Even Wikipedia and other sources for this meme gives frank credit.
REPLY  

 **We Remotely Low** 2 months ago
things, like MC5 and The Stooges. Obviously inspiring them. These bands are now labeled as Protopunk. But if you don't listen to that, this comparison makes no sense. Yeah, Frank started an idea, but this video finalized it and shaped it into what it became.
[Read more](#)
REPLY  

 **whatlez** 2 months ago
I'm still wondering why you are defending these guys. There's comments from months ago with you there. Just face it, if they didn't watch Frank, they would of never posted this video conveniently 3 days after Frank. If you can honestly tell me that then well done to these guys for making the meme.
REPLY  

Figure 14: YouTube comments, *The Harlem Shake v1 (TSCS original)*

Here, we see *ex post* monitoring enabling tolerated uses and supporting a creative community that collectively creates original works. Fewer barriers at first release provides time for a chain of remixes to demonstrate their originality separate from prior works. This departure from *ex ante* licensing nonetheless proves to be

consistent with one of copyright's purposes to encourage the creation of original works.

It is likely that the creation and uploading to YouTube of these remixes would have infringed at least the reproduction and communication rights under Australian copyright law. Yet, it is difficult to envision the propagation of remixes or memes without some tolerated use. The *Harlem Shake* meme demonstrates upstream creators tolerating downstream uses that were unlicensed. Earlier recording artists Delgado and Musson tolerated Baauer's *Harlem Shake*, just as Baauer tolerated the Filthy Frank and TheSunnyCoastSkate videos at the birth of the meme. Likewise, these two creators tolerated the thousands of meme videos that would follow. As McLeod and DiCola note in the context of mashups, remixes

'have not incurred the legal wrath of copyright owners. They are largely tolerated or ignored by the mainstream music industry, and since the turn of the millennium thousands of individuals have posted and shared their mashups without consequence.'⁵⁷⁶

These tolerated uses provide a bridge between infringement and licensed or otherwise authorised uses, particularly for amateur or early-career creators. As the US Internet Policy Taskforce and Google noted, 'amateur creators such as those starting out on YouTube often want to become professionals, but may find it difficult to negotiate the transition from amateur to professional given the different "clearance culture" in the professional world.'⁵⁷⁷

The *Harlem Shake* meme enables us to link the body of tolerated uses back to copyright incentives. Often, the discussion about copyright incentives is a discussion of financial incentives. The *Harlem Shake* example provides a reason to engage in a more plural understanding of incentives; the permission to create and share or the tolerating of these uses can itself be a copyright incentive. This helps

⁵⁷⁶ McLeod and DiCola, *Creative License*, 176

⁵⁷⁷ Internet Policy Taskforce, *White Paper on Remixes, First Sale and Statutory Damages* (online), (US Department of Commerce, 2016), <<https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf>>

explain why the millions of YouTube users have created and uploaded videos as part of the *Harlem Shake* meme, despite financial incentives flowing to others.

If copyright has a vested interest in the creation and distribution of more original works, then *ex post* monitoring can make valuable contributions to the copyright ecology. The *Harlem Shake* meme provides one prominent example of content identification enabling tolerated uses that are at least initially a small commercial threat to prior works and enable a chain of originality creations, some of which rise to the level of works.

From *ex-post* monitoring to originality

This chapter has outlined how automated content identification systems can enable *ex post* monitoring of copyright uses. Automation is key, as it raises awareness of copyright uses by lowering the transaction costs of monitoring potential uses of copyright material. Licensing agreements with music publishers and record labels are equally essential to *ex post* monitoring, though not for individual uses but rather to foster a culture of tolerated uses.

With the assistance of automated content recognition and licensing agreements with music publishers and record labels, *ex post* monitoring can improve copyright outcomes in at least four areas.

Firstly, *ex post* monitoring debunks the myth that '[a]rtists who cannot afford licensing fees have few good choices'.⁵⁷⁸ By avoiding upfront fees, it enables artists to use first and pay later. This provides an alternative to common requests for prohibitive licensing fees for use of samples.

Secondly, it increases the potential for copyright incentives to creators by enabling collective licensing for a broader range of uses. Traditional collective licences, such as those for mechanical rights for musical works and performance rights for sound

⁵⁷⁸ Mazzone goes on to state the most extreme of these choices 'One is not to use samples.' Jason Mazzone. *Copyfraud and other abuses of intellectual property law*, (Stanford University Press, 2011) (hereinafter Mazzone, *Copyfraud*), 61

recordings, have been granted with strict conditions. These collective licences provide users with binary outcomes: permission or no permission. With *ex post* monitoring, some of these conditions can be loosened, with the flexibility to review potential uses of copyright material upon detection, and to apply nuanced outcomes. Permission can be granted with or without taking a share of advertising revenue, and in some cases, downstream creators can share in copyright incentives. The emerging licences between content identification systems (or content platforms) and copyright owners, mark a potential leap for collective licensing.

Financial copyright incentives are commonly chosen by users of content identification systems. As Google notes: ‘The vast majority of the more than 8,000 partners using Content ID choose to monetize their claims, rather than block their content from appearing.’⁵⁷⁹ Google estimates that the music industry ‘chooses to monetize of 95% of sound recording claims’.⁵⁸⁰

Though monetising identified uses is commonplace, *ex post* monitoring may enable more nuanced allocation of sampling-related copyright incentives in future. For example, YouTube currently has a fixed royalty split, keeping 45 per cent of YouTube advertising revenue and passing on the remaining 55 per cent to video creators or content partners.⁵⁸¹ Arguably, 55 per cent is a low percentage to reserve to copyright creators, though it is more generous than other schemes such as the Beatport Mixes licence which grants only 10 per cent of the royalty from any

⁵⁷⁹ Google. *Submission to U.S. Copyright Office Section 512 Study*, (1 April 2016), 3

⁵⁸⁰ Google, *How Google Fights Piracy*, 6

⁵⁸¹ ‘It is widely publicised that YouTube maintains 45% of this revenue’. APRA AMCOS, *Q&A with Frank Rodi, APRA AMCOS Online & Mobile Licensing Manager*, (2013), <<http://apraamcos.com.au/news/2014/past-aprap-articles/youtube-and-you/>>.

‘Revenue splits have shifted from a high of 70/30 in favour of their premium creators to a standardized split of 55/45’. Stuart Cunningham, David Craig and Jon Silver, ‘YouTube, multichannel networks and the accelerated evolution of the new screen ecology.’ (2016) 22(4) *Convergence: The International Journal of Research into New Media Technologies* 376, 381

sale to the sampling artist.⁵⁸² Regardless of the gross amount reserved to copyright creators, there is additional scope to nuance the apportioning of incentives to different creators.

Dubset's 'timed-based' payments to rights holders provides one rough model for apportioning the 55 per cent in the context of sampling. As Dubset CEO Stephen White explains: 'For instance, say, a mix consists of exactly half of one song and half of another song. When a person streams the entire mix, half of the royalties would be allocated to the first song and half to the second song.'⁵⁸³ This time-based apportioning of revenue provides a proportional incentive to music creators; the more seconds of your music is used, the greater your share of revenue. This is of course only a rough means of rewarding originality but provides an initial step towards consistent apportioning of royalties at scale.

As *ex post* monitoring becomes more efficient and accurate, there is scope to support more inclusive incentive sharing arrangements. As YouTube's own material states, Content ID is only granted to those who operate at a large scale: 'To be approved, they must own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community.'⁵⁸⁴ Artists and smaller labels may sacrifice some incentives to use Content ID via a larger third party. If a large catalog of copyrights works remains a threshold criterion for using Content ID, the system may in some cases entrench existing market entry issues. Those who cannot enter miss out a portion of their potential copyright incentives. As Rebecca Tushnet neatly summarises: 'To those who have, more is given.'⁵⁸⁵

⁵⁸² Beatport. *How do royalties and payments work*, (Beatport, c2017), <<https://knowledgebase.beatport.com/kb/article/000115>>

⁵⁸³ Marc Hogan. 'Apple Music Strikes Deal to Stream Previously Unlicensed DJ Mixes and Remixes', *Pitchfork* (online), (15 March 2016), <<http://pitchfork.com/news/64163-apple-music-strikes-deal-to-stream-previously-unlicensed-dj-mixes-and-remixes/>>

⁵⁸⁴ Ibid

⁵⁸⁵ Rebecca Tushnet. 'All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing', (2014) 29 *Berkeley Technology Law Journal* 1447, 1464

Google explicitly excludes copyright owners of ‘mashups, “best of”s, compilations, and remixes of other works’ from directly using its Content ID system.⁵⁸⁶ As a result, remix artists must use third parties to use Content ID. This position is further entrenched on other content platforms by a set of objectives articulated by a collection of copyright owners and content platforms:

‘In coming together around these Principles, Copyright Owners and UGC Services recognize they share several important objectives: (1) blocking infringing user-uploaded content, (2) allowing wholly original and authorized uploads, and (3) accommodating fair use.’⁵⁸⁷

Dubset’s approach shows more nuance than Google’s, promising the same royalty rates for labels and publishers of any size, and artists of any prominence. As one commentator notes, ‘Major labels and independent labels are paid at the same rates. Big DJs and small DJs also earn the same rates.’⁵⁸⁸

Thirdly, *ex post* monitoring enables a wealth of tolerated uses, which informs fair use. Tim Wu has construed tolerated use as ‘a massive and fully legal exploitation of the fair use doctrine’.⁵⁸⁹ As the *Harlem Shake* meme example demonstrates, *ex post* monitoring can enable tolerated uses of copyright material which provides time for the world of original material to develop before facing the barrier of copyright permission. As coined by Tim Wu, a tolerated use is ‘the infringing usage of a copyrighted work of which the copyright owner may be aware, yet does nothing about’.⁵⁹⁰

⁵⁸⁶ Google, ‘How Content ID works’

⁵⁸⁷ CBS Corporation *et al.* *Principles for User Generated Content Services* (online), (c2006), <<http://www.ugcprinciples.com/>>

⁵⁸⁸ Glenn Peoples. ‘Apple Music, Dubset Partner to Stream Previously Unlicensed Remixes and DJ Mixes: Exclusive’, *Billboard* (online), (2016), <<http://www.billboard.com/articles/news/7256376/apple-music-dubset-partner-previously-unlicensed-remixes-dance>>

⁵⁸⁹ Tim Wu. ‘Tolerated Use’, 31 *Columbia Journal of Law and Arts* 617, (2008) (hereinafter ‘Wu, ‘Tolerated Use’’), 620

⁵⁹⁰ Wu, ‘Tolerated Use’, 619

Ex post monitoring enables copyright participants to strike flexible compromises between upstream and downstream uses. Flexible, context-specific systems may be more desirable than bright line rules. As Story J opined in *Folsom v Marsh* in the context of fair use:

[i]t is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, to lay down any general principles applicable to all cases. A definite standard would champion predictability at the expense of justification and would stifle intellectual activity to the detriment of the copyright objectives. We should not adopt a bright-line standard unless it were a good one—and we do not have a good one.⁵⁹¹

Ex post monitoring and fair use exploit the flexibility in vague rules, allowing delegation of power to those using the copyright system. Endicott and Spence support of vagueness in the context of copyright law for this very reason:

'The value that may lie in the use of vagueness to delegate power is the converse of the process value of precision. The process value of precision consists in reducing decision makers' discretion, yet there may be circumstances in which it is valuable to leave a discretion to decision makers. These are situations in which it is not possible fully to work out either the precise purpose or the appropriate breadth of a particular standard at the time at which it is first promulgated. Such standards may be more likely to develop in a way that is just and convenient.'⁵⁹²

Ex post monitoring delegates power to creators, distributors and other parties in the music community to decide what constitute tolerated uses. This creates a feedback loop to fair use, because tolerated uses establish over time what is a 'reasonable and customary' use, which the US Supreme Court recognised is likely to be fair use.⁵⁹³ Because norms 'change what fair use law itself permits', these tolerated uses change fair use over time.⁵⁹⁴ *Ex post* monitoring empowers copyright participants to identify what forms and reforms works, and allocate nuanced remedies and rewards for consumptive and productive uses.

⁵⁹¹ *Folsom v Marsh*

⁵⁹² Timothy Endicott and Michael Spence. 'Vagueness in the Scope of Copyright' (2005), 122 *Law Quarterly Review* 657, 663-664

⁵⁹³ '[T]he fair use doctrine was predicated on the author's implied consent to 'reasonable and customary' use'. *Harper & Row v Nation*, 550

⁵⁹⁴ Mazzone, *Copyfraud*, 41

Fourthly, *ex post* monitoring generates enormously useful usage data. Benefits flow not only from content identification, which captures data about uses. They also flow from uses that are not blocked, which provides a truer picture of uninhibited practices of audience listening and artist creation. This assists industry to understand audiences for works, and the ways in which works are shared, used and reused. Put in the language of originality, *ex post* monitoring enables the music industry and community to better understand how originality is stitched together across time and works. This helps inform jurists, sampling clearance specialists and others involved in resolving copyright disputes, by providing data on ‘works’ intended audience and... social science surveys’.⁵⁹⁵

This usage data has already helped us understand how content platforms such as YouTube, Spotify and SoundCloud have vastly expanded the scale and range of uses of musical works and sound recordings. With this expansion comes both a greater scale of both infringing and original uses. While this opens new possibilities for originality, it also challenges the limits of *ex ante* licensing.

Earlier, this thesis noted Siva Vaidhyanathan’s fear in 2003 that the ‘practice of sampling without permission has all but ended’.⁵⁹⁶ *Ex post* monitoring helps ensure that sampling without permission can continue. There is great potential for *ex post* monitoring to continue recalibrating the copyright balance towards stronger copyright incentives and lower barriers. By tapping into a range of content identification systems, *ex post* monitoring provides an opportunity for the music industry and community to weigh up the merits of tolerating potentially infringing uses in the pursuit of greater originality, and not just for sampling artists.

Ex post monitoring is an example of what Carys Craig has described as an ‘expansive approach’ to technology neutrality: ‘what must be consistent across

⁵⁹⁵ Manta, ‘Reasonable Copyright’, 1303

⁵⁹⁶ Vaidhyanathan, *Copyrights and Copywrongs*, 15

technologies is the application of core copyright concepts and doctrine in a manner that appropriately balances the rights and interests at stake—maintaining, in the face of technical change, the steady pursuit of copyright’s policy goals.’⁵⁹⁷

Australian DJ Pogo provides one more example of the possibility of *ex post* monitoring. He has stitched together a chain of video mashups from snippets of Disney films, some of the most fiercely guarded copyright assets. Some of Pogo’s mashups are born of samples from single films, such as *Expialidocious* from *Mary Poppins* and *Wishery* from *Snow White and the Seven Dwarves*.⁵⁹⁸ Others draw out themes across Disney films; for example, *Bloom* brings together the voices of female Disney protagonists.⁵⁹⁹ While Disney has enlisted Pogo to make some authorised mashups—for example the *Upular* mashup of the film *Up*—this has not prevented continued unauthorised mashups. For example, Pogo has rearranged *Upular* into *Trumpular*, a mashup from audio snippets of President Trump.⁶⁰⁰ *Trumpular* juxtaposes *Upular*’s saccharine and upbeat funk arrangement with samples of President Trump making harsh political statements, which are vocoded and spliced to form a melody. The number of views of Pogo’s videos provides a strong indicator of the potential of *ex post* monitoring. In all, Pogo’s videos posted to YouTube have been viewed over 170 million times at the time of writing.⁶⁰¹ To

⁵⁹⁷ Bringing these perspectives from the neighbouring fields of internet law and competition law, Carys Craig also cautions against a narrow or blind application of the concept of technology neutrality, which aims to replicate existing rights in the environment of new technology. Carys Craig, ‘Technology Neutrality: Recalibrating Copyright in the Information Age’ (2016), 17(2) *Theoretical Inquiries in Law* 601, 606-612

⁵⁹⁸ Pogo, ‘Expialidocious’, *YouTube* (online), (24 May 2009), <https://www.youtube.com/watch?v=3Za-V_lhwGg>. Pogo, ‘Wishery’, *YouTube* (online), (4 November 2010), <<https://www.youtube.com/watch?v=qs1bG6BIYlo>>. Pogo,

‘Upular’, *YouTube* (online), (25 December 2009), <<https://www.youtube.com/watch?v=JVxe5NIABsI>>

⁵⁹⁹ Pogo, ‘Bloom’, *YouTube* (online), (22 June 2011), <https://www.youtube.com/watch?v=t_htoSaqFf4>

⁶⁰⁰ Pogo, ‘Trumpular’, *YouTube* (online), (2 October 2016), <https://www.youtube.com/watch?v=1vx3_2ks5qQ>

⁶⁰¹ Nick Bertke, ‘About’ [Pogo], *YouTube* (online), (2017), <<https://www.youtube.com/user/Fagottron/about>>

put this in perspective, consider that the YouTube channels for Australian artists John Farnham and The Avalanches have under 30 million views each.⁶⁰²

Pogo's unauthorised remixing and distribution of mashups of Disney films may appear foolhardy. However, tolerated use on YouTube—enabled by a combination of a safe harbour regime, content identification and *ex post* monitoring—provides one example of copyright promoting incremental originality:

'Bertke's first pop-culture remix was "Alice," which used Disney's animated Alice in Wonderland as its source material. When it became popular online, Bertke was contacted by Disney. But to his surprise, instead of a subpoena, the company offered him a job: a commissioned work, to be based on sounds from the Pixar movies. The meeting resulted in a Pogo remix called "Upular," which now has more than 6 million views on YouTube — and counting.'⁶⁰³

Moreover, Pogo's experience with the copyright system demonstrates a change in the perspective of the copyright industries towards appropriation. Disney is one of the largest copyright conglomerates in the history of copyright, and a former industry icon against unauthorised uses in the digital age. For Disney to commission work from an unauthorised mashup artist such as Pogo is progress indeed. Equally, it symbolises an at least partial truce between sampling artists and copyright industries, with a sampling artist voluntarily using Disney films as raw material for mashups without trying to form a subculture to the Disney culture.

