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A Stroke of Genius or Copyright Infringement? Mashups and Copyright in Canada

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Abstract

Mashups, songs created by combining pieces of two or more pre-existing sound recordings into one new sound recording, allow anyone with access to a computer and sound editing software to engage with and participate in the (re)creation of culture. Among other purposes, mashups allow individuals to critique artists, to make satirical statements on the nature of pop music or the music industry, to make new works out of existing cultural expression, and to craft homages to favourite artists or works. This article examines the extent to which mashups are permitted by copyright law in Canada. It is structured as follows. First, it will provide an introduction to mashups, defining the term and discussing the popular emergence of mashups. Second, it will examine whether mashups prima facie infringe copyright in Canada. Third, it will look at whether mashups are protected by the fair dealing defence. This article will demonstrate that many mashups created and disseminated in Canada prima facie infringe copyright. Furthermore, a large number of mashups that prima facie infringe copyright will not be protected by the fair dealing defence as it is currently being applied by Canadian courts. The question, therefore, of the extent to which the Canadian Copyright Act should be revised to permit individuals to create and disseminate mashups without infringing copyright merits discussion during Canada's ongoing process of copyright reform. One possibility for reform is to incorporate a right to create and disseminate transformative works within the Canadian Copyright Act.

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1. Introduction

Alternatively described as an "exercise in irreverence,"[1] "another step on the path towards the democratization of creativity"[2] and "surprisingly vapid,"[3] mashups are songs created by combining pieces of two or more sound recordings into one new sound recording which is both "at once familiar yet often startlingly different."[4] Through mashups, anyone with access to both a computer and sound editing software can engage with and participate in the (re)creation of culture. Among other purposes, mashups allow individuals to critique artists through the comical juxtaposition of their works with other artists' works (for instance, to staple the dark, brooding lyrics of Montreal's The Dears to the music of Walter Ostanek, "Canada's Polka King"), to explore what the lyrics of Vancouver indie pop band Said the Whale would sound like when played over the big band music of Rob McConnell and his Boss Brass, and to create tributes to iconic bands such as Winnipeg's The Weakerthans by mashing their entire musical library onto one track. Due to both the cost and logistical difficulty of obtaining licences,[5] most mashups are created without the permission of those who hold copyright in the underlying works.[6]

The purpose of this article is to examine the extent to which mashups are permitted by copyright law in Canada. It is structured as follows. First, it will provide an introduction to mashups, defining the term and discussing the popular emergence of mashups. Second, it will examine whether mashups prima facie infringe copyright in Canada. Third, it will look at whether mashups are protected by the fair dealing defence. This article will demonstrate that many mashups created and distributed in Canada prima facie infringe copyright. Furthermore, many mashups that are found to prima facie infringe copyright will not be protected by the fair dealing defence as it is currently being applied by Canadian courts. The question, therefore, of the extent to which the Canadian Copyright Act should be revised to permit individuals to legally create and disseminate mashups merits discussion during Canada's ongoing process of copyright reform. In seeking to "maintain an appropriate balance"[7] between copyright owners and users, one possibility for reform is to revise the Canadian

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[1] M Serazio, "The Apolitical Irony of Generation Mash-Up: A Cultural Case Study in Popular Music" (2008) 31 *Popular Music and Society* 79-94, at 83 (henceforth Serazio).

[2] S Howard-Spink, "Grey Tuesday, online cultural activism and the mash-up of music and politics" (2005) available at http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1460/1375 (accessed 14 November 2009).

[3] See note 1 above, at 91.

[4] P Rojas, "Bootleg Culture" (2002) available at http://dir.salon.com/story/tech/feature/2002/08/01/bootlegs/index.html (accessed 14 November 2009).

[5] N Netanel, *Copyright's Paradox* (New York: Oxford University Press, 2008) at 15-16 and 20-21 (henceforth Netanel).

[6] As noted in the Copyright Act, "copyright" is defined as the rights described in s 3, in the case of a work; ss 15 and 26, in the case of a performer's performance; s 18, in the case of a sound recording; or s 21, in the case of a communication signal: *Copyright Act*, RSC 1985, c C-42 (Canada), at s 2 (henceforth *Copyright Act*).

[7] *Théberge v Galerie d'Art du Petit Champlain Inc*, [2002] 2 SCR 336, 2002 SCC 34 (henceforth *Théberge*).

Copyright Act to incorporate a right to create and disseminate transformative works – a right to "rework [copyright-protected] material for a new purpose or with a new meaning."[8]

2. Introduction to Mashups

2.1. What is a mashup?

In its simplest form, a mashup, also referred to as a "bootleg," a "blend" or "bastard pop," mixes one song's vocals over another song's instrumental or rhythm section.[9] This type of mashup can be described as "A vs B," in that portions of two sound recordings are combined into one new work.[10] Frequently, the source songs come from disparate musical genres and differ in tone, subject matter, style or other characteristics. Many of the songs used in mashups are popular or "Top 40" works. Various elements of the source songs, such as tempo, key and pitch, may have to be manipulated in order for the works to co-exist within the same track. Though most mashups are of the "A vs B" variety, some are much more complex. For instance, Jordan "DJ Earworm" Roseman, in a piece entitled "United States of Pop (2008): Viva La Pop," arranged *Billboard Magazine*'s Top 25 hits of 2008 into one four and a half minute song.

For the purposes of this article, a mashup will be defined as a sound recording composed entirely of pieces of two or more pre-existing recordings.[11] The Copyright Act defines "sound recording" as a "recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work".[12] Mashups, as recordings fixed in digital form, consisting of pieces of preexisting songs, satisfy the definition of "sound recording" under the Canadian Copyright Act.

Before proceeding, it is important to distinguish mashups from the related terms "sampling" and "remix." Sampling "refers to a broad spectrum of musical techniques that involve taking some portion of a preexisting sound recording and incorporating it into a new sound recording."[13] Many artists who engage in sampling integrate the sample (the portion of the pre-existing sound recording) into their own expression. For instance, in "Ice Ice Baby," Vanilla Ice combines his original lyrics with the bass line and piano from "Under Pressure," a song written by Queen and David Bowie.

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[8] A Gowers, "Gowers Review of Intellectual Property" (London: HM Treasury, 2006) (henceforth Gowers).

[9] F Preve, "Mash It Up" (2006) 32 *Keyboard* 38-44, at 38.

[10] J Roseman, *Audio Mashup Construction Kit* (Indianapolis: Wiley Publishing, 2007), at 16 (henceforth Roseman).

[11] A Power, "The Mouse That Roared: Addressing the Post-Modern Quandary of Mash-ups through Traditional Fair Use Analysis" (2006) 3 *Vanderbilt Journal of Entertainment and Technology Law* 531-540 at 532.

[12] See note 6 above, at s 2.

[13] *Ibid.*

Mashups, as songs composed entirely of pieces of pre-existing sound recordings, can be seen as a "subset of sampling."[14]

Remix can be defined as "the activity of taking samples from pre-existing materials to combine them into new forms according to personal taste."[15] Though mashups are a type of remix, the scope of remix is much broader than mashups. Remixes can involve art, literature or film in addition to music, and need not be composed entirely of pieces of preexisting expression.[16]

2.2. Popular Emergence of Mashups

Early versions of mashups have existed for decades.[17] Working from a New York City apartment in 1983, Steve "Steinski" Stein and Doug "Double Dee" DiFranco created a song called "The Payoff Mix" which combines samples from Culture Club, Little Richard, Humphrey Bogart, and Herbie Hancock, among many others. In creating this song, Steinski and Double Dee "took in a wide range of pop culture, chopped it all up, and manically reassembled it as something you could bop your head to."[18] In 1988, Kitchener, Ontario's John Oswald (who, along with "Negativland had long been creating new work from bits and pieces of pre-existing music"[19]) released a CD called *Plunderphonics* which sampled from and remixed artists such as Bing Crosby, The Beatles, Michael Jackson, and Glenn Gould.[20] Oswald's work used sampling to challenge conceptions of authorship, originality and copyright, and quickly became a "cult classic."[21] Another significant moment in the development of mashups as a musical genre occurred in 1993 when The Evolution Control Committee combined a Public Enemy *a cappella* with music by Herb Alpert's Tijuana Brass.[22]

The popular emergence of the mashup, however, is generally seen as having occurred at the turn of the millennium.[23] At this time, digital music files (the raw material for mashups) became easily accessible through various sources such as peer to peer file

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[14] *Ibid.*

[15] E Navas, "Remix: The Bond of Repetition and Representation" (2009), available at http://remixtheory.net/?page_id=361 (accessed 14 November 2009).

[16] See Lawrence Lessig's *Remix* for an exploration of contemporary remix culture and copyright infringement.

[17] See note 10 above, at 5.

[18] M Brownlie, "Steinski and the Origins of Mashup" (2009) *Rice Radio Folio.*

[19] *Ibid.*

[20] *Plunderphonics* available at www.plunderphonics.com (accessed 14 November 2009).

[21] *Ibid.*

[22] N Strauss, "Spreading by the Web, Pop's Bootleg Remix" (2002) available at http://www.nytimes.com/2002/05/09/business/spreading-by-the-web-pop-s-bootleg-remix.html?pagewanted=2 (accessed 14 November 2009).

