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# The Grey Album: Copyright Law and Digital Sampling

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# THE GREY ALBUM: COPYRIGHT LAW AND DIGITAL SAMPLING

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## Abstract

*In the field of digital sampling, disk jockeys have shown a recent enthusiasm for ‘mash-ups’ — new compositions created by combining the rhythm tracks of one song and the vocal track of another. Most famously of all, DJ Danger Mouse remixed the vocals from Jay-Z’s The Black Album and the Beatles’ White Album and called his creation The Grey Album. The Grey Album poses a number of difficult issues regarding copyright law and digital sampling. Does such a ‘mash-up’ go beyond the de minimis use of a copyright work? Is The Grey Album protected by the defence of fair use under copyright law because it provides a transformative use of copyright works? Can such remixes be compulsorily licensed? Does a ‘mash-up’ raise issues concerning the moral rights of attribution and integrity, which are recognised in Europe and Australia?*

## Introduction

A commentator recently observed: ‘The most interesting and entertaining phenomena of the MP3 peer-to-peer is the availability of “mashes” — new compositions created by combining the rhythm tracks of one song and the vocal track of another.’ (Vaidhyathan, 2004a: 104) The most famous example of a mash-up is *The Grey Album*. In 2003, DJ Danger Mouse — whose real name is Bruce Burton — remixed the vocals from Jay-Z’s *The Black Album* and the Beatles’ *White Album* and called his creation *The Grey Album* (Young, 2004). He released 3000 promotional copies of the album. The record company EMI, the owner of the rights to the sound recording of *White Album*, sent cease and desist letters to DJ Danger Mouse and stores such as Fat Beats and hiphop.com, demanding they destroy copies of the album and remove them from their websites. DJ Danger Mouse agreed to cease distribution of *The Grey Album*. He was quoted as saying, ‘This wasn’t supposed to happen ... I just sent out a few tracks [and] now online stores are selling it and people are downloading it all over the place.’ (Reuters, 2004) He denies that he was an agent provocateur: ‘[It] was not my intent to break copyright laws. It was my intent to make an art project.’ (Moody, 2004)

On 24 February 2004, some 170 websites posted copies of *The Grey Album* on the internet in an act of protest and civil disobedience called ‘Grey Tuesday’. The organisers of the protest, Downhill Battle, declared online: ‘This first-of-its-kind protest signals a refusal to let major label lawyers control what musicians can create and what the public can hear.’ (Downhill Battle, 2004) The group affirmed:

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‘We cannot allow these corporations to continue censoring art; we need common-sense reforms to copyright law that can make sampling legal and practical for artists.’ (Downhill Battle, 2004) A survey of the sites that hosted files during Grey Tuesday, and an analysis of filesharing activity on that day, reported that *The Grey Album* was the number one album in the United States on February 24 by a large margin. The protestors boasted: ‘Danger Mouse moved more “units” than Norah Jones and Kanye West, with well over 100 000 copies downloaded.’ The album was also actively distributed on peer-to-peer networks, such as Kazaa and Soulseek. Cultural commentators hailed such online activism as a symbol of ‘semiotic democracy’ (Howard-Spink, 2004).

In response, EMI and Sony/ATV Publishing instructed their lawyers to stop the distribution of *The Grey Album* on the internet. J. Christopher Jensen (2004), from the New York law firm Cowan, Liebowitz and Latman, warned the host websites of the album: ‘Any unauthorized distribution, reproduction, public performance, and/or other exploitation of *The Grey Album* will constitute, among other things, common law copyright infringement/misappropriation, unfair competition, and unjust enrichment rendering you and anyone engaged with you in such acts liable for all of the remedies provided by relevant laws.’ He demanded that the sites ‘cease and desist from the actual or intended distribution, reproduction, public performance or other exploitation of *The Grey Album* and any other unauthorized uses of the Capitol Recordings or any other sound recordings owned and/or controlled by Capitol’.