Looking to the future, *ex post* monitoring holds great promise as an operational piece of an originality-friendly, and therefore remix-friendly, copyright on online content platforms. The challenge for copyright owners and their representatives is to harness these systems not only for enforcement purposes, but also to exploit them to better connect artists with their audiences and communities. *Ex post* monitoring also brings an opportunity for copyright owners to build a richer

⁶⁰² The Avalanches. 'About' [The AvalanchesVEVO], *YouTube* (online), (2017), <<https://www.youtube.com/user/TheAvalanchesVEVO/about>>. See also John Farnham. 'About', *YouTube* (online), (2017), <<https://www.youtube.com/user/JohnFarnhamVEVO/about>>

⁶⁰³ NPR. 'Pogo: Harnessing The Innate Rhythm Of Pop Culture', *NPR* (online), (21 April 2012), <<http://www.npr.org/2012/05/06/150981484/pogo-harnessing-the-innate-rhythm-of-pop-culture>>

understanding of originality, not just with new works but also across their existing catalogues.

The challenge for policymakers and governments is to bring *ex post* monitoring into their view over time, improving their view of contemporary consumption and production practices and avoiding a focus on collecting societies which only see and present a fraction of online copyright uses.⁶⁰⁴ Content identification systems are already displacing the gatekeeper role of copyright, governing the flow of works through digital networks and between creators, other creators and consumers, and the flow of copyright incentives from advertisers and subscribers to creators, distributors and platforms. In this sense, the creators of content identification systems are pseudo-policymakers. While the private sector has long been involved in the distribution and enforcement of copyright in the music industry, governments should continue to be concerned about the appropriate allocation of power and roles between public and private interests. Currently, it is perhaps unclear whether governments need to regulate in this area and whether the rules applied in *ex post* monitoring have a place in statute. It is clear already that government will benefit from understanding how these systems operate to inform future copyright reforms. An operational understanding of content identification and *ex post* monitoring will underpin the effectiveness of the next generation of copyright law for digital platforms.

⁶⁰⁴ An understanding of *ex post* monitoring may aid better understanding of online content business models, including the influence of open licencing on licencing practices, Blockchain on regulation of individual uses and the monetisation of uses.

VII. Recapitulation: Harmony between sampling and originality

A reprise of counter point

This thesis closes with optimism that we are witnessing a second chapter of sampling and its tentative accord with copyright. Chapter I began at the turn of the millennium with the tale of The Avalanches and their struggles in gaining sample clearance for *Since I Left You*. Many feared the practice of sampling without permission had all but ended, with Siva Vaidhyanathan and others expressing concern that the operation of copyright was chilling the creative forms behind sampling.

The recent release of a long-awaited sophomore album *Wildflower* allows us to close this thesis as we began, with The Avalanches and their copyright experiences.⁶⁰⁵ *Wildflower* references the 1972 recording of the same name by Skylark, which has been commonly sampled in hip-hop. It also comments on the nature of sampling. On their own, many wildflowers cannot spawn new plants; insects must spread seeds to complete their reproductive cycle. Likewise, sampling artists help spawn future sound recordings from existing recordings, playing their part in a living culture. Given this context, it is little surprise that the album cover features wildflowers and a butterfly. As a rebellious reference to Sly and the Family Stone's *There's a Riot Goin' On*, *Wildflower* also features the United States flag, replacing the stars with wildflowers and overlaying a butterfly on the stripes.⁶⁰⁶ Like *Since I Left You*, *Wildflower* was critically and popularly acclaimed, garnering several ARIA nominations. Though The Avalanches did not convert any

⁶⁰⁵ The Avalanches. *Wildflower*, (Modular, 2016)

⁶⁰⁶ Sly and the Family Stone. *There's a Riot Goin' On*, (Epic, 1971). See Zane Lowe. *Interview with The Avalanches* (online), (Apple Music, 1 June 2016), <<https://itunes.apple.com/us/post/idsa.eacf609a-2876-11e6-ba78-6c8e419fd692>> (hereinafter 'Lowe, *Interview with The Avalanches*'), 1:51

nominations into wins, sampling was the winner at the ARIA Awards, with key awards won by Australian sampling artist Flume.⁶⁰⁷



Figure 15: Album covers from *There's a Riot Goin' On* and *Wildflower*

Wildflower took even longer for creation and release than *Since I Left You*, leading many to question whether it would arrive at all. One music commentator asked, 'Will this damn thing ever get released?'⁶⁰⁸ The graphic artist who designed the *Wildflower* album cover, Chris Hopkins, noted the extended gestation period for *Wildflower*: 'When Darren [Seltmann of The Avalanches] first contacted me, George W. Bush was still president.'⁶⁰⁹ Even after its release, the eon devoted to *Wildflower* led one journalist to observe: 'Though the Guinness Book of World Records doesn't

⁶⁰⁷ For example, Flume's *Innocence* mixes fresh vocals from AlunaGeorge, new synthesiser and percussion parts with a pitched and sped up sample from Alpha Wann's *A deux pas*. Flume. 'Innocence', *Skin*, (Future Classic, 2016). Alpha Wann. 'A deux pas', *Alph Lauren 2*, (Don Dada, 2016). Flume received awards for album of the year, best male artist, best dance release, best pop release and best independent release. ARIA. 'And the award goes to...', *Aria Awards* (online), (ARIA 2016), <<http://www.ariaawards.com.au/News/2016/AND-THE-ARIA-AWARD-GOES-TO>>

⁶⁰⁸ 'First there was a 2006 press release issued by the Avalanches' record label Modular that stated in no uncertain terms that "they've made the record of their lives basically". Then a note from the band themselves: "It's so fuckin party you will die." Levin, 'Was the Avalanches' *Since I Left You* too good to follow up?'

'First there was a 2006 press release issued by the Avalanches' record label Modular that stated in no uncertain terms that "they've made the record of their lives basically". Then a note from the band themselves: "It's so fuckin party you will die." Levin, 'Was the Avalanches' *Since I Left You* too good to follow up?' [alanches-album-art/>](#) (hereinafter 'Cartwright, 'Lost Art Spent a Decade')

award a designation for “Most Time Spent Continuously Working on One Album,” The Avalanches would have to be strong contenders if such a category were created.’⁶¹⁰

The gestation for *Wildflower* had begun at least 16 years prior, the year that *Since I Left You* was released. As band member Tony di Blasi revealed *Saturday Night Inside Out* is the ‘last song on the record [*Wildflower*], which is quite ironic because 16 years ago Robbie gave us all a mixtape of all the new little songs he’d been doing. This was the first song on that tape 16 years ago and it’s the last song on this record. It ties it all up very nicely.’⁶¹¹ Further versions of *Wildflower* were created throughout the 16 years. Graphic artist Chris Hopkins, who designed the cover art and other visual material for *Wildflower*, recounts his experience with an earlier version in 2007: ‘It was a different record back then... but yeah, a bunch of the songs are on the current record, and stuff like [the track] Frankie Sinatra was basically there.’⁶¹² The post-production mixing of the record alone took five years.⁶¹³

Rearrangement continued through to the last moment of the mastering of *Wildflower*. As band member Tony di Blasi recounts: ‘At 6:00 in the morning, we were like, “Well, that has to be it.” And that was when the record was over. So in all these years, we were still tweaking until he had to get on a plane to go master... We could have tweaked for years. We could still be doing it now.’⁶¹⁴

⁶¹⁰ Matt Fink. ‘The Avalanches: Worth Every Second’, *Under The Radar* (online), (3 March 2017), <http://www.undertheradarmag.com/interviews/the_avalanches> (hereinafter ‘Fink, ‘The Avalanches: Worth Every Second’)

⁶¹¹ Triple J. ‘The Avalanches’ guide to the samples, features, and stories of *Wildflower*’, *ABC* (online), (ABC, 1 July 2016), <<http://www.abc.net.au/triplej/musicnews/s4492761.htm>>

⁶¹² Cartwright, ‘Lost Art Spent a Decade’

⁶¹³ Chris Johnston. ‘You’ve waited 16 years for this. So what took The Avalanches so long?’, *The Sydney Morning Herald* (online), (1 July 2016), <<http://www.smh.com.au/entertainment/youve-waited-16-years-for-this-so-what-took-the-avalanches-so-long-20160624-gprdtg>> (hereinafter ‘Johnston, ‘You’ve waited 16 years for this’)

⁶¹⁴ Fink, ‘The Avalanches: Worth Every Second’

Rearrangement extended beyond mastering and release of *Wildflower*. Live performances by The Avalanches featured longer versions of samples used in the album, as well as instrumentals and vocals. Likewise, 17 years after the creation and release of *Since I Left You*, rearrangement continues. The personnel performing as part of The Avalanches has undergone multiple iterations. Of the six band members at the time of *Since I Left You*, only Tony di Blasi and Robbie Chater remain. In live performances by The Avalanches, these two are now accompanied by other artists, including Jonti (who performed a live cover of *Since I Left You* in 2014), Paris Jeffree and Spank Rock.

Rearrangement extended beyond the music and sound of *Wildflower* to other art forms. The graphic designer of the album cover and accompanying animations confirms countless versions of visual art in the album: ‘There’s versions and versions and versions of the album cover and the animations that are not like the final one—with different music and different visuals—but they just weren’t right. But that’s kind of how the record stuff was too.’⁶¹⁵

Wildflower was also rearranged to form an audiovisual montage. Departing from the usual reliance on music videos to accompany music releases, The Avalanches collaborated with Chris Hopkins and audiovisual artists Soda Jerk to create a 13-minute video montage, *The Was*. Described by one of its creators as ‘part experimental film, part music video and concept album’, this montage was the product of extensive rearrangement of samples from *Wildflower* and snippets of footage from 129 popular films.⁶¹⁶ The film was screened and made available online mere days before the release of *Wildflower*.

While copyright did not prevent the creation of *Wildflower*, or end the practice of sampling as some feared in the 1990s, it did deter some originality. The operation

⁶¹⁵ Cartwright, ‘Lost Art Spent a Decade’

⁶¹⁶ Soda Jerk, The Avalanches and Chris Hopkins. ‘The Was’, *Soda Jerk* (online), (2016), <http://www.sodajerk.com.au/video_work.php?v=20160709074312>. See also this review of debut screening of *The Was*. Conor Bateman. ‘The Was – Soda Jerk vs The Avalanches’, *4:3 film* (online), <http://fourthreefilm.com/2016/07/the-was-soda_jerk-vs-the-avalanches/>

of copyright impeded the creation and release of *Wildflower*, as had been the case for *Since I Left You*. Though the constant versioning of *Wildflower* produced an original album, it had an unfortunate interaction with the operation of copyright. Sample licensing delays compounded the delays from frequent changes to arrangements and introduction of new samples.⁶¹⁷ As the sample clearance specialist for *Wildflower* confirms:

'I started clearing samples in 2009, which none were used on the record... I started in earnest again in 2012... At the end of 2015, The Avalanches came back to me and were like, "OK, we're ready to go." I thought it was going to be a reinstating the licenses I had already cleared. They came through with like fifteen new samples, and I went "Whoaaa!" I had not been prepared for that.'⁶¹⁸

The time required for versioning and sample clearance burdened The Avalanches with further delays, to renew or reapply for sample clearances:

'These publishers and labels will hold your quote for 30, 60, 90 days. And our Avalanches project went on hold, several times over the years. So I'd have to go back to the labels and publishers and renew these quotes to keep them alive. I think they do that because sometimes people won't come back.'⁶¹⁹

The clearance for some samples on *Wildflower* was particularly protracted, and required personal intervention by The Avalanches.⁶²⁰ As one music journalist noted:

'The trickiest sample to clear was a portion of a kids' choir singing Come Together by The Beatles for the song Noisy Eater, which also samples the '60s teen musical Putney Swope: the general rule is you can't sample Beatles' music because the

⁶¹⁷ This experience contrasts with *Since I Left You*, where the *Gimix* mixtape which is extremely close to the released version of *Since I Left You*, was ready to support sample clearance two years prior to release. As the clearance specialist for *Since I Left You* confirms, 'When they came to me, they were pretty much ready to go. It was probably a couple years.' Coleman, 'Meet the Woman Who Helps The Beastie Boys, Beck And The Avalanches Clear Their Samples'

⁶¹⁸ Coleman, 'Meet the Woman Who Helps The Beastie Boys, Beck And The Avalanches Clear Their Samples'

⁶¹⁹ Coleman, 'Meet the Woman Who Helps The Beastie Boys, Beck And The Avalanches Clear Their Samples'

⁶²⁰ At one point, 'the legal procedure for acquiring the rights to each sample used on the record ground to a halt.' Cartwright, 'Lost Art Spent a Decade'

owners – Paul McCartney and Yoko Ono – don't allow it. So the pair wrote a letter to the other pair outlining the spirit of what they wanted to do, stressing it wasn't gratuitous, but respectful. The letter was "heartfelt", says Chater, and it worked.⁶²¹

Being a signed artist with a major record label did not ameliorate these delays faced by The Avalanches. Whereas *Since I Left You* was released under Modular Records as a standalone label, *Wildflower* is now part of the Universal Music conglomerate, which owns 50 per cent of shares in Modular Records.⁶²² These delays existed, despite The Avalanches becoming part of this larger record label family.

Ultimately, it was the interaction between copyright clearances and the extensive rearrangement and incremental originality behind *Wildflower* that explains most of the 16 years. The need to renew sample clearance quotes and to seek additional clearances of new uses of samples increased transaction costs. This was an acute problem for The Avalanches, given the extensive process of rearrangement of *Wildflower* which exceeds even the rearrangement for *Since I Left You*. The more extensive their experimentation with samples, the greater the copyright transaction costs.

These negative interactions between the original rearrangement of samples by The Avalanches and costs, delays and compromises are counter to copyright's purpose. Copyright sometimes fails to see the potential for future originality in prior originality, and the product of past rearrangement in current originality. The Avalanches' philosophy of treating samples as raw material for works, only becoming original in certain arrangements, is perhaps more in line with copyright's purpose:

'I think the vast majority of the samples on this record were pretty old and obscure and weird and far out. Those moments remind me that they're not the point, the

⁶²¹ Johnston, 'You've waited 16 years for this'

⁶²² 'Under the Shareholders' Agreement, Mr Pavlovic and Universal each held 50 per cent of the shares in Modular'. *Pavlovic v Universal Music Australia Pty Limited* (2015) NSWCA 313, 32

ingredients aren't the point. They get focused on a lot. We're not elitist, not into finding the rarest stuff. The end result is what we're after.'⁶²³

Towards a revised theory of originality

This thesis has traversed many stories of originality through rearrangement, starting with The Avalanches and other examples of sampling artists. Chapter II considered how Madonna's *Vogue* was the latest in a string of appropriation of a horn hit. Likewise, Chapter III considered how Gorillaz completely rearranged their album following the addition of bass player Junior Dan. Completing the Exposition, Chapter IV considered how Italian lyrics and Goliardic poems yielded chains of original works, with the wholeness and integrity of works unpicked and rewoven across centuries and continents.

However, in the age of automated content recognition system and online music platforms such as YouTube and Spotify, some sampling artists have a cursory regard for operational features of copyright law. Chapter V considered several examples of mashup, including Gotye's *Somebodies*, which involved Gotye remixing fan covers of his own recording *Somebody That I Used To Know*. Chapter VI considered how the *Harlem Shake* meme rose from millions of unauthorised and distributed instances of sampling, transforming sound recordings into a dance and video movement.

By reimagining originality as rearrangement to clarify the copyright work, this thesis helps explain why sampling conflicts with copyright law. While sampling is at odds with the operation of copyright, it is aligned with the purpose of copyright to encourage progress and innovation. If we accept that originality is incremental, then productive uses of prior works, including appropriative uses, are well aligned with progress and innovation.

⁶²³ Lachlan Kanoniuk. 'Introducing: The Avalanches (again)', *faster louder*, (7 July 2016), <<http://fasterlouder.junkee.com/the-avalanches-interview-robbie-chater-2016-wildflower/864236>>

Revisiting originality at the scale of samples reveals that the creation of copyright works has long been a process, at least in part, of appropriation. In truth, appropriation and originality have long possessed strong commonalities. As this thesis has discussed, composers of the Baroque era frequently appropriated from one another. Lawrence Lessig has chronicled how many of Disney's classic films parodied or appropriated earlier fables and films.⁶²⁴ More recently, the flute solo in Men At Work's *Down Under* was discovered to have appropriated *Kookaburra Sits in the Old Gum Tree*.⁶²⁵ These and many other examples canvassed throughout this thesis demonstrate that the appropriation of original works can yield further original works.

