MUSIC MASH-UPS: THE CURRENT AUSTRALIAN COPYRIGHT IMPLICATIONS, MORAL RIGHTS AND FAIR DEALING IN THE REMIX ERA

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This article discusses the likely Australian copyright implications of an increasingly popular form of digital music expression: the music mash-up, a majority of which are created from pre-existing audio/sound recordings and video without permission of the copyright owner. In examining this issue, the analysis of the courts in the recent Larrikin music copyright infringement cases are examined. Consideration of the implications of music mash-up creation to moral rights is also considered. In the hypothetical scenario that a music mash-up artist is accused of copyright infringement, consideration is given as to the likely outcome of the application of the fair dealing exceptions under the Copyright Act 1968 *(Cth). Finally, a suggestion is made as to the direction of future law reform in this area.*

I INTRODUCTION

We now live in the age of the 'remix culture'. With the advent of widespread and accessible digital technology via the internet, there is a permanent and ever-increasing practice of re-mixing pre-existing works together to create new ones. One such practice involves the subject matter of music, where audio/sound recordings are digitally blended in lieu of sheet music to form a new digitalised musical work, known as a 'mash-up'.[1] Over the last decade a phenomenal shift has occurred, so that the once restricted technological capabilities of a select few in the music recording industry are now available to millions of amateurs worldwide.[2] It is now possible for anyone with a home computer, particular software and access to the internet to blend pre-existing sound recordings into a music mash-up. Technology also makes it possible for an individual to globally

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[1] The term 'sound recordings' will be used to describe digitalised audio and sound recordings throughout this article.

[2] Peter Friedman, 'Why is Music the Main Battleground in Copyright Wars?' in Peter Friedman, *Geniocity.com — Tools and Toys for People Who Think* (6 July 2009) <http://blogs.geniocity.com/friedman/2009/07/why-is-music-the-main-battleground-in-the-copyright-wars/>.

disseminate their mash-up within a few seconds. One of the most distinctive features of a music mash-up is that it typically blends many copyright-protected sound recordings (often of different genres) together without the owners' permission.[3]

This article seeks to discuss the Australian copyright implications of music mash-ups and the defence of fair dealing under the *Copyright Act 1968* (Cth). After discussing in further detail the process of the creation of a music mash-up and some of the issues that such a mash-up raises, it will explore the current Australian copyright implications of this creative form of digital musical expression. The recent copyright infringement cases involving Larrikin Music Publishing Pty Ltd and EMI Songs Australia[4] will be used to explain the current Australian copyright implications of the re-use of music without permission. Then this article will discuss the moral rights provisions from pt IX of the *Copyright Act* and their application to music mash-ups, drawing on the recent case of *Perez v Fernandez*.[5]

Having engaged in consideration of these moral rights and their application to music mash-ups, this article will then investigate some of the exceptions to copyright infringement under the *Copyright Act 1968* (Cth), known as the fair dealing provisions. It will question whether any of the fair dealing provisions might be applicable under Australian law. To do this it will consider the hypothetical scenario that an Australian digital mash-up artist is accused of copyright infringement, after creating their mash-up from pre-existing, copyright-protected sound recordings without permission.

Conclusions will be drawn and finally a suggestion will be made as to how Australian law might address music mash-ups in the future, particularly in light of the current *Inquiry into Copyright and the Digital Economy* by the Australian Law Reform Commission (ALRC).[6] In the recently released Issues Paper, one of the terms of reference of this review was stated as being 'the importance of the digital economy and the opportunities for innovation … created by the emergence of new digital technologies'.[7] As explained on the ALRC website: 'The ALRC is considering whether exceptions and statutory licences in the

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[3] Michael Allyn Pote, 'Mashed-Up in Between: The Delicate Balance of Artists' Interests Lost Amidst the War on Copyright' (2010) 88 *North Carolina Law Review* 639, 640.

[4] *Larrikin Music Publishing Pty Ltd v EMI Songs Australia* (2010) 263 ALR 155 ('*Larrikin*'); *EMI v Larrikin* (2011) 276 ALR 35 ('*Larrikin Appeal*'); Transcript of Proceedings, *EMI v Larrikin* [2011] HCATrans 284. Throughout this article, when referred to collectively, these cases will be called '*the Larrikin cases*'.

[5] [2012] FMCA 2.

[6] ALRC, *Copyright and the Digital Economy* (30 May 2012) <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy>.

[7] ALRC, *Copyright and the Digital Economy*, Issues Paper No 42 (2012) 3.

Copyright Act 1968 are adequate and appropriate in the digital environment and whether further exceptions should be recommended.'[8] It remains to be seen as to whether any of the final recommendations that are made will pertain to works of the mash-up genre in general, or whether any might be specific to music mash-ups.

II WHAT IS A MUSIC MASH-UP?

A A Music Mash-Up — the Technological Continuance of a Long-Standing Practice?

From a musicological perspective, in Western music, the creation of new works from old ones is not a new concept. For hundreds of years, a common creative practice known as 'music borrowing' has been documented.[9] Composers who engage in borrowing practices incorporate a small quantity of music from another's work into their own work.[10] Often this small amount of music is developed within the new work as thematic material.[11] Music borrowing practices have been documented to span every musical genre throughout history, with some of the earliest examples demonstrated in medieval liturgical chants.[12]

In the context of the digital era, more people than ever before have the capacity to create, distribute and listen to mash-ups. It may be argued that a mash-up is an extreme genre of music borrowing — the digital era's version — where borrowing is pushed to the limits when multiple sound recordings are blended together to create an entirely new work.[13] Mash-ups are situated in a unique context because often the person who created them was once their user, listener, and therefore consumer.

The growing popularity of the creation and distribution of music mash-ups cannot be underestimated. The music mash-up genre has now attained such

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[8] ALRC, above n 6.

[9] J Peter Burkholder, *Borrowing* (2007-2012) Oxford Music Online <http://www.oxfordmusiconline.com>.

[10] Ibid.

[11] 'Thematic material' is 'the themes, subjects, motifs, rhythmic figures from which a composition is constructed': Michael Kennedy, *Concise Dictionary of Music* (Oxford University Press, 4th ed, 1996) 734.

[12] Burkholder, above n 9.

[13] Elina M Lae, 'Mashups — A Protected Form of Appropriation Art or a Blatant Copyright Infringement?' (Working Paper December 2011) 20.

global popularity that it has become 'a widely recognized part of the landscapes of popular music and popular culture'.[14] The music mash-up genre initially gained global attention in 2004, when a United Kingdom-based DJ called Danger Mouse released a non-commercial collection titled the *Grey Album*. The works on the *Grey Album* remixed songs from the Beatles' *White Album* and a cappella hip-hop vocals from Jay-Z's *The Black Album*.[15] A cease and desist letter was promptly issued by EMI, who were representing the Beatles.

However, through internet file-sharing websites and worldwide defiance on the part of users, listeners and consumers, the *Grey Album* went viral on the internet. An initiative called 'Grey Tuesday' was launched through 'Downhill Battle', a non-profit music-activist organisation, which resulted in over 100 000 free downloads of the *Grey Album* in one day, from over 170 websites.[16] The *Grey Album* was downloaded over a million times, which would have placed it at the top of the charts if it had been a mainstream commercial album.[17]

B The Difference between Music Sampling and Mash-Ups

Technically, music sampling is the re-use of a short segment of sound recording into the 'sonic fabric' of a new musical work.[18] Music sampling usually involves the technological re-use of a small quantity of music and it is a common practice in hip-hop music, where an owner's permission is usually sought for the re-use.[19] In the United States, the licensing of samples began earnestly throughout the record industry in 1991, following a finding of copyright infringement by Duffy J in the case of *Grand Upright Music Ltd v Warner Bros Records Inc*.[20]

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[14] Liam McGranahan, 'Bastards and Booties: Production, Copyright, and the Mashup Community' (2010) 14 *TRANS-Transcultural Music Review* <http://www.sibetrans.com/trans/a13/bastards-and-booties-production-copyright-and-the-mashup-community>.

[15] Alan Hui, *Can Daft Punk Play at My House* (BA (Media and Communications) Thesis, University of Sydney, 2009) 22.

[16] Aaron Power, 'Megabytes of Fame: A Fair Use Defense for Mash-Ups as DJ Culture Reaches its Postmodern Limit' (2005) 35 *Southwestern University Law Review* 577, 580.

[17] Phillip A Gunderson, 'Danger Mouse's Grey Album, Mash-Ups, and the Age of Composition' (2004) 15(1) *Postmodern Culture* <http://muse.jhu.edu/journals/postmodern_culture/summary/v015/15.1gunderson.html>.

[18] Madhavi Sunder, 'IP3' (2006) 59 *Stanford Law Review* 257, 305.

[19] Olufunmilayo B Arewa, 'From J C Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context' (2006) 84 *North Carolina Law Review* 547, 547.

[20] 780 F Supp 182 (SD NY, 1991). Ironically, this case did not consider the fair use doctrine.

When music sampling occurs, usually a short segment of sampled music is incorporated into *original* music that has been created by the composer.[21] In comparison, a music mash-up is sampling in an extreme form: a new musical work created *entirely* from the content of *two or more* pre-existing sound recordings, usually through the process of layering.[22] This layering usually involves 'overlaying the vocal track of one song onto the music track of another'.[23] Therefore a mash-up contains *no original material* and is composed entirely from pre-existing works.[24] Such works have been described as 'the most overt examples of intertextuality in popular music'.[25] Some of the most spectacular mash-ups layer, blend and weave sound recordings together so that the listener is effectively transported on a musical journey. Listeners can be conveyed through many musical genres and snippets of recognisable song themes within a single mash-up, which are noticeable through subtle musical changes as new samples are blended into the work.