Interceding in the debate, the Electronic Frontier Foundation issued a brief legal analysis of the issues raised by the controversy over *The Grey Album* (EFF, 2004). It noted that there were at least four rights-holders potentially involved in the matter — EMI, the owners of the rights to the recording for the Beatles’ *White Album*; Sony Music/ATV Publishing, the owners of the rights to the musical works that appear on the Beatles’ *White Album*; as well as the owners of the rights to the musical works and the sound recording for Jay-Z’s *Black Album*. The EFF observed that there was no federal copyright protection for sound recordings made before 1972: ‘Because the *White Album* was released in 1968, it appears that EMI has no federal copyright rights in the sound recording.’ It noted, though, that state laws may protect sound recordings made before 1972. The EFF commented that the hosts of *The Grey Album* could raise the defence of fair use: ‘It is clear, however, that Grey Tuesday protesters have a credible fair use defense to any copyright claim by Sony/ATV.’

The controversy over the mash-up of *The Grey Album* is emblematic of the wider debate over copyright law and digital sampling of cultural works (Lessig, 2004a). As one cultural critic observed: ‘The tale of *The Grey Album* and Grey Tuesday offers a rich case study for the examination of a wide variety of contemporary cultural issues within the context of the “copyright wars”, remix culture and the age of the digital network.’ (Howard-Spink, 2004) This paper focuses upon the legal dimensions of the debate over *The Grey Album*. Jonathan Zittrain commented that the controversy illustrated a need for revisions in copyright law:

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As a matter of pure legal doctrine, the Grey Tuesday protest is breaking the law, end of story. But copyright law was written with a particular form of industry in mind. The flourishing of information technology gives amateurs and home-recording artists powerful tools to build and share interesting, transformative, and socially valuable art drawn from pieces of popular culture. There's no place to plug such an important cultural sea change into the current legal regime. (Werde, 2004)

The dispute poses a number of difficult legal issues. The first part of this article considers whether a 'mash-up' goes beyond the *de minimis* use of a copyright work, and amounts to infringement of the economic rights of the owner. The second part examines whether *The Grey Album* is protected by the defence of fair use under copyright law because it provides a transformative use of copyright works. The article then speculates whether there is scope for a compulsory licence or even a Creative Commons licence to deal with the digital sampling of musical works. The final section of the paper examines whether digital sampling raises issues concerning the moral rights of attribution and integrity in certain jurisdictions.

### **De minimis use**

On behalf of EMI, the lawyer J. Christopher Jansen emphasised that the samples used in *The Grey Album* constituted a substantial part of the sound recordings of the Beatles, and thus infringed the economic rights of the copyright owner. He observed: 'There is no dispute that *The Grey Album* incorporates Capitol Recordings, as Mr Burton acknowledges on his website that "every kick, snare, and chord is taken from the Beatles *White Album* and is in their original recording somewhere [sic]".' (Jansen, 2004)

In the United States, the courts have stressed the legal maxim of *de minimis non curat lex* — 'the law cares not for trifles' (Kaplicer, 2000; Blessing, 2004). In the case of *Newton v Diamond*, the jazz flautist and composer James W. Newton claimed that the band Beastie Boys had sampled a six-second, three-note performance of his composition, 'Choir'. In 1992, Beastie Boys obtained a licence from ECM Records to use portions of the sound recording of 'Choir' in various renditions of their song 'Pass the Mic' in exchange for a one-time fee of \$1000. Beastie Boys did not obtain a licence from Newton to use the underlying composition.

For the majority, Chief Justice Mary Schroeder of the Federal Court provided a definition and a history of the practice of 'digital sampling'. She affirmed that Beastie Boys' use was *de minimis* and therefore not actionable: 'Having failed to demonstrate any quantitative or qualitative significance of the sample in the 'Choir' composition as a whole, Newton is in a weak position to argue that the similarities between the works are substantial, or that an average audience would recognize the appropriation.' The court observed that the sole basis of Newton's infringement action was his remaining copyright interest in the 'Choir' composition, because Beastie Boys' use of the sound recording was authorised. It held that the use of a brief segment of that composition, consisting of three notes separated by a half-

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step over a background C note, was not sufficient to sustain a claim for copyright infringement.