In essence, this thesis has articulated a theory of originality. What makes a copyright work original is the wholeness of the arrangement, not the absence of prior or appropriated material. Robbie Chater of The Avalanches reinforces the centrality of wholeness to their work, noting there was 'a lot of difference between a lot of songs on the record [*Wildflower*], trying to get them sound the one thing is quite a hard process too'.⁶²⁶ The combination of samples with new vocals in *Wildflower* focused on integrating parts into a new whole:

'None of the songs were easy to finish with the vocalists. It was always back and forward, back and forward. We didn't want the vocals to seem, you know, tacked on... It really needed to feel like part of the music, otherwise, we didn't really want to do it.'⁶²⁷

While sampling unfixes sound recordings, it does not necessarily follow that it destroys value in the previous whole. The *Harlem Shake* meme did not displace the value of Baauer's sound recording; in fact, it gave Baauer's recording the best promotional lift an artist could imagine. Likewise, *Since I Left You* did not diminish the aesthetic value in Madonna's *Holiday*.

⁶²⁴ Many of these films created through appropriation in the first half of the twentieth century are now some of the most valuable copyright assets. Lawrence Lessig, *Free Culture: How big media uses technology and the law to lock down culture and control creativity*, (The Penguin Press, 2004), 21-24

⁶²⁵ *EMI v Larrikin*

⁶²⁶ Lowe, *Interview with The Avalanches*, 7:48

⁶²⁷ *Ibid*, 17:33

The appropriation and transformation of parts of prior works into a new arrangement is the foundation of future originality. At an operational level, we may see a trade-off between prior creator's rights and the desire of downstream creators to create using prior works. This seeming contradiction in interests sees only individual transactions and misses the potential benefits locked within a work until it contributes to future works. Because originality is more about the arrangement and less about the raw material, exclusive rights that leave room for original downstream uses are more consistent with the purpose of copyright.

This thesis makes the normative argument that the operation of copyright should distinguish between consumptive and productive uses of copyright. This would remove barriers so potential creators could more easily contribute to the body of originality, progress culture and innovate through new modes of creation. As a result, at least some works of sampling should be recognised as original works for the purposes of copyright. It is important to make clear that this argument does not intend to prefer existing or future original works; it is interested in the body of originality. For this reason, it differs from Paul Théberge who argues:

'Sampling as a creative practice is at odds with copyright in that it is fundamentally based on the idea of "unfixing" recorded sounds: that is, the aesthetic "value" of the recorded object lies less in the form of its fixation than in its reuse in a new musical context.'⁶²⁸

The existing operation of copyright involves a system of rights and exceptions. Rights attach to existing works. Exceptions are seen to carve out from these rights. In this view, exceptions sacrifice the incentive afforded to authors of existing works to provide access for users. However, this zero-sum view undervalues the potential value in a copyright work, which is not only an original arrangement but also a collection of parts that are potentially building blocks for future works. This black and white view of rights and exceptions causes copyright law to overlook potential colour and creativity. The parallel passage of appropriation and copyright over

⁶²⁸ Paul Théberge. 'Technology, Creative Practice and Copyright', in Simon Frith and Lee Marshall (eds), *Music and Copyright (2nd edition)*, 139-156, 147-148

centuries confirms that the notion of a work can be consistent with the borrowing, adaptation, transformation and remix of prior works.

Moreover, a binary view of rights and exceptions divorces prior works from latter works. Even if one ignores value in appropriation, there is still virtue in balancing interests in prior and latter works. A system biased towards rights in prior works without sufficient regard for downstream creators is likely to limit incentives for future originality. In each use, we should look not only for uses of existing copyright material but the seeds of future originality. This is the perspective often missing from copyright's current operation.

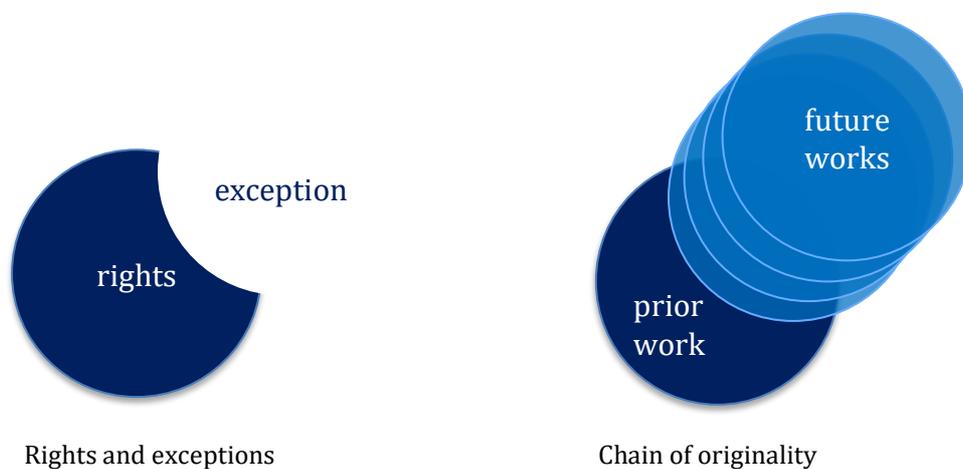


Figure 16: From rights and exceptions to a chain of originality

For The Avalanches, contributing to a chain of originality is more important than simply creating an album. Like the creators behind Gorillaz discussed in Chapter III, The Avalanches' Robbie Chater downplays the importance of individual creators. Instead, he focuses on how a music community of creators engaging in acts of listening and versioning form a chain of rearrangement. As Robbie Chater notes

'... personally, The Avalanches is just the music, you know. It's not myself or Toni or anyone, you know. It's what happens when you find a record that might be 50 years old and sample that and combine that with other old records and that sort of filters through Tony and I and then it gets played on your radio show and then someone listens to it and that whole cycle of music... we're all Avalanches.'⁶²⁹

⁶²⁹ Lowe, *Interview with The Avalanches*, 11:52

What this thesis proposes ventures beyond merely excluding uses of insubstantial parts of works.⁶³⁰ It contends that even a use of a substantial part of work should be less likely to infringe if it is more transformative and therefore more likely to yield an original work. In contrast with consumptive uses, creative uses deserve preferential treatment by copyright. This is already consistent with the concept of originality and the purpose of copyright but not necessarily the operation of copyright.

The contrasting journeys of two types of sampling artists illustrate the potential benefits of the two complementary policy approaches discussed in the Development of this thesis.

For artists who take the ‘first licence, then use’ path, implementation of a fair use regime as recommended by the Australian Law Reform Commission may promote transformative use and therefore originality.⁶³¹ Currently, The Avalanches take this traditional path. Even being part of the Universal Music conglomerate, The Avalanches were plagued by extensive licensing delays and costs. These barriers for sampling artists and other appropriation artists inhibit the purpose of copyright to promote progress and innovation. A fair use regime may provide a nuanced relief valve for artists making such transformative uses. While such a regime would be unlikely to relieve sampling artists of all licensing burden, they would provide an appropriate incentive—lower licensing burden—for more transformative uses.

⁶³⁰ ‘In determining whether the part taken is “substantial”, the most important question is whether the part is an “essential”, “vital” or “material” part, in relation to the work as a whole.’ ALRC, *Copyright and the Digital Economy Final Report*, 210 (citing Staniforth Ricketson and Chris Creswell. *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, (Thomson Reuters, c2013), [9.02] and *Blackie & Sons Ltd v Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396). The concept of the substantial part is related to the US *de minimus* standard, by which some US courts refuse to find copyright infringement in the case of minimal uses

⁶³¹ See Recommendations 4 and 5. ALRC, *Copyright and the Digital Economy Final Report*, 13-14

For artists like Pogo, Danger Mouse and Girl Talk who take the a ‘first use, then monitor’ approach, *ex post* monitoring provides an alternative path through the copyright jungle. Though little attention has been given to content identification systems, they provide *ex post* monitoring for those musicians and recording artists who wish to transform prior material without facing the upfront costs of realising upfront revenue. By making mashups of Disney films, then distributing on YouTube as a tolerated and unauthorised use, Pogo enabled millions of viewers to enjoy his creations. In tandem, *ex post* monitoring enabled Disney to discover a creative artist and commission further transformative works.

The following Coda presents a short case study which brings together concepts and echoes themes of the preceding chapters. Before proceeding to this Coda, it is worthwhile to suggest research areas where this thesis makes contributions, and anticipate how this thesis may be rearranged to support further original research.

One area is the degree of overlap between prior and future original works under the *Berne Convention*. While this thesis has built its foundation on a reconceptualisation of originality as rearrangement, practical implementation by member states would require either amendment of or compliance with this convention. Two excerpts from the *Berne Convention* are particularly relevant. Subarticle 2(3) requires recognition of certain translations, adaptations, arrangements and alterations as original works: ‘Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.’⁶³² Because subarticle 2(3) limits recognition of these downstream works to the extent it does not ‘prejudice the copyright in the original work’, it requires member states to make a judgement about the boundary and overlap between the prior and downstream works. This judgement is made more complex by Article 12: ‘Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.’⁶³³

⁶³² *Berne Convention*, 2(3)

⁶³³ *Berne Convention*, 12

Another area for future research is a standalone exception for quotation, which forms an alternative policy to those proposed in the Development of this chapter. The *Berne Convention* already requires that quotation is permitted under certain circumstances, and is implemented partially and implicitly by fair dealing exceptions in Australia.⁶³⁴ Future research could focus on making such an exception more complete and explicit. Certainly, such an exception could improve downstream access to parts of works, though several challenges would need to be surmounted.

Quotation emphasises the individual contributions of authors and individual works. This may fail to encourage the collective contributions of a creative community and the cumulative rearrangement of material into new works. This is more than an abstract issue, especially for musicians. As Elizabeth Adeney has noted in the context of German copyright law:

‘Musical quotations within musical works do not fit neatly into the general quotation regime, which is adapted more for language works. Music contains no inverted commas, no italics and no footnotes. In music it is not easy for the quoting author to make clear the purpose of a quotation or the distinction between a quotation and an illegitimate reproduction of the quoted work.’⁶³⁵

One can imagine that with no clear punctuation to demarcate quotes, it would also be challenging separate those quotes from common melody shapes, rhythmic patterns and harmonic progressions that may arise in a genre or style or music.

A quotation may also enable transformative or original uses of whole works, which may become part of a new whole. Ricketson and Ginsburg argue that there are

⁶³⁴ ‘It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.’ *Berne Convention*, 10(1)

⁶³⁵ Elizabeth Adeney. ‘Appropriation in the Name of Art: Is a Quotation Exception the Answer?’, (2013), 23 *Australian Intellectual Property Journal* 142, 153

circumstances where quotation of a whole work is permissible, though case law is sparse on this issue.⁶³⁶

Having focused on the concept of originality, this thesis may be useful in extending scholarship relating to the idea-expression dichotomy, a related core concept in copyright. In the realm of works, an expression is both original and copyrightable, while an idea is neither. Chapter II suggested that ideas and expressions are not binaries but rather on a spectrum of originality. If we accept this, to what extent can ideas be arranged to form an expression? This thesis also points to further critique of the idea-expression dichotomy under the merger doctrine. As one court puts the doctrine: 'When there is essentially only one way to express an idea, the idea and its expression are inseparable and copyright is no bar to copying that expression.'⁶³⁷ Are the parts of works and recordings broken down by sampling less distinctive and therefore less separable from their underlying ideas?

Another path for extending the qualitative research in this thesis would be to conduct quantitative research. The literature on music and copyright features a wealth of qualitative research. However, despite the generous and growing repositories of quantitative data brought by the rise of online content platforms, there remains a dearth of quantitative research. One can imagine a comparative study of quantitative and qualitative originality based on content identification systems, which estimate the degree of similarity between works. This could provide insights into the degree of overlap between works at a macro scale, beyond just comparing an arbitrarily chosen 'original' version with future versions. Such insights could refine the application of copyright principles at scale. They could also inform efforts to strengthen originality in the copyright ecology through tolerated uses and trade courtesies, beyond a rights and exceptions view of copyright.

⁶³⁶ Sam Ricketson and Jane Ginsburg. *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edition), (Oxford University Press, 2006), Vol I, 788

⁶³⁷ *Concrete Machinery Co. v Classic Lawn Ornaments*, 843 F. 2d 600 (1st Cir. 1988)

Future rearrangements of this thesis' arguments about music and law are unlikely to be bound to these disciplines. Some of these rearrangements may cover to neighbouring fields, transcend disciplines or critique this thesis. In the spirit of rearrangement, and expressing a belief that appropriation underpins originality, progress and innovation, this thesis welcomes these possibilities.

While this thesis has focused on musical works and sound recordings, particularly remixes and other forms of sampling, its core argument may be relevant for other subject matter, derivative works, adaptations, quotations and other original works of appropriation. For example, what is a retweet but an original appropriation of another tweet? Is a search engine result not an original appropriation of websites? How else should copyright characterise a meme than a transformation of images, sound and video into a social movement?

The path of originality in the digital era is neither linear, nor bound by existing arrangements. Because remix and other forms of rearrangement and transformation are an engine of digital creativity, the quest for a nuanced understanding of originality is a worthy one. If abandoned, this writer fears that the arguments here will need to be rearranged to serve an original but depressing thesis: *Copyright Killed the Digital Star*.

VIII. Coda: One tale of 99 Problems

This story of *99 Problems* echoes the core argument of the thesis and points to a prominent example of originality as rearrangement. Continuing the tradition of appropriation and in the keeping with the reconception of originality as rearrangement, the title of this thesis rearranges a lyric that is popularly associated with Jay-Z's version of *99 Problems*: 'I got 99 problems but a bitch ain't one'.

Many mistakenly believe the story of *99 Problems* runs the gamut from Jay to Z. The Jay-Z version, while original and possessing its own voice and character, is not the earliest version of the lyrics; it is just one in a chain of rearrangement spanning two decades. Many versions preceding and succeeding the Jay-Z version hold their own originality in spite of borrowing from other versions.

Version of lyric	Year	Relationship to earlier versions
Brother Marquis	1993	n/a (conversation between rappers)
Ice-T version	1993	Based on 1993 conversation
2 Live Crew version	1996	Based on 1993 conversation
Trick Daddy version	2001	Based on the Ice-T version
Lil Wayne version	2003	Based on the Ice-T version
Jay-Z version	2004	Based on the Ice-T version
Danger Mouse mashup	2004	Based on the Jay-Z version
Linkin Park and Jay-Z version	2004	Based on the Jay-Z version
Jay-Z inauguration version	2009	Based on the Jay-Z version
Professor Mason's Fourth Amendment version	2011	Based on the Jay-Z version
Hugo version	2011	Based on the Ice-T and Jay-Z versions
President Obama's version	2013	Based on the Jay-Z version
Zayid TEDTalk version	2013	Based on the Ice-T version
Ariana Grande version	2014	Based on the Jay-Z version
Body Count version	2014	Based on the Ice-T and Jay-Z versions

Figure 17: Chronology of select versions of *99 Problems*

The genesis of *99 Problems* is a conversation where rapper Brother Marquis innocuously uttered the lyric to fellow rapper Ice-T. As Ice-T describes, 'then out of nowhere, he [said] 'Man, I got 99 problems but the [sic] bitch ain't one''. I said,

“What!” I said, “That’s a song.” So I made the song and then I called Marquis up and he did a verse on it. That was it.’⁶³⁸

The conversation spawned two versions, one from each rapper. Firstly, the 1993 Ice-T version of *99 Problems* featured the following couplet in its first verse rapped by Ice-T:

‘So if you havin’ girl problems, I feel bad for you son
Got 99 problems and a bitch ain’t one – hit it’⁶³⁹

The Ice-T version of *99 Problems* is a true product of rearrangement. The lyric is also given new voice through protagonist of the Ice-T version of *99 Problems*: a crass, sexist American lothario. In the first verse, he boasts that he has ‘got a ho’ from every direction on a compass. In this context, the couplet is an extension of the boasts in each verse—a shortage of ‘hoes’ or ‘bitches’ is no problem for this man. When *99 Problems* was released in 1993, Ice-T was a controversial figure, being the lyricist and lead vocalist for the band Body Count. Body Count was infamous for releasing the track *Cop Killer*, which was criticised for inciting violence against police and subsequently replaced by an alternative track on the album. Ice-T’s anti-police reputation amplified the crassness of the lyrics.⁶⁴⁰ In addition to rearrangement in the lyrics, the recording featured a looped sample throughout its length. The sample is the infamous arpeggiated guitar chord from Funkadelic’s *Get Off Your Ass and Jam*, which was the subject of the *Bridgeport v Dimension Films*.