[23] K 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 *Popular Music and Society* 79-93, at 82 (henceforth McLeod).

sharing networks. Also, a variety of software programmes had been developed that facilitated the creation of mashups.[24]

One mashup that is commonly associated with the beginning of the modern mashup era[25] is a song by Freelance Hellraiser, called "A Stroke of Genius," which spliced the guitar work of indie rock band the Strokes with the lyrics from pop singer Christina Aguilera's "Genie in a Bottle."[26] "A Stroke of Genius" has been described as "cooler and sexier and tenser than either of its sources."[27] According to New York newspaper *The Village Voice*, "[e]ach is what the other one was missing all along."[28] Another mashup which has "assumed a mythical status" is a mashup called "Smells like Teen Booty."[29] Created by the group 2 Many DJs , "Smells like Teen Booty" combines the "strident riff of Nirvana's "Smells like Teen Spirit" with the giddy girl harmonies and guitar strut of Destiny's Child's 'Bootylicious', [creating an] inspired collision of pop sensibilities."[30] Both "A Stroke of Genius" and "Smells like Teen Booty" were unlicensed creations.

In 2004, Brian Burton, better known by his stage name Danger Mouse, took the lyrics from Jay-Z's *Black Album* and overlaid them on a "musical bed created entirely with samples from the Beatles' *White Album*,[31] creating what he called the *Grey Album*. He did so without obtaining licences for either source album.[32] Danger Mouse issued a limited run of 3000 copies of the album, and did not intend to sell the album commercially.[33] However, the *Grey Album* "spread like digital fire on file-sharing networks," receiving coverage and praise from various high-profile magazines and newspapers.[34] *Rolling Stone* called the *Grey Album* an "ingenious hip-hop record that sounds oddly ahead of its time."[35] *Entertainment Weekly* named the *Grey Album* their record of the year for 2004.[36] *NME* magazine described the *Grey Album* as "a start-to-finish staggering, witty, delightful and ferociously funky remix album," and "one of

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[24] See note 1 above, at 81.

[25] See note 10 above, at 15.

[26] See note 23 above, at 82.

[27] D Wolk, "Barely Legal" (2002) available at http://www.villagevoice.com/2002-02-05/music/barely-legal/ (accessed 14 November 2009).

[28] *Ibid.*

[29] M McKinnon, "Mash to the Music" (2005) available at http://www.cbc.ca/arts/music/mash.html (accessed 14 November 2009).

[30] *Ibid.*

[31] B Greenman, "The Mouse That Remixed" (2004) available at http://www.newyorker.com/archive/2004/02/09/040209ta_talk_greenman (accessed 14 November 2009).

[32] B Werde, "Defiant Downloads Rise from Underground" (2004) available at http://nytimes.com/2004/02/25/arts/music/25REMI.html (accessed 14 November 2009).

[33] See note 23 above, at 80.

[34] *Ibid*.

[35] L Gitlin, "DJ Makes Jay-Z Meet Beatles" (2004) available at http://www.rollingstone.com/news/story/5937152/dj_makes_jayz_meet_beatles (accessed 14 November 2009).

[36] See note 1 above, at 85.

THE great avant-garde pop records of the millennium."[37] EMI, the owner of the Beatles' sound recordings, sent out cease and desist notices in an attempt to stop the spread of the album. In response, the music activism website downhillbattle.org initiated a mass online protest, dubbed "Grey Tuesday," where fans were "urged…to put the Grey Album on websites for 24 hours to protest against EMI's block on the record."[38] The protest was successful. Approximately 170 websites hosted a copy of the *Grey Album*. Nearly a million tracks from the *Grey Album* were downloaded.[39]

The *Grey Album* is one example of the category of mashups described above as "A vs B." Though most mashups fall within this category, some mashups that have been released are much more elaborate. As noted above, Jordan "DJ Earworm" Roseman, in "United States of Pop (2008): Viva La Pop," blended *Billboard Magazine's* Top 25 hits of 2008 into one four and a half minute song. Gregg Gillis, who creates and performs mashups under the name "Girl Talk," built his 2008 album *Feed the Animals* out of pieces of 322 songs.[40]

These critically acclaimed mashups are merely a few examples of the hundreds of thousands of mashups created by amateur mashup artists since the genre's popular emergence at the turn of the millennium. When completed, many of these mashups are uploaded to peer-to-peer file sharing networks, video sharing sites like YouTube, personal websites, blogs, and mashup forums like Mashuptown (www.mashuptown.com). Some mashups, like Girl Talk's *Feed the Animals*, are sold commercially. Various radio shows feature mashups, such as Annie Mac's *Mashup* on BBC Radio 1. Bars and clubs around the world have hosted mashup events, including Toronto's Rockwood Nightclub (which hosts Mashup Mondays), Vancouver's Republic and Halifax's Marquee Club (now known as The Paragon). Bootie is a well-known mashup party that puts on events in cities around the world, including San Francisco, Los Angeles, New York City, Paris, Beijing, Munich and Boston.

Some artists have recognised the positive impact that mashups can have on their career through increased record sales, the expansion of a group's listener base, and media attention. David Bowie, in partnership with Audi, initiated a mashup contest where he encouraged fans to mix any song from his 2003 album *Reality* with any other song from his back catalogue. The winning song was released as an MP3, and the creator of the winning song was rewarded with a new Audi. Bowie retained copyright over all mashups created in the context of the contest.[41]

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[37] P Cashmore, "Danger Mouse: The *Grey Album*" (2004) available at http://www.nme.com/reviews/danger-mouse/7347 (accessed 14 November 2009).

[38] BBC News, "Beatles remix was 'art project'" (2004) available at http://news.bbc.co.uk/2/hi/entertainment/3488670.stm (accessed 14 November 2009).

[39] M Rimmer, "The *Grey Album*: Copyright Law and Digital Sampling" (2005) 114 *Media International Australia incorporating Culture and Policy* 40-53, at 40; see note 1 above, at 86.

[40] Girl Talk was featured prominently in a recent documentary by Canadian Brett Gaylor, entitled *RiP: A Remix Manifesto* (*RiP*). *RiP*, billed as the world's first open-source documentary, investigates the tension between copyright and remix culture.

[41] M Rimmer, *Digital Copyright and the Consumer Revolution* (Northampton: Edward Elgar Publishing, 2007), at 144.

Other artists release their works in such a manner that it facilitates the creation of mashups. DJ Earworm notes that:

> *Both Kanye West and Radiohead are participating in a long overdue trend that seems to now be emerging where musical artists are beginning to release "stems" from their tracks. ... Most modern recordings have many tracks, usually more than ten, and sometimes more than a hundred. Each track typically represents a single recording or electronic sound. Traditionally, before all these tracks are mixed down into a final stereo mix, it is first mixed down into about four to eight separate audio files (stems). All the foreground vocals might be on one stem, all the drums on another, while the guitars and keyboards might be on yet another. When all the stems are added together, you hear the song as it was originally meant to be heard. The traditional purpose of these stems was to enable the mastering engineer to give the final mixdown just the right sound for various formats (radio or club, CD or vinyl). Now, with DIY remix culture exploding, we sonic manipulators are growing hungry for disassembled pop music, and the music industry is beginning to see the benefit of increased exposure through releasing stems directly to the public, allowing us much greater freedom than if they had simply released the instrumentals and acapellas. Now we can choose which instruments are playing. This new trend augers well for us in the mashup community, and I look forward to the practice expanding. Thank you Kanye, thank you Radiohead, and thanks to all the other musicians (and music execs) that are starting to see the light!*[42]

Musicians who wish to support mashups and other creative interactions with their work may also choose to publish their work with a Creative Commons licence. Creative Commons is a nonprofit organisation, founded in 2001 in the United States of America (USA), that provides free tools, such as licences, that allow artists to "easily mark their creative work with the freedoms they want it to carry."[43] For instance, the Creative Commons noncommercial licence allows others to "copy, distribute, display, and perform [a] work – and derivative works based on it – but for noncommercial purposes only."[44] Creative Commons licences have been "ported" or re-written to suit copyright legislations worldwide, including Canada's Copyright Act.[45] Creative Commons Canada was founded in 2003.[46]

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[42] J Roseman, "Reckoner Lockdown" (2009) available at http://www.djearworm.com/ (accessed 14 November 2009).

[43] "Creative Commons" (2009) available at http://creativecommons.org/ (accessed 14 November 2009).

[44] "Creative Commons Canada: Licences Explained" (2009) available at http://www.creativecommons.ca/index.php?p=explained (accessed 14 November 2009).

[45] *Ibid;* also see "Creative Commons: International " (2009) available at http://creativecommons.org/international (accessed 14 November 2009).

[46] "Creative Commons Canada: History" (2009) available at http://www.creativecommons.ca/index.php?p=history (accessed 14 November 2009).