Dissenting, Justice Susan Graber held that a jury reasonably could find that Beastie Boys' use of the sampled material was not *de minimis*. She observed: 'The majority is simply mistaken in its assertion that Newton's experts did not present evidence of the qualitative value of the compositional elements of the sampled material sufficient to survive summary judgment.'

In *Bridgeport Music Inc v Dimension Films Inc*, the owner of a partial interest in copyright for the musical composition '100 Miles' brought infringement action against the producer of the motion picture, *I Got the Hook Up*. In the District Court, Justice Higgins held that there was *de minimis* use of the copyright work: 'The portion of the song at issue here is an arpeggiated chord — that is, three notes that, if struck together, comprise a chord but instead are played one at a time in very quick succession — that is repeated several times at the opening of "Get Off".' His Honour emphasised that 'a balance must be struck between protecting an artist's interests, and depriving other artists of the building blocks of future works'. The judge concluded: 'Since the advent of Western music, musicians have freely borrowed themes and ideas from other musicians.'

Overturning this finding, the Federal Court of Appeals denied that there was a *de minimis* use of the copyright work. It found that, even where a small part of a sound recording is sampled, the part taken is valuable. Justice Guy observed: 'This case also illustrates the kind of mental, musicological, and technological gymnastics that would have to be employed if one were to adopt a *de minimis* or substantial similarity analysis.' His Honour denied that the need for a licence for digital sampling was a fetter upon artistic creativity or freedom of speech: 'We do not see this as stifling creativity in any significant way.'

In Australia, the Federal Court has shown little fondness for the practice of digital sampling. In *Universal Music Australia Pty Ltd v Miyamoto*, a number of record companies brought legal action against five DJs who engaged in the remixing of tracks from sound recordings, and Anthem Records who sold compact discs containing the remixed tracks. Peter Papalii, known as DJ Gunz, argued that he and the other DJs had made the unlicensed CDs to raise their profiles and satisfy an audience demand. He argued that artists and record companies benefited from the mix CDs circulating in the community: 'We would bring awareness to the artist that we feature on the mix.' (Dasey, 2003) Indeed, Papalii commented that bootleg mix tapes had led to the discovery of artists, such as rapper 50 Cent.

Justice Lindgren held that, under the *Copyright Act 1968* (Cth), the CDs contained substantial reproductions of the sound recordings. His Honour also found that defendants failed to respond to charges that they had infringed the *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1987* (NSW). In a separate hearing, Justice Wilcox awarded \$141 000 in damages and costs against the defendants. He scolded the disk jockeys for their flagrant copyright infringements: 'The evidence suggests the existence, amongst some people in the popular music industry, of a culture of disregard for copyright restrictions.' However, the judge noted: 'If the respondents' infringements of copyright had been limited to creation

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of one or more of the compilation CDs for use only by the respondent himself, so as to facilitate his presentation on a particular occasion, I would have taken a less serious view of the infringements.’ Indeed, in such circumstances he believed ‘they might have benefited from audience members being exposed to particular sound recordings and, thereby, influenced to buy a particular album or albums from a legitimate retailer’.

Similarly, in *Commonwealth Director of Public Prosecutions v Ng, Tran and Le*, the music industry took legal proceedings against Peter Tran, Charles Ng and Tommy Le who were alleged to have run a Napster-style website called MP3 WMA Land. It was alleged that they copied 390 commercially available CD albums and 946 singles. One of the students, Le, called himself ‘DJ Ace’, mixing his own tracks from copyrighted music and offering those on the website (Guilliatt, 2003). The three students pleaded guilty to the charges. Deputy Chief Magistrate Graeme Henson sentenced two students, Ng and Tran, to 18-month suspended custodial sentences, and a \$1000 three-year good behaviour bond. The magistrate sentenced the third defendant, Le, to 200 hours’ community service.