The variance in the exact re-use and blending of others' digitalised music through layering is only limited by a mash-up artist's imagination and creativity. Therefore in terms of quantity, a very small or a very large portion of a sound recording may be re-used. A mash-up could be comprised of the blending of a large and substantial portion of only two sound recordings (technically known as 'A + B'), or the blending of a more limited portion of up to a dozen or more recordings.[26] An example of such a work is 'Stairway to Bootleg Heaven' by United States artist DJ Earworm, which mashes works by Dolly Parton, the Beatles, Art of Noise, Pat Benatar, the Eurythmics, and Laurie Anderson.[27] Another example is DJ Earworm's four and a half minute work titled 'United States of Pop (2008): Viva La Pop', which blends Billboard Magazine's top 25 hits of 2008.[28]

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[21] *Newton v Diamond*, 388 F 3d 1189, 1192 (9th Cir, 2004).

[22] Emily Harper, 'Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm' (2010) 39 *Hofstra Law Review* 405, 406.

[23] Australian Law Reform Commission, above n 7, 37 [118], citing *The Macquarie Dictionary Online* (2012) <http://www.macquariedictionary.com.au/anonymous@9c99926873275/-/p/dict/index.html>.

[24] Pote, above n 3, 646.

[25] Liam Maloy, '"Stayin' Alive in Da Club": The Illegality and Hyperreality of Mashups' (2010) 1(2) *Journal of the International Association for the Study of Popular Music* 1, 1 <http://www.iaspmjournal.net>.

[26] Em McAvan, 'Boulevard of Broken Songs: Mash-Ups as Textual Re-Appropriation of Popular Music Culture' (2006) 9(6) *Journal of Media and Culture* <http://journal.media-culture.org.au/0612/02-mcavan.php>.

[27] Ibid.

[28] Graham Reynolds, 'A Stroke of Genius or Copyright Infringement? Mashups and Copyright in Canada' (2009) 6(3) *Scripted* 640, 641.

It should be noted that many music mash-ups that are available online blend not only sound recordings of pop songs, but also the video clips that accompany these sound recordings. Such mash-ups are a hybrid of audio and video. Therefore the viewer will not only hear the blending of music from the various sound recordings, but they will also see a visual mash-up of the music video-clip footage.[29] This type of a mash-up has been described as a 'music video [that] fluidly moves from one song and music video to another'.[30] The Australian copyright implications of these mash-ups will be discussed later in this article.

C The Creation and Distribution of Music Mash-Ups

Often the sole motivation for the creation of a music mash-up is a creative and artistic one, as opposed to economic incentive. Mash-up artists create their work as a form of artistic expression and they often wish to share their creativity with the world.[31] Sometimes a desire to engage in social or political commentary is a catalyst for creation.[32] It has been suggested that another motivation on the part of some mash-up artists has been to challenge the very notion of copyright law itself.[33] The music mash-up genre has become so popular that many websites have been created where mash-up artists can globally distribute their works and users can listen to, download, and rate these works.[34]

Currently, a majority of mash-up artists around the world have not released their works commercially. For many artists, a fear of litigation due to the re-use of works without licence is probably the reason as to why.[35] From a legal perspective, if a mash-up artist was to receive monetary remuneration for their work, this would be problematic. Such a situation may ignite prompt litigation

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[29] However, under the *Copyright Act 1968* (Cth), the notated musical score, sound recording and video are considered separate works, with separate rights vesting in each: music is classified under pt III 'Works' and sound recordings under pt IV 'Subject Matter Other Than Works'. For more information about video mash-ups, see Andrew S Long, 'Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values Of Transformative Video' (2007) 60 *Oklahoma Law Review* 317.

[30] Long, above n 29, 319.

[31] Damien O'Brien and Brian Fitzgerald, 'Mashups, Remixes and Copyright Law' (2006) 9(2) *Internet Law Bulletin* 17, 17–9.

[32] McAvan, above n 26. An example of such a mash-up is RX's work that mashes speeches made by George W Bush with U2's anti-war song 'Sunday Bloody Sunday'.

[33] Pote, above n 3, 641–2.

[34] Katie Simpson-Jones, 'Unlawful Infringement or Just Creative Expression? Why DJ Girl Talk May Inspire Congress to "Recast, Transform, or Adapt" Copyright' (2010) 43 *John Marshall Law Review* 1067, 1068.

[35] Harper, above n 22, 410.

from the copyright owners of the music/videos used, who would seek damages for copyright infringement and subsequent royalties for this unauthorised re-use.

However, in the United States, there have been a few exceptions, with some mash-up artists deliberately distributing their works commercially to derive profit, without having sought clearance for all sampled works. One of the most publicised artists is DJ Girl Talk (Gregg Gillis), who has mashed hundreds of sound recordings without permission in four commercially distributed mash-up albums.[36] It is currently unclear as to why individuals such as Gillis have so far managed to avoid litigation. Gillis has stated that if he is sued for copyright infringement at a future date, he intends to raise the fair use defence, which is an exception to copyright infringement in the United States.[37] To support this defence, he has stated that he aims to rely upon the mash-ups themselves, asserting that they sufficiently blend enough works together to create new 'transformative' works.[38]

It has been suggested that one reason that more litigation has not occurred against commercial or amateur mash-up artists is that copyright owners have weighed up the current state of affairs and are fearful of the possible outcome.[39] There is a possibility that if an owner sues for infringement and a court finds *in favour* of the mash-up artist under a legal exception to infringement (such as fair dealing in Australia or fair use in the United States), that this would 'open the floodgates' for the widespread commercial distribution of mash-ups.[40]

Although a majority of mash-up artists do not distribute their works commercially, there have been some rarer cases where an artist has been offered further economic opportunities as a result of the notoriety of a particular work. Such opportunities have included: endorsements from website advertising; subsequent major-label record contracts (this occurred to DJ Danger Mouse for the release of the 'Gnarls Barkley' project); or the subsequent licensing and official release of a mash-up by the original artist's label (this occurred to mash-up artists Phil & Dog for 'Dr Pressure').[41] Although quite rare, these types of scenarios challenge the notion and the meaning of the 'non-commercial' creation and use of mash-ups. The ALRC's Issue Paper acknowledges this

[36] Simpson-Jones, above n 34, 1067.

[37] Anna Shapell, '"Give Me a Beat": Mixing and Mashing Copyright Law to Encompass Sample Based Music' (2012) 12(2) *Journal of High Technology Law* 519, 541. In Australia, a similar type of copyright infringement exception is fair dealing, which will be discussed later in this article.

[38] Ibid.

[39] Friedman, above n 2.

[40] Ibid.

[41] McAvan, above n 26.

issue, stating that there are difficulties present in defining 'non-commercial'[42] use in the digital era, because such an environment 'monetises social relations, friendships and social interactions'[43] and revenue may be received through other avenues, such as website advertising.[44]

D Music Mash-Ups: Creative Freedom vs Economics?

From a legal perspective, it is likely that worldwide, a majority of music mash-ups that are created and distributed online have been created without the granting of a licence and the payment of a fee for the portion of sound recordings blended.[45] While there are some cultural and artistic arguments against mash-up artists having to seek consent for the re-use of a sound recording, there are also some practical reasons. These include the cost and difficulty that a mash-up artist faces in locating the owners of every work they wish to use, as well as the cost involved after an agreement is reached on licence terms.[46] This is particularly difficult if a mash-up artist re-uses many works or very popular and therefore expensive works. In many cases the insurmountable expense of all of the copyright licence fees alone would prohibit the release of such a work.

The practical difficulties in obeying copyright law and obtaining copyright clearance for the use of all samples mashed in a commercial mash-up album are immense, as illustrated by the following example. The process of complying with the law was described on the website of mash-up artists 2ManyDJs, whose record company sought clearance for their 2002 commercial mash-up titled 'As Heard on Radio Soulwax Pt 2':[47]

> it's been almost three years in the making, it took one record company employee more than six months of hard labour, 865 e-mails, 160 faxes and hundreds of phone calls to contact over 45 major and independent record-companies. a total amount of 187 different tracks were involved from which 114 got approved, 62 refused and 11 were un-trackable. it caused massive headaches and sweaty palms to employees of 'clearance centres' and record companies all over the world. but it's finally here. it's about 62 minutes long and there's 45 (or is that 46?) tracks on it. it took seven long days and nights to cut, edit, mix and re-edit it all together.

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[42] ALRC, above n 7, 34 [110].

[43] Ibid 39 [130].

[44] Ibid 39 [130].

[45] Reynolds, above n 28, 646.

[46] Peter Daniel Eckersley, *Digital Copyright & The Alternatives: An Interdisciplinary Inquiry* (PhD Thesis, The University of Melbourne, 2011) 224.

[47] McGranahan, above n 14.

The irony in this example is that even though their record company complied with United States copyright law and laboriously cleared all the samples used, commercial release of the album was still banned.[48] This example illustrates the extent of the work which is involved in complying with current law. In consideration of the current state of affairs, it is very unlikely that an amateur mash-up artist would have the financial or logistical means by which to obtain licences to clear the copyright of all works mashed.

Some commentators have suggested that in an artist having to seek permission to re-mix works, the situation becomes one of economics versus creative freedom, where only those who can afford to pay the licence fees are permitted to create.[49] Others have suggested that from an infringement perspective, current copyright regimes not only contest the music industry against the general public but current artists (such as pop singers) against future artists (mash-up artists).[50] This is because in having to seek permission to use a desired sound recording, there is the possibility that a mash-up artist may be refused the use of the work by the owner. Accordingly, it has been suggested that a balance needs to be achieved between the parties involved.[51] The issue becomes exactly how to approach this balance.