Though some artists have embraced (or tacitly approved) mashups of their works, the large majority of mashups are created without the consent of the copyright owners.[47] Gregg Gillis did not secure licences for any of the 322 samples used in *Feed the Animals*.[48] Danger Mouse did not obtain licences to sample either the Beatles' *White Album* or Jay-Z's *Black Album*.[49] It is probable that only a few of the mashups posted on Mashuptown or YouTube are licensed creations.[50] The prevalence of unlicensed mashups can be attributed, in large part, to the costs and logistical difficulties associated with securing licences to sample multiple sound recordings. Professor Neil Netanel notes that:

> *With few exceptions, clearing rights to multiple samples on a single recording has become prohibitively time-consuming and expensive. Recorded music consists of at least two separate copyrighted works, the recorded musical composition and the sound recording of the composition as performed in the studio or onstage. Thus, each sample of recorded music requires clearances from the owners of copyrights in both the sampled music composition, typically a music publisher, and the sound recording, typically a record label. The publishers and labels do not generally issue sampling licenses without first hearing the entire track in which the sample appears, and clearance invariably requires the consent of a substantial number of people, including lawyers, artists, and various other copyright-holder representatives.* [51]

Often, the cost involved in securing the requisite licences "renders the recording commercially infeasible."[52] One American example is illustrative of this claim. The Twentieth Century Fox Film Corporation[53] insisted on being paid $10,000 for a licence to allow filmmaker Jon Else to use a 4.5 second, "out-of-focus, no-sound background shot" of an episode of *The Simpsons* which appeared accidentally in Else's documentary *Sing Faster: The Stagehands' Ring Cycle*.[54] Unable to pay the fee, Else digitally removed the clip of *The Simpsons* from the scene.[55]

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[47] M Hite, "Beatmixed: Bootie Turns 1!" (2004) available at http://beatmixed.com/2004/07/20/bootie-turns-1 (accessed 14 November 2009).

[48] R Walker, "Mash-Up Model" (2008) available at http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?_r=2&partner=rssnyt&emc=rss&oref=slogin (accessed 14 November 2009).

[49] See note 32 above.

[50] See note 47 above.

[51] See note 5 above, at 20-21.

[52] *Ibid*, 21.

[53] The Twentieth Century Fox Film Corporation is the copyright holder in this particular example.

[54] See note 5 above, at 15-16.

[55] *Ibid*, 16. This act may not be infringement in Canada. In 1997, a defence for "incidental use" was added to the Canadian Copyright Act which notes that "[i]t is not an infringement of copyright to incidentally and not deliberately (*a*) include a work or other subject-matter in another work or other subject-matter; or (*b*) do any act in relation to a work or other subject-matter that is incidentally and not deliberately included in another work or other subject-matter" (see note 6 above, at s 30.7).

Having both defined mashups and discussed the popular emergence of mashups as a musical genre, this article will proceed by discussing whether mashups prima facie infringe copyright in Canada.

3. Do mashups prima facie infringe copyright in Canada?[56]

In Canada, the rights and obligations of copyright owners and users are set out in the Copyright Act. Section 27 of the Copyright Act states that "[i]t is an infringement of copyright for anyone to do, without the consent of the owner of the copyright, anything that [by the Copyright Act] only the owner of the copyright has the right to do."[57] Each song that has been recorded is protected by multiple rights. Separate rights exist in the sound recording, the performer's performance embodied in the sound recording, and in the musical work.[58] A separate copyright may also exist in the lyrics of the song, which can be considered to be a literary work. These rights can be held by different individuals or entities. The rights of the copyright owners vary depending on which right they own.

The first owner of copyright in a sound recording is the maker of the sound recording.[59] Makers' rights terminate fifty years after the end of the calendar year in which the work was first "fixed" onto a medium (a computer hard drive, for example).[60] Upon termination of the makers' rights, the sound recording enters the public domain. The maker of a sound recording has, among other rights, the sole right to reproduce the sound recording or any substantial part of the sound recording and to authorise any reproduction of the sound recording or any substantial part of the sound recording.[61]

The first owner of copyright in a performer's performance is the performer.[62] The performer's rights terminate fifty years after the end of the calendar year in which the performer's performance either occurs or is fixed in a sound recording.[63] With respect to authorised fixed performances (such as those in most sound recordings), the performer has the sole right to reproduce any reproduction of that fixed performance or of any substantial part of that fixed performance for a purpose other than that for

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[56] For the purposes of this analysis, it will be assumed that valid copyright exists in the underlying works that are used in the mashup and that copyright in the source works has not expired. The majority of works used in mashups are either current "Top 40" hits or were "Top 40" hits within the past twenty to thirty years. In Canada, as will be established, the term of copyright in sound recordings and performers' performances lasts for fifty years, and the term of copyright in "works" roughly lasts for the life of the author plus fifty years. Therefore, the majority of source works used to create mashups are probably still covered by copyright.

[57] See note 6 above, at s 27.

[58] "Musical work" is defined in the Copyright Act as "any work of musical composition, with or without words, and includes any compilation thereof" (see note 6 above, at s 2).

[59] See note 6 above, at s 24(b).

[60] See note 6 above, at s 23(1)(b).

[61] *Ibid*, s 18(1).

[62] *Ibid*, s 15.

[63] *Ibid*, s 26(1).

which the performer's authorisation was given, and to authorise any such reproduction.[64]

The first owner of copyright in musical and literary works is the author of the works.[65] The term of copyright in musical and literary works is the life of the author plus fifty years following the end of the calendar year when the author dies.[66] The rights that copyright owners have with respect to their works are set out in section 3 of the Copyright Act. These rights include the right to reproduce the work, the right to perform the work in public, the right to produce any translation of the work, the right to make any sound recording of the work, the right to communicate the work to the public by telecommunication, and the right to authorise any of the copyright owner's rights.[67]

As noted above, mashups are created by combining pieces of two or more pre-existing sound recordings into one new sound recording. At the end of the mashup process, the individual has created both a new musical work (made up of portions of the original musical works) and a new sound recording.[68] Various rights may be infringed in the process of creating a mashup and in the dissemination of a mashup. Many mashups, after they are created, are uploaded to the Internet. This section will analyse those rights that may be infringed during the process of creating a mashup. It will then analyse those rights that may be infringed in the dissemination of a mashup. First, however, this section will examine whether mashups use a substantial part of the underlying source works. The copyright owner's rights are infringed only if an individual incorporates either the whole work, sound recording or performer's performance into the allegedly infringing work; or incorporates a substantial part of the work, sound recording or performer's performance into the allegedly infringing work.

Mashups falling into the category of "A vs B" combine the lyrics of one song with the music of another song. Danger Mouse noted that "[e]very single kick, snare, and chord [on his *Grey Album*] is taken from the original Beatles recording."[69] Thus, with respect to "A vs B" mashups, it is not difficult to argue that a "substantial part" of the underlying source works has been reproduced. However, some mashups are more complex than others. For instance, Girl Talk's *Feed the Animals* combines 322 songs in almost fifty-four minutes. Within this album, some songs are sampled for only a second or two. Is such a brief taking "substantial"?

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[64] *Ibid*, s 15(1)(b)(ii).

[65] *Ibid*, s 13(1).

[66] *Ibid*, s 6.

[67] *Ibid*, s 3.

[68] No Canadian or American case has yet dealt with the question of whether combining two existing sound recordings into one mashup is sufficiently original to have the mashup qualify as a musical work protected by copyright. The leading Canadian case to define "originality" is *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339. In *CCH et al,* the SCC states that a work is "original" if it originates from the author, is not copied from another work, and is the product of the author's exercise of skill and judgment. It can be argued that a mashup artist exercises both judgment in selecting which two (or more) works to use in the mashup and skill in combining the works, thus satisfying the definition of originality.

[69] See note 23 above, at 80.

In *Canadian Performing Right Society Ltd v Canadian National Exhibition Association* (*CPRS*), a 1934 decision of the Ontario High Court of Justice, the question of what constitutes a substantial part of a musical work was addressed.[70] In *CPRS*, the plaintiffs alleged that they owned the copyright in the musical work "Walkin' My Baby Back Home," and that the defendants had performed a substantial part of that work in public. At the exhibition in question, entertainment was provided by a parade of elephants marching to a medley of songs. Included in this medley was somewhere between five measures (according to the defendant) and thirty-two measures (according to the plaintiff) of "Walkin' My Baby Back Home." The question which had to be addressed was whether the part of the work that was taken was a "substantial" part of the original work.

Rose CJHC stated that the question of whether the part of the work that was taken is "substantial" could not be decided solely by reference to how much of the work was taken.[71] Rose CJHC held that the determining factor is whether anyone who saw the performance and who was familiar with the work would recognise the song, regardless of how many measures of the work was played.[72] In this case, Rose CJHC held that "anyone who saw the performance and who was familiar with ["Walkin' My Baby Back Home"] would have" recognised the song.[73] As a result, the portion taken, since it was recognizable and in fact recognised, was deemed to be a substantial part of the original work. Thus, the plaintiff was able to establish copyright infringement.

A more recent Canadian case to have dealt with the issue of "substantial taking" is *Grignon v Roussel* (*Grignon*).[74] In *Grignon,* the plaintiff alleged that the defendant had infringed the plaintiff's copyright in a song entitled "Chanson Numero 7." Denault J held that in copying eight measures from the plaintiff's work for inclusion in his own song "Tous les juke-box," the defendant had infringed the plaintiff's work.[75] Denault J stated that:

> *I…consider that this resemblance applies to a significant part of the work, not in quantitative but in qualitative terms, in that it concerns the first measures of the refrain which are the "hook" that the ear retains for the purpose of identifying a piece.*[76]

Both *CPRS* and *Grignon* imply that even if only a small amount is taken from a song, if the amount taken is sufficient to make the original song recognizable or identifiable within the allegedly infringing work, the amount taken will constitute a "substantial part" of the original work and a finding of copyright infringement will be made.

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[70] *Canadian Performing Right Society Ltd v Canadian National Exhibition Association,* [1934] 4 DR 154 (Ont HCJ) (henceforth *CPRS*).