In the United Kingdom case of *Hyperion Records Ltd v Warner Music (UK) Ltd*, the plaintiff sought to redefine the notion of a musical work to its most diminutive meaning. He argued that copyright was vested not only in the whole of the sound recording ‘A Feather on the Breath of God’ and the whole of the track ‘O Eucharist’, but copyright also consisted of the seven or eight notes in the introduction of the ‘O Eucharist’ track. Hugh Laddie QC, sitting as a deputy judge of the High Court, rejected this submission: ‘If the copyright owner is entitled to redefine his copyright work so as to match the size of the alleged infringement, there will never be a requirement for substantiality.’ Citing the film director Jean Luc Goddard, His Honour held: ‘In my judgment, a copyright sound recording must have a beginning, middle and end.’ On the facts, Hugh Laddie QC found that it was arguable whether seven or eight notes, lasting a mere four seconds, could be considered to be a substantial part of the plaintiff’s sound recording.

In light of such precedents in the United States and elsewhere, EMI and Sony/ATV will have to persuade a court that *The Grey Album* songs appropriated a substantial portion of each of the Lennon-McCartney compositions and the sound recordings that they claim have been infringed. The practice of ‘mash-ups’ poses a particular problem here. *The Grey Album* is not a minimalist piece of sampling; on the contrary, it is a maximalist appropriation of the work of The Beatles and Jay-Z. It is doubtful that a court would dismiss the amount of copying of the artists as merely trifling. Indeed, it would be likely that *The Grey Album* would be considered to use a substantial part of the musical works and the sound recordings.

## The defence of fair use

In the United States, there has been much debate about whether digital sampling of musical works is protected under the defence of fair use. Famously, in 1992, Island Records and music publisher Warner-Chappell Music sued Negativland and SST Records Ltd in respect of the unauthorised and unattributed sampling of U2’s

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song ‘I Still Haven’t Found What I’m Looking For’ (Negativland, 1995). The band was forced to settle over the U2 recording because it could not afford the costs involved in fighting for its rights in court. It agreed to pay \$25 000 and half of the wholesale proceeds to Island Records and Warner-Chappell Music. After the litigation with U2, Negativland argued that the defence of fair use should be liberalised and expanded to allow any partial usage for any reason. It has supported a development of the public domain and the intellectual commons: ‘In the isolated medium of the Internet, and in the suggestion of fair use for collage, we are being guided by new technologies to reacquaint ourselves with cultural urges toward a rejuvenated public domain, right here in the twenty-first century.’ (Negativland, 2003: 262–63)

In *Campbell v Acuff-Rose Music Inc*, the Supreme Court of the United States provided a coherent theory and explanation for the fair use doctrine. The case concerned whether a rap song, ‘Pretty Woman’, recorded by the group 2 Live Crew, was a fair use of Roy Orbison’s song, ‘Oh Pretty Woman’. The Supreme Court of the United States emphasised that the fair use doctrine supported the transformative use of copyright material. Justice Souter stressed that the question was ‘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’. The Supreme Court held that parody, like other comment or criticism, deserves fair use protection. Justice Souter found that parody has an obvious claim to transformative value because, ‘like less humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one’.

In *Abilene Music Inc v Sony Music Entertainment Inc*, the plaintiffs alleged that Sony Music infringed their copyright in the famous song ‘What a Wonderful World’ by issuing an album containing ‘The Forest’, a rap song that uses the first three lines of ‘Wonderful World’ as its introduction. The District Court of New York held that the quotation of ‘Wonderful World’ in ‘The Forest’ was a parody and constituted fair use, and therefore did not infringe plaintiffs’ copyright. Justice Lynch observed: ‘The primary aim of “The Forest” is to portray the modern world as corrupted and venal, and it uses “Wonderful World” to underscore that message, by providing an ironic contrast to the body of the song.’ The judge also noted that the song itself was a target of parodic criticism, and that the creators of ‘The Forest’ were not merely using the original song as an ironic or satirical device to comment on what they viewed as a less than wonderful world — as was the case in the films *12 Monkeys* and *Good Morning, Vietnam*.