⁶³⁸ The quote actually matches Jay-Z’s later lyric rather than the lyric used by Ice-T and Brother Marquis in their 1993 and 1996 versions. Ice-T. *Ice-T Talks New Body Count Album, Jay-Z’s Remake of “99 Problems” & Much More*, radio.com, (online), (radio, 7 July 2014), <<https://www.youtube.com/watch?v=6YJhbJDGb7g>>, 1:52

⁶³⁹ Ice-T. ‘99 Problems (featuring Brother Marquis)’, *Home Invasion*, (Rhyme \$yndicate, 1993)

⁶⁴⁰ Ironically, Ice-T has played an NYPD detective on television series *Law & Order: SVU* since 2000

2 Live Crew also features in the *99 Problems* storyline, following their successful parody of Roy Orbison's *Oh, Pretty Woman* which led to the US Supreme Court case of *Campbell v Acuff-Rose*. Some years after the Ice-T version, Brother Marquis used the second line of the lyric in 2 Live Crew's 1996 *Table Dance*, rapped in a similar rhythm:

'I got 99 problems and a bitch ain't one'⁶⁴¹

This was followed by several other rap versions, following Ice-T's lead by featuring more male protagonists boasting of fame, women and sex. Trick Daddy released a version in 2001 featuring the following variation of the lyric:

I got so many bitches and they love to get done
I got 99 problems and a bitch ain't one'⁶⁴²

Lil Wayne released another rap version of *99 Problems* in 2003 on his mixtape, *The Prefix*. This featured a longer variation of the lyric:

I got 99 problems and a bitch ain't one
I got 99 partners and a snitch ain't one
I got 99 bitches and I don't love one
My 1999 bitches I been done⁶⁴³

Jay-Z's 2004 rap version stands out as the highest charting and best-known version of *99 Problems*. It features a similar lyric to the Ice-T version, substituting 'but' for 'and' in the second line, an amendment that is retained for most later version.:

'If you're havin' girl problems I feel bad for you son
I got 99 problems but a bitch ain't one—hit me'⁶⁴⁴

Ice-T describes the chain of events that inspired Jay-Z's version of *99 Problems*:

⁶⁴¹ 2 Live Crew. 'Table Dance', *Shake a Lil' Somethin'*, (Lil' Joe Records, 1996)

⁶⁴² Trick Daddy. '99 Problems', *Thugs Are Us*, (Atlantic Records, 2001)

⁶⁴³ Lil Wayne. 'In My Life', *The Prefix*, (Cash Money, 2004)

⁶⁴⁴ Jay-Z. '99 Problems', *The Black Album*, Roc-A-Fella and Def Jam, 2004)

'Chris Rock heard the song [Ice T's version of *99 Problems*], told Rick Rueben [sic; studio producer and former co-President of Columbia Records Rick Rubin] Jay-Z should remake it. Jay heard the song. They paid for the publishing and they made the song.'⁶⁴⁵

Though Jay-Z's lyric is similar to Ice-T's, the intended meaning is not. Jay-Z's version sheds the bravado and crassness of Ice-T for a tone of social justice. His lyrics comment on criticism of rappers, the treatment of women, racial profiling by police, and unfair bail conditions for African Americans. For example, the second verse describes racial profiling during a traffic stop and an unwarranted vehicle search; as Jay-Z confirms, the bitch in this verse refers to a police canine, rather than any woman.⁶⁴⁶ Rick Rubin corroborates the social justice slant in Jay-Z's version:

'[Chris Rock] said, "Ice-T has this song, and maybe there's a way to flip it around and do a new version of that' ... And I told Jay Z the idea and he liked it. The Ice-T song is about "got 99 problems and a bitch ain't one," and then it's a list of him talking about his girls and what a great pimp he is. And our idea was to use that same hook concept, and instead of it being about the girls that are not his problem, instead of being a bragging song, it's more about the problems. Like, this is about the other side of that story.'⁶⁴⁷

Jay-Z was no stranger to creation through appropriation and rearrangement, having sampled The Jackson 5's *I Want You Back* on his first single, *Izzo (H.O.V.A)*. However, his version of *99 Problems* represented a particularly concerted effort in appropriation. In addition to recycling the lyric from the Ice-T's version, it also sampled several other recordings, including *The Big Beat* by Billy Squier, *Long Red*

⁶⁴⁵ Brian Ives. 'Interview: Ice-T Puts The World On Blast', *radio.com* (online), (radio, 21 July 2014), <<http://radio.com/2014/07/21/interview-ice-t-body-count-manslaughter/>>

⁶⁴⁶ 'Jay-Z says that the "bitch" in this line, which recurs in the chorus, refers to the late-arriving drug dog, not to a woman.' Caleb Mason. 'Jay-Z's "99 Problems," Verse 2: A Close Reading With Fourth Amendment Guidance for Cops and Perps', (2011), 56 *St. Louis University Law Review* 567 (online), <<http://s3.documentcloud.org/documents/396286/99problems.pdf>> (hereinafter 'Caleb Mason, 'Jay-Z's "99 Problems"'), 584 FN91. See also Jay-Z. *Decoded*, (Random House, 2010), 56

⁶⁴⁷ Kory Grow. 'How Chris Rock and Ice-T Inspired Jay Z's "99 Problems"', *Rolling Stone* (online), (25 March 2014), <<http://www.rollingstone.com/music/news/how-chris-rock-and-ice-t-inspired-jay-zs-99-problems-20140325>>. Jay-Z also acknowledges Rick's role in the outro of the recording with the lyrics, 'You crazy for this one, Rick / It's your boy'

by Mountain, and *Get Me Back On Time* by Wilson Pickett. Even the name of the album—*The Black Album*—containing Jay-Z's version of *99 Problems* was borrowed three times over. Firstly, it was a reference to The Beatles' *White Album*. Secondly, it referred to Prince's album of the name. Finally, it reused the working title for the album containing Ice-T's version of *99 Problems*, which was ultimately released as *Body Invasion*.⁶⁴⁸

Jay-Z also encouraged rearrangement of his version of *99 Problems* by others, making an acapella of *The Black Album*, including *99 Problems* and other tracks, available for remix artists to use in future. This acapella isolates the vocal track of *99 Problems*, improving ease of remix with other materials.

Danger Mouse was one prominent user of Jay-Z's acapellas of *The Black Album*, combining them with The Beatles' *White Album* to create *The Grey Album*.⁶⁴⁹ Shara Rambarran provides a painstaking element-by-element breakdown of how Danger Mouse artistically selects and mashes together vocals from Jay-Z's *99 Problems* and instrumentals and vocals from The Beatles' *Helter Skelter*.⁶⁵⁰ Charles Fairchild describes this version as 'an iteration that outpaces the original [Jay-Z's version] by some distance'.⁶⁵¹ In remixing *99 Problems* and other recordings, Danger Mouse earns recognition as an archetype of the 'amateur' creator that Barthes bemoaned had been lost in his time:

'The amateur, a role defined much more by a style than by a technical imperfection, is no longer anywhere to be found; the professionals, pure specialists whose training remains entirely esoteric for the public... never offer that style of the perfect amateur... touching off in us not satisfaction but desire, the desire to *make* that music.'⁶⁵²

⁶⁴⁸ Ice-T and Heidi Sigmund. *The Ice Opinion*, (Pan Books, 1994), 181-184

⁶⁴⁹ Charles Fairchild. *Danger Mouse: The Grey Album*, (Bloombury Academic, 2014) (hereinafter 'Fairchild, *The Grey Album*')

⁶⁵⁰ Shara Rambarran. "'99 Problems" but Danger Mouse Ain't One: The Creative and Legal Difficulties of Brian Burton, "Author" of The Grey Album', (2013), 3 *Popular Musicology Online* (online), <<http://www.popular-musicology-online.com/issues/03/rambarran.html>>

⁶⁵¹ Fairchild, *The Grey Album*

⁶⁵² Barthes, *The Death of the Author*, 150

Shortly after the release of *The Grey Album*, Danger Mouse showed deference to Jay-Z: 'If Jay-Z heard it and said, 'This sucks, dude,' then I'd be like, 'OK, everyone please send me back their copies.'"⁶⁵³ As it turns out, Jay-Z did hear *The Grey Album* and commented, 'I was actually honored that, you know, someone took the time to mash those records up with Beatles records. I was honored to be on, you know, quote-unquote the same song with the Beatles.'⁶⁵⁴ Notably, neither Danger Mouse nor Jay-Z emphasise the use of samples on their versions of *99 Problems*, focusing on their original arrangement of samples and covering of previous works.

Jay-Z's acapellas also contributed to a six-track mashup EP *Collision Course* with alternative music group Linkin Park. One of these tracks combined Jay-Z's *99 Problems* with Linkin Park's *Points of Authority* and *One Step Closer*.⁶⁵⁵ Unlike Danger Mouse, who relied on the acapellas to create a mashup, Jay-Z and Linkin Park made bespoke recordings of Jay-Z's rap vocals and some of the Linkin Park's instrumental. Ultimately, the Jay-Z acapellas enabled an iterative rearrangement towards the published EP. Having heard *The Grey Album*, Jay-Z contacted Linkin Park about a possible collaboration, triggering Shinoda to use the acapellas to make draft mashups:

'Jay lit the first spark by contacting Linkin Park about a possible collaboration after hearing about Danger Mouse's *Grey Album*... Instead of getting back to Jay's manager with an answer right away, Shinoda picked up the a cappella version of *The Black Album*, created mash-ups of three songs and e-mailed them back to Jay.'⁶⁵⁶

⁶⁵³ Lauren Gitlin. 'DJ Makes Jay-Z Meet Beatles', *Rolling Stone* (online), (2004), <DJ Makes Jay-Z Meet Beatles>

⁶⁵⁴ Terry Gross. 'Jay-Z: The Fresh Air Interview', *NPR* (online), (16 November 2010), <<http://www.npr.org/2010/11/16/131334322/the-fresh-air-interview-jay-z-decoded>>

⁶⁵⁵ Linkin Park and Jay-Z, 'Points Of Authority/99 Problems/One Step Closer', *Collision Course*, (Roc-A-Fella, Machine Shop, Warner Bros. and Def Jam, 2014)

⁶⁵⁶ Jon Wiederhorn. 'Jay-Z and Linkin Park show Danger Mouse How It's Done: Rappers, rockers mix tracks together in studio and live', *MTV News* (online), (MTV, 4 October 2004), <<http://www.mtv.com/news/1491889/jay-z-and-linkin-park-show-danger-mouse-how-its-done/>>

The acapellas formed an intermediate step, enabling a faster iteration towards bespoke, rerecorded vocals. As Linkin Park's DJ Mike Shinoda notes:

'Jay and I realized it's better to re-perform the rap vocals if you're gonna do it to a new beat because the vibe changes and you have to deliver your verse a little differently'.⁶⁵⁷

After his collaboration with Linkin Park, Jay-Z rearranged *99 Problems* as political speech. To mark the election of President Obama in 2009, Jay-Z performed a live version of *99 Problems* with a subtle, political word substitution:

'If you're havin' girl problems I feel bad for you son
I got 99 problems but a Bush ain't one – hit me'⁶⁵⁸

Jay-Z reprised his political rearranging during the 2012 presidential campaign. Republican candidate Governor Mitt Romney had just debated President Obama in the third and final debate, which focused on foreign affairs. Jay-Z adapted his earlier lyrics:

'If you're havin' world problems I feel bad for you son
I got 99 problems but Mitt ain't one'⁶⁵⁹

The political originality continued with President Obama taking the remix baton from Jay-Z and creating his own version of *99 Problems*. In a section of President Obama's speech at the 2013 White House Correspondents' Dinner, he adapted the lyric to depict the trivial dramas that a President can face:

'But some things are beyond my control. For example, this whole controversy about Jay-Z going to Cuba. It's unbelievable. I got 99 problems and now Jay-Z's one.'⁶⁶⁰

⁶⁵⁷ Ibid

⁶⁵⁸ Jay-Z. '99 Problems But a Bush Ain't One', *YouTube* (online), (22 January 2009), <<https://www.youtube.com/watch?v=flgi4qjK41M>>

⁶⁵⁹ Jay-Z. '99 Problems But Mitt Ain't One', *YouTube* (online), (5 November 2012), <<https://www.youtube.com/watch?v=-kZ89zUroFI>>

⁶⁶⁰ President Barack Obama. '2013 White House Correspondents' Dinner', *YouTube* (online), (27 April 2013) <<https://www.youtube.com/watch?v=ON2XWvyePH8>>, 4:09

Ariana Grande's *Problem* also rearranged *99 Problems*, changing the context from Jay-Z's commentary on social issues to a personal commentary on ending a personal relationship. The *Problem* rap interlude by Australian rap artist Iggy Azalea features the following lyric:

'There's a million yous baby boo, so don't be dumb
I got 99 problems but you won't be one'⁶⁶¹

Issues of social justice also formed the basis of two other rearrangements of *99 Problems*. The allusion to female police canine in the second verse of Jay-Z's version—'We'll see how smart you are when the K-9s come, I got 99 problems but a bitch ain't one'—inspired legal research on the Fourth Amendment which prohibits unreasonable search and seizures. As Caleb Mason explains:

'It was a big hit in 2004. I'm writing about it now because it's time we added it to the canon of criminal procedure pedagogy. In one compact, teachable verse (Verse 2), the song forces us to think about traffic stops, vehicle searches, drug smuggling, probable cause, and racial profiling, and it beautifully tees up my favorite pedagogical heuristic: life lessons for cops and robbers.'⁶⁶²

Maysoon Zayid's presentation at TEDWomen—a conference dedicated to leading female thinkers in technology, entertainment and design—provides another social justice appropriation of *99 Problems*. She adapts the lyric to comment on the her many disadvantages in life, stating:

'I got 99 problems, and palsy is just one. If there was an Oppression Olympics, I would win the gold medal. I'm Palestinian, Muslim, I'm female, I'm disabled, and I live in New Jersey.'⁶⁶³

Two further versions are worth mentioning here. In a parallel life to being a recording artist and composer, Jay-Z is also a cofounder of record label Roc Nation.

⁶⁶¹ Ariana Grande. *My Everything*, (Republic, 2014)

⁶⁶² Caleb Mason, 'Jay-Z's "99 Problems"', 567

⁶⁶³ Maysoon Zayid. 'I got 99 problem... palsy is just one', *TEDWomen* (online), (TEDTalks, December 2013),
<https://www.ted.com/talks/maysoon_zayid_i_got_99_problems_palsy_is_just_one/transcript?language=en>

Unsurprisingly, Roc Nation artist Hugo recorded a bluegrass version of *99 Problems* that nods towards both the Ice-T and Jay-Z versions:

'If you're havin' girl problems I feel bad for you son
I got 99 problems and a bitch ain't one
99 problems but a bitch ain't one'⁶⁶⁴

Closing a chapter arc for *99 Problems*, Jay-Z's version itself was rearranged by Ice-T. Almost one decade after Jay-Z's version and over two decades after Ice-T's version, Body Count released two versions of *99 Problems* with Ice-T as lead vocalist and lyricist. *99 Problems BC* version starts with Ice-T's acapella lyrics from his 1993 version, and then is mixed with the guitar riff from Jay-Z's version. *99 Problems BC Rock Mix* combines Ice-T's lyrics from his 1993 version with the guitar riff from Jay-Z's version throughout.

These two Ice-T versions suggest that Jay-Z's version has attained prime influence in the chain of rearrangement, spawning a remix by Ice-T himself who participated in the conversation that generated the lyric and recorded the first version of *99 Problems*. One might suggest that Jay-Z's version is the most distinctive and original. The influence of Jay-Z's version suggests being a latter version is no barrier to recognition as an original, worthy of attention, adaptation and rearrangement.

Ariana Grande's *Problem* is also notable, spawning versions outside of the rap and hip-hop genres. These include a doo-wop version of *Problems* by brass band Postmodern Jukebox and doo-wop outfit The Tee-Tones, an acapella version by Pentatonix and a highly vocoded version on the television series *Glee*.

Looking through the versions discussed, the story of *99 Problems* parallels many of the themes in this thesis. Echoing Chapters II and III, we can see the central role of rearrangement in the creation of original compositions and sound recordings of *99 Problems*. Some of these rearrangements are made by successive artists. In other

⁶⁶⁴ Hugo. '99 Problems', *Old Tyme Religion*, (Roc Nation, 2011)

cases, we see Jay-Z and Ice-T rework the earlier arrangements by themselves and others into yet further versions.

Also evident is the primacy of the studio producer in seeding the ideas for original works. In this Coda, we have seen Rick Rubin's influence in Jay-Z's version and Mike Shinoda's influence in mashing up by Linkin Park and Jay-Z. Danger Mouse stands out for his rearrangement as a studio producer in relation to his mashup of *99 Problems* with *Helter Skelter* as well as his work on *Demon Days*, one of the Gorillaz albums discussed in Chapter III.

Harking back to Chapter IV, *99 Problems* triggers discussions about the honour and reputation of creators. Despite being remixed without copyright permission by Danger Mouse, Jay-Z felt honoured by *The Grey Album's* treatment of *The Black Album*. This mirrors the view of a musicologist in Chapter IV that adhering to the wishes of a living ballet music composer is a show of respect. In the example of *99 Problems*, it may be reasonable to interpret Jay-Z's publishing of acapella tracks as an expression of his wishes that *The Black Album* be remixed; interpreted this way, remixing those tracks is a potential show of respect. Jay-Z's *ex post* approval of Danger Mouse's treatment of *99 Problems* returns the respect back to Danger Mouse.

99 Problems presents a plethora of examples that support Chapter V, showing how transformative uses of prior material and original works can yield new arrangements that hold the requisite originality for recognition as works. Ice-T and Brother Marquis transform a conversation into a series of compositions and sound recordings. Jay-Z transforms Ice-T's version which brims with sexual bravado into a new version which makes observations about social justice and freedoms. President Obama transforms Jay-Z's version into part of a speech that contrasts trivial issues with matters of domestic and foreign significance. Over time, versions of *99 Problems* transform from conversation to music to political speech, bringing original meaning each time.

At the time of writing, the rearrangement of *99 Problems* continues unabated. As Chapter VI discussed, content identification systems enable *ex post* monitoring, which in turn allows tolerated uses of prior versions of *99 Problems*. Indeed, a quick search on YouTube and other content platforms yields thousands of versions of *99 Problems*. It remains open to sampling artists of the future to rearrange a version of *99 Problems* that rivals the originality of the Jay-Z version. In all, past and future versions of *99 Problems* demonstrate that while whole works may be original, pieces of works are rearrangeable into new original works. Thus, promoting more original and more transformative rearrangements of works, including sampling, is key to growing the body of originality.