[71] *Ibid.*

[72] *Ibid.*

[73] *Ibid.*

[74] *Grignon v Roussel* (1991), 44 FTR 121 (FCTD) (henceforth *Grignon*). *CPRS,* see note 70 above, was cited in *Grignon.*

[75] *Ibid.*

[76] *Ibid.*

Part of the impetus behind the creation of a mashup is the desire to construct a work that is both familiar and different – familiar in the sense that the underlying works are recognizable and different in the sense that they are being heard in a new context. As Gregg Gillis noted, "I like to use [samples] in a way that everything is recognizable. That's a part of the fun where you recognize the sample and you hear how it can be manipulated."[77] Thus, it is probable that many mashups created in Canada – which attempt, as "part of the fun," to make their source works recognisable - contain a "substantial part" of the original songs upon which they are based.

The need to show an objective similarity between the allegedly infringing work and a substantial part of the copyrighted work is only one of three steps required to establish an infringement of the copyright owner's reproduction right. The plaintiff (the person claiming copyright infringement) must also establish that they own a valid copyright in the work. As most mashups were created using songs that are either "Top 40" hits or were "Top 40" hits within the past twenty to thirty years, it will be assumed, for the purposes of this article, that valid copyright exists in the underlying works used in the mashups. The plaintiff must also establish that the defendant had access to the plaintiff's work and that the infringing work is derived from the copyrighted work.[78] If the plaintiff's work was widely disseminated, courts will presume access.[79] As most mashups are composed of popular works which have been widely disseminated, access would be presumed, satisfying the second part of the test. As a result, unless there is a defence set out in the Copyright Act upon which mashup creators can rely, artists who create mashups within which the underlying source works are recognizable will probably be held to have infringed the reproduction right of the person(s) owning copyright in the musical works, literary works (if applicable), sound recordings and performer's performances that make up the mashup.[80] If the amount taken from the original sound recordings is not sufficient to make the original song recognisable or identifiable within the mashup, it will not constitute a "substantial part" of the original work and, in Canada, a finding of copyright infringement will not be made.[81]

In addition to infringing the copyright owner's right of reproduction, the creation of a mashup may also infringe the right of the person holding copyright in the underlying musical or literary works to produce any translation of the work.[82] In *Apple Computer, Inc v Mackintosh Computers Ltd,* Reed J adopted the definition of "translation" as "[expressing] the sense of (word, sentence, book, poem…) in or into

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[77] See note 27 above.

[78] See note 74 above.

[79] D Gervais and E Judge, *Intellectual Property: The Law in Canada* (Toronto: Thomson, 2005), at 50.

[80] See note 6 above, at ss 3, 15, 18.

[81] Such a taking may, however, be deemed infringing in the USA. See *Bridgeport Music, Inc v Dimension Films,* 410 F 3d 792 (6th Cir 2005), which suggests that one can commit copyright infringement by sampling even a single note from a sound recording. See also, J Boyle, *The Public Domain* (New Haven: Yale University Press, 2008), at 146; O Arewa, "From JC Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context" (2006) 84 *North Carolina Law Review* 547; and note 5 above, at 21.

[82] See note 6 above, at s 3(1)(a).

another language, in or to another form of representation."[83] One of the questions dealt with in this case was whether a silicon computer chip should be seen as a translation of a computer program under s 3(1)(a) of the Copyright Act. Neither the Court of Appeal for Ontario nor the Supreme Court of Canada (which affirmed the judgment of the Court of Appeal for Ontario) made a final decision on this point. Using the definition proposed by Reed J for "translation", however, it is possible that a mashup could be seen as a "translation" of the original works – as "express[ing] the sense of [the original songs] in another form of representation."[84] As well, the creation of a mashup may also infringe the right of the person(s) holding copyright in the underlying musical or literary works to make any sound recording of those works.[85]

In addition to any rights that may be infringed during the process of creating a mashup, various rights may be infringed in the dissemination of a mashup. These rights include the copyright owner's right to authorise any of their rights, the right to communicate a work to the public by telecommunication,[86] and the right to perform a work in public. Also, in knowingly disseminating an infringing mashup "either for the purpose of trade or to such an extent as to affect prejudicially the owner of copyright", artists may expose themselves, under s 42(1) of the Copyright Act to, on summary conviction, "a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both", or, on conviction on indictment, "a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both". [87]

An individual who uploads a mashup to the Internet may be found to have authorised infringement. In Canada, authorisation has been interpreted as meaning to "sanction, approve and countenance."[88] For further clarity, in *CCH Canadian Ltd v Law Society of Upper Canada* (*CCH et al),* the leading Canadian case to address the authorisation right, the SCC defined countenance as meaning to "[g]ive approval to; sanction, permit; favour, encourage."[89] A court might determine that an individual's act of uploading mashups to a file sharing site or mashup forum infringed the authorisation right of copyright owners "because it invited and permitted other persons with Internet access to have the musical works communicated to them and be copied by them."[90] In *Society of Composers, Authors and Music Publishers of Canada v Canadian Ass. of Internet Providers,*[91] the SCC stated that the right of the owner of

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[83] *Apple Computer, Inc v Mackintosh Computers Ltd* (1986), 28 DLR (4th) 178 (FCTD).

[84] *Ibid.*

[85] See note 6 above, at s 3(1)(d).

[86] See *Society of Composers, Authors and Music Publishers of Canada v Canadian Assoc of Internet Providers*, 2004 SCC 45 (henceforth SOCAN).

[87] Supra note 6 at ss 42(1)(c), 42(1)(f), 42(1)(g). See *R v JPM* (1996), 150 NSR (2d) 143, 107 CCC (3d) 380.

[88] See note 68 above, at [38].

[89] See note 68 above, at [37], citing L Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles*, new ed (Oxford: Clarendon Press, 1993), vol 1, at 526.

[90] *BMG Canada Inc v John Doe,* 2005 FCA 193.

[91] See note 86 above.

the copyright in a musical or literary work to communicate his or her work to the public by telecommunication is infringed each time an infringing work is accessed over the Internet.[92] Thus, the copyright owner's right to communicate their work to the public by telecommunication will be infringed each time a mashup that has been uploaded to the Internet without the permission of the copyright owner is downloaded from locations such as YouTube, Mashuptown, or a personal website. Also, depending on the context in which one exhibits his or her mashup, the copyright owner's right to perform the work in public may be infringed. The leading Canadian case on the right to perform a work in public is *Canadian Cable Television Assn. v Canada (Copyright Board)*[93]. In this case, Letourneau J, delivering the judgment of the Court, defined "in public" as "openly, without concealment and to the knowledge of all."[94] When mashups are performed in such a fashion (for instance in a club or auditorium, where the performance has been advertised), the right of the copyright owner to perform the work in public may be infringed.

As this section has demonstrated, many mashups created and disseminated in Canada prima facie infringe copyright. At least for those songs which are "recognisable" within the mashup, the creation and dissemination of a mashup will probably infringe various rights: the right of the person owning copyright in the underlying musical or literary works to make any sound recording of their works; the reproduction right of the person(s) owning copyright in the underlying musical works, literary works (if applicable), sound recordings, and performer's performances; the right of the person owning copyright in the underlying musical or literary works to produce any translation of their works; the copyright owner's right to authorise any of their rights (including the right of reproduction); the copyright owner's right to communicate a work to the public by telecommunication; and (in certain contexts) the copyright owner's right to perform a work in public. This article will proceed by examining whether individuals who create and disseminate mashups may rely on the fair dealing defence in order to have their conduct declared non-infringing.

4. Are mashups protected by the fair dealing defence?

4.1. The fair dealing defence in Canada

Various defences to copyright infringement are set out in the Copyright Act. One defence which is particularly relevant in the case of mashups is fair dealing. The Copyright Act sets out the fair dealing defence as follows:

> *29. Fair dealing for the purpose of research or private study does not infringe copyright.*
>
> *29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:*
>
> *(a) the source; and*

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[92] *Ibid*.

[93] *Canadian Cable Television Assn v Canada (Copyright Board)* (1993), 46 CPR (3d) 359 (FCA).

[94] *Ibid.*

> *(b) if given in the source, the name of the*
>
> *(i) author, in the case of a work,*
>
> *(ii) performer, in the case of a performer's performance,*
>
> *(iii) maker, in the case of a sound recording, or*
>
> *(iv) broadcaster, in the case of a communication signal.*
>
> *29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:*
>
> *(a) the source; and*
>
> *(b) if given in the source, the name of the*
>
> *(i) author, in the case of a work,*
>
> *(ii) performer, in the case of a performer's performance,*
>
> *(iii) maker, in the case of a sound recording, or*
>
> *(iv) broadcaster, in the case of a communication signal.*[95]

Similar defences are found in the United Kingdom,[96] Australia,[97] and New Zealand.[98] An analogous concept, termed fair use, exists in the United States of America.[99]

In Canada, the fair dealing analysis proceeds in three steps. The first step requires a court to determine whether the work in question (in this case, a mashup) was created for the purposes of research, private study, criticism, review or news reporting. The second step in the fair dealing analysis applies only to works created for the purpose of criticism, review or news reporting. In order to be protected by the fair dealing defence, works created for these purposes must mention the source of the work and the name of the author of the work (if given in the original). The third step in the fair dealing analysis requires the court to determine whether the dealing with the work was fair. The term "fair" is not defined in the Copyright Act. Whether something is fair "is a question of fact and depends on the facts of each case."[100] *CCH et al* is the leading Canadian case to address the fair dealing defence.[101] In *CCH et al,* the SCC set out a list of factors to provide a "useful analytical framework [governing]

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[95] See note 6 above, at ss 29, 29.1, 29.2.