In the United States, two opposing points of view have been advanced regarding mash-ups. The first is that mash-ups infringe copyright and do not constitute fair use.[52] The second is that although 'amateur remix'[53] mash-ups currently infringe copyright, they should be free from the constraints of United States copyright law altogether.[54] Some commentators have stated that although non-commercial mash-ups infringe copyright, due to the widespread, increasing practice of creation and online distribution, a compulsory licensing scheme should be implemented for 'transformative sample-based music'.[55] Another proposal is the introduction of a specific fair use exception to legalise the creation of mash-ups.[56] However, mash-ups currently continue to infringe United States copyright and whether the law regarding mash-ups is reformed in the future remains to be determined.

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[48] Ibid.

[49] Shapell, above n 37, 547.

[50] Pote, above n 3, 642.

[51] Ibid.

[52] Harper, above n 22, 405–45.

[53] Works that are created and distributed non-commercially.

[54] Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Bloomsbury Academic, 2008) 254–5.

[55] Shapell, above n 37, 560; Amanda Webber, 'Digital Sampling and the Legal Implications of its Use After Bridgeport' (2007) 22 *St John's Journal of Legal Commentary* 373, 409.

[56] See generally Long, above n 29.

Having engaged in a detailed discussion of the creation of music mash-ups and examined some of the issues that the creation and distribution of these works raise, this article will now turn to discuss the copyright implications of these works under current Australian law.

III WHAT ARE THE CURRENT AUSTRALIAN COPYRIGHT IMPLICATIONS OF A MUSIC MASH-UP?

In order to discuss the current Australian copyright implications of a music mash-up, consideration must be given to the *Copyright Act 1968* (Cth) and how it seeks to protect the types of works that are re-mixed in the process of mash-up creation.

A Copyright Subsistence in Musical Works, Sound Recordings and Videos

First, for the purpose of identification and classification, the *Copyright Act* bestows copyright protection by categorising creative works into eight different types of subject matter in two categories:[57]

- Part III 'Works' includes a musical work, which may pertain to the notated musical score.[58] Although mash-ups do not tangibly use or re-mix the actual written musical scores, the underlying principles of the law of music copyright infringement is still relevant. Also, as mash-ups remix music via technological means, although difficult, theoretically it would be possible to produce a tangible notated musical score from a mash-up. In relation to a musical work the Act states that copyright will subsist as long as the work: is original;[59] has been reduced to tangible

[57] Part III 'Works' (ss 31–83); pt IV 'Subject Matter Other than Works' (ss 84–113C).

[58] Exactly what can be classified as a musical work is a very difficult question and for this reason the *Copyright Act 1968* (Cth) does not attempt to define it. One of the first judicial attempts to define a musical work occurred in the decision of *Bach v Longman* (1777) 98 ER 1274; 2 Cowp 623, where Mansfield J stated that music 'may be written'. See Wellett Potter and Heather A Forrest, 'Musicological and Legal Perspectives on Music Borrowing: Past, Present and Future' (2011) 22 *Australian Intellectual Property Journal* 137, 146.

[59] *Copyright Act* s 32. Originality has been defined as 'being more than a copy of other material': *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 511 (Dixon J).

form;[60] and has a territorial connection to Australia via the notion of a qualified person;[61] or the first publication first occurring in Australia.[62]

- Part IV 'Subject Matter Other than Works' pertains to sound recordings and cinematograph film (video). As mentioned earlier, both of these separate types of works are commonly remixed in a single music mash-up so that in addition to hearing a blend of various sound recordings, the music video footage is also mixed. Section 10 of the Act defines a sound recording as 'the aggregate of the sounds embodied in a record' and a cinematograph film as 'the aggregate of the visual images embodied in an article or thing so as to be capable by the use of that article or thing'.[63] Therefore, for the purposes of copyright protection under Australian law, the sound recordings and accompanying cinematograph film (video) that are often blended into music mash-ups are considered separate works. This means that although sound recordings and videos are blended within a single mash-up, copyright subsists separately in each work and therefore they must individually satisfy the copyright subsistence criterion. In order for copyright to subsist in a sound recording, it must either: be made by a qualified person;[64] be made in Australia;[65] or first published in Australia.[66] Likewise, a cinematograph film must also be either: made by a qualified person;[67] made in Australia;[68] or be first published in Australia.[69]

B Copyright Infringement under Australian Law

Once copyright subsists in a musical work, sound recording or cinematograph film, the copyright owner is granted an exclusive bundle of rights:

- For a musical work, these rights include: the right to reproduce the work in a material form;[70] to publish the work;[71] to perform the work in

[60] *Copyright Act* s 22. For a musical work, reduction to tangible form may be as a published work (s 29(1)(a)) or an unpublished work (s 32(1)).

[61] *Copyright Act* s 32(4).

[62] Ibid s 32(2)(c).

[63] Ibid s 10.

[64] Ibid s 89(1).

[65] Ibid s 89(2).

[66] Ibid s 89(3).

[67] Ibid s 90(1).

[68] Ibid s 90(2).

[69] Ibid s 90(3).

[70] Ibid s 31(1)(a)(i).

[71] Ibid s 31(1)(a)(ii).

public;[72] to communicate the work to the public;[73] and to make an adaptation of the work.[74]

- When copyright subsists in a sound recording, the rights bestowed upon the owner include: the right to make a copy of the sound recording;[75] the right to cause the work to be heard in public;[76] the right to communicate the recording to the public;[77] and the right to enter into a commercial rental agreement in respect of the recording.[78]

- For a cinematograph film (video clip), the rights include: the right to make a copy of the film;[79] to cause the film, its visual images or sounds to be heard in public;[80] and to communicate the film to the public.[81]

Under the *Copyright Act*, in considering all three types of subject matter, when another person exercises the exclusive rights belonging to the copyright owner without the owner's permission, they are committing copyright infringement.[82]

In order to establish copyright infringement of a musical work, as summarised in the *Larrikin Appeal* case,[83] a three step test must occur:

(1) The original work in which copyright subsists must be identified;

(2) Identification in the alleged infringing work of the part copied from the original work. This involves an investigation into what has been reproduced from the original work. There must be sufficient objective similarity (substantiality) and a causal connection between the two works;[84] and

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[72] Ibid s 31(1)(a)(iii).

[73] Ibid s 31(1)(a)(iv).

[74] Ibid s 31(1)(a)(vi).

[75] Ibid s 85(1)(a).

[76] Ibid s 85(1)(b).

[77] Ibid s 85(1)(c).

[78] Ibid s 85(1)(d).

[79] Ibid s 86(a).

[80] Ibid s 86(b).

[81] Ibid s 86(c).

[82] Ibid s 36 for pt III Works (musical works) and s 101 for pt IV Subject Matter Other than Works (sound recordings and cinematograph films).

[83] *Larrikin Appeal* (2011) 276 ALR 35, 51 [66] (Emmett J), 81 [187], 83 [198] (Jagot J), citing *Metricon Homes Pty Ltd v Barrett Property Group Pty Ltd* (2008) 248 ALR 364, 369 [23] and *Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd* (2008) 172 FCR 580, 587 [41]–[42].

[84] Affirming *S W Hart & Co Proprietary Ltd v Edwards Hot Water Systems* (1985) 159 CLR 466, 472.

(3) Determination as to whether the part taken constitutes a 'substantial part' of the original work, which primarily involves a qualitative assessment. Of consideration is whether the alleged infringing work reproduces 'that which made the copyright work an original work'.[85]

To-date, no Australian copyright infringement case has considered the subject matter of a music mash-up.[86] However, the ultimate finding from the recent succession of *Larrikin* cases is a good example of the current copyright implications of the re-use of a small quantity of written music without permission.[87] Although these cases involved the subject matter of written music (as opposed to a sound recording or film), they affirm the current Australian legal position on music mash-ups: the unauthorised exercising of an author's exclusive rights in a work such as a mash-up constitutes copyright infringement. The analysis of the courts in these cases will now be discussed.

C *Larrikin Music Publishing Pty Ltd v EMI Songs Australia (2010) 263 ALR 155*

Larrikin Music Publishing Pty Ltd was the owner of *Kookaburra Sits in the Old Gum Tree* ('*Kookaburra*'), an iconic Australian round.[88] In 2010, Jacobson J of the Federal Court determined that two recordings of Men at Work's *Down Under* (which was owned and licensed by EMI companies)[89] had infringed copyright in *Kookaburra*, by reproducing a substantial part of this work.

After identifying the original work in which copyright subsisted as being *Kookaburra*,[90] the court considered the substantiality test to determine whether copyright infringement had occurred. The court questioned whether a 'substantial part' of *Kookaburra* had been reproduced in the flute riff of *Down Under*. An aural and visual comparison of both works was undertaken,[91] along with the assistance of expert musicologist witnesses.[92] Upon a visual

[85] *Larrikin Appeal* (2011) 276 ALR 35, 51 [66] (Emmett J).

[86] However, there has been a rare case involving a breach of moral rights in a mash-up: *Perez v Fernandez* [2012] FMCA 2, which will be discussed later.

[87] *Larrikin* (2010) 263 ALR 155; *Larrikin Appeal* (2011) 276 ALR 35; Transcript of Proceedings, *EMI v Larrikin* [2011] HCATrans 284.

[88] *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (2009) 179 FCR 169.

[89] The owners were EMI Songs Australia Pty Ltd and EMI Music Publishing Australia Pty Ltd, who were the respondents, in addition to Mr Colin James Hay and Mr Ronald Graham Strykert, the composers of *Down Under* and former members of Men at Work: *Larrikin* (2010) 263 ALR 155, 159 [24].

[90] *Larrikin* (2010) 263 ALR 155, 157 [1].

[91] Ibid, 174 [158].