IX. Bibliography of referenced works

Judgements and court documents

Australian

- *Blackie & Sons Ltd v Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396
- *CBS Records Australia Limited v Guy Gross* (1989) FCA 404, 31
- *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* (2002) FCAFC 112
- *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* (2011) FCAFC 47
- *Fernandez v Perez* (No 2) (2012) NSWSC 1602
- *Fernandez v Perez* (2012) NSWSC 1242
- *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) HCA 14
- *Network Ten Pty Limited v TCN Channel Nine Pty Limited* (2004) HCA 14
- *Pavlovic v Universal Music Australia Pty Limited* (2015) NSWCA 313
- *Pocketful of Tunes Pty Ltd v Copyright Tribunal* (2015) FCAFC 146
- *Qantas Airways Limited v Edwards* (2016) FCA 729
- *Sands & McDougall Pty Ltd v Robinson* (1917) HCA 14; (1917) 23 CLR 49
- *Schott Musik International GMBH & Co & Ors v Colossal Records of Australia Pty Ltd & Ors* (1997) FCA 531
- *Schott Musik International GMBH & Co & Ors v Colossal Records of Australia Pty Ltd & Ors* (1996) FCA 1033
- *Universal Music Australia Pty Ltd v Miyamoto* (2004) FCA 982, 14

International

- *A&M Records Ltd v Video Collection International Ltd*, (1995) EMLR 25
- *Antiquesportfolio.com plc v Rodney Fitch & Co Ltd* (2001) FSR 345
- *Bach v Longmann*, (1777), 2 Cowper 623
- *Bill Graham Archives v Dorling Kindersley, Ltd.*, 448 F.3d 605, 612-13 (2d Cir. 2006)
- *Blanch v Koons* 467 F. 3d 244 (2nd Cir. 2006)
- *Bridgeport Music, Inc v Dimension Films*, 410 F.3d 792 (2005)
- *Campbell v Acuff-Rose Music*, 510 U.S. 569 (1994)
- *Carlton Illustrators v Coleman & Co Ltd* (1911) 1 KB 771
- *Castle Rock Entertainment v Carol Publishing Group*, 150 F. 3d 132 (2nd Cir. 1998)
- *Coffey v Warner/Chappell Music Ltd. & Ors* (2005), EWHC 449 (Ch)
- *College Entrance Examination Board v Pataki*, 889 F. Supp. 554 (N.D.N.Y. 1995)
- *Concrete Machinery Co. v Classic Lawn Ornaments*, 843 F. 2d 600 (1st Cir. 1988)
- *Confetti Records & Ors v Warner Music UK Ltd* (t/a East West Records) (2003) EWHC 1274 (Ch)
- *Cox v Land & Water Journal Co* (1869) 9 L.R.-Eq. 324 (Eng.)
- *Eldred v Ashcroft*, 537 U.S. 186 (2003), including

- George A. Akerlof *et al.*. *Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners* (No. 01-618)
- *Feist Publications, Inc., v Rural Telephone Service Co.*, 499 U.S. 340 (1991)
- *Fisher v Dees*, 794 F. 2d 432 (9th Cir. 1986)
- *Folsom v Marsh*, 9 F. Cas. 342, No. 4901 (C.C.D. Mass. 1841)
- *Gyles v Wilcox* (1740) 26 ER 489
- *Golan et al. v Holder, Attorney General, et al.* 132 S. Ct. 873 (2012)
- *Grand Upright v Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991)
- *Hadley v Kemp* (1999) EMLR 589
- *Harper & Row, Publishers, Inc. v Nation Enterprises*, 471 U.S. 539, 563 (1985)
- *Hyperion Records Ltd v Sawkins*, (2005), EWCA Civ 565
- *Hyperion Records v Warner Music*, (unreported case, May 17, 1991) (Ch.), 8
- *Jean v Bug Music, Inc.*, No. 00 Civ 4022(DC), 2002 WL 287786 (S.D.N.Y., 2002)
- ‘Order re Request to Proceed in *Forma Pauperis*’, *Jessie Braham v Sony/ATV Music Publishing et al.*, 2:15-cv-8422-MWF (GJSx)
- *Lenz v Universal Music Corp.*, 582 US ___ (2017)
- *Lenz v Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015)
- *Lenz v Universal and Viacom Intern., Inc. v YouTube, Inc.*, 676 F. 3d 19 (2nd Cir. 2012)
- *Metall auf Metall*, Bundesgerichtshof [German Federal Court of Justice], I ZR 112/06, (20 November 2008)
- *Newton v Diamond*, 349 F. 3d 591, 1249 (9th Cir. 2003)
- *Pharrell Williams, et al. v Bridgeport Music, Inc., et al.*, Civ. No. LA CV13-06004 JAK (AGRx), (C.D. Cal., 2015), including court documents:
 - ‘Order regarding the admissibility of Sound Recording Evidence at Trial’
- *Reade v Conquest* (1861) 9 CB (NS) 755
- *Rupa Marya, et al. v Warner/Chappell Music Inc., et al.*, CV 13-04460-GHK, (C.D. Cal., 2016)
- ‘Complaint for Copyright Infringement, Demand for Jury Trial’, *Sean Hall, Nathan Butler, et al. v Taylor Swift et al.*, (C.D. Cal., 2017)
- *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* SCC36 (2012)
- *Sony Corporation of America v Universal City Studios, Inc.*, 464 US 417
- *Stewart v Abend*, 495 US 207 (1990)
- *Telstra Corporation Limited v Phone Directories Company Pty Ltd* (2010) FCA 44
- *UMG Recordings, Inc. v Veoh Networks Inc.*, 665 F. Supp. 2d 1099, (C.D. Cal., 2009)
- *University of London Press Ltd v University Tutorial Press Ltd*, (1916), 2 Ch 601
- *VMG Salsoul, LLC v Ciccone*, 824 F.3d 871 (9th Cir. 2016)
- *VMG Salsoul v Ciccone*, CV 12-05967 (C.D. Cal., 2013), including court documents:
 - ‘Deposition of Robert Pettibone, Vol. 1’
 - ‘Complaint for Copyright Infringement’
 - ‘Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment’
- *NXIVM et al. v The Ross Institute et al.*, 364 F. 3d 471 (2nd Cir. 2004)

Legislation, treaties and legislative documents

Australian

- Commonwealth of Australia, Explanatory Memorandum, US-Australia Free Trade Agreement Implementation Bill 2004
- *Copyright Act 1968* (Cth), including bills amending:
 - Revised Explanatory Memorandum, Copyright Amendment (Moral Rights) Bill 1999 (Cth)
- *Copyright Amendment (Moral Rights) Act 2000*
- *Copyright Act 1905* (Cth) (No 25 of 1905)
- *Copyright Act 1842*, 5 & 6 Vict. c. 45
- *Patents Act 1990* (Cth)
- *Trade Marks Act 1995* (Cth)

International

- 17 U.S.C. (US)
- *An Act to constitute the Commonwealth of Australia 1990*
- *An Act to Amend the Several Acts Respecting Copyrights 1831* (US)
- *Auteurswet 1912* (Netherlands)
- *Berne Convention for the Protection of Literary and Artistic Works*, revised at PARIS on July 24, 1971, and amended on September 28, 1979
- *Constitution of the United States of America* (US)
- *Copyright Act 1994*, s 14 (New Zealand)
- *Copyright Act*, (R.S.C., 1985), c. C-42 (Canada)
- *Copyright Act of 1831*, ch. 16, 4 Stat. 436 (US)
- *Copyright, Patent and Designs Act 1998* (UK)
- *Copyright Act 2007* (Israel)
- *Copyright Act 1967* (South Korea)
- *Copyright Act (Cap 63, 2006 Rev Ed)* (Singapore)
- *Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (UK)
- *Gesetz über Urheberrecht und verwandte Schutzrechte* [Author's and Related Property Rights Act] 1965 (Germany)
- *Intellectual Property Code of the Philippines (Republic Act No. 8293)* (the Philippines)

Other government documents

Australian

- Australian Law Reform Commission. *Copyright and the Digital Economy: Final Report* (online), (ALRC, 2013), <http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf>
- Australian Law Reform Commission. *Discussion Paper 79: Copyright and the Digital Economy*, (ALRC, 2013)
- Australian Law Reform Commission. *Copyright and the Digital Economy Issues Paper*, (ALRC, 2012)

- APRA and AMCOS. 'Submission', *Copyright and the Digital Economy Issues Paper*, (2012)
- Commonwealth of Australia. *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements* (online), (2017), <<https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf>>
- Commonwealth, *Parliamentary Debates*, House of Representatives, 18 June 1997, 5547–8, (Daryl Williams, Attorney-General)
- Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 14 October 1999, (Jamie Wodetzki). See also the Copyright Amendment (Digital Agenda) Bill 1999
- Productivity Commission. *Intellectual Property Arrangements*, no. 78, (2016), <<https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>>

International

- *Audible Magic Corporation v Google Inc.*, USPTO, (9 December 2014), Registration Number 4651405
- Google. *Submission to U.S. Copyright Office Section 512 Study*, (1 April 2016)
- Great Britain, *Report of the Commissioners Appointed to Make Inquiry with Regard to the Laws and Regulations Relating to Home, Colonial and International Copyright*, Parl. Paper No 163, 1878
- Ian Hargreaves. *Digital Opportunity: A review of Intellectual Property and Growth* (online), (UK Government, 2011), <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf>
- Internet Policy Taskforce, *White Paper on Remixes, First Sale and Statutory Damages* (online), (US Department of Commerce, 2016), <<https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf>>
- Internet Policy Task Force. *White Paper on Remixes, First Sale, and Statutory Damages* (online), (US Department of Commerce, 2016), <<https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf>>
- Internet Policy Task Force. *Copyright Policy, Creativity, and Innovation in the Digital Economy* (online), (US Department of Commerce, 2013), <<http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>>
- Zacharias James. *Identifying matching video content*, US 20150278292 A1, (USPTO, filed 31 March 2014, published 1 October 2015)
- David Stein. *Method and System for Analyzing Copyright Information in a Mixed Long-Format Audio File*, US 20120323800 A1, (USPTO, filed 18 May 2012, published 20 December 2012)
- US Copyright Office. *Copyright and the Music Marketplace: A Report of the Register of Copyrights*, (2015)
- United States Copyright Office. *Copyright Basics* (online), (2012), <<https://www.copyright.gov/circs/circ01.pdf>>
- Maxwell Wells. *Automatic identification of sound recordings*, US 7328153 B2, (USPTO, filed 22 July 2002, granted 5 February 2008)

Journal articles

- Elizabeth Adeney. 'Appropriation in the Name of Art: Is a Quotation Exception the Answer?', (2013), 23 *Australian Intellectual Property Journal* 142
- Elizabeth Adeney. 'The Sampling and Remix Dilemma: What is the Role of Moral Rights in the Encouragement and Regulation of Derivative Creativity?' (2012), 17(2) *Deakin Law Review* 335
- Barton Beebe. 'An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005', (2008), 156 *University of Pennsylvania Law Review* 3
- Lionel Bently. 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia', (2004), 38 *Loyola of Los Angeles Law Review* 71
- Robert Brauneis. 'Copyright and the World's Most Popular Song', (2009), 56 *Journal of the Copyright Society of the U.S.A.* 335
- Whitney C. Broussard, 'Current and Suggested Business Practices for the Licensing of Digital Samples', (1991), 11 *Loyola of Los Angeles Entertainment Law Review* 479
- James M. Buchanan and Yong J. Yoon, 'Symmetric Tragedies: Commons and Anticommons', (2000), 43(1) *The Journal of Law & Economics* 1
- Brianna Chesser. 'The Art of Musical Borrowing: A Composers Guide to the Current Copyright Regime Five Years on from Larrikin' (2015), 37(1) *Musicology Australia* 60
- Carys Craig. 'Technology Neutrality: Recalibrating Copyright in the Information Age' (2016), 17(2) *Theoretical Inquiries in Law* 601
- Stuart Cunningham, David Craig and Jon Silver, 'YouTube, multichannel networks and the accelerated evolution of the new screen ecology.' (2016) 22(4) *Convergence: The International Journal of Research into New Media Technologies* 376
- W. Dallan, 'The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest', (2004), 44(2) *Santa Clara Law Review* 365
- Timothy Endicott and Michael Spence. 'Vagueness in the Scope of Copyright' (2005), 122 *Law Quarterly Review* 657
- Warren Enström, Joshua Dennis, Brian Lynch and Kevin Schlei. 'Musical Notation for Multi-Touch Interfaces' *Proceedings of the International Conference on New Interfaces for Musical Expression* 83, (2015), <http://www.nime.org/proceedings/2015/nime2015_289.pdf>
- Kai Fikentscher, "'There's not a problem that I can't fix, 'cause I can do it in the mix": On the Performative Technology of 12-Inch Vinyl', in René T. A. Lysloff, Leslie C. Gay, Jr. (eds), *Music and Technoculture*, (Wesleyan University Press, 2003)
- Commander P. W. Foote. 'Narrative of the "President Lincoln', (1922), 48(7) *Proceedings of the United States Naval Institute* 1073 (online), <<https://archive.org/stream/proceedingsofuni192248712unit#page/n9/mode/2up>>
- James Gibson. 'Risk Aversion and Rights Accretion in Intellectual Property Law', (2007), 116 *Yale Law Review* 882
- Jane Ginsburg. 'The Concept of Authorship in Comparative Copyright Law', *Public Law Research Paper No. 03-51*, (online) (Columbia Law School, 2003), 21, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=368481>

- Kevin J. Greene. 'Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues', (2008), 16(3) *American University Journal of Gender, Social Policy & the Law* 365
- Lynne Greenway. 'The Art of Appropriation: Puppies, Piracy and Post-modernism' (1992), 11 *Cardozo Arts & Entertainment* 1, 33
- Anthony Hutchings. 'Authors, Art, and the Debasing Instinct: Law and Morality in the Carmina Burana Case' (1997), 19(3) *Sydney Law Review* 21
- Edward Kealy. 'Conventions and the Production of the Popular Music Aesthetic', 1982, 16(2) *The Journal of Popular Culture* 100
- Roberta Rosenthal Kwall. 'Originality in Context' (2007), 44(4) *Houston Law Review* 871
- Pierre Leval. 'Campbell v. Acuff-Rose: Justice Souter's rescue of fair use', (1995), 13 *Cardozo Arts and Entertainment Law Journal* 1
- Pierre Leval. 'Toward a Fair Use Standard' (1990), 103 *Harvard Law Review* 5
- Lassi A. Liikkanen and Antti Salovaara. 'Music on YouTube: User engagement with traditional, user-appropriated and derivative videos', (2015) 50 *Computers in Human Behaviour* 108, 116
- Patricia Loughlan. 'Pirates, Parasites, Reapers, Sowers, Fruits, Foxes... The Metaphors of Intellectual Property' (2006), 28 *Sydney Law Review* 211
- Irina D. Manta. 'Reasonable Copyright', (2012), 53 *Boston College Law Review* 1303
- Caleb Mason. 'Jay-Z's "99 Problems," Verse 2: A Close Reading With Fourth Amendment Guidance for Cops and Perps', (2011), 56 *St. Louis University Law Review* 567 (online),
<<http://s3.documentcloud.org/documents/396286/99problems.pdf>>
- Tom Mays and Francis Faber. 'A Notation System for the Karlux Controller', *Proceedings of the International Conference on New Interfaces for Musical Expression* 553, (2014),
<http://www.nime.org/proceedings/2014/nime2014_509.pdf>
- Kembrew McLeod. 'Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist-Academic' (2005), 28(1) *Popular Music and Society* 79
- Emily Myers. 'Art on Ice: The Chilling Effect of Copyright on Artistic Expression' (2007), 30 *Columbia Journal of Law and Arts* 219
- Melville B. Nimmer & David Nimmer. *Nimmer on Copyright* (Westlaw, 2007)
- Damien O'Brien and Brian Fitzgerald. 'Mashups, remixes and copyright law', 9(2) *Internet Law Bulletin* (online), (LexisNexis, 2006),
<<http://eprints.qut.edu.au/4239/1/4239.pdf>>
- Shane O'Connor. 'A Critical Evaluation of the Law of Copyright Authorship in Relation to Derivative Musical Works', 3(2) *Westminster Law Review*, (2012)
- William Patry. 'Who's Afraid of an evidence-based Copyright Law' (2013), 1(15) *Suffolk University Law Review Online* 55
- William Patry. *Patry on Fair Use*, (Westlaw, 2012) §2:8
- Justine Pila. 'Copyright and its Categories of Original Works', (2008), 30 *Oxford Journal of Legal Studies* 229
- Jeffrey J. Rachlinski. 'The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters', (2000), 85 *Cornell Law Review* 739