There has been much litigation over copyright law and peer-to-peer networks. It has proven difficult to stop the circulation of MP3 files on the internet. In *A & M Records Inc v Napster Inc*, the Federal Court of Appeals held that the centralised peer-to-peer network Napster was engaged in contributory and vicarious copyright infringement (Rimmer, 2001; Bowrey and Rimmer, 2002). It rejected the arguments of the company that the users of the software were engaged in fair use activities — such as listening to authorised music, sampling and space-shifting. It found that such activities were not substantial activities on the peer-to-peer network.

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By contrast, in *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, the Federal Court of Appeals held that decentralised peer-to-peer networks such as Grokster could not be held liable for contributory or vicarious copyright infringement because they could not police the conduct of its users, as Napster could. Justice Thomas observed that the software was capable of substantial, non-infringing uses. His Honour cited the striking example of the popular band Wilco who enjoyed a revival after they made an album for free downloading, both from their own website and through the file-sharing networks. The court noted, though, in the marginalia: ‘Indeed, even at a 10% level of legitimate use, as contended by the Copyright Owners, the volume of use would indicate a minimum of hundreds of thousands of legitimate file exchanges.’ Justice Thomas concluded that the courts were an inappropriate forum to resolve such clashes over market forces and technological change: ‘We live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation.’ The Federal Circuit emphasised that it was the role of Congress, rather than the courts, to craft copyright laws in order to deal with new technologies.

Copyright owners have appealed against the decision to the Supreme Court of the United States. They have argued that the verdict is at odds with the decision of the Seventh Circuit of the Federal Court in *In re Aimster Copyright Litigation*, which found that the peer-to-peer network Madster was liable for contributory and vicarious copyright infringement. Copyright industries will also redouble their efforts to lobby Congress to pass the *Inducing Infringement of Copyrights Act 2004* (US), or the so-called ‘Induce Act’. Such legislation would provide civil penalties against anyone who ‘intentionally aids, abets, induces or procures’ a copyright violation by a third person. There have been grave concerns about the wide scope of this legislation. Siva Vaidhyanathan observes: ‘It is the worst kind of policy intervention: destined to cause more trouble than it solves and certain to stifle technological innovation.’ (2004b).

Such precedents will be useful to make sense of the dispute over *The Grey Album*. In the present case, the Electronic Frontier Foundation hedged its advice: ‘Because fair use demands a case-by-case consideration of the particular facts surrounding any defendant, and because there is little case law addressing a situation like the one presented by Grey Tuesday, it is difficult to predict the outcome of any particular case.’ Nonetheless, it believed that Grey Tuesday protesters clearly had a credible fair use defence to any copyright claim by the record companies. It stressed that the posting of *The Grey Album* was for a non-commercial purpose, and that the downloads of *The Grey Album* did not substitute for purchases of the *White Album* or other recordings of the Lennon-McCartney songs on the album. It emphasised that the *The Grey Album* was a transformative use of the *White Album*, not a wholesale copy; and the posting of *The Grey Album* was intended as part of a commentary on the use of copyright law to stymie new kinds of musical creativity.

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## The Creative Commons

Inspired by the free software and open-source movements, a group of academics began the Creative Commons project in 2001. The executive director, Glenn Otis Brown, commented upon the controversy over Grey Tuesday:

It's a great example of our two-tiered copyright system. Labels are saying, 'If you do [a remix] on the underground scene, it's OK. But if it's so compelling that people trade it all over the Internet, then we're going to sue you.' (Schachtman, 2004)

The group launched new sampling licences in 2003 to encourage the creative transformation of existing works: 'The Sampling licenses will help authors foster a broad range of culture, from photo collage to musical "mash-ups", that the law currently deems illegitimate — despite its growing popularity and acceptance online.'