[92] Wellett Potter, *Illegal Harmony: Discord between the Practice of Music-Borrowing and Australian Music Copyright Law* (LLB Hons Thesis, University of New England, 2010) 94.

examination of the musical works, *Kookaburra* is a very short work, comprising of four phrases of music. It is also highly memorable because it is a cyclic round. In terms of quantity, two musical phrases were reproduced in *Down Under*. The first phrase of the song comprises of only 11 musical notes and it was repeated twice in *Down Under*. The second phrase of the *Kookaburra* song also comprises of 11 notes and it was repeated three times in *Down Under*.

Of considerable debate was whether a small musical hook within the flute riff of *Down Under* resulted in a new musical phrase which could distinguish the work from *Kookaburra*.[93] This hook was composed by Men at Work and was interspersed through the musical phrases taken from *Kookaburra*. As expressed by Jacobson J, '[t]he issue of whether there is a degree of objective similarity between the works turns very much on the answer to that question'.[94]

Ultimately, the court determined that the two bars of music from *Kookaburra* reproduced in the flute riff of *Down Under* constituted a 'substantial part' of *Kookaburra*.[95] This was despite the fact that (1) at four bars long, *Kookaburra* is a very short work; (2) being a cyclic round, the work is highly memorable and was specifically created so that it could be layered upon itself; and (3) the work was copied into a less memorable part of *Down Under*.[96]

In terms of quantity, a very small portion of the *Down Under* composition incorporates the two bars from the *Kookaburra* work. *Down Under* comprises of a total of 93 bars of music and of this, five bars reproduce part of *Kookaburra*. However, in consideration of substantial similarity, the test is one of quality rather than quantity and therefore substantiality was sufficiently established.[97]

A causal connection between the works was determined from the music video of *Down Under*, where Mr Ham was shown playing the flute riff while sitting in a gum tree.[98] The established fact that the words to Kookaburra had been sung for a period of two to three years in a number of live performances also satisfied the causal connection.[99] Therefore, as *Kookaburra* was established to be an original

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[93] *Larrikin* (2010) 263 ALR 155, 158 [18].

[94] Ibid 158 [19].

[95] Ibid 191 [337].

[96] Ibid 191 [339].

[97] Ibid 160 [42], 162 [54], 179 [218]–[229], affirming *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 254 ALR 386, 394 [30], 424 [155], 426 [170]; *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, 294.

[98] *Larrikin* (2010) 263 ALR 155, 168 [106].

[99] Ibid 169 [111].

work and was found to be reproduced (through substantiality and a causal connection), *Down Under* infringed the copyright of *Kookaburra*.[100]

D EMI v Larrikin (2011) 276 ALR 35

On 7 April 2010, EMI appealed the findings of the primary judge to the Full Court of the Federal Court. A multitude of arguments were forwarded on behalf of EMI as to how the lower court had erred in the application of the law, which were outlined in paragraphs 67 and 68 of the judgment.[101] The essence of the first of these arguments was that the incorrect principles had been applied by the lower court during the application of the substantiality test to determine infringement.[102] In relation to this issue, the Full Court judges were of differing opinions. Emmett J found that it was arguable that the trial judge had erred in his application of substantial similarity;[103] whereas Jagot and Nicholas JJ found that the trial judge had not erred in his determination of substantial similarity.[104]

Emmett J stated that an error had occurred in the determination of substantial similarity because weight was given to the fact that during live performances of *Down Under*, the words to *Kookaburra* had been sung.[105] This finding was used in the lower court to support objective similarity between the works.[106] Also, the trial judge erred by giving weight to the quantitative analysis that half of *Kookaburra* (50%) had been reproduced, when in fact the work was a round, containing seven aurally unique bars of music.[107] Since *Kookaburra* was a round, it was not necessary for an infringer to reproduce a substantial part of the work as a round for substantiality to be determined.[108] Additionally, the trial judge had engaged in an 'overly mechanistic' analysis regarding the objective similarity between the works, focusing upon certain musicological elements[109] in isolation to each other and giving more weight to melody than the rest.[110]

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[100] Ibid 161 [49], affirming the copyright infringement test from *Francis Day & Hunter Ltd v Bron* [1963] 1 Ch 587, 623–4 (Diplock LJ).

[101] *Larrikin Appeal* (2011) 276 ALR 35, 51–3.

[102] Ibid 51–2 [67].

[103] Ibid 53–6 [71]–[81].

[104] Ibid 80–90, 96 [185]–[186], [191]–[227], [254] (Jagot J); 98 [263]–[267] (Nicholas J).

[105] Ibid 54 [72].

[106] Ibid 56 [81].

[107] Ibid 54 [74].

[108] Ibid 56 [84].

[109] Ibid 55 [78]. These elements were listed as being: melody, key, tempo, harmony and structure.

[110] *Larrikin Appeal* (2011) 276 ALR 35, 55 [78].

Therefore Emmett J stated that the issue of the determination of copyright infringement needed fresh reconsideration by the Full Court.[111]

However, Emmett J concluded that *Down Under* had engaged in copyright infringement of *Kookaburra* because a substantial part of *Kookaburra* had been reproduced. [112] As such, the two of the four phrases from *Kookaburra* that were reproduced in *Down Under* constituted a substantial part of *Kookaburra* because qualitatively they were 'an essential air or melody of the work'.[113] In coming to the finding of copyright infringement, he stated that he felt 'some disquiet' about it, because the taking of the melody of *Kookaburra* had been done 'by way of tribute to the iconicity of *Kookaburra*, and as one of a number of references made in *Down Under* to Australian icons'.[114]

In the alternative, Jagot and Nicholas JJ disagreed with Emmett J's finding that the trial judge had erred in the way in which he had established substantial similarity between the works.[115] Rather, they stated that the correct test of the 'ordinary, reasonably experienced listener'[116] had been identified by the trial judge and was correctly applied to determine the objective similarity between the works.[117] In all other actions in considering objective similarity between the works, the trial judge did not err and therefore no error of principle had been demonstrated.[118] Therefore, they found that the Full Court need not disturb the findings of the lower court in regards to copyright infringement.

Nicholas J affirmed that in undertaking the substantiality assessment as to the quality of the original work, it is necessary to establish that the work originated with the author.[119] This is because the reproduction of work that does not originate with an author is an insubstantial part of the work.[120] In consideration of the first two bars of *Kookaburra*, they amounted to a substantial part of the work.[121] Nicholas J also found that EMI had wrongly assumed the subsistence

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[111] Ibid 53–6 [71]–[81].

[112] Ibid 60 [98].

[113] Ibid 47, 57, 59 [49], [85], [97], applying *Hawkes and Son (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593, 609.

[114] *Larrikin Appeal* (2011) 276 ALR 35, 60 [99].

[115] See above n 104.

[116] *Larrikin Appeal* (2011) 276 ALR 35, 71, 80 [145], [180] (Jagot J).

[117] Ibid 71 [145] (Jagot J).

[118] Ibid 88 [218] (Jagot J).

[119] Ibid 98 [265].

[120] Ibid 98 [265], affirming *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, 475 [37] (French CJ, Crennan and Kiefel JJ); *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465, 481 (Lord Pearce).

[121] *Larrikin Appeal* (2011) 276 ALR 35, 98 [265].

of originality in *Kookaburra* because they had relied on it as being a particular type of musical work: a round.[122] Rather, originality subsisted in the work because it arose from 'independent intellectual effort' of composer Miss Marion Sinclair.[123] Therefore, for substantial similarity to be found, all that was needed was a qualitative determination that a substantial part of *Kookaburra* had been reproduced and this had been satisfied.[124]

The essence of the second argument of appeal advanced on behalf of EMI was that the trial judge had become 'sensitised by the evidence to the similarity between the respective melodies'.[125] Emmett and Jagot JJ (with whom Nicholas J agreed) found that although the trial judge had become sensitised to the similarities between the works, in examining the relevant parts of the works, listening to the works and relying upon and accepting the advice of expert musicologists, no errors in principle had been made.[126] Jagot J stated that the use of expert evidence in determining objective similarity was very common and that no error could be found purely on the basis that a trial judge relied on expert evidence.[127]

In consideration of the findings, the Full Court of the Federal Court dismissed the appeal and unanimously upheld the Federal Court decision regarding copyright infringement of *Kookaburra*.[128]

E Application for Special Leave to Appeal Before the High Court

Following the unanimous finding in favour of Larrikin in the Full Federal Court, on 7 October 2011, EMI sought application for special leave to appeal before the High Court.[129] Gummow and Bell JJ of the High Court presided over the special leave application. Three grounds of appeal were forwarded:

(1) In assessing whether a substantial part of *Kookaburra* had been reproduced in *Down Under*, instead of comparing both works in their totality as whole works, the court had incorrectly 'departed from the statute'.[130] This was because

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[122] Ibid 98 [263].

[123] Ibid.

[124] Ibid 98–9 [263]–[267].

[125] Ibid 51–2 [67] (Emmett J).

[126] Ibid 57 [86] (Emmett J), 84 [202] (Jagot J).

[127] Ibid 84 [202].

[128] Ibid 61 [104] (Emmett J); 95 [253] (Jagot J); 96 [254] (Nicholas J).

[129] Transcript of Proceedings, *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] HCATrans 284.