[96] *Copyright, Designs and Patents Act 1988* (UK), c 48, ss 29-30.

[97] *Copyright Act 1968* (AUS), No 63, at s 40-42.

[98] *Copyright Act 1994* (NZ), No 143, at ss 42-43.

[99] *Copyright Act of 1976*, § 107, 17 USC (henceforth *Copyright Act USA)*.

[100] See note 68 above, at [52].

[101] *Ibid*.

determinations of fairness in future cases,"[102] which includes the purpose of the dealing, the character of the dealing, the amount of the dealing alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.[103]

CCH et al dealt with copyright infringement actions brought by CCH Canadian Ltd (which publishes a variety of legal works), along with other legal publishers, against the Law Society of Upper Canada (Law Society). The Law Society, which governs the legal profession of Ontario, maintains a reference library called the "Great Library". One feature of the library is the provision of photocopiers for patrons. The Law Society also provides a custom photocopying service. For a fee, "[s]ingle copies of library materials required for research, review, private study, and criticism as well as for use in court, tribunal, and government proceedings could be provided to patrons of the library."[104] CCH Canadian Ltd and the other parties alleged that the Law Society infringed their copyrights through the Law Society's custom photocopying service and by providing free-standing photocopiers.

The Supreme Court of Canada (SCC) rejected the allegation of copyright infringement, holding that the Law Society's dealings with the plaintiffs' works were protected by the fair dealing defence. McLachlin CJ, in discussing the nature of the defence, described fair dealing as an "integral part of the Copyright Act."105 Whereas the fair dealing defence had been previously portrayed as a limitation on the copyright holder's exclusive rights or as an exception which should be strictly interpreted,106 the Supreme Court of Canada, in CCH et al, stated that:

> *The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver…has explained…: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation".*[107]

The concept of the "proper balance" between the rights of copyright owners and users was discussed by the SCC in *Théberge v Galérie d'Art du Petit Champlain*:

> *The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator...The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In*

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[102] *Ibid*, [53].

[103] *Ibid*.

[104] *Ibid*, [61].

[105] *Ibid*, [48].

[106] *Cie Generale des Établissements Michelin-Michelin & Cie v CAW-Canada et al* (1996), 71 CPR (3d) 348 (henceforth *Michelin*); *Boudreau v Lin* (1997), 150 DLR (4th) 324 (henceforth *Boudreau*).

[107] See note 68 above, at [48], citing D Vaver, *Copyright Law* (Toronto: Irwin Law, 2000), at 171.

> *interpreting the Copyright Act, courts should strive to maintain an appropriate balance between these two goals.*[108]

The fair dealing defence, by giving individuals the right to access, use and build upon the copyright-protected expression of others for certain purposes in a "fair" manner, plays a critical role in helping maintain the balance between the public interest and the creator's rights.

4.2. Can mashup creators rely on the fair dealing defence?

The first step in determining whether a mashup is protected by the fair dealing defence involves analysing whether the mashup was created for the purposes of research, private study, criticism, review or news reporting. In contrast to the United States' fair use defence, which features an open-ended list of categories of works which may be considered fair,[109] Canada's fair dealing defence features a finite list of purposes. In order to be protected by the fair dealing defence, works must have been created for one of the purposes listed in the Copyright Act, namely research, private study, criticism, review, and news reporting. The SCC has said that these categories should not be interpreted restrictively.[110]

Research is "not limited to non-commercial or private contexts," and must be "given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained."[111] In a recent decision by the Canadian Copyright Board, the Copyright Board determined that offering previews of music is fair dealing for the purpose of research within the meaning of s 29 of the Copyright Act.[112] It stated that:

> *generally speaking, users who listen to previews are entitled to avail themselves of section 29 of the Act, as are those who allow them to verify that they have or will purchase the track or album that they want or to permit them to view and sample what is available online.*[113]

Previews, however, can be distinguished from mashups. Previews are an important element in the research process involved in purchasing a CD. As noted by the Copyright Board, listening to a preview is the "most practical, most economical and safest way for users to ensure that they purchase what they wish."[114] Though some individuals may purchase songs after hearing pieces of them in mashups, mashups cannot be said to be part of the research process involved in purchasing a CD. Even giving research a "large and liberal interpretation," it is probable that only a small

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[108] See note 7 above, at [30]-[31].

[109] See note 99 above.

[110] See note 68 above, at [48].

[111] See note 68 above, at [51].

[112] Tariff No 22.A (Internet-Online Music Services) 1996-2006 (Copyright Board, October 18, 2007) (henceforth Tariff No 22.A).

[113] *Ibid.* at para 116.

[114] *Ibid.* at para 114.

portion of mashups (for instance those created by this author in the process of researching for this article) are created for the purpose of "research."

Mashups created by individuals in their own homes or offices, and not shared with others, could be seen as having been created for the purpose of private study, particularly given the "large and liberal" interpretation mandated by the SCC. Many of the mashups created in private, however, are then uploaded to YouTube, blogs, websites or mashup forums. This act of uploading would probably prevent mashup creators from relying on the "private study" category of fair dealing. In *Hager v ECW Press Ltd*, Reed J states that "the use contemplated by private study…is not one in which the copied work is communicated to the public."[115] This statement is consistent with the determination of the Ontario Court of Justice in *Boudreau v Lin* that material distributed to "all members of [a] class of students…does not qualify as 'private study'."[116]

Although one could envision a news report which features mashups, it is unlikely that many mashups will be created for the purpose of news reporting. As a result, this category is unlikely to be of much significance in seeking to determine whether mashups are protected by the fair dealing defence.

Some mashups could be seen as having been created for the purpose of "review." For instance, someone might create a mashup that combines, onto a single track, pieces of every song recorded and released by a certain artist for the purpose of "reviewing" their career. The leading case interpreting "review" in Canada, *Canada v James Lorimer & Co*., states that fair dealing for the purpose of review "requires as a minimum some dealing with the work other than simply condensing it into an abridged version and reproducing it under the author's name."[117] *Lorimer* suggests that the mashup artist, in order to have their creation fall within the category of "review" for fair dealing purposes, may have to do more than simply combine pieces of all of the artist's sound recordings into one mashup. This additional requirement could potentially be satisfied by the insertion of various comments into the mashup, noting, for instance, the passage of time, the names of the artists' albums, or prominent historical events giving context to the artist's career.

Many mashups are critical. Some criticise one (or both) of the original works upon which they are based. For instance, a mashup artist may wish to critique the seriousness with which a heavy metal band views itself by combining their lyrics with the playful music of a string quartet. Conversely, the mashup artist may wish to critique the seriousness with which a string quartet views itself by combining their music with the lyrics of a heavy metal band. Mashups which comment upon or criticise the original works upon which they are based can be described as parodies.[118]

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[115] *Hager v ECW Press Ltd,* [1999] 2 FC 287 (TD) (henceforth *Hager*). Reed J also interpreted the category of "research" in the same manner – that "the use contemplated by…research is not one in which the copied work is communicated to the public" (at [51]). This conclusion conflicts with the determination of the SCC in *CCH et al.* See note 68 above, that research is not limited to private contexts, and, as a result, should not be followed.

[116] See note 106 above (*Boudreau*), at [51].

[117] *Canada v James Lorimer & Co* (1984), 77 CPR (2d) 262.

[118] The popular perception of parody conceives of parody as a "specific work of humorous or mocking intent, which imitates the work of an individual author or artist, genre or style, so as to make it appear

Other mashups may criticise pop culture, pop music, the music industry, or society at large. For instance, a mashup artist may wish to critique the homogeneity of contemporary pop music by combining sound recordings from multiple artists into one seamless track. These types of mashups can be described either as "weapon parodies" or as satire.[119] While a parody attacks the copyright-protected work itself (at least according to the popular perception of parody),[120] in satire and in "weapon parodies", the copyright-protected work functions as the vehicle for the attack.[121] The target is something other than the copyright-protected work.

Are these forms of "criticism" protected under the fair dealing defence? Does "criticism," in the context of Canada's fair dealing defence, encompass the popular perception of parody, "weapon parodies" and satire? Canadian courts have held that criticism is not "confined to 'literary composition'."[122] Thus, the fact that mashups may criticise musical works (or sound recordings) and not literary texts does not, in itself, remove mashups from the ambit of the fair dealing defence. As well, Canadian courts have noted that for the purposes of the fair dealing defence, the "object of criticism"[123] can be the style of the work, the ideas set out in the work, the work's "social or moral implications,"[124] or the "text or composition of a work."[125] These decisions seem to protect a broad swath of criticism from claims of copyright infringement.

However, Canadian courts have consistently rejected the claim that parody is a defence to copyright infringement. In *Ludlow Music Inc v Canint Music Corp*,[126] the Exchequer Court of Canada granted an injunction restraining the defendants from selling a parody of the Woody Guthrie song "This Land is Your Land". The parody, directed towards a Canadian audience, replaced the original song's lyrics with lyrics "which gently chid[ed] the Canadian Government and the Canadian people for their alleged feelings of inferiority."[127] In granting the injunction Jackett P. deemed it to be a "proper exercise of judicial discretion to protect property rights against encroachment that has no apparent justification, and, in particular, to protect copyright

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ridiculous" (E Gredley and S Maniatis, "Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright" (1997) 19 *European International Property Review* 339-344, at 341). Some literary theorists define parody in much broader fashion. For instance, Linda Hutcheon defines parody as a "form of imitation…characterized by ironic inversion, not always at the expense of the parodied text", suggesting that "what is remarkable about modern parody is its range of intent – from the ironic and playful to the scornful and ridiculing" (Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (New York: Methuen, Inc, 1985), at 6.).