The Creative Commons offered two models of sampling licences. Under the first version, 'The Sampling license will let authors invite others to transform their work, even for commercial purposes, while prohibiting distribution of verbatim copies, or any use in advertising.' Under the second version, 'the Sampling-Plus license will offer the same freedoms as the Sampling license, but will also allow noncommercial sharing of the verbatim work.' The Creative Commons explains: 'So, an artist could release her song under a Sampling-Plus license to encourage her fans to trade it on file-sharing networks, then remix or build upon it however they like.' The website for the project proclaims: 'Thus, a single goal unites Creative Commons' current and future projects: to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.'

The technology bible, *Wired* magazine, released a collection of 16 songs produced under the Creative Commons licences, encouraging its consumers to 'Rip, Mix, Burn. Swap till you drop. The music cops can't do a thing — it's 100 percent legal, licensed by the bands.' (Goetz, 2004) The concept album even featured a piece by DJ Danger Mouse and Jemini entitled 'What U Sittin' On?'

The project of the Creative Commons has met with a degree of scepticism. Kathy Bowrey (2004) observes that such a licensing regimen may be attractive to libraries, universities and the sciences because such institutions are familiar with such bureaucratic practices. However, she contends that artists will intuitively resist the intrusion of law into everyday practices: 'The "civility" of the commons is that of the respectable property holder, graciously consenting to specified free or less restrictive uses, so long as the prescribed notice stays attached.' Bowrey argues that, for all its rhetoric, the Creative Commons project remains difficult to access for non-legal actors. She concludes: 'In any case, the spread of intellectual property rights globally is not intrinsically a good thing, even where the license purports to be on the side of the angels.'

There are, of course, important limitations to the Creative Commons project. As the controversy over DJ Danger Mouse makes clear, there will be circumstances in which recording artists would be reluctant to grant permission for other artists to sample and remix their work. Lawrence Lessig of Stanford University contends that there is a need for a system of compulsory licensing for digital sampling. He

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maintained that copyright law should ‘give DJ Danger Mouse a compulsory right to remix’ conditional upon his paying a small fee per sale (Lessig, 2004b). Jonathan Zittrain complains that copyright has become ‘a means of control, rather than a means of profit’ (Shachtman, 2004). Once a musician has released a song commercially, other acts are free to perform and record their own versions of the song — as long as they pay a standard royalty. However, remixing and sampling are a different matter: ‘There is no freedom to beat-match.’ (Shachtman, 2004)

However, it should not be assumed that recording artists and groups are necessarily hostile to ‘mash-ups’. Sponsored by the car manufacturer Audi, David Bowie staged a contest which involved the ‘mash-ups’ of musical works from his album, *Reality*. His website encouraged his fans to ‘mix, match, mash-up and make something new’. However, some underground DJs were suspicious of the commercial nature of the contest. Nicholas Reville, a co-founder of Downhill Music, observed that, although David Bowie allowed people to use and remix his copyright works, he nonetheless retained copyright over any adaptations of his works. There was some alarm that the practice of ‘mash-ups’ was being co-opted by the mainstream music industry.

## Moral rights

Article 6 of the Berne Convention obliges nation states to provide recognition of two moral rights: the moral right of the author to be attributed as the author of a work; and the moral right of the author to object to derogatory treatment of a work which is prejudicial to their honour and reputation.

The United States Congress has resisted the introduction of moral rights into the framework of copyright law. It maintains that the concerns of other copyright creators are adequately recognised under such doctrines as the common law of misrepresentation and unfair competition, trade mark protection under the *Lanham Act* and defamation law. At most, the Congress has only recognised limited moral rights protection for visual artists under the *Visual Artists Rights Act* 1990 (US).