[130] Ibid (J T Gleeson) (during argument).

a narrow scope of comparison was demonstrated through the examination of objective similarity between the first two bars of *Kookaburra* and the flute riff of *Down Under*, instead of between the whole of both works.[131]

(2) The reliance upon expert musicologists to determine substantial similarity between the first two bars of *Kookaburra* and the flute riff in *Down Under* was erroneous. The determination of substantial similarity between the two works was insufficient to establish reproduction because the similarities could only be determined *after* being educated by these expert witnesses.[132]

(3) As Emmett J stated in the appeal, the flute riff in *Down Under* had engaged in a process of quotation of two bars of *Kookaburra* as a type of tribute to *Kookaburra* and as an act of Australian iconicity.[133] Therefore it was argued that this act of tribute had 'involved a sufficient degree of transformation of the part taken from the first work so as to place it within the territory of legitimate appropriation outside the statutory monopoly'.[134]

However, upon consideration of these grounds of appeal, the High Court refused special leave to appeal and costs were awarded to Larrikin. The court stated: 'We are not satisfied that any question of principle respecting copyright infringement in musical works would be presented upon an appeal in this case rather than questions to the application of settled principle to the particular facts.'[135] Therefore the finding of music copyright infringement was affirmed.

By analogy, the ultimate finding of music copyright infringement would likely apply to a music mash-up. These cases are indicative of a rather poor outlook, in considering the hypothetical event that a mash-up artist is accused of copyright infringement under Australian law. This is particularly so in consideration of the application of the substantiality test to any mash-up. This is because most mash-up artists seek to blend a highly recognisable (often *the* most highly recognisable portion of music) from another's work into their mash-up. An identifiable portion of music needs to be blended into the mash-up so that it is recognisable as having come from an original work.

Therefore, relying on a qualitative application of the test (as occurred in the *Larrikin* cases), the very selection of any sound recording used within a mash-up is likely to satisfy substantiality and lead to a finding of infringement. In

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[131] Ibid.

[132] Ibid.

[133] *Larrikin Appeal* (2011) 276 ALR 35, 60 [99] (Emmett J).

[134] Transcript of Proceedings, *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Ltd* [2011] HCATrans 284 (J T Gleeson) (during argument).

[135] Ibid (Gummow J).

conclusion, prima facie, under Australian law, a mash-up artist who re-uses a sound recording or cinematograph film (video) *without permission* is infringing copyright.

Having discussed the current copyright implications of the creation of music mash-ups in Australia, the issue of the application of moral rights to music mash-ups will now be considered.

F Music Mash-Ups and Moral Rights under Australian Law

Under the *Copyright Act*, another issue for consideration in relation to the creation of a music mash-up is whether this type of work could potentially infringe any of the moral rights of the composers of the works mashed. In December 2000, the *Copyright Amendment (Moral Rights) Act 2000* (Cth) introduced moral rights into the *Copyright Act* in order to better conform to the *Berne Convention*.[136] Moral rights are additional[137] to the economic rights of a work (discussed under copyright infringement) and moral rights always vest in the individual author of a work.[138]

Currently, the author of a written musical work or a cinematograph film (music video) that is mashed in some music mash-ups would possess particular moral rights under the *Copyright Act*. An 'author' in relation to a film is defined as the maker of the film.[139] There are no moral rights for the creators of sound recordings. Specifically, under pt IX of the *Copyright Act*, there are three types of moral rights: (1) the right of attribution (the right to be credited for their work);[140] (2) the right against false attribution (so that the work is not falsely attributed);[141] and (3) the right of integrity (so that the work is not represented in a derogatory way).[142]

In relation to the right of attribution, under the Act, most music mash-ups engage in an attributable act involving a musical work by: (1) reproducing the work in a material form (albeit in segments);[143] (2) publishing the work (via the

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[136] *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 July 1886, 943 UNTS, 178 (entered into force 1 March 1978).

[137] *Copyright Act* s 192(1).

[138] Ibid s 190.

[139] Ibid s 189.

[140] Ibid s 193.

[141] Ibid s 195AC.

[142] Ibid s 195AI.

[143] Ibid s 194(1)(a).

internet);[144] (3) performing the work in public (via the internet);[145] (4) communicating the work to the public (via the internet).[146] Likewise, most music mash-ups engage in an attributable act involving cinematograph film (music video) by: (1) making a copy of a film (albeit in segments);[147] and (2) communicating this to the public (via the internet).[148] Therefore under s 193, the author of a musical work or film used in a music mash-up is entitled to a right of attribution, through sufficient identification. Identification may occur through any 'reasonable form' of identification,[149] in a clear and prominent way,[150] so that it is noticeable.[151] Most music mash-ups already conform to this right because they identify and acknowledge in writing the name of the works and authors of any works mashed.

In relation to an author's rights against false attribution of their authorship in a musical work, an act of false attribution includes: (1) to insert, affix or authorise the inserting or affixing of another's name other than the author on the work or a reproduction of the work;[152] (2) to falsely imply that a person is the author of a work;[153] (3) to falsely imply that a work is an adaptation of a work of the author;[154] (4) to deal with a work with a false author's name inserted, if the attributor has knowledge of this fact;[155] (5) to deal with a reproduction of a work with the knowledge that a false author's name has been attributed;[156] and (6) to perform the work in public or communicate it to the public with the knowledge that a false author has been attributed to the work.[157] If a music mash-up draws upon a written musical work, most would not engage in false attribution of authorship. Rather, most mash-ups engage in some type of identification and attribution of any of the works mashed.

When considering an author's rights against false attribution of their authorship in a film,[158] acts of false attribution for the director, producer or screenwriter

[144] Ibid s 194(1)(b).
[145] Ibid s 194(1)(c).
[146] Ibid s 194(1)(d).
[147] Ibid s 194(3)(a).
[148] Ibid s 194(3)(c).
[149] Ibid s 195.
[150] Ibid s 195AA.
[151] Ibid s 195AB.
[152] Ibid s 195AD(a).
[153] Ibid s 195AD(a)(i).
[154] Ibid s 195AD(a)(ii).
[155] Ibid s 195AD(b).
[156] Ibid s 195AD(c).
[157] Ibid s 195AD(d).
[158] Ibid s 195AC.

include: (1) inserting, affixing or authorising another to insert or affix a person's name on the film or copy as to imply false authorship;[159] (2) to deal with a film in that situation with the knowledge that false attribution of authorship has occurred;[160] and (3) to communicate the film to the public as a work of false authorship.[161] Once again, most mash-ups already conform to this requirement because they normally attribute correct authorship to the works that they have mashed. A majority of music mash-ups also acknowledge that they have altered all of the works drawn upon through the mash-up process.

In considering the three types of moral rights provisions in relation to music mash-ups, the most interesting is found in ss 195AI and 195AL, which pertains to the right of integrity in a musical work or cinematograph film. An author has a right of integrity of authorship in respect of their work,[162] which involves their work not being subjected to derogatory treatment.[163] Derogatory treatment in relation to a musical work is: (1) the doing of anything that relates to the distortion, mutilation or material altercation to the work that is prejudicial to the author's honour or reputation;[164] or (2) the doing of anything else in relation to the musical work that is prejudicial to the author's honour or reputation.[165] Likewise, derogatory treatment in relation to a film is: (1) the doing of anything that results in a material distortion of, the mutilation of, or a material alteration to, the film that is prejudicial to the maker's honour or reputation;[166] or (2) the doing of anything else that is prejudicial to the honour or reputation to the maker of the film.[167]

The issue therefore becomes whether music mash-ups could be considered to be infringing upon an author's right of integrity in respect of their work through the constant distorting and altering of the work that is prejudicial to the maker's honour or reputation. Although music mash-ups engage in a lot of distortion and alteration of films (as music videos) and music (in the form of a written musical work) it is unlikely that a majority of mash-ups could be found to be 'prejudicial to the maker's honour or reputation'. Rather, many mash-up artists may argue that their works are a homage to the original artists and therefore do not infringe the moral right of integrity.

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[159] Ibid s 195AF(2)(a).
[160] Ibid s 195AF(2)(b).
[161] Ibid s 195AF(2)(c).
[162] Ibid s 195AI(1).
[163] Ibid s 195AI(2).
[164] Ibid s 195AJ(a).
[165] Ibid s 195AJ(b).
[166] Ibid s 195AL(a).
[167] Ibid s 195AL(b).

Interestingly, the recent Federal Magistrate's Court case of *Perez v Fernandez*[168] discussed the scope of the moral right of integrity. In this case, the court found that the mashing of an artist's work into a music mash-up infringed this right, because the use of the work was prejudicial to the author's reputation. The facts of this case are as follows. The applicant, Mr Perez, an international recording artist known as 'Pitbull', authored a sound recording and musical work titled *Bon Bon*, which was released in the United States but not in Australia.[169] Under the *Copyright Act*, as the author of this work, Mr Perez was entitled to the moral right of integrity of authorship for his written work (the *Bon Bon Song*), as distinct from the sound recording.[170] In 2008, Mr Fernandez, the respondent and an Australian DJ and promoter, obtained a sound recording known as an 'audio drop' in connection with the promotion of an upcoming Australian tour. The tour was subsequently cancelled and was the subject of separate litigation for breach of contract.[171]

The audio drop was very short in duration. It contained Mr Perez stating 'Mr 305 and I am putting it down with DJ Suave'.[172] Mr Fernandez mashed this audio drop into the beginning of his MP3 recording of *Bon Bon* via audio editing software to use as promotional material for the upcoming tour.[173] This mashed version of the work was subsequently uploaded onto a website, where it remained for approximately a month, during which time it was streamed to the computers of people who visited the website.[174] Mr Fernandez also played this mashed version at nightclubs in Perth, where listeners were unfamiliar with the original version of *Bon Bon*.[175]

The court determined that the mashed version made 'it sound to the listener like Mr Perez … [was] … positively referring to Mr Fernandez at the beginning of the song, and that this reference forms part of the original work'.[176] This is because '305' was commonly known to Mr Perez's fans as an alter ego name for himself and 'DJ Suave' was a codename name for Mr Fernandez. Subsequently, Mr Perez sued for infringement of his moral right of integrity of authorship under s 195AI and sought compensatory and additional damages,