[119] M Spence, "Intellectual Property and the Problem of Parody" (1998) 114 *Law Quarterly Review* 594-620, at 594.

[120] See note 118 above.

[121] A Watt, "Parody and Post-Modernism: The Story of Negativland" (2002) 25 *Columbia Journal of Law and the Arts* 171-195, at 182 (henceforth Watt).

[122] See note 106 above (*Michelin),* at [61].

[123] See note 115 above.

[124] *Fraser Health Authority v Hospital Employees' Union*, 2003 BCSC 807.

[125] See note 115 above.

[126] *Ludlow Music Inc v Canint Music Corp* (1967), [1967] 2 ExCR 109, 51 CPR 278 (Exchequer Court of Canada) (henceforth *Ludlow*).

[127] *Ibid.*

against what appears to be piracy."[128] As well, in *MCA Canada Ltd v Gilberry & Hawke Advertising Agency Ltd,* the defendants were found to have infringed the plaintiff's copyright through the creation of a parody of the musical work "Downtown."[129] The parody, which used the tune of Downtown, "extolled the merits of Lewis Mercury, a car dealership located in downtown Ottawa. The final stanza brings it all together in one irresistible invitation: Lewis Mercury is Downtown. They have a car for you downtown. They are just waiting to help you Downtown."[130] Lastly, in *ATV Music Publishing of Canada Ltd v Rogers Radio Broadcasting Ltd et al,* the Ontario High Court of Justice granted a motion for an interlocutory injunction restraining the defendants from using the music from the song "Revolution", composed by John Lennon and Paul McCartney, in their parody of "Revolution" entitled "Constitution."[131] In granting the injunction, Van Camp J stated that "[i]t would be difficult ever again to listen to the original song without the words of the new song intruding."[132]

The first Canadian case to address the issue of whether parody is protected under the fair dealing defence is *Cie Generale des Établissements Michelin-Michelin & Cie v CAW-Canada et al* (*Michelin*).[133] In *Michelin,* the defendant Canadian Auto Workers union (CAW), as part of an organising campaign occurring in the midst of labour unrest at Michelin Canada's Nova Scotia plants, had created leaflets which featured the plaintiff's character Bibendum (the Michelin Tire Man) "broadly smiling…arms crossed, with his foot raised, seemingly ready to crush underfoot an unsuspecting Michelin worker."[134] The plaintiff, who owned the copyright in Bibendum, sought "damages on the grounds that its intellectual property rights were violated by the defendants."[135] Michelin also sought a permanent injunction to restrain the CAW from "using its trade-marks and copyrights in future organizing drives."[136]

CAW argued that their version of Bibendum was a parody and therefore an exception to copyright infringement under fair dealing for the purpose of criticism.[137] Teitelbaum J rejected CAW's argument, stating that under the Copyright Act, "criticism" is not synonymous with parody.[138] In rejecting CAW's argument, *Michelin* adopted a narrow view of criticism, stating that criticism, for the purposes of the fair dealing defence, "requires analysis and judgment of a work that sheds light on

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[128] *Ibid.*

[129] *MCA Canada Ltd v Gilberry & Hawke Advertising Agency Ltd* (1976), 28 CPR (2d) 52 (henceforth *MCA*).

[130] *Ibid,* [4].

[131] *ATV Music Publishing of Canada Ltd v Rogers Radio Broadcasting Ltd et al* (1982), 35 OR (2d) 417, 65 CPR (2d) 109 (Van Camp J) (henceforth *ATV Music*). In the early 1980s, Canada underwent a process of contentious constitutional reform.

[132] *Ibid.*

[133] See note 106 above (*Michelin).*

[134] *Ibid,* [8].

[135] *Ibid,* [3].

[136] *Ibid*.

[137] *Ibid,* [49].

[138] *Ibid,* [42].

the original." This definition of "criticism" privileges the view of criticism as an exercise through which excerpts of a work are presented and dissected through analysis. It rejects those types of criticism, such as parody and satire, that do not fit this narrow definition.

Teitelbaum J's decision was grounded in the belief that "exceptions to copyright infringement should be strictly interpreted."[139] In *CCH et al*, the leading Canadian case on defences to copyright infringement, the SCC overruled this approach, stating that the fair dealing defence is an integral part of the Copyright Act, not simply a defence or an exception.[140] As a user's right,[141] "it must not be interpreted restrictively."[142] Mandated by the SCC to give a "large and liberal interpretation" to the categories of fair dealing, future courts may accept that the category of "criticism" is broad enough to encompass other types of criticism, such as parody or satire. As a result of the SCC's decision in *CCH et al,* some commentators have suggested that Canadian courts may now find that parody is protected under the fair dealing defence.[143] A recent Canadian decision, however, affirmed the narrow view of "criticism" adopted in *Michelin*. In *Canwest Mediaworks Publications Inc v Horizon Publications Ltd*, a case involving a parody of the Vancouver Sun, Master Donaldson of the British Columbia Supreme Court followed *Michelin* in stating that parody "is not an exception to copyright infringement under the *Copyright Act,* and therefore does not constitute a defence" to copyright infringement.[144] Master Donaldson reached his conclusion without referring to *CCH et al.* As a result, this decision would probably be held to have been given per incuriam, and should not be seen as undermining the argument that, following *CCH et al,* parody may now be protected under the fair dealing defence.[145]

If future courts determine that the fair dealing defence (and, particularly, the fair dealing category of "criticism") encompasses parody, the question shifts from whether parody is protected to how broadly should parody be protected.[146] As noted above, mashups which use copyright-protected material for the sole purpose of critiquing something other than the works themselves, for instance the music industry, "pop music" or society itself, can be described as "weapon parodies" or satire. These

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[139] *Ibid,* [63].

[140] *Ibid,* [48].

[141] *Ibid*, [12].

[142] *Ibid,* [48].

[143] For instance, Professor Giuseppina D'Agostino notes that "[p]ost CCH's liberal interpretation of the enumerated grounds, it could be argued that 'criticism' could now encompass parody. *Michelin* no longer seems to be good law" (Giuseppina D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use" (2008) 53 *McGill Law Journal* 309, at 3); also, in an article entitled "Parody as a form of fair dealing in Canada: A guide for lawyers (and judges)" (2009) *Journal of Intellectual Property Law and Practice*, Professor EAC Mohammed states that "simply put, copyright law in Canada now recognizes a defence of parody".

[144] *Canwest Mediaworks Publications Inc v Horizon Publications Ltd,* 2008 BCSC 1609.

[145] See D'Agostino, note 143 above; and see Mohammed, note 143 above.

[146] One limitation would seem to be the category of criticism itself. Though some theorists define parody as being broader than "criticism" (see note 118 above), if parody is protected under the category of criticism, those conceptions of parody which see parody as something which is not critical will not receive protection.

types of critique encompass a wider range of dealings than does the popular perception of parody, which defines parody as a "specific work of humorous or mocking intent, which imitates the work of an individual author or artist, genre or style, so as to make it appear ridiculous".[147] Can "criticism" be interpreted to include "weapon parodies" and satire?

In the seminal American decision on parody and fair use, *Campbell v Acuff-Rose*, the United States Supreme Court drew a distinction between parody and satire.[148] As stated by Justice Souter, who delivered the Opinion of the Court:

> *[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.*[149]

Andrew Watt notes that various lower court opinions in the United States have treated this statement as indicating that while parody[150] will be protected by the fair use defence, satire and other critiques which cannot be described as parody will fall outside of this protection.[151] In Canada, even taking into consideration the large and liberal interpretation given to the categories of fair dealing as mandated by *CCH et al*, it is questionable whether Courts would find that mashups which function as "weapon parodies" or satire and not as parody (under the popular perception of parody) are encompassed within the category of "criticism" for fair dealing purposes. Thus, though many mashups are critical, it is an open question whether they will be considered to have been created for the purpose of "criticism" under the fair dealing defence.

Lastly, many mashups cannot be seen, even tangentially, as critical. Some mashups are homages – shows of respect or deference. Danger Mouse's *Grey Album* and Girl Talk's *Feed the Animals* are works that fall into this category. The *Grey Album* has been described as a "sincere, sophisticated homage to two acclaimed works and the musical celebrities who created them."[152] Gregg Gillis, when asked whether his works are social commentary or a critique of pop culture, responded by saying that he wants his work "to be a celebration of the music. I'm a sincere fan of everything I sample."[153] Other mashups are created by individuals seeking simply to make something new out of existing cultural expression – to use existing cultural expression as the building blocks for their own expression. Mashups created for the purpose of

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[147] See note 118 above.

[148] *Campbell v Acuff-Rose*, 510 US 569 (1994) (henceforth *Campbell*).

[149] *Ibid.* at 581.

[150] This reference to parody again refers to the popular perception of parody set out in note 118.

[151] See note 121 above, at 183.

[152] J Blakley, "The *Grey Album,* Celebrity Homage and Transformative Appropriation" (2005) available at http://www.learcenter.org/images/event_uploads/DemersNotes.pdf (accessed 14 November 2009).