- Shara Rambarran. “99 Problems’ but Danger Mouse Ain’t One: The Creative and Legal Difficulties of Brian Burton, “Author” of The Grey Album’, (2013), 3 *Popular Musicology Online* (online), <<http://www.popular-musicology-online.com/issues/03/rambarran.html>>
- John Richardson. “‘The Digital Won’t Let Me Go”: Constructions of the Virtual and the Real in Gorillaz’ “Clint Eastwood”, (2005), 17(1) *Journal of Popular Music Studies* 1
- Sam Ricketson. ‘The Concept of Originality in Anglo-Australian Copyright Law’, (1992), 39 *The Journal of the Copyright Society of the U.S.A.* 265, 288
- Matthew Sag. ‘God in the Machine: A New Structural Analysis of Copyright’s Fair Use Doctrine’, (2005) 11 *Michigan Telecommunications Technology Law Review* 381
- Pamela Samuelson. ‘Unbundling Fair Uses’ (2009), 77 *Fordham Law Review* 2537
- Brad Sherman. ‘What is a Copyright Work?’, (2011), 12 *Theoretical Inquiries in Law* 99
- Brad Sherman and Lionel Bently. ‘Cultures of copying: digital sampling and copyright law’ (1992), 3(5) *Entertainment Law Review* 158
- Michael Soha and Zachary J. McDowell. ‘Monetizing a meme: YouTube, Content ID, and the Harlem Shake’ (2016), 2(1) *Social Media + Society* 1
- Nicolas Suzor. ‘Where the bloody hell does parody fit in Australian copyright law?’, (2008), 3 *Media and Arts Law Review* 218
- David Tan. ‘The Transformative Use Doctrine and Fair Dealing in Singapore’ (2012), 24 *Singapore Academy of Law Journal* 832
- Jonathan David Tankel. ‘The Practice of Recording Music: Remixing as Recording’, (1990), 40(3) *Journal of Communication* 34
- Dilan Thampapillai. ‘The Novel As Social Satire: 60 Years Later, The Wind Done Gone And The Limitations Of Fair Use’, (2012) 17(2) *Deakin Law Review* 425
- Rebecca Tushnet. ‘All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing’, (2014) 29 *Berkeley Technology Law Journal* 1447
- Rebecca Tushnet. ‘Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It’, (2004) 114 *Yale Law Journal* 535
- Tim Wu. ‘Tolerated Use’, 31 *Columbia Journal of Law and Arts* 617, (2008)

Books and chapters

- Elizabeth Adeney. ‘O Fortuna! On the vagaries of litigation and the story of musical debasement in Australia’, *Landmarks in Australian intellectual property law*, in Andrew T. Kenyon, Megan Richardson and Sam Ricketson (eds), (Cambridge University Press, 2009), 171-190
- Elizabeth Adeney. *The moral rights of authors and performers: an international and comparative analysis*, (Oxford University Press, 2006)
- Chet Atkins, John McClellan, Deyan Bratic. *Chet Atkins in Three Dimensions*, (Mel Bay Publications, 2011)
- Jacques Attali. *Noise*, (University of Minnesota Press, 1985)
- Patricia Aufderheide and Peter Jaszi. *Reclaiming Fair Use: How to Put Balance Back in Copyright*, (University of Chicago Press, 2010)

- Roland Barthes. *"The Death of the Author."* *Image / Music / Text*, Stephen Heath (trans.), (Hill and Wang, 1977), 142-148
- Howard S. Becker. *Art Worlds*, (University of California Press, 1982)
- Walter Benjamin. 'The Work of Art in the Age of Mechanical Reproduction' (1935), translated in Harry Zohn (ed), *Illuminations: Essays and reflections*, (Schocken, 1968), 217-252
- Siglind Bruhn. *J.S. Bach's Well-Tempered Clavier. In depth Analysis and Interpretation. Volume III: Preludes and Fugues on F# G Ab*, (MAINER International, 1993)
- Michael Channan. *Repeated Takes: A Short History of Recording and Its Effects on Music*, (Verso, 1995)
- Carys Craig and Guillaume Laroche. 'Out of tune: Why copyright law needs music lessons', in B. Courtney Doagoo, Mistrale Goudreau, Madelaine Saginur and Teresa Scassa (eds), *Intellectual property for the 21st century: Interdisciplinary approaches*, (Irwin Publishing, 2014), 43-71
- Chris Creswell. *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, (Thomson Reuters, c2013)
- Mark Davison, Ann Monotti and Leanne Wiseman. *Australian Intellectual Property Law*, (Cambridge University Press, 2016)
- Richard Dawkins. *The Selfish Gene*, (Oxford University Press, 1976)
- Peter Decherney. *Hollywood's Copyright Wars: From Edison to the Internet*, (Columbia University Press, 2013)
- Stevin C. Dublin. *Arresting Images: Impolitic Art and Uncivil Actions*, (Psychology Press, 1994)
- Charles Fairchild. *Danger Mouse: The Grey Album*, (Bloombury Academic, 2014)
- Alvin B Feuer. 'The Death of the *USS President Lincoln*', *The U.S. Navy in World War I: Combat at Sea and in the Air*, (Greenwood Publishing Group, 1999), 55-62
- Michel Foucault. 'What Is an Author?', Paul Rabinow and Nikolas Rose (eds), *The Essential Foucault: Selections from The Essential Works of Foucault, 1954-1984*, (The New Press, 2003), 377-391
- Simon Frith. 'Art vs Technology: The Strange Case of Popular Music (1986)', *Taking Popular Music Seriously: Selected Essays*, (Ashgate, 2007)
- Simon Frith, *Performing Rites: On the Value of Popular Music*, (Harvard University Press, 1996)
- Michael Geist. *Copyright Pentology: How the Supreme Court of Canada shook the foundations of Canadian Copyright Law*, (University of Ottawa Press, 2013)
- Daniel Gervais. 'Collective Management of Copyright', in Daniel Gervais (ed), *Collective Management of Copyright and Related Rights (3rd Edition)*, (Wolters Kluwer, 2016)
- Andrew Goodwin. 'Sample and Hold: Pop Music in the Digital Age of Reproduction', in Simon Frith and Andrew Goodwin (eds), *On Record: Rock, pop and the written word*, (Routledge, 1990), 258-273
- Lydia Goehr. *The Imaginary Museum of Musical Works: An Essay in the Philosophy of Music*, (Oxford University Press, 2007)
- Dick Hebdige. *Cut 'n' mix: Culture, identity and Caribbean music*, (Routledge, 1987)

- Irving Horowitz, 'Rock, Recordings, and Rebellion', in Charles Nanry (ed), *American Music*, (Transaction, 1972), 267-288
- Ice-T and Heidi Sigmund. *The Ice Opinion*, (Pan Books, 1994)
- Jay-Z. *Decoded*, (Random House, 2010)
- Henry Jenkins. *Convergence Culture: Where Old and New Media Collide*, (NYU Press, 2006)
- Edward Kealy. 'From craft to art: The case of sound mixers and popular music', in Frith, Simon and Goodwin, Andrew (eds), *On Record: Rock, pop and the written word*, (Routledge, 1990), 207-220
- Al Kohn and Bob Kohn. *Kohn on Licensing*, (Aspen Publishers, 2010)
- Michael Kosser. *How Nashville Became Music City, U.S.A.: 50 Years of Music Row*, (Hal Leonard, 2006)
- Tim Lawrence. *Love Saves the Day: A History of American Dance Music Culture, 1970-1979*, (Duke University Press, 2004)
- Richard Leppert. 'Commentary', *Essays on Music: Theodor W. Adorno; Selected With Introduction, Commentary, and Notes by Richard Leppert; New Translations by Susan H. Gillespie*, (University of California Press, 2002)
- Lawrence Lessig. *Free Culture: How big media uses technology and the law to lock down culture and control creativity*, (The Penguin Press, 2004), 21-24
- Desmond Manderson. *Songs Without Music: Aesthetic Dimensions of Law and Justice*, (University of California Press, 2000)
- Jason Mazzone. *Copyfraud and other abuses of intellectual property law*, (Stanford University Press, 2011)
- Kembrew McLeod. 'How Copyright Law Changed Hip-Hop: An Interview with Public Enemy's Chuck D and Hank Shocklee', *Cutting Across Media: Appropriation Art, Interventionist Collage, and Copyright Law*, (Duke University Press, 2011), 152-157
- Kembrew McLeod and Peter DiCola. *Creative License: The Law and Culture of Digital Sampling*, (Duke University Press, 2011)
- Kembrew McLeod and Rudolf Kuenzli, *Cutting Across Media: Appropriation Art, Interventionist Collage, and Copyright Law*, (Duke University Press, 2011)
- Kembrew McLeod. *Freedom of Expression®: Overzealous Copyright Bozos and Other Enemies of Creativity*, (Doubleday, 2005)
- William Patry. *How to fix copyright*, (Oxford University Press, 2011)
- William Patry. *Copyright Law and Practice*, (Greenwood Press, 1994)
- Elizabeth Hafkin Pleck. *Celebrating the Family: Ethnicity Consumer Culture and Family Rituals*, (Harvard University Press, 2000)
- Dick Hebdige. *Cut 'n' Mix: Culture, Identity and Caribbean Music*, (Routledge, 1987)
- James Hepokoski and Warren Darcy. *Elements of Sonata Theory: Norms, Types, and Deformations in the Late-Eighteenth-Century Sonata*, (Oxford University Press, 2006)
- Robert Macfarlane. *Original Copy: Plagiarism and Originality in the Nineteenth Century Literature*, (Oxford University Press, 2007)
- William Patry. 'The Role of Metaphors in Understanding', *Moral Panics and the Copyright Wars*, (Oxford University Press, 2009)
- Mark Ribowsky. *He's a Rebel: Phil Spector, Rock and Roll's Legendary Producer*, (Rowman & Littlefield, 2000)

- Sam Ricketson and Jane Ginsburg. *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edition), (Oxford University Press, 2006)
- Matthew Rimmer. 'The Garden of Australian Dreams: The Moral Rights of Landscape Architects', in Fiona Macmillan and Kathy Bowrey (eds), *New Directions in Copyright Law: Volume 3*, (Edward Elgar Publishing, 2006), 134-170
- Ronald S. Rosen. *Music and Copyright*, (Oxford University Press, 2008)
- David Sanjek. "'Don't Have to DJ No More": Sampling and the "Autonomous" Creator', in Martha Woodmansee and Peter Jaszi (eds), *The construction of authorship: Textual appropriation in law and literature*, (Duke University Press, 1994), 343-360
- Judith Sebesta. 'Medieval Latin Poetry', *Carmina Burana: Cantiones Profanae*, (Bolchazy-Carducci Publishers, 1996)
- Catherine Seville. *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century*, (Cambridge University Press, 2006)
- Limor Shifman. *Memes in Digital Culture*, (MIT Press, 2014)
- Aram Sinnreich. *Mashed Up: Music, Technology, and the Rise of Configurable Culture*, (University of Massachusetts Press, 2010)
- Michael Steinberg. *Choral Masterworks: A Listener's Guide*, (Oxford University Press, 2005)
- Paul Théberge. 'Plugged in': technology and popular music', in Simon Frith, Will Straw and John Street (eds), *The Cambridge Companion to Pop and Rock*, (Cambridge University Press, 2001), 3-25
- Paul Théberge. 'Technology, Creative Practice and Copyright', in Simon Frith and Lee Marshall (eds), *Music and Copyright (2nd edition)*, (Edinburgh University Press, 2004), 139-156
- Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*, (New York University Press, 2003)
- Li Weng and Bart Preneel. 'A Secure Perceptual Hash Algorithm for Image Content Recognition', in Bart De Decker *et al.* (eds), *Communications and Multimedia Security*, (Springer, 2011)
- Patrik Wikström. *Reluctantly virtual: Modelling Copyright Industry Dynamics*, (Karlstad University Studies, 2006)
- Martha Woodmansee, 'On the Author Effect: Recovering Collectivity', in Martha Woodmansee and Peter Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature*, (Duke University Press, 1994)
- Mark C. Young. *The Guinness Book of World Records 1998*, (Mass Market, 1997)

News, magazine and non-audiovisual web sources

- Alexa. *YouTube Traffic Statistics* (online), (2017), <<http://www.alexacom/siteinfo/youtubecom>>
- Alexa. *The top 500 sites on the web* (online), (2017), <<http://www.alexacom/topsites>>

- Kevin Allocca. 'The Harlem Shake Has Exploded (Updated)', *YouTube Trends* (online), (12 February 2013), <<http://youtube-trends.blogspot.com.au/2013/02/the-harlem-shake-has-exploded.html>>
- Apple. *Lady DJ Mix Pro* (online), (Apple, 2016), <<http://itunes.apple.com/us/app/dj-mix-pro/id483255235?mt=8>>
- APRA AMCOS, *Q&A with Frank Rodi, APRA AMCOS Online & Mobile Licensing Manager*, (2013)
- APRA AMCOS. *YouTube and You*, (APRA AMCOS, 2013), <<http://apraamcos.com.au/news/2014/past-aprap-articles/youtube-and-you/>>
- ARIA. 'And the award goes to...', *Aria Awards* (online), (ARIA 2016), <<http://www.ariaawards.com.au/News/2016/AND-THE-ARIA-AWARD-GOES-TO>>
- ARIA. *ARIA End of Year Top 100 Album Chart – 2013*, (online), (6 January 2014), <<http://www.ariacharts.com.au/chart/top-100-albums>>
- ARIA. 'End of the year charts: Top 50 singles.', *aria.com.au* (online), (Sydney: ARIA, 1995), <<http://www.aria.com.au/pages/aria-charts-end-of-year-charts-top-50-singles-1995.htm>>
- Australian Copyright Council. 'A case involving the moral right of integrity', *News & Policy* (online), (Australian Copyright Council, 2012), 29 February 2012, <<http://www.copyright.org.au/news-and-policy/details/id/2047/>>
- Australian Copyright Council. *Information Sheet G118v4 Mashups & Copyright* (online), (December 2014), <http://www.copyright.org.au/acc_prod/AsiCommon/Controls/BSA/Downloader.aspx?iDocumentStorageKey=e8ff34fd-32c7-4c19-b67e-2d5afd92244d&iFileTypeCode=PDF&iFileName=Mashups,%20Memes,%20Remixes%20&%20Copyright>
- APRA AMCOS. 'What's a remix and how do copyright and royalties apply to remixes?', *Music Creators* (online), (2016), <<http://apraamcos.com.au/about-us/faqs/music-creators/>>
- APRA AMCOS. *Recorded Music for Dance Use Licence Application* (online), (2016), <http://apraamcos.com.au/media/Customers/GFN_Recorded-Music-Dance-Use.pdf>
- APRA AMCOS, *Q&A with Frank Rodi, APRA AMCOS Online & Mobile Licensing Manager*, (2013), <<http://apraamcos.com.au/news/2014/past-aprap-articles/youtube-and-you/>>
- The Avalanches. 'About' [The AvalanchesVEVO], *YouTube* (online), (2017), <<https://www.youtube.com/user/TheAvalanchesVEVO/about>>
- Conor Bateman. 'The Was – Soda_Jerk vs The Avalanches', *4:3 film* (online), <https://fourthreefilm.com/2016/07/the-was-soda_jerk-vs-the-avalanches/>
- Beatport. *How do royalties and payments work*, (Beatport, c2017), <<https://knowledgebase.beatport.com/kb/article/000115>>
- Nick Bertke. 'About' [Pogo], *YouTube* (online), (2017), <<https://www.youtube.com/user/Fagottron/about>>
- Nick Bertke. *Pogomix* (online), (c2015), <<http://pogomix.net/>>
- Sanjiv Bhattacharya. 'Plain crazy', *guardian.co.uk* (online), (23 April 2006), <<http://www.guardian.co.uk/music/2006/apr/23/urban.popandrock>>

- Billboard. *Billboard*, (22 January 1977)
- Georgia Blain. *Moral Rights of Artists: A Code of Practice*, (Australia Council, 1991), 5
- Lars Brandle and Christie Eliezer. 'Dance Surges Down Under', *Billboard*, (24 November 2001), <<http://larsbrandle.com/dance-surges-down-under>>
- Adam Bychawski. 'Gorillaz' Murdoc "hijacks" NME Radio to play Horrors, Dead Weather', *NME* (online), (21 January 2010), <<http://www.nme.com/news/gorillaz/49355>>
- Angelo Candalepas. 'Sense of place permeated works of great designer', *theage.com.au* (online), (21 September 2011), <<http://www.theage.com.au/comment/obituaries/sense-of-place-permeated-works-of-great-designer-20110921-1kljp.html>>
- James Cartwright. 'Lost Art Spent a Decade Working on The Avalanches Album Art', *Aiga* (online), (19 December 2016), <<https://eyeondesign.aiga.org/designer-chris-hopkins-spent-a-decade-working-on-the-avalanches-album-art/>>
- Keith Caulfield. "'Vogue' Producer Shep Pettibone's First Interview in 20 Years: On Making a Madonna Classic & Why He Left Music Behind", *Billboard* (online), (22 May 2015), <<http://www.billboard.com/articles/columns/pop-shop/6575923/vogue-producer-shep-pettibone-interview>>
- CBS Corporation *et al.* *Principles for User Generated Content Services* (online), (c2006), <<http://www.ugcprinciples.com/>>
- Senthil Chidambaram. 'Is Pitbull's 'Bon, Bon' a heist? Alvaro speaks the truth!', *Dancing Astronaut* (online), (10 December 2010), <<http://www.dancingastronaut.com/2010/12/is-pitbulls-bon-bon-a-heist-alvaro-speaks-the-truth/>>
- Jonny Coleman. 'Meet The Woman Who Helps The Beastie Boys, Beck And The Avalanches Clear Their Samples', *LAist* (online), (19 October 2016), <http://laist.com/2016/10/19/pat_shannahan_detective_sampling_interview.php>
- John Constine. 'Dubset makes Sony the first major label legalized for remixing', *Techcrunch* (online), (22 August 2017), <https://techcrunch.com/2017/08/22/dubset-makes-sony-the-first-major-label-legalized-for-remixing/?lipi=urn%3Ali%3Apage%3Ad_flagship3_feed%3B6r3zZ4FNS5uEFuaeJGCLgQ==>>
- Ben Dandridge-Lemco. 'SoundCloud Founder Says DJ Mixes Will No Longer Be Removed For Copyright Infringement', *Fader* (online), (12 December 2016), <<http://www.thefader.com/2016/12/12/soundcloud-no-longer-remove-dj-mixes-for-copyright-infringement>>
- Discogs. *Colossal Records*, (2017), <<http://www.discogs.com/label/Colossal+Records>>
- Ryan Dombal, 'Interviews: Girl Talk' (online), *pitchfork.com*, (30 August 2006), <<http://pitchfork.com/features/interviews/6415-girl-talk/>>
- Stuart Dredge, 'It's not just YouTube with expired major-label deals - Spotify has too', *Music Ally* (online), (12 April 2016), <<http://musically.com/2016/04/12/its-not-just-youtube-with-expired-major-label-deals-spotify-has-too/>>