[168] [2012] FMCA 2.
[169] Ibid 1 [1], 2 [4] (Driver FM).
[170] Ibid 3 [13].
[171] Ibid 5 [37].
[172] Ibid 4 [28].
[173] Ibid 5 [31].
[174] Ibid 5 [34].
[175] Ibid 14 [59].
[176] Ibid 16 [65].

including aggravated damages for moral rights infringement, interest and costs.[177]

The court found that the mashing of the sound recording amounted to a material 'distortion' or alteration and was prejudicial to Mr Perez's honour or reputation under s 195AJ.[178] In examining the mashing of the works, the court determined that a prominent part of the original work had been deleted and replaced with words that gave the entire work a different context, involving Mr Fernandez as a subject and author of the song.[179] The references in the audio drop to Mr Perez's alter ego were also found to have attracted particular listener attention, thereby distorting or mutilating the work.[180]

Two grounds were found by the court to support the mashed work being prejudicial to Mr Perez's honour or reputation. First, the work had not been released in Australia when infringement occurred via the online streaming — the work had only just been released in the United States.[181] Therefore some listeners would have been misled to assume that the mashed version online was the original work, thereby inferring a connection between Mr Perez and Mr Fernandez.[182] The court placed emphasis on the evidence submitted that 'the associations between artists and DJs in the hip-hop/rap genre are highly significant' and that any perceived connection between the artists may have been prejudicial to Mr Perez's reputation.[183] Alternatively, the court found that even if this were not the case that Mr Perez considered that this association was prejudicial to his reputation and caused him anger and distress.[184]

Secondly, the court found that there would have been listeners who were more acutely aware of the works of Mr Perez and Mr Fernandez. Such listeners would be likely aware of the litigation between the artists and would 'understand the alterations to the song made by Mr Fernandez to be mocking Mr Perez's reputation'.[185] Subsequently, the court determined that Mr Fernandez had infringed Mr Perez's moral right of integrity.[186] Therefore the court affirmed that in order to find infringement of an author's moral right of integrity, all that

[177] Ibid 7 [42].
[178] Ibid 21 [85]–[86].
[179] Ibid 21 [84].
[180] Ibid.
[181] Ibid 21 [86].
[182] Ibid.
[183] Ibid 22 [87].
[184] Ibid.
[185] Ibid 22 [88].
[186] Ibid 27 [108].

is required is the finding that an infringing act is prejudicial to an author's honour or reputation; the proof of actual damage to the author is not required.[187]

The moral rights infringement defence of reasonableness under s 195AS was found to be inapplicable in this case.[188] In fact, the court found that in examining the matters that related to this defence under s 195AS(2), the harm caused by Mr Fernandez's actions was highlighted.[189] This included: (1) the nature of the work, which existed in a genre where associations between artists was significant;[190] (2) the purpose of the use of the work, which was to either falsely promote Mr Fernandez or to mock Mr Perez in retribution;[191] and (3) the manner and context of the breach, involving global streaming from a website and the relationship between the parties.[192]

In discussing the awarding of damages for breach of the moral right of integrity under s 195AZA(1) of the *Copyright Act*, the court considered Mr Perez's reputation as an artist and the harm caused by Mr Fernandez's conduct.[193] This included compensation for injured feelings and vindication of an artist through aggravated damages.[194] The court also considered Mr Fernandez's conduct during litigation.[195] In consideration of appropriate damages, the court awarded Mr Perez $10 000.[196]

In conclusion, as demonstrated by this recent case, it is possible a music mash-up may infringe an author's moral rights, particularly the moral right of integrity in a written musical work or a film (video clip).Therefore mash-up artists need to ensure that the way in which they mash their works could not be considered to be prejudicial to the honour or reputation of the author of the musical work or maker of the film.[197]

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[187] Ibid 24 [95]–[97].
[188] Ibid 22 [89].
[189] Ibid 22 [89] (a)–(c).
[190] Ibid 22 [87].
[191] Ibid 22 [87]–[88].
[192] Ibid 22 [89] (a)–(c).
[193] Ibid 26 [103].
[194] Ibid 26 [104], applying *Meskenas v ACP Publishing Pty Ltd* (2006) 70 IPR 172.
[195] *Perez v Fernandez* [2012] FMCA 2, 26 [104].
[196] Ibid 27 [107].
[197] *Copyright Act* s 195AJ (musical works); s 195AL (cinematograph film).

G Not All Copying or Re-Use is Illegal

From a copyright perspective, it must be noted that not all copying or re-use of music, sound recordings or video is illegal. Under Australian law, if a digital mash-up artist was able to re-use music, sound recordings or video from the following sources, they may avoid a copyright infringement finding at a later date:

(1) Material from the public domain, where copyright had expired.[198] However, in Australia, it is often difficult to ascertain whether a work has fallen into the public domain because no formal registry exists. Sound recordings in which copyright has expired are those that were made before 1 January 1955; otherwise the current duration of copyright subsists until the end of 70 years after the end of the calendar year in which the recording is first published.[199] Therefore modern digitalised sound recordings would not have exceeded the duration of copyright, due to their limited age, so this is an unlikely avenue of resources. The duration of copyright for cinematograph films (videos) is also 70 years from the end of the calendar year in which the film was first published.[200]

(2) Material that was the subject of an open licence, which may be re-used upon adherence to licensing permissions and restrictions.[201] An example of an open licence is a Creative Commons licence.[202] Creative Commons licences are becoming increasingly popular in Australia, particularly in relation to electronic documents. A good example of this is the Australian government, who formally replaced Crown Copyright on government publications with Creative Common licences in 2010.[203] A mash-up artist may be able to utilise a sound recording or video under a Creative Commons licence, as long as they satisfied the licensing conditions stipulated.[204] The compulsory condition for all Creative Commons

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[198] As stated in the Australian Copyright Council Information Sheet — *Duration of Copyright Fact Sheet G023v16* (February 2012): 'Once copyright has expired, anyone may use that material without needing copyright clearances or permissions.'

[199] Ibid s 93.

[200] Ibid s 94(2).

[201] See generally, Lawrence Liang, *A Guide to Open Content Licenses* (Piet Zwart Institute, Amsterdam, 2004).

[202] Creative Commons Australia, *About the Licences* <http://creativecommons.org.au/learn-more/licences>.

[203] For further information see Anne M Fitzgerald, Neale Hooper and Brian F Fitzgerald, 'The Use of Creative Commons Licensing to Enable Open Access to Public Sector Information and Publicly Funded Research Results: An Overview of Recent Australian Developments' in Danièle Bourcier, Pompeu Casanovas, Mélanie Dulong de Rosnay and Catharina Maracke (eds), *Intelligent Multimedia: Managing Creative Works in a Digital World* (European Press Academic Publishing, 2010) 151–74.

[204] Cheryl Foong, *Creative Commons and the Digital Economy* (21 September 2012) Creative Commons Australia <http://creativecommons.org.au/weblog/entry/3688>.

licences is attribution (credit to the original author and any other nominated parties, with a link to the source).[205]

(3) Material that was found to satisfy one of the statutory special exceptions,[206] which includes the *Copyright Act's* fair dealing provisions.[207] These provisions will now be discussed in consideration of music mash-ups.

IV FAIR DEALING AND MUSIC MASH-UPS

Fair dealing provides a boundary in which copyright law operates. In a number of common law jurisdictions around the world, fair dealing may be used as a complete defence when a copyright infringement allegation is made.[208] If fair dealing is determined by the court to be applicable to a particular work, then no finding of copyright infringement can be found (ie permission did not need to be sought for the re-use of the work and license fees/royalties paid).

It must be highlighted that in a copyright infringement case, before considering whether the use of a work could be a fair dealing, the court has to have already determined that the taking of a substantial part of the work has occurred without permission.[209] This is because the use of an insubstantial part of a work does not constitute copyright infringement and fair dealing is only considered after copyright infringement has been established.

Substantiality will likely pose a significant hurdle for any music mash-up; it is impossible to provide a standard formula as to what a court would consider permissible, or what would be deemed excessive. It is likely that many mash-ups would fail on the grounds of substantiality, particularly those that mash a limited number of works. This is because from a quantitative point of view, the more limited number of works used in a mash-up, the more likely that it would be a larger quantity of that work used. Additionally, from a qualitative perspective, any mash-up will likely have used the most recognisable portion of other works so that the re-use is recognisable. As affirmed in the *Larrikin cases*,

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[205] Creative Commons Australia, above n 202.

[206] These include special provisions for educational institutions: *Copyright Act* s 200AB(3), libraries: s 200AB(2), governments; pt VII div 2, private copying exceptions; ss 43C, 111, and special cases.

[207] For a comprehensive list of the many special exceptions under the *Copyright Act 1968* (Cth), see Australian Copyright Council, *Exceptions to Copyright — Fact Sheet G121v01* (July 2012) Australian Copyright Council <http://www.copyright.org.au/find-an-answer/browse-by-a-z/>.

[208] Jurisdictions include Canada, Singapore, New Zealand, South Africa and the United Kingdom.

[209] Sam Ricketson, Megan Richardson and Mark Davison, *Intellectual Property: Cases, Materials and Commentary* (LexisNexis, 4th ed, 2009) 394.

infringement will be found if it is determined that a substantial part of a copyright-protected work has been taken without permission.

A The Difference between Fair Dealing and Fair Use

Fair dealing in Australia differs to the United States copyright infringement exception of fair use[210] — a much more generalised defence which permits significantly broader use of material.[211] It is for this reason that particular uses that would be permissible as being 'fair' in the United States would most likely be rejected under current Australian law. In the United States, four factors are considered in determining whether fair use applies. These factors are: (1) The purpose and character of the use, including whether such use is for commercial or non-profit purposes. This criterion examines whether a transformative use has occurred – transformative use will be discussed in further detail later; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of the copyrighted work. When considering these factors in relation to a non-commercial music mash-up, there is a strong possibility that such works would satisfy the fair use exception under Untied States law.