[153] C Dodero and Z Baron, "Interview: Girl Talk a/k/a Gregg Gillis" (2008) available at http://blogs.villagevoice.com/music/archives/2008/11/interview_girl.php (accessed 14 November 2009).

homage or for the purpose of building new works out of existing cultural expression and disseminating these works online would probably not be considered to have been created for any of the listed fair dealing purposes.

As this section has established, though some mashups will satisfy the first step of the fair dealing analysis, many mashups created and disseminated in Canada will not be considered to have been created for any of the listed permissible fair dealing purposes and, as a result, will not be protected by the fair dealing defence. Assuming, however, that some mashups would pass the first step of the fair dealing analysis, this article will proceed by examining the second and third steps.

The second step in the fair dealing analysis applies only to works created for the purpose of criticism, review or news reporting. In order to be protected by the fair dealing defence, these works must mention the source of the work and the name of the author of the work. In mashups, this requirement may be satisfied in a variety of ways. On forums like Mashuptown, many mashups are posted with accompanying descriptions that detail the artists and tracks whose works make up the mashup. Other mashups identify the artists' names and the source tracks in the name of the mashup itself. For instance, a group called The Illuminoids created a mashup and made it available for download on Mashuptown which it entitled "MGMT 'Kids' (Soulwax Remix) vs Santogold 'L.E.S Artistes' vs Norman Greenbaum 'Spirit in the Sky.'" A third method of identifying artists' names and source works is demonstrated by Girl Talk, who inserted a sheet into a sleeve in the *Feed the Animals* album identifying all of the songs and artists sampled on the album.

Though there are a variety of ways in which current mashup artists probably satisfy the requirement, under the fair dealing defence, to identify the source of the work and the name of the author of the work, it can be argued that mashup artists should not have to explicitly cite the source of the work because, in mashups, the source is implicitly known to the listener.[154] Mashups are constructed in such a way that, for the most part, the listener is expected to recognise the source works. In the *Grey Album,* listeners familiar with the respective works recognise, almost immediately, both Jay-Z's lyrics and the Beatles' music. The argument that certain types of works should not have to explicitly cite a source which is "implicitly known to [an] onlooker" was rejected in *Michelin.*[155] However, after *CCH et al*, a Canadian court could hold that the recognition implicit in a mashup is sufficient to satisfy the source requirement, and the fact that some mashups may not explicitly list the source of the work and the name of the author of the work should not bar the application of the fair dealing defence.

The third step in the fair dealing analysis requires the court to determine whether the work was dealt with in a fair manner. As noted above, in assessing whether "fairness" has been established, triers of fact should consider various factors, including the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.[156]

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[154] See note 106 above, at [63].

[155] See note 117 above (*Michelin),* at [112].

[156] See note 68 above, at [53].

The first factor to be considered in assessing whether "fairness" has been established is the purpose of the dealing. In *CCH et al,* the SCC said that courts should "attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work," while ensuring that this purpose is not given a restrictive interpretation.[157] The purpose of the dealing is fair if it is for one of the purposes set out in the Copyright Act (namely, research, private study, criticism, review or news reporting).[158] Those mashups which cannot be considered to fall under the listed purposes will not be protected by the fair dealing defence. For those mashups which can be considered to fall under the listed purposes, this factor will tend towards a finding of fairness.

The second factor to consider, the "character of the dealing," examines how the works were dealt with. In *CCH et al,* the SCC noted that the wide distribution of multiple copies of works will tend to be unfair.[159] With mashups, complete copies of the original songs are not distributed. Mashups are composed of portions of various works. Although some popular mashups are distributed widely, the original works are not distributed in their entirety. Thus, this factor should be considered to be either neutral or to tend towards a finding of fairness.

The amount of the dealing varies depending on the mashup in question. Some mashups, like Girl Talk's *Feed the Animals*, use only small portions of copyright-protected works. Other mashups, like the *Grey Album* or "A Stroke of Genius," use larger portions of works. This distinction could imply that a work like *Feed the Animals*, which uses only small snippets from each song sampled, might be considered "more fair" than the *Grey Album*, which took the lyrics in their entirety from Jay-Z's *Black Album* and large chunks of music from the Beatles' *White Album*.

The fact that mashups may use large portions of copyright-protected works (and in some instances, complete works such as a capella versions of songs that are incorporated, in their entirety, into A vs B mashups) does not remove mashups from the ambit of the fair dealing defence. This issue was canvassed in *Allen v Toronto Star Newspapers Ltd.*[160] In this case, Mr. Allen, a freelance photographer, alleged that *The Toronto Star* had infringed his copyright in a photo which he had taken of Canadian politician Sheila Copps "dressed in leathers astride a [Harley-Davidson] motorcycle" for a November 1985 cover of the magazine *Saturday Night*.[161] *The Toronto Star* had reproduced a black and white, reduced-size version of the *Saturday Night* cover in the context of an article, published in 1990, about Ms. Copps' candidacy for the political leadership of her party. *The Toronto Star*, therefore, within its article, had reproduced Mr. Allen's photo in its entirety. The Ontario Court (General Division) determined that *The Toronto Star's* actions were covered by the fair dealing defence, and, as a result, did not infringe Allen's copyright. In the context of the decision, Sedgwick J, delivering the judgment of the Court, commented upon the case of *Zamacoïs v Douville,* a 1943 decision of the Exchequer Court of Canada in which it was determined that the reproduction of a newspaper article in its entirety, even though it

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[157] *Ibid,* [54].

[158] *Ibid*.

[159] *Ibid,* [55].

[160] *Allen v Toronto Star Newspapers Ltd* (1995), 36 OR (3d) 201 (henceforth *Allen*).

[161] *Ibid.*

was accompanied by critical comments, was not "fair dealing."[162] Sedgwick J noted that:

> *[t]o the extent that this decision is considered an authority for the proposition that reproduction of an entire newspaper article or, in this case, a photograph of a magazine cover, can never be considered a fair dealing with the article (or magazine cover) for purposes of news summary or reporting, we respectfully disagree.*[163]

Another factor to be considered in determining whether the dealing is fair asks whether there are "alternatives to the dealing." In *CCH et al*, the SCC states that it is "useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose."[164] This requires a determination of the ultimate purpose of the mashup in question. If the purpose is to critique a specific artist by juxtaposing their work with that of another artist (for instance to subvert the macho image of Canadian rock band Nickelback by mixing its vocals over Canadian country music artist Shania Twain's pop country sound), it is difficult to see how this criticism could be "equally effective" if it was done in any way other than through a mashup. In a similar manner, if the purpose is to critique the uniformity of pop music by mashing together the entire *Billboard* Top 40 into one seamless track, it is difficult to see how this critique could have the same effectiveness if presented in another form (such as a research paper). Furthermore, though it could be argued that one alternative to using the portion of the musical work or the portion of the sound recording without the permission of the copyright owner was to secure a licence from the copyright owner for its use, the SCC has noted, in *CCH et al,* that "[t]he availability of a licence is not relevant to deciding whether a dealing has been fair."[165]

The nature of the work is another factor which should be considered by the courts in determining whether a dealing is fair. The use of confidential works may "tip the scales towards finding that the dealing was unfair."[166] The use of unpublished, non-confidential works may tend towards a finding of fairness.[167] As noted above, many mashups are composed of works which have been recorded, released, and which have achieved a degree of popular success. Mashups, generally, are not composed of confidential or unpublished works or sound recordings. Thus, it is possible that this finding could be seen as neutral with respect to the fairness analysis. However, in *CCH et al,* the SCC notes that "if a work has not been published, it may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work — one of the goals of copyright law".[168] It is also possible, therefore, that a court could determine that since the dissemination of mashups could lead to "wider public dissemination of the work – one of the goals of copyright law" –

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[162] *Zamacoïs v Douville* (1943), 2 CPR 270, [1943] 2 DLR 257.

[163] See note 160 above.

[164] See note 68 above, at [57].

[165] *Ibid,* [70]. It did so without referring to *Michelin.*

[166] *Ibid,* [58].

[167] *Ibid*.

[168] *Ibid*.

that this factor might tend to fairness with respect to those mashups which are distributed online.[169]

The last factor to be considered in determining whether the dealing is fair is the effect of the dealing on the work. In discussing this factor, the SCC notes that "[i]f the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair."[170] Many mashups will not compete with the market for the original work. This is certainly true for mashups like Girl Talk's albums, where a few seconds of an original work is woven together with many other sound recordings. It is unlikely that an individual who wishes to purchase that original work will settle, instead, for a few seconds of that song combined with various other works. It is also unlikely that individuals who wish to purchase either the Beatles' *White Album* or Jay-Z's *Black Album* will, instead, purchase the *Grey Album*. By bringing older works back into the public eye or by presenting new works in different, potentially more appealing contexts, mashups may in fact lead to an increase in sales of the original works. It is possible, however, to conceive of mashups which do compete with the market of the original work. For instance, in an "A vs B" mashup, the lyrics of one song may be combined with the music of another song in a way that is so pleasing to the ear that individuals would rather purchase the mashup than the original. In this case, this factor would tend to unfairness. Where mashups do not compete with the market for the original work, this factor will tend to fairness.

Based on the factors noted above, particularly the factor which addresses the effect of the dealing on the work, many mashups created in Canada would probably be considered fair. However, as discussed above, the first step of the fair dealing analysis will prove to be a substantial impediment to mashup artists seeking to have their works protected by the fair dealing defence. As a result, as the law currently stands in Canada, many mashups created and shared on peer to peer file sharing networks or websites prima facie infringe copyright and cannot be saved by the fair dealing defence.[171]

5. Mashups and moral rights infringement

5.1. Moral rights in Canada

In addition to alleging that their copyright has been violated by the incorporation of their works within mashups, authors may also allege that their moral rights have been violated.[172] Moral rights, which emanated from nineteenth century Europe,[173] "treat

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[169] *Ibid*.