In *Dastar Corporation v Twentieth Century Fox Film Corporation*, the Supreme Court of the United States held that section 43(a) of the *Lanham Act* does not prevent the unaccredited copying of an uncopyrighted work. Justice Scalia observed: ‘The rights of a patentee or copyright holder are part of a carefully crafted bargain, under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution.’ His Honour cautioned against the over-extension of trade mark law into areas traditionally occupied by copyright. Justice Scalia concluded that ‘allowing a cause of action under section 43(a) for that representation would create a species of mutant copyright law that limits the public’s federal right to copy and to use expired copyrights’. Such a decision casts doubt on the assertion that there is adequate protection of the attribution and integrity.

In contrast to the US Congress, the Australian government introduced comprehensive moral rights legislation with the enactment of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). It recognised the right of attribution, the right against false attribution and the right of integrity (Sainsbury, 2003).

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The Federal Court of Australia considered the meaning of debasement in the intriguing matter of *Schott Musik International GmbH & Co and Others v Colossal Records of Australia Pty Ltd and Others*. The case concerned whether a techno dance adaptation made by the group Excalibur of the ‘O Fortuna’ chorus from Carl Orff’s *Carmina Burana* debased the original work. It involved section 55(2) of the *Copyright Act 1968* (Cth), which provides that the entitlement to a compulsory licence for a record does not apply ‘in relation to a record of an adaptation of a musical work if the adaptation debases the work’. At first instance, Justice Tamberlin found that Excalibur preserved substantial and essential elements of the original intact, and communicated an exuberance and rhythmic character consistent with the spirit of the work. His Honour counselled that, in assessing the notion of debasement, it was necessary to take a broad view of artistic tastes and values: ‘As musical tastes are so divergent and varied (which is amply illustrated by the evidence in this case), it is necessary in approaching the question, to pay due regard to that broad spectrum of taste and values.’ On appeal, the Full Federal Court upheld the finding of Justice Tamberlin. There was disagreement, though, over the proper test for debasement. Justice Hill favoured an objective test, whereas Justice Wilcox and Justice Lindgren held that a subjective test of debasement had to be applied.

In the United Kingdom, there has been judicial consideration of the debasement of musical works. In *Morrison Leahy Music Limited v Lightbond Limited*, George Michael and Morrison Leahy Music Limited sought an injunction against Lightbond Limited from releasing samples of his work on the album *Bad Boys Megamix*. The plaintiffs argued that Lightbond Limited should be denied a compulsory licence on the grounds that it subjected the work of George Michael to derogatory treatment. Justice Morrit examined whether the sampling of parts of the music altered the character of the work. He weighed evidence from the plaintiffs that the sampling had completely altered the character of the original compositions against evidence from the defendants in the form of letters of recommendation from disc jockeys who argued that the authenticity of the originals was faithfully preserved, even though only snatches had been taken from them. Justice Morrit also considered whether the lyrics had been modified by being taken from their context and put into a different context. There were three instances where the words ‘bad boys’ had been transposed on to the lyrics. Justice Morrit was quite willing to entertain the possibility that the remix of the work of George Michael amounted to derogatory treatment. He granted an injunction until there could be a trial.

In *Confetti Records v Warner Music*, the Chancery Division of the High Court of Justice considered a claim based on the alleged derogatory treatment of ‘Burnin’ composed by Andrew Alcee in a remix by the UK garage band The Heartless Crew. The derogatory treatment was said to be the overlay of the song with a rap containing references to violence and drugs. Justice Lewinson commented that there was a need for expert evidence to decipher the meaning of the words used in the song (Hamilton, 2003). His Honour noted ‘that the words of the rap, although in a form of English, were for practical purposes a foreign language’. He quipped that ‘the occasions on which an expert drug dealer might be called to give

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evidence in the Chancery Division are likely to be rare'. Justice Lewinson observed that the hearing involved 'the faintly surreal experience of three gentlemen in horsehair wigs examining the meaning of such phrases as "mish mish man" and "shizzle (or sizzle) my nizzle"'. He held: 'I hold that the mere fact that a work has been distorted or mutilated gives rise to no claim, unless the distortion or mutilation prejudices the author's honour or reputation.' His Honour found that the fundamental weakness in the case was there was no evidence about Mr Alcee's honour or reputation, or of any prejudice to either of them. As a result, the claim about derogatory treatment failed.