- Stuart Dredge. 'Dubset's MixBANK Licenses Remixes – And Apple Music Is Its First Client', *Music Ally* (online), (15 March 2016), <<http://musically.com/2016/03/15/dubset-mixbank-licenses-remixes-apple-music/>>
- Dubset. *Sony Music Partners with Dubset To Monetize and Manage Song Uses In Streaming DJ Sets and Remixes* (online), (22 August 2017), <<https://static1.squarespace.com/static/5435df50e4b0193dcc7e1d97/t/599c47868419c23da1282c76/1503414151183/dubset+sme+press+release+-+2017-08-07.pdf>>
- Dubset Media Holdings. *Dubset's MixSCAN® Technology Platform Identifies Over 20,000 Artists Being Streamed and Not Receiving Royalties* (online), (9 March 2015), <<https://static1.squarespace.com/static/5435df50e4b0193dcc7e1d97/t/54ff15d4e4b0a23095bd0609/1426003412112/%5BDubset%5D+MixSCAN+Tri+al+Release+Final+3-9-15.pdf>>
- Mandi Dudek. 'A Look Inside The Gorillaz x Sonos "Spirit House" in Brooklyn', *Baeble Music* (online), (25 April 2017), <<http://www.baebblemusic.com/musicblog/4-25-2017/a-look-inside-the-gorillaz-x-sonos-spirit-house-in-brooklyn.html>>
- Nick Duerden. 'Gorillaz in our midst', *The Observer* (online), (11 March 2001), <<http://www.guardian.co.uk/theobserver/2001/mar/11/featuresreview.review2>>
- Entertainment Weekly. 'The return of Gorillaz', *Entertainment Weekly* (online), (25 November 2005), <<http://ew.com/article/2005/11/25/return-gorillaz/>>
- John Farnham. 'About', *YouTube* (online), (2017), <<https://www.youtube.com/user/JohnFarnhamVEVO/about>>
- Elizabeth Farrelly. 'Genius doesn't mean pleasure', *smh.com.au* (online), (11 November 2003), <<http://www.smh.com.au/articles/2003/11/10/1068329493877.html>>
- Matt Fink. 'The Avalanches: Worth Every Second', *Under The Radar* (online), (3 March 2017), <http://www.undertheradarmag.com/interviews/the_avalanches>
- Neil Gaiman. 'Keeping It (Un)real', *Wired*, (1 July 2005), <<https://www.wired.com/2005/07/gorillaz-2/>>
- Lauren Gitlin. 'DJ Makes Jay-Z Meet Beatles', *Rolling Stone* (online), (2004), <<http://www.rollingstone.com/music/news/dj-makes-jay-z-meet-beatles-20040205>>
- Aaron Gonsler. 'Sample Clearance Expert Pat "The Detective" Shannahan is The Avalanches' Secret Weapon', *Red Bull Music Academy Daily* (online), (18 August 2016), <<http://daily.redbullmusicacademy.com/2016/08/pat-the-detective-shannahan-interview>>
- Google. 'Statistics', *YouTube* (online), (2016), <<https://www.youtube.com/yt/press/statistics.html>>
- Google. *How Google Fights Piracy* (online), (2016), <<https://drive.google.com/file/d/0BwxyRPFduTN2cl91LXJ0YjIYSjA/view>>
- Google. 'How Content ID works', *How to manage your copyrights on YouTube* (online), (c2016)

- Google. 'Testimony of Katherine Oyama, Senior Copyright Policy Counsel, Google Inc.', *Hearing on s.512 of Title 17 Before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary*, 113th Congress, (2014)
- Gorillaz and Korg. *Remix Gorillaz on the iELECTRIBE* (online), (2011), <<http://gorillaz.com/KORG-iELECTRIBE-Gorillaz-Edition>>
- Gotye. *Original videos used in Somebodies* (online), (Gotye, 2012) <<http://gotye.com/reader/items/original-videos-used-in-somebodies-a-youtube-orchestra.html#blog.html>>
- Kory Grow. 'How Chris Rock and Ice-T Inspired Jay Z's "99 Problems"', *Rolling Stone* (online), (25 March 2014), <<http://www.rollingstone.com/music/news/how-chris-rock-and-ice-t-inspired-jay-zs-99-problems-20140325>>
- Heikko Hoffman. 'SoundCloud Go', *Groove* (online), (7 December 2016), <<http://groove.de/2016/12/07/soundcloud-go-eric-wahlforss-tantiemen-gema/>>
- Marc Hogan. 'Apple Music Strikes Deal to Stream Previously Unlicensed DJ Mixes and Remixes', *Pitchfork* (online), (15 March 2016), <<http://pitchfork.com/news/64163-apple-music-strikes-deal-to-stream-previously-unlicensed-dj-mixes-and-remixes/>>
- Tim Ingham. 'Warner and Youtube sign new deal... 'under very difficult circumstances'', *Music Business Worldwide* (online), (5 May 2017), <<https://www.musicbusinessworldwide.com/warner-youtube-sign-new-deal-difficult-circumstances/>>
- Sam Inglis. 'Recording Gorillaz's "Clint Eastwood": Tom Girling & Jason Cox', *Sound on Sound* (online), (September 2001), <http://www.gorillaz-unofficial.com/media_archive/sosinterviewsep01.htm>
- Brian Ives. 'Interview: Ice-T Puts The World On Blast', *radio.com* (online), (radio, 21 July 2014), <<http://radio.com/2014/07/21/interview-ice-t-body-count-manslaughter/>>
- Triple J. 'The Avalanches' guide to the samples, features, and stories of Wildflower', *ABC* (online), (ABC, 1 July 2016), <<http://www.abc.net.au/triplej/musicnews/s4492761.htm>>
- Double J. *The Avalanches* (online), (ABC, 2014), <<http://doublej.net.au/programs/jfiles/the-avalanches>>
- Meera Jagannathan. 'R&B artist sues Taylor Swift for \$42 million, claims she ripped off "Shake It Off" lyrics', *New York Daily News* (online), (31 October 2015), <www.nydailynews.com/entertainment/music/musician-sues-taylor-swift-42-mil-shake-article-1.2418802>
- Chris Johnston. 'You've waited 16 years for this. So what took The Avalanches so long?', *The Sydney Morning Herald* (online), (1 July 2016), <<http://www.smh.com.au/entertainment/youve-waited-16-years-for-this-so-what-took-the-avalanches-so-long-20160624-gprdtg>>
- Rhian Jones, 'Dubset signs deal for indie publisher rights with NMPA', *Music Business Worldwide* (online), (18 May 2016), <<http://www.musicbusinessworldwide.com/dubset-signs-deal-for-indie-publisher-rights-with-nmpa/>>

- Justia. 'Cases matching "VMG Salsoul"', *justia.com*, (online), 14 March 2015, <dockets.justia.com/search?filters=&query=vmg+Salsoul>
- Peter Kafka. 'Here's why the music labels are furious at YouTube. Again.', *recode* (online), (11 April 2016), <<http://www.recode.net/2016/4/11/11586030/youtube-google-dmca-riaa-cary-sherman>>
- Paul Kallenbach and Nicole Reid. 'Rappers, moral rights and infringement', *Intellect: Minter Ellison's technology, media, communications and IT blog* (online), (Minter Ellison, 1 March 2012), <http://minterstmt.blogspot.com.au/2012_03_01_archive.html>
- Lachlan Kanoniuk. 'Introducing: The Avalanches (again)', *faster louder*, (7 July 2016), <<http://fasterlouder.junkee.com/the-avalanches-interview-robbie-chater-2016-wildflower/864236>>
- Jim Koch. 'How to Make Money with Your Music on YouTube', *ASCAP* (online), (2015), <<https://www.ascap.com/help/royalties-and-payment/make-money-youtube>>
- Chuck Klosterman. 'The D.J. Auteur', *The New York Times* (online), (18 June 2006), <www.nytimes.com/2006/06/18/magazine/18barkley.html?mcubz=3>
- Danny Krivit. [untitled biography], (online), c2014, <<http://www.dannykrivit.net/biography.html>>
- Matt LeMay. 'The Avalanches', *Pitchfork* (online), (31 October 2001), <http://web.archive.org/web/20080618093953/http://www.pitchforkmedia.com/article/record_review/15136-since-i-left-you>
- Darren Levin. 'Was the Avalanches' Since I Left You too good to follow up?', *The Guardian* (online), (23 May 2014), <<http://www.theguardian.com/music/australia-culture-blog/2014/may/23/was-the-avalanches-since-i-left-you-too-good-to-follow-up>>
- Robert Levine and Bill Werde. 'Superproducers', *Wired* (online), (10 January 2003), <www.wired.com/2003/10/producers/>
- Robert Levine and Bill Werde. 'They're reinventing the sound of music. And the music industry.', *Wired* (online), (c2003), <http://www.wired.com/wired/archive/11.10/producers_pr.html>
- Peter Macia. 'Interview: Damon Albarn and Jamie Hewlett', *thefader* (online), (30 April 2010), <<http://www.thefader.com/2010/04/30/interview-damon-albarn-and-jamie-hewlett-of-gorillaz/>>
- Kia Makarechi. "'Harlem Shake" Samples Cleared By Diplo After Unlicensed Use Attracted Complaints', *The Huffington Post* (online), (25 April 2013), <http://www.huffingtonpost.com/2013/04/25/harlem-shake-samples-diplo_n_3157430.html>
- Kevin Meenan. 'D is for Dance: #10YearsofYouTube', *YouTube Trends* (online), (5 May 2015), <<http://youtube-trends.blogspot.com.au/2015/05/d-is-for-dance-10yearsofyoutube.html>>
- Native Instruments. *Press Release: Native Instruments today announced Traktor Remixed* (online), (Native Instruments, 3 April 2012), <<http://www.musicradar.com/news/tech/native-instruments-announces-traktor-remixed-537952>>

- NIME. *Interactive Music Notation and Representation Workshop* (online), (30 June 2014), <<http://notation.afim-asso.org/doku.php/evenements/2014-06-30-nimew>>
- Lynn Oldshue. 'The Right Notes', *The Southern Rambler* (online), (2013), <<http://thesouthernrambler.com/3wvbp0avyx6o9n785t0fk8zoqfduof/>>
- onerpm. *onerpm* (online), (2016), <<https://onerpm.com/>>
- Glenn Peoples. 'Apple Music, Dubset Partner to Stream Previously Unlicensed Remixes and DJ Mixes: Exclusive', *Billboard* (online), (2016), <<http://www.billboard.com/articles/news/7256376/apple-music-dubset-partner-previously-unlicensed-remixes-dance>>
- Chuck Philips. 'Songwriter Wins Large Settlement in Rap Suit: Pop music: Following a court ruling, Biz Markie and Warner Bros. agree to pay Gilbert O'Sullivan for rapper's 'sampling' of 'Alone Again (Naturally).', *Los Angeles Times* (online), (1 January 1992), <http://articles.latimes.com/1992-01-01/entertainment/ca-1136_1_biz-markie>
- PPCA. *Licence Application Form: For public use of protected sound recordings and/or music videos* (online), (2015), <http://www.pcca.com.au/IgnitionSuite/uploads/docs/PPCA_LICENCING_25-10-11-V7.pdf>
- Mark Pytlik. 'The Avalanches', *soundonsound* (online), (November 2002), <<http://www.soundonsound.com/sos/nov02/articles/avalanches.asp>>
- Rich Raddon. 'ZEFR CEO on How Mayweather-Pacquiao Fight Exposed Periscope's Copyright Problem (Guest Blog)', *The Wrap* (online), (5 May 2015), <<http://www.thewrap.com/zefr-ceo-on-how-mayweather-pacquiao-fight-exposed-periscopes-copyright-problem-guest-blog/>>
- RIAA. *Diamond Awards*, (online), (c2014), <http://riaa.com/goldandplatinum.php?content_selector=top-diamond-awards>
- Mallory Russell. 'The Harlem Shake Hits 1 Billion Views!', *Visible Measures* (online), (4 April 2013), <<http://www.visiblemeasures.com/2013/04/04/the-harlem-shake-hits-1-billion-views/>>
- Dan Rys. 'Lyor Cohen Named YouTube's Global Head of Music', *Billboard* (online), (28 September 2016), <<http://www.billboard.com/articles/business/7525695/lyor-cohen-named-youtube-global-head-of-music>>
- Schott. *Carl Orff* (online), (Schott, c2016) <<http://www.schott-music.com/shop/persons/az/carl-orff/>>
- Anne Steele. 'Now in the Mix for Sony Music Artists: Royalties From DJ Sets', *The Wall Street Journal* (online), (22 August 2017), <https://www.wsj.com/article_email/now-in-the-mix-for-sony-music-artists-royalties-from-dj-sets-1503406803-lMyQjAxMTI3MTI3MjgyNTI5Wj/>
- Greg Tate. 'Diary of a Bug', *Village Voice*, (22 November 1988)
- Angus Taylor. 'Interview: Junior Dan', *United Reggae* (online), (28 May 2010), <<http://unitedreggae.com/articles/n388/052810/interview-junior-dan-part-2>>
- Gary Trust. 'Baauer's "Harlem Shake" Debuts Atop Revamped Hot 100', *Billboard* (online), (20 February 2013),

- <<http://www.billboard.com/articles/news/1549388/baauers-harlem-shake-debuts-atop-revamped-hot-100>>
- Vydia. *Vydia* (online), (2016), <<http://vydia.com/>>
 - Rob Walker. 'Mash-Up Model', *The New York Times*, (20 July 2008), <http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?partner=rssnyt&emc=rss&_r=0>
 - Christian Ward. 'Avalanches: Since I Left You', *NME* (online), (12 September 2005), <<http://www.nme.com/reviews/avalanches/4828>>
 - Jon Wiederhorn. 'Jay-Z and Linkin Park show Danger Mouse How It's Done: Rappers, rockers mix tracks together in studio and live', *MTV News* (online), (MTV, 4 October 2004), <<http://www.mtv.com/news/1491889/jay-z-and-linkin-park-show-danger-mouse-how-its-done/>>
 - Verse Music Group. *The Salsoul Orchestra*, (online), (c2013), <<http://versemusicgroup.com/the-salsoul-orchestra>>
 - Tim Wu. 'Jay-Z versus the Sample Troll', *Slate* (online), 16 November 2006, <http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html>
 - XFM. *Gorillaz Launch 'Search For A Star' Competition* (online), (1 December 2014), <<http://gorillaz-news.livejournal.com/6114.html>>
 - Ian Youngs, 'Gorillaz pull it off', *BBC News* (online), (23 March 2001), <<http://news.bbc.co.uk/2/hi/entertainment/1237698.stm>>
 - Zefr. *Careers* (online), (2017), <<http://zefr.com/careers/>>
 - Zefr. 'Our Deep Tech', *Technology* (online), (2017), <<http://zefr.com/technology/>>
 - Zefr and Sony Pictures Television, Inc.. *Content Services Agreement* (online), (Wikileaks, c2014), <[https://wikileaks.org/sony/docs/031_03/Legal_Dept/Corporate%20Legal/Former%20Staff%20Directories/TFreed/Crackle/Syndication/ZEFR/ZEFR%20-%20Content%20Services%20Agreement%20\(Sony\)\(SPT%20Comments%2010.23.14\).docx](https://wikileaks.org/sony/docs/031_03/Legal_Dept/Corporate%20Legal/Former%20Staff%20Directories/TFreed/Crackle/Syndication/ZEFR/ZEFR%20-%20Content%20Services%20Agreement%20(Sony)(SPT%20Comments%2010.23.14).docx)>
 - zerosozha. 'Haters Gonna Hate', *KnowYourMeme* (online), (8 February 2010), <<http://knowyourmeme.com/memes/haters-gonna-hate>>

Audio

- 2 Live Crew. 'Table Dance', *Shake a Lil' Somethin'*, (Lil' Joe Records, 1996)
- 2Pac. *How Do U Want It*, (Death Row Records, 1996)
- 3LW. *3LW*, (Epic, 2000)
- Alpha Wann. 'A deux pas', *Alph Lauren 2*, (Don Dada, 2016)
- The Avalanches. *Wildflower*, (Modular, 2016)
- The Avalanches. *Since I Left You*, (Modular, 2001)
- The Avalanches. *Ski Surfin'*, (Warner Bros. Records, 1963)
- The Beatles. *The Beatles*, (Apple Records, 1968)
- Bee Gees. *Stayin' Alive*, (RSO, 1977)
- Ben Brown. '19-2000 (Ben Brown's UKFUNK.COM Remix As Chosen By Gorillaz', *XFM - the Remix Vol.1*, (Virgin, 2002)
- Biz Markie. *All Samples Cleared*, (Cold Chillin', 1993)
- Black Sabbath. *Paranoid*, (Vertigo, 1970)