In Australia in 2005, a governmental inquiry occurred into the possibility of enacting a broader, United States type of fair use exception.[212] However, although a new exception was introduced for the purpose of parody or satire, the existing restrictive approaches were ultimately favoured over a new broader and more open-ended American-style of provision.[213] Interestingly, seven years later, once again this issue is under consideration through the current ALRC inquiry for *Copyright and the Digital Economy*. The question as to whether

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[210] *Copyright Act*, 17 USC § 107 (1976).

[211] See for example, *Universal City Studios v Sony Corporation*, 464 US 417 (1984); *Hustler Magazine Inc v Moral Majority Inc*, 606 F Supp 1526 (CD Cal, 1985); *Wright v Warner Books Inc*, 953 F 2d 731 (2nd Cir, 1991); *Campbell v Acuff-Rose Music*, 510 US 569 (1994); *Religious Technology Center v Pagliarina*, 908 F Supp 1353 (ED Va, 1995); *Monster Communications Inc v Turner Broadcasting Systems Inc*, 935 F Supp 490 (SD NY, 1996); *Leibovitz v Paramount Pictures Corporation*, 137 F 3d 109 (2nd Cir NY, 1998); *Kelly v Arriba-Soft*, 336 F 3d 811 (9th Cir, 2003); *Bill Graham Archives v Dorling Kindersley Ltd*, 448 F 3d 605 (2nd Cir, 2006); *Field v Google Inc*, 412 F Supp 2d 1106 (D Nev, 2006); *Perfect 10 Inc v Amazon.com Inc*, 508 F 3d 1146 (9th Cir, 2007); *Warren Publishing Co v Spurlock d/b/a Vanguard Productions*, 645 F Supp 2d 402 (ED Pa, 2009).

[212] Attorney-General's Department, 'Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age' (Issues Paper, Attorney-General's Department, 5 May 2005).

[213] See Kimberlee Weatherall, 'Of Copyright, Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms' (2007) 31 *Melbourne University Law Review* 967.

Australian law should be amended to include a broader, more flexible fair use exception to infringement has been listed for inquiry.[214] It will be interesting to observe whether such reform is finally recommended and whether music mash-ups could be accepted under such an exception.

B Fair Dealing

In relation to the current Australian fair dealing provisions, ss 40 to 42 of the *Copyright Act* outline the fair dealing provisions for musical works. Sections 103A to 103C outline these provisions for audio-visual items (including sound recordings and cinematograph films). These provisions allow the re-use of these works, as long as the use complies with specific purposes. In this way, the provisions seek to achieve a balance between the rights of copyright owners and users. The specific purposes permitted are: criticism or review;[215] parody or satire;[216] reporting news;[217] and research or study.[218]

When a court examines whether fair dealing applies in a copyright infringement case, a number of considerations will occur. First, the court will consider the actual purpose of the use of the music mash-up to determine if it complies with one of the specific purposes within the Act. In examining this issue, in addition to the actual purpose of the use, the court will question whether the work has been commercially distributed and whether the mash-up artist could have easily obtained a licence for the works used. Of consideration will be whether the use of the music mash-up has resulted in lost income for the copyright owner of the works used. As previously discussed, a majority of music mash-ups are distributed non-commercially and such works draw upon a large quantity of material so that logistically, it would be difficult for a mash-up artist to obtain licences from all owners involved. In examining the actual use of the work, the court will determine whether the use could be considered to be 'fair'. This determination is a question of degree.[219] The test is to be judged from the perspective of a fair-minded and honest person.[220]

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[214] The specific questions posed about fair use are 'Question 52. Should the *Copyright Act 1968* (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on "fairness", "reasonableness" or something else? Question 53. Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?': ALRC, above n 7, 10.

[215] *Copyright Act* s 103A (sound recordings/film); s 41 (musical works).

[216] Ibid s 103AA (sound recordings/film); s 41A (musical works).

[217] Ibid s 103B (sound recordings/film); s 42 (musical works).

[218] Ibid s 103C (sound recordings/film); 40 (musical works).

[219] *Hubbard v Vosper* [1972] 2 QB 84, 94 (Lord Denning).

[220] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 55 IPR 112 (Hely J).

When considering the application of the specific purposes to a music mash-up, the outlook does not seem very promising. This is because the fair dealing provisions are rather restrictive and are only permissible for highly specific purposes. Also, the provisions themselves have been drafted in quite a broad manner. Therefore they require significant judicial interpretation, which has been more inclined to narrowly focus upon the exact purpose of the use, instead of whether the use would be considered 'fair'.[221] The judicial application of the fair dealing provisions will now be discussed in further detail in relation to music mash-ups.

C Fair Dealing and Music Mash-Ups: Not Very Promising

1 Criticism or Review

Criticism or review is permitted under ss 103A (audio-visual item) and 41 (musical work). Under these sections, criticism or review of these works is permitted as long as 'a sufficient acknowledgement' of the works is made.[222] 'Criticism' has been found to include the acts of 'analysing and judging the quality of' or 'passing judgement as to the merits of something';[223] whereas 'review' has been found to mean 'a critique' — 'cognate with the word "criticism" … one is the process and the other is the result'.[224] 'Sufficient acknowledgement' has been described as 'an acknowledgement identifying the work by its title or other description and … also identifying the author'.[225]

In the case of *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd*,[226] the Full Court of the Federal Court had to decide whether the fair dealing exceptions for criticism or review and reporting news were applicable to a television program which broadcast and light-heartedly discussed a number of other broadcasters' clips. This case occurred prior to the introduction of the fair dealing exceptions for parody or satire, so that defence was unavailable at the time.

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[221] Kimberlee Weatherall and Emily Hudson, Response to the Attorney-General's Department Issues Paper, *Fair Use and Other Copyright Exceptions in the Digital Age* (2005) 10 <http://www.ag.gov.au/Documents/p150%20IPRIA%201.PDF>.

[222] *Copyright Act* ss 41, 103A.

[223] *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 297–302 (Beaumont J) relying upon definitions from the *Macquarie Dictionary*.

[224] *Macquarie Dictionary*, above n 223.

[225] *Copyright Act* s 10; affirmed in *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 297–302 (Beaumont J).

[226] (2002) 118 FCR 417 ('*The Panel Case*').

In relation to fair dealing for the purposes of criticism or review, the court stated that the 'true purpose' of the re-use needed determining.[227] A genuine attempt was required at engaging in actual criticism and review of the material reproduced, although this need not be balanced.[228] Therefore it is insufficient to rely upon this defence if a hidden motive exists, such as 'an attempt to dress up the infringement of another's copyright in the guise of criticism, and so profit unfairly from another's work'.[229] As such, fair dealing will fail if trade rivals are found to have used a copyright-protected work for their own benefit.[230]

In consideration of whether a music mash-up could satisfy fair dealing for the purpose of criticism or review, this category is likely to be inapplicable to a majority of such works. Although most mash-ups engage in acknowledgement of the works that they mash (through identification of the work and artist), most do not effectively engage in criticism or review of the material that they mash. In order to satisfy criticism or review, a music mash-up would need to effectively convey 'the passing of a judgment' as to the merits of those works.[231] It would take an extremely creative music mash-up to be able to consider the application of this particular exception and it is unlikely that a majority of mash-ups would sufficiently satisfy this use.

2 Reporting News

Sections 103B and 42 allow fair dealing for the purpose of, or association with, the reporting of news in a newspaper, magazine, similar periodical, communication or a film. In relation to an audio-visual item, sufficient acknowledgement of the first mentioned audio-visual item must be made.[232] Fair dealing for the purpose of reporting news extends to music that is incidentally recorded during news footage; however, this does not extend to any extraneous music soundtracks which are later added to this footage.[233] The reporting of news is not necessarily restricted to current events; rather it may extend to older events.[234]

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[227] Ibid 444 [115] (Hely J).

[228] Ibid.

[229] Ibid, relying upon the test stated by Henry LJ in *Time Warner Entertainment Co Ltd v Channel 4 Television Corporation Plc* (1993) 28 IPR 459, 468.

[230] *The Panel Case* (2002) 118 FCR 417, 444 [115] (Hely J), relying upon *Hubbard v Vosper* [1972] 2 QB 84, 93 (Lord Denning).

[231] *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 297–302 [43] (Beaumont J).

[232] *Copyright Act* s 103B(1)(b).

[233] Ibid s 42(2). Broadcaster licensing becomes applicable in this scenario.

[234] *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 56 (Mason J); *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 297–302 [46] (Beaumont J).

In considering the application of this section to a music mash-up, although the mash-up would likely engage in sufficient acknowledgement of its sources, a court would need to find that the subject matter had been mashed for the purpose of, or to be associated with, the reporting of news in a film. Therefore this section would likely be inapplicable to a majority of music mash-ups.

3 Research or Study

Fair dealing for the purpose of research or study is permitted by ss 103C and 40 of the *Copyright Act*. When considering this purpose, Australian courts have applied a restrictive judicial interpretation of the meaning of 'research or study'.[235] Therefore accepted uses pertaining to 'research' and 'study' have been found to comply with the standard definitions in the *Macquarie Dictionary*, strongly favouring personal use in education or academia and rejecting commercial use.[236]

Under s 103C, in determining whether the sound recordings and videos used in a music mash-up constitutes fair dealing for the purpose of research or study, a number of non-exclusive factors are considered. These include: (a) the purpose and character of the dealing;[237] the nature of the audio-visual item;[238] the possibility of obtaining the sound recording within a reasonable time at an ordinary commercial cost;[239] and the effect of the dealing upon the potential market or value of the sound recording.[240] Therefore a court may look more favourably upon a non-commercial mash-up that has drawn upon many works and does not affect the potential market value of the original sound recordings, as opposed to a commercial mash-up that competes with the market of original works.