In light of such precedents, it is debatable whether *The Grey Album* would offend moral rights held by The Beatles and Jay-Z. DJ Danger Mouse expressed his view that *The Grey Album* was a labour of love — a tribute and a homage to the work of both The Beatles and Jay-Z. He said:

I'm just worried ... whether Paul and Ringo will like it. If they say that they hate it, and that I messed up their music, I think I'll put my tail between my legs and go. (Shachtman, 2004)

The organisers of *The Grey Album* protest, the music activism project Downhill Battle, denied that the album was a derogatory treatment of other musical works: 'Danger Mouse's album is one of the most "respectful" and undeniably positive examples of sampling; it honors both the Beatles and Jay-Z.' (Shachtman, 2004) A music journalist agreed that there was a need for a less reverential approach to The Beatles: 'It is beyond question that it is certainly time to free ourselves of the cultural nostalgia and legal stagnation that have allowed their music to fossilize.' (Powers, 2004)

Faithful fans of The Beatles have found *The Grey Album* to be a perversion of all that is pure and good about the Fab Four. They have labelled the album as blasphemous, sacrilegious and disrespectful. One critic observes: 'The results are brilliant, frustrating, obnoxious, beautiful, and an insult to the legacy of the Beatles (though ironically, probably intended as a tribute).' (Hacker, 2004) He elaborates:

Jay-Z's rap is not worthy of The Beatles' backing music (even remixed). In fact, it creates the opposite effect: You get the feeling that one of the greatest records of all time by one of the greatest groups of all time has just had mud ladled all over it.

The critic concludes: 'Listening, I go back and forth between digging this whole crazy messed-up adventure on one hand, and feeling like a great chapter in human creativity has been totally desecrated on the other.' Such views would lend credence to the argument that *The Grey Album* debases the integrity of its musical sources. However, such evidence would have to be counter-balanced against the artist's intentions, and the full range of artistic tastes of musical audiences.

## Conclusion

The dispute over *The Grey Album* highlights the gulf that separates copyright law and social practices in the musical community. At present, copyright owners can

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exercise plenary control over uses of their works, much to the detriment of creators and consumers. The author of the book *Digital Copyright*, Jessica Litman (2001), sagely observes that there is a need to simplify and reform copyright law:

I suggest that if copyright law is going to apply to consumers as well as publishers and record labels, we need to replace the current long incomprehensible law with something short and intuitive. My suggestion is to junk the current structure entirely and recast copyright as an exclusive right of commercial exploitation. Copyright owners would have the sole right to exploit their works commercially or authorize others to do so, but would not be entitled to control noncommercial uses. (Pawlo, 2004)

Such a reformation of copyright law should be guided by the overriding goal of promoting the public interest in the encouragement and dissemination of works of the arts and intellect. It should be recognised that the *de minimis* use of copyright works is wholly acceptable. There should be an expansive application of the defence of fair use — especially in respect of transformative use of copyright works. There is a need for wider compulsory licensing of not only covers of sound recordings, but remixes and mash-ups as well. There could be scope for Creative Commons licences to allow for greater material to fall into the public domain. The moral rights of authors must be tempered to guard against the threat of artistic censorship. As one critic observes: ‘For all of us who hold music dear, we owe it to ourselves to not only let our musical past footnote our musical present, but also allow that past to live and breathe, change and reform, disappear and reappear in unexpected ways.’ (Powers, 2004)

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