- Renato Carosone and Nicola Salerno. 'Tu vuò fà l'Americano', in Mario Mattoili, *Totò Peppino e le fanatiche*, (Titanus, 1958)
- Chic. *Good Times*, (Atlantic, 1979)
- Chicago. *Chicago's Greatest Hits*, (CBS, 1975)
- Daft Punk. *Human After All*, (Virgin, 2005)
- Daft Punk. *Homework*, (Virgin, 1996)
- De La Soul. *A Roller Skating Jam Named "Saturdays"*, (Tommy Boy, 1991)
- Deee-Lite. *Groove is in the Heart*, (Elektra, 1990)
- Lamont Dozier. *Take Off Your Make-Up*, (ABC Records, 1973)
- Eddie Drennon B.B.S. Unlimited. *Let's Do The Latin Hustle*, (Friends & Co., 1975)
- The Duprees. *The Sky's The Limit*, (Legacy Music, 1968)
- Flume. 'Innocence', *Skin*, (Future Classic, 2016)
- Funkadelic. *Get Off Your Ass And Jam*, (Funkadelic Invasion Force, 1975)
- Gorillaz. *Demon Days*, (Parlophone, 2005)
- Gotye. *Somebody That I Used To know*, (Eleven, 2011)
- Jesse Braham. *Sexy Ladies*, (Southern Soul, 2013)
- Ariana Grande. *My Everything*, (Republic, 2014)
- Terry Gross. 'Jay-Z: The Fresh Air Interview', *NPR* (online), (16 November 2010), <<http://www.npr.org/2010/11/16/131334322/the-fresh-air-interview-jay-z-decoded>>
- Jimi Hendrix. *Electric Ladyland*, (Polydor, 1968)
- Hrishikesh Hirway. 'GORILLAZ (feat. D.R.A.M.)', *Song Exploder* (online), (12 April 2017), <<https://soundcloud.com/hrishihirway/song-exploder-gorillaz-feat-dram>>
- Hugo. '99 Problems', *Old Tyme Religion*, (Roc Nation, 2011)
- Ice-T. *The Seventh Deadly Sin*, (Atomic Pop, 1999)
- Ice-T. '99 Problems (featuring Brother Marquis)', *Home Invasion*, (Rhyme \$yndicate, 1993)
- Instant Funk. *I Got My Mind Made Up / Wide World Of Sports*, (Salsoul Records, 1978)
- The Jackson Five, *I Want You Back*, (Motown, 1969)
- Michael Jackson. *Remember The Time*, (Epic, 1991)
- Michael Jackson. *Bad*, Epic, (1987)
- Michael Jackson. *Billie Jean*, (Epic, 1982)
- Michael Jackson. *Thriller*, (Epic, 1982)
- Michael Jackson. *Don't Stop Till You Get Enough*, (Epic, 1979)
- Jane Doze. *Girls Talk*, (2012), <<http://www.thejanedoze.com/>>
- Jay-Z + Alicia Keys. *Empire State of Mind*, (Roc Nation, 2009)
- Jay-Z. '99 Problems', *The Black Album*, Roc-A-Fella and Def Jam, 2004)
- Jay-Z. *The Black Album*, (Roc-A-Fella Records, 2003)
- Jay-Z. *The Black Album*, (Roc-A-Fella Records, 2003)
- J.C. *Vote 4 Me*, (Swagg Team, 2010)
- Cyndi Lauper. *Girls Just Want To Have Fun*, (Portrait, 1983)
- Lil Wayne. 'In My Life', *The Prefix*, (Cash Money, 2004)
- Linkin Park and Jay-Z, 'Points Of Authority/99 Problems/One Step Closer', *Collision Course*, (Roc-A-Fella, Machine Shop, Warner Bros. and Def Jam, 2014)

- Zane Lowe. *Interview with The Avalanches* (online), (Apple Music, 1 June 2016), <<https://itunes.apple.com/us/post/idsa.eacf609a-2876-11e6-ba78-6c8e419fd692>>
- Ludacris *et al.*. *Saturday (Oooh Oooh!)*, (Def Jam South, 2001)
- Madonna, Julie Frost and Jimmy Harry. *Masterpiece*, (Interscope, 2011)
- The Main Attraction, *And Now The Main Attraction*, (Tower, 1967)
- Massed Bands of the Australian Army, conducted by Major R. A. Newman. *Waltzing Matilda*, (online), (Melbourne Olympics, 1956), <<http://www.nfsa.gov.au/collection/sound/sounds-australia/waltzing-matilda/>>
- Massive Attack. *Angel*, (Circa, 1998)
- Mighty Ryeders. *Help Us Spread The Message*, (Sun Glo Records, 1978)
- Kylie Minogue. *Slow*, (Parlophone, 2003)
- Tony Mottola. *Warm, Wild & Wonderful*, (Project 3 Total Sound Stereo, 1968)
- Tony Mottola. *Roman Guitar, Vol. 2*, (Command, 1962)
- Nelly. *Hot In Herre*, (Universal, 2002)
- The Osmonds. *The Plan*, (MGM, 1973)
- Gilbert O'Sullivan. *Gilbert O'Sullivan*, (Music For Pleasure, 1978)
- Pitbull. *Bon, Bon* (Sony Music Latin, 2010)
- Rose Royce. *Car Wash*, (Geffen Records, 1976)
- Sly and the Family Stone. *There's a Riot Goin' On*, (Epic, 1971)
- Taylor Swift. *1989*, (Big Machine, 2014)
- Tower of Power. *In The Slot*, (Warner Bros. Records, 1975)
- Trick Daddy. '99 Problems', *Thugs Are Us*, (Atlantic Records, 2001)
- Frankie Valli. *Frankie Valli...Is The Word*, (Warner Bros. Records, 1978)
- Klaus Wunderlich And His New Pop Organ Sound. *Südamericana 3 - Latin Festival*, (Telefunken 1976)
- Yolanda Be Cool and DCUP. *We No Speak Americano*, (Ultra Music, 2009)

Audiovisual

- DJ Alvaro. 'Pitbull - Bon Bon | How it's Made (DJ ALVARO)', *YouTube* (online), (6 October 2010), <<http://www.youtube.com/watch?v=jJaJ59pysEs>>
- Mark Applebaum. 'The Scientist of Music', *ted.com*, (online), (May 2012), <http://www.ted.com/talks/mark_applebaum_the_mad_scientist_of_music?language=en>
- Bandstand. 'Every Sample From The Avalanches Since I Left You', *YouTube* (online), (28 June 2017), <<https://www.youtube.com/watch?v=MFEZiMyfSYI>>
- Phillippe Charluet. *The Avalanches* (film), (ABC Videos, 1999)
- Harry Coade. '40 MJ tracks in 3minutes Mashup by Harry Coade @ Westend Production', *YouTube* (online), (Westend Productions TV, 26 October 2011), <<http://www.youtube.com/watch?v=E1ST8C0dcko>>
- Kirby Ferguson. *Everything is a Remix* (online), (2011), <<http://everythingisaremix.info/about/>>
- Bob Giraldi. *Club Med*, (Lorimar Telepictures, 1986)
- Gorillaz. *Dare*, *YouTube* (online), (Parlophone, 7 September 2010), <<http://www.youtube.com/watch?v=uAOR6ib95kQ&ob=av2e>>

- Gorillaz. *The Making of Plastic Beach*, (Parlophone and Virgin, 2010)
- Gotye. 'Somebodies: A YouTube Orchestra', *YouTube* (online), (12 August 2012), <<http://www.youtube.com/watch?v=opg4VGvyi3M>>
- Oliver Heckman. 'YouTube: A peek inside', (Streaming Media Europe, 2011)
- Ice-T. *Ice-T Talks New Body Count Album, Jay-Z's Remake of "99 Problems" & Much More*, radio.com, (online), (radio, 7 July 2014), <<https://www.youtube.com/watch?v=6YJhbJDGb7g>>
- Jay-Z. '99 Problems But Mitt Ain't One', *YouTube* (online), (5 November 2012), <<https://www.youtube.com/watch?v=-kZ89zUroFI>>
- Jay-Z. '99 Problems But a Bush Ain't One', *YouTube* (online), (22 January 2009), <<https://www.youtube.com/watch?v=flgi4qjK41M>>
- Jiangsu Satellite Television, *If You Are The One*, (JST, c2010)
- Kimbra. 'Settle Down', *YouTube* (online), (South by Southwest, 16 May 2012), <<http://www.youtube.com/watch?v=sd7GLvMYSHI>>
- Johannes Kreidler. 'Johannes Kreidler GEMA-Aktion product placements Doku', *YouTube* (online), (27 February 2009), <http://www.youtube.com/watch?time_continue=6&v=EAptRZlwziA>
- Ceri Levy. *Bananaz*, (Head Film Ltd, 2008)
- George Lopez. 'Prince at Lopez Tonight', *Lopez Tonight* (online), (15 April 2001), <https://www.youtube.com/watch?v=rQbqNl_lacg>
- George Patterson Y&R. *Big Ad* (online), (George Patterson Y&R, c2005), <http://www.youtube.com/watch?v=eH3GH7Pn_eA>
- Madonna. 'Vogue -MTV Music Awards 1990', *YouTube* (online), (17 November 2010), <<http://www.youtube.com/watch?v=ITaXtWWR16A>>
- Madonna. 'Madonna - Vogue (video)', *YouTube* (online), (26 October 2009), <<http://www.youtube.com/watch?v=GuJQSAiODqI&feature=kp>>
- Alan Menken and Howard Ashman. *Little Shop of Horrors*, (Workshop of the Players' Art, 1982)
- Remi. 'Remi covers The Avalanches 'Since I Left You' for Like A Version', *YouTube* (online), (ABC, 21 November 2013), <<https://www.youtube.com/watch?v=2Js1bNb-eqA>>
- Madeon. 'Madeon - Pop Culture (live mashup)', *YouTube* (online), (11 July 2011), <<http://www.youtube.com/watch?v=lTx3G6h2xyA>>
- Musion. *Gorillaz & Madonna: Grammy Awards* (online), (c2006), <http://www.eyeliner3d.com/gorillaz_madonna_grammy_awards.html>
- Nina Las Vegas. *LISTMAS* (online), (13 December 2013), <<https://www.youtube.com/watch?v=ynN5iHN5SRM>>
- NPR. 'Pogo: Harnessing The Innate Rhythm Of Pop Culture', *NPR* (online), (21 April 2012), <<http://www.npr.org/2012/05/06/150981484/pogo-harnessing-the-innate-rhythm-of-pop-culture>>
- President Barack Obama. '2013 White House Correspondents' Dinner', *YouTube* (online), (27 April 2013) <<https://www.youtube.com/watch?v=ON2XWvyePH8>>
- Pogo. 'Trumpular', *YouTube* (online), (2 October 2016), <https://www.youtube.com/watch?v=1vx3_2ks5qQ>
- Pogo. 'Bloom', *YouTube* (online), (22 June 2011), <https://www.youtube.com/watch?v=t_htoSaqFf4>

- Pogo. 'Wishery', *YouTube* (online), (4 November 2010), <<https://www.youtube.com/watch?v=qs1bG6BIYlo>>
- Pogo. 'Upular', *YouTube* (online), (25 December 2009), <<https://www.youtube.com/watch?v=JVxe5NIABsl>>
- Pogo. 'Expialidocious', *YouTube* (online), (24 May 2009), <https://www.youtube.com/watch?v=3Za-V_lhwGg>
- Rickydowns Kanal. 'The Avalanches – Since I Left You (The Samples)', *YouTube* (online), (8 September 2009), <<https://www.youtube.com/watch?v=zehvICx-Rsg>>
- Ed Rollo. *Madeon - Pop Culture (Live mashup cover) by Ed Rollo* (online), (16 December 2011), <<http://www.youtube.com/watch?v=jvqOqLpry40&feature=related>>
- Seth Rudetsky. 'ABBA Respond to Madonna's Sample', *YouTube* (online), (25 September 2009), <<https://www.youtube.com/watch?v=a6MCc8qMy7A>>
- Jon Selfridge. 'Madeon - Pop Culture (Half) Cover by Jon Selfridge', *YouTube* (online), (16 September 2011), <<http://www.youtube.com/watch?v=lWcfpwLFw8g&feature=related>>
- Silicon Valley Bank, 'ZEFR', *Amplify Mentor Series* (online), (20 May 2013), <<https://www.youtube.com/watch?v=hNvAl21WR9M>>
- Soda Jerk, The Avalanches and Chris Hopkins. 'The Was', *Soda Jerk* (online), (2016), <http://www.sodajerk.com.au/video_work.php?v=20160709074312>
- Quentin Tarantino. *Pulp Fiction*, (Miramax Films, 1994)
- Reggie Watts. 'Reggie Watts disorients you in the most entertaining way', *YouTube* (online), (25 May 2012), <http://www.youtube.com/watch?v=BdHK_r9RXTc>
- Wild Combination. *girlwalkallday* (online), (2011), <<http://www.girlwalkallday.com/>>
- World Youth Choir. *O Fortuna* (online), (Nobel Peace Prize, 2011), <<http://www.youtube.com/watch?v=ixNnHc7ecmA>>
- Maysoun Zayid. 'I got 99 problem... palsy is just one', *TEDWomen* (online), (TEDTalks, December 2013), <https://www.ted.com/talks/maysoun_zayid_i_got_99_problems_palsy_is_just_one/transcript?language=en>

Other

- Brendel Informatik. *Brasilia* (font), (Cologne, c1994)
- Johannes Kreidler. 'Person', *Johannes Kreidler Composer* (online), (c2015), <<http://www.kreidler-net.de/english/CV.htm>>
- Frederick Dana Marsh. *The Sinking of the USS President Lincoln on 31st May 1918*, (Naval History and Heritage Command, 1920), <<http://www.history.navy.mil/our-collections/photography/wars-and-events/world-war-i/incidents--1918/uss-president-lincoln-torpedoed-and-sunk-by-u-90/uss-president-lincoln.html>>
- Richard Meale. untitled and undated letter to Peter Banki of Banki Palobi Haddock & Fiora (c1995), *Papers of Richard Meale*, National Library of Australia, MS 10076, Series 6, Folder 10

- Personal communications with Darren Seltmann of The Avalanches, *Remix Culture* (conference), (Deakin University, July 2012)
- Li Weng. *Perceptual Multimedia Hashing*, (September 2012)

Appendix A: Research question and thesis structure

Research question

Is sampling so inconsistent with copyright that it warrants a unique system?

Parts of the thesis



Chapters of the thesis

Part	Chapter
Introduction	I. Counter point or counterpoint
Exposition	II. Originality as rearrangement (main theme)
	III. Sound recording as rearrangement (first variation)
	IV. Integrity as wholeness of arrangement (second variation)
Development	V. Transformative use and originality
	VI. <i>Ex post</i> monitoring and originality
Recapitulation	VII. Harmony between appropriation and copyright
Coda	VIII. One tale of 99 <i>Problems</i>

See following two pages for a summary of the arguments of each chapter.

I. Introduction

- Through the example of The Avalanches' first album, articulates the conflict between sampling and the operation copyright
- Considers the consistency of sampling and appropriation with the purpose of copyright
- Foreshadows the argument of thesis, that sampling is consistent with the purpose of copyright

II. Originality as rearrangement

- Considers copyright subsistence in sampling through the case of *VMG Salsoul v Ciccone*
- Explores the fractured concepts of the copyright work and originality
- Considers the divisibility of works in subsistence and infringement
- Considers the difficulty of separating musical works and sound recordings from one another
- Articulates a theory of the originality as rearrangement

III. Sound recording as rearrangement

- Shows how sound recording has long been an act of original rearrangement
- Illustrates the role of sampling in the creation of Gorillaz sound recordings
- Outlines how Gorillaz remix their own sound recordings to yield further original arrangements
- Considers how the rearrangement of Gorillaz material continues outside the control of the creators

IV. Integrity as wholeness of arrangement

- Sketches a bridge between the copyright concept of originality and the moral rights concept of integrity
- Applies the conceptual discussion to explain the outcomes of two Australian music sampling cases dealing with the right of integrity and its conceptual predecessor, the right against debasement
- Considers how the link between integrity and originality points to links between moral rights and other concepts in copyright law

V. Transformative use and originality

- Shows how rearrangement helps explain both transformative use and originality
- Illustrates how transformative use underpins the four fair use factors.
- Demonstrates how the four fair use factors encourage mashup artists to transform samples, and therefore create original material
- Locates originality and transformative use on the same spectrum, helping existing copyright material add to the ongoing body of originality

VI. *Ex post* monitoring and originality

- Considers shortcomings of *ex ante* licensing for remixes and other creations
- Outlines how content identification systems equip content platforms to detect use of audiovisual copyright material
- Considers how content identification systems and *ex post* monitoring enabled distributed remixing behind the *Harlem Shake* meme
- Explores how *ex post* monitoring can improve allocation of copyright incentives and promote originality at the scale of digital platforms

VII. Recapitulation

- Through the example of The Avalanches' second album, considers how copyright still deters originality for some sampling artists
- Puts forward a revised theory of copyright that enriches the chain of originality, rather than trading off rights and exceptions
- Points out the relevance of the thesis to the field, and to areas of future research

VIII. Coda

- Presents the story of *99 Problems*, which explains the thesis title and echoes themes of preceding chapters