[170] *Ibid,* [59].

[171] Please see note 11 above, for a detailed discussion of whether fair use can act as a defence for mashups created and distributed in the USA.

[172] Currently, in Canada, only "authors" of a work have moral rights. Bill C-61, the latest attempt to amend the Canadian Copyright Act, proposed extending the moral rights regime to performers of "live aural performance[s]" or "a performance fixed in a sound recording." Performers, as well as authors, would then have both the right to the integrity of their performance and the right to attribution. Bill C-61, however, died on the order table in 2008. As a result, performers in Canada do not have moral rights with respect to their performances.

the artist's oeuvre as an extension of his or her personality, possessing a dignity which is deserving of protection."[174] In contrast with copyright, which is generally concerned with protecting the "pecuniary interests" of the author, moral rights protect the author's non-commercial interests.[175] They take a "more elevated and less dollars and cents view of the relationship between an artist and his or her work".[176]

In Canada, moral rights are protected under s 14.1(1) of the Canadian Copyright Act which notes that the author of a work has the right to the integrity of the work and the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.[177] S 28.2(1) of the Copyright Act specifies that the right of integrity is infringed in two situations: where the work is either distorted, mutilated or otherwise modified to the prejudice of the honour or reputation of the author; or whether the work is used in association with a product, service, cause or institution to the prejudice of the honour or reputation of the author.[178] In Canada, moral rights cannot be assigned.[179] As a result, any suit filed against a mashup artist for moral rights infringement will be brought by the author of the original source work, and not by the copyright owner (if they are two different parties). Though moral rights cannot be assigned, they can, however, be waived by the author.[180] The term of protection of moral rights is the same as the term of copyright in the work.[181]

The moral right to integrity, as noted above, is infringed when the work is, to the prejudice of the honour or reputation of the author, either distorted, mutilated or otherwise modified; or used in association with a product, service, cause or institution. A subjective-objective test is applied to determine whether a distortion or association is prejudicial to the honour or reputation of the author.[182] The author must feel that the distortion or association was prejudicial to their honour or reputation. This opinion must be supported through objective evidence.

5.2. Do mashups infringe moral rights in Canada?

Both the moral rights of attribution and integrity may be infringed through the creation of mashups. Mashups that fail to identify the names of the artists whose works make up the mashup may be found to have violated the artists' right of attribution as set out in s 14.1(1) of the Copyright Act. In many mashups, however,

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[173] Jonathan Herman, "Moral Rights and Canadian Copyright Reform: The Impact on Motion Picture Creators" (1990) 20 *Revue de Droit de l'Université de Sherbrooke* 407-431 (henceforth Herman).

[174] See note 7 above.

[175] See note 173 above.

[176] See note 7 above.

[177] See note 6 above, at s 14.1(1).

[178] *Ibid*, s 28.2(1).

[179] *Ibid,* s 14.1(2).

[180] *Ibid*.

[181] *Ibid,* s 14.2(1).

[182] *Snow v Eaton Centre* (1982), 70 CPR (2d) 105 (O'Brien J) (henceforth *Snow*); *Prise de Parole Inc v Guérin, Éditeur Ltée* (1995), 66 CPR (3d) 257 (henceforth *Prise de Parole*). See note 7, above.

the original artists are identified. In "A vs B" mashups, the original artists' names may be featured in the title of the mashup. In more complex mashups like Girl Talk's *Feed the Animals,* the names of the artists whose works make up the mashup may be included on a separate sheet accompanying the album.

Though one can imagine situations in which the right of integrity is infringed through the incorporation of a work into a mashup which is then used in association with a product, service, cause or institution – such as a mashup created from songs composed by an anti-smoking advocate which is then used in an advertising campaign for a cigarette company – the majority of situations in which the right of integrity will be implicated will probably be those where the work is, to the prejudice of the honour or reputation of the author, either distorted, mutilated or otherwise modified.

By taking pieces of songs and incorporating them into a new work, mashups distort, mutilate and modify the original songs.[183] Though some musicians, such as Chuck D from the group Public Enemy, like "amateurs reworking [their] songs without permission," others strongly dislike unauthorised mashups or remixes of their works.[184] Dave Grohl of Nirvana "reportedly found the hit mash-up 'Smells like Teen Booty' 'wretched.'"[185]

In determining whether there is objective evidence to support the artist's view that a mashup is prejudicial to their honour or reputation, courts could attempt to ascertain the opinions of other artists.[186] The artist could also attempt to demonstrate that their CD sales, concert bookings, or album downloads fell after the creation and distribution of the mashup. The original artist may also want to submit evidence that they have been "ridiculed or mocked" as a result of the mashup, or that they have heard complaints about the mashups.[187]

6. Towards a right to create and disseminate transformative works

Today's digital technologies give individuals the ability to engage with culture in a way that has never before been possible. No longer confined to the role of passive consumers of culture, individuals are embracing the opportunity to remix, remake and (re)produce culture. One way in which individuals are doing so is through mashups. Using a computer and audio editing software, individuals create mashups by combining pieces of two or more sound recordings into one new sound recording. In so doing, they interact with the original works; they play with them, challenge them, respond to them, critique them, celebrate them, imbue them with new meanings, and use them for new purposes. Many individuals then share their creations on forums like Mashuptown, blogs, peer to peer file sharing networks, or websites like YouTube. Some mashups are parodies, some satire, and some homages. All are examples of individuals embracing the opportunity to use the copyright-protected expression of

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[183] Even in cases where the artist releases his or her vocal track as an "*a cappella*" track, an argument can still be made that the work was modified through the addition of an underlying instrumental track.

[184] See note 23 above, at 86.

[185] K Johnson, "Shades of 'Black' 'White' 'Grey'" *St Louis Post-Dispatch* (30 Jan 2005: F03), cited in Serazio, see note 1 above, at 83.

[186] See note 182 above (*Snow*)

[187] See note 182 above (*Prise*).

others as the "raw material for [their] own creative acts."[188] All are examples of individuals participating in the (re)creation of culture, rejecting the role of passive consumer to assume the role of collaborative creator.

This article has examined the extent to which mashups are permitted by copyright law in Canada. As it has demonstrated, many mashups created and disseminated in Canada prima facie infringe copyright. Furthermore, many mashups that are found to prima facie infringe copyright will not be protected by the fair dealing defence as it is currently being applied by Canadian courts. Thus, a large number of artists and disseminators of mashups in Canada would probably be found liable for infringement of either moral rights or copyright, or both, if sued by the holders of those rights.

The question, therefore, of the extent to which the Canadian Copyright Act should be revised to permit individuals to create and disseminate mashups without infringing copyright merits discussion. In seeking to "maintain an appropriate balance"[189] between the rights of copyright owners and users, one possibility for reform is to revise the Canadian Copyright Act to incorporate a right to create and disseminate transformative works – a right to "rework [copyright-protected] material for a new purpose or with a new meaning."[190] The adoption of such a right would open up space within which individuals can legally create and disseminate mashups. Its impact, however, would extend far beyond the mashup genre. Other individuals who create new works from copyright-protected content, such as authors of fan fiction, machinimators (individuals who create films within video games) and digital collagists, among others, would also be able to enjoy the benefits of a "right to create and disseminate transformative works."

This right could be incorporated within the fair dealing defence as the sixth acceptable "fair dealing" purpose (joining research, private study, criticism, review, and news reporting). Individuals in Canada would then have the right, under the fair dealing defence, to use a substantial amount of copyright-protected expression, without the permission of the copyright owner, for the purpose of creating and disseminating a transformative work, provided they do so in a "fair" manner. As is the case with the current list of five "fair dealing" purposes, "fairness" would be determined through an analysis of various factors, including: the purpose of the dealing, the character of the dealing, the amount of the dealing, the alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.

In discussing the potential incorporation of a "right to create and disseminate transformative works" into Canada's Copyright Act, we can look to other jurisdictions that have either incorporated or are considering incorporating this right into their copyright legislation. For instance, the question of whether a new work is transformative is a key consideration in the USA's fair use analysis.[191] As well, in 2006, the "Gowers Review of Intellectual Property", the mandate of which was to comment on whether the United Kingdom's (UK) intellectual property system "was fit for purpose in an era of globalisation, digitisation and increasing economic

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[188] M Sunder, "IP^3" (2006) 59 *Stanford Law Review* 257-332, at 263.

[189] See note 7 above.

[190] See note 8 above.

[191] See note 148 above.

specialisation,"[192] recommended that the UK government take steps to create a copyright exception for transformative use.[193]

The exact content and contours of such a right cannot be set out in the scope of this article. However, the question of the extent to which Canada's Copyright Act should be revised to allow individuals to engage with the copyright-protected expression of others for the purpose of creating and disseminating a transformative work merits discussion during Canada's ongoing process of copyright reform. Ultimately, much more is at stake than simply the future of mashups as a musical genre. The resolution of this issue will help determine whether mashups created and distributed in Canada continue to infringe copyright. It will also speak volumes about the future of creativity, culture, and freedom of expression in Canada.

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[192] See note 8 above, at 1.

[193] *Ibid*, 68.