Significantly, where part of a sound recording or video is used, as often occurs in a mash-up, the substantiality of the part taken is considered in relation to the whole work.[241] Once again, in consideration of substantiality, the prospects of success for a music mash-up under fair dealing for the purpose of research or study appear far fetched.

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[235] *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545, 558 (Davies J); *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99, [32]–[33] (Beaumont J).

[236] *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99, [32]–[33] (Beaumont J).

[237] *Copyright Act* s 103C(2)(a).

[238] Ibid s 103C(2)(b).

[239] Ibid s 103C(2)(c).

[240] Ibid s 103C(2)(d).

[241] Ibid s 103C(2)(e).

4 Parody or Satire — a More Promising Defence for Mash-Ups

As previously stated, following the findings from the Fair Use Issues Paper by the Attorney-General's Department,[242] the parody and satire exception to copyright infringement was introduced to the *Copyright Act* on 11 December 2006 via the *Copyright Amendment Act 2006* (Cth). Currently, the *Copyright Act* does not define what constitutes a parody or satire, although it is likely that a court would consider the standard dictionary definitions of these terms. The information sheet provided by the Australian Copyright Council provides the standard *Macquarie Dictionary* definitions of the terms 'parody', 'burlesque' and 'satire' for guidance.[243] The information provided states that a parody is 'an imitation of a work that may include parts of the original', the purpose of which is to 'make some comment on the imitated work or on its creator'.[244] In comparison, satire draws 'attention to characteristics or actions — such as vice or folly — by using certain forms of expression — such as irony, sarcasm and ridicule'.[245]

In considering whether a mash-up could be considered a fair dealing as a parody or satire, it would depend on the exact content of the mash-up as to whether it could fall under s 103AA or s 41A. Mash-ups usually mash small quantities of sound recordings together, so this may present challenges as to whether the mash-up as a whole could be considered a parody or satire. Also, generally the problem with any musical parody or satire is that the new work has to bear some resemblance to the original so that it is recognisable by an audience, otherwise the parody or satire becomes lost.[246] This presents a problem from an infringement point of view because once again the court has to consider the substantiality test, where many mash-ups would likely fail.

In conclusion, theoretically, under Australian law, if a mash-up artist created a work that was found to constitute a parody or satire, then such a work may avoid copyright infringement under fair dealing. It must be remembered though that in order for fair dealing to be satisfied, the second limb of the test must also be satisfied. Therefore each portion of all the works used would need to be found to be less than a substantial part of the original work. This seems unlikely, particularly in consideration of what constitutes a mash-up (multiple recognisable snippets of works) and how they are created (via layering and

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[242] Attorney-General's Department, above n 212.

[243] Australian Copyright Council, *Parodies, Satires and Jokes — Fact Sheet G083v03* (January 2008) <http://www.copyright.org.au/find-an-answer/browse-by-a-z/>.

[244] Ibid.

[245] Ibid.

[246] Priscilla Blackadder, *Copyright: Parody is a Defence but it is No Laughing Matter* (LLB Hons Thesis, University of New England, 2008) 13.

blending). In summation, the prospects of the success of a finding of fair dealing by parody or satire in a music mash-up seem rather unlikely; however, it would depend on the exact mash-up in question.

5 *Transformative Use*

In the United States, the re-use of music or sound recordings are more likely to satisfy the fair use exception to infringement if the new work is a parody of the original and it is found to be sufficiently transformative in nature.[247] The concept of being transformative creates a new and therefore entirely different work from the original work and is considered under the first factor in considering fair use – 'the purpose and character of the use'. Being found to have created a transformative work strengthens support for a finding of fair use: '[T]he more transformative the new work, the less will be the significance of other factors that may weigh against a finding of fair use.'[248] The United States Supreme Court case of *Campbell v Acuff-Rose Music Inc*[249] provided an explanation of transformative use and a discussion of parody under the fair use doctrine. In this case, the court considered whether 2 Live Crew's raunchy rap work titled *Pretty Woman* was a parody of Roy Orbison's *Oh, Pretty Woman*.

The court found that 2 Live Crew's work was transformative enough as a parody to constitute fair use.[250] In examining the extent to which a work must be transformative, the court stated that the new work must 'add[s] something new, with a further purpose or different character, altering the first with new expression meaning or message'.[251] Additionally, transformative benefit was conferred by the parody, in that it provided a social benefit 'by shedding light on an earlier work, and in the process, creating a new one'.[252]

Although transformative use is not currently considered when determining fair dealing under Australian law, the question as to whether music mash-ups could be considered to be a transformative work is an interesting one. Depending on the music mash-up in question, this could be argued both ways; it ultimately depends on the level of creative innovation or originality displayed in the actual mash-up process. Many mash-ups would be considered transformative because

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[247] Arewa, above n 19, 576; *Campbell v Acuff-Rose Music Inc*, 510 US 569 (1994); *Dr Suess Enterprises v Penguin Books USA Inc*, 109 F 3d 1394 (9th Cir, 1997); *Sun Trust v Houghton Mifflin*, 268 F 3d 1257 (11th Cir, 2001).

[248] *Campbell v Acuff-Rose Music Inc*, 510 US 569, 579 (1994).

[249] 510 US 569 (1994).

[250] Ibid 581.

[251] Ibid 579.

[252] Ibid.

they convey 'new meaning, new understandings, or the like [to the listener]'.[253] Therefore such a work is transformative because it performs a different function when compared to the old works that it has mashed.[254] On the other hand, some mash-ups may not be considered to be sufficiently transformative due to the way in which they present their material. For example, a mash-up that blends just two works together by drawing on significant qualitative and quantitative aspects of both works may not be considered transformative enough to sufficient convey new meaning to the listener and be classified as a transformative work.

In the ALRC's *Inquiry into Copyright and the Digital Economy Issues Paper*, the term 'transformative' is used 'to refer generally to [non-commercial or commercial] works that transform pre-existing works to create something new and that is not merely a substitute for the pre-existing work'.[255] This paper highlights that, in 2011, the Copyright Council Expert Group recommended that an exception be introduced to the Act for 'private, non-commercial, transformative uses'.[256] Five specific questions have been asked about some substantive issues regarding transformative use.[257] Whether music mash-ups would be considered transformative works and an exception to copyright infringement under future Australian copyright law is yet to be determined.

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[253] *UMG Recordings Inc v MP3.com Inc*, 92 F Supp 2d 349, 351 (SD NY, 2000).

[254] *Suntrust Bank v Houghton Mifflin Company*, 268 F 3d 1257 (11th Cir, 2001).

[255] ALRC, above n 7, 36 [112].

[256] Ibid 38 [126], citing Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (31 October 2011) Australian Copyright Council 2 <http://www.copyright.org.au/pdf/Copyright%20Council%20Expert%20Group%20-%20Paper%202011.pdf>.

[257] The specific questions posed about transformative use are: 'Question 14. How are copyright materials being used in transformative and collaborative ways — for example, in "sampling", "remixes" and "mashups". For what purposes — for example, commercial purposes, in creating cultural works or as individual self-expression? Question 15. Should the use of copyright materials in transformative uses be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed? Question 16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative? Question 17. Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright? Question 18. The *Copyright Act 1968* (Cth) provides authors with three "moral rights": a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?': ALRC, *Copyright and the Digital Economy*, above n 7, 38–9.

V CONCLUSIONS

In Australia under the *Copyright Act*, when a mash-up artist currently re-uses copyright-protected music in a work without permission, prima facie, they are committing copyright infringement. Therefore the apparent situation under Australian law is that currently no provisions exist that legalise a majority of works created under the music mash-up genre. Music mash-ups may also infringe an author's moral rights, particularly the right of integrity, so mash-up artists need to be aware of this when mashing their works.

When considering whether any of the fair dealing provisions may apply to a music mash-up, due to the purposive and rather closed nature of these provisions and their rather limited judicial application, it is unlikely that any would apply. However, in relation to the parody or satire exception, it would depend on the musicological nature of the mash-up in question. Of consideration would be the way in which the works were mashed and whether this use was determined to be fair.

Unlike the United States, in Australia, when considering the fair dealing exceptions, transformative use (ie whether the work would be considered significantly transformative when compared to the original work) is not considered. Therefore in the United States, some music mash-ups may be considered to be sufficiently transformative to satisfy fair use that would not currently satisfy fair dealing in Australia. Resultantly, under current Australian law, a mash-up appears to have, at best, a rather poor outlook at avoiding a finding of copyright infringement.

The digital age brings many new challenges to copyright law. One of the challenges due to the advancement of technology has been a heightened and permanent accessibility to digitalised music via the internet. Millions of people around the world now have the opportunity and means to mash-up their favourite works (including sound recordings and videos). If it is assumed that the *Copyright Act* should be amended to accommodate these permanent and increasing music mash-up practices within Australia, the question becomes exactly how. In light of this escalating issue, perhaps the Act could be amended to include a specific copyright infringement exception provision that legalises the creation of non-commercial music mash-ups, as long as: (1) they are not distributed for profit; and (2) they acknowledge all works utilised. Alternatively, mash-ups may be legalised in provisions pertaining to the creation of transformative works, or under some type of broader fair use provision.

In late 2013, it will be interesting to observe whether any of the recommendations made by the ALRC's *Inquiry into Copyright and the Digital Economy* will be applicable to music mash-ups.

If any recommendations are made which pertain to music mash-ups, it will also be interesting to observe the scope and nature of the suggested reform. Only time will tell as to whether Australian law will be amended to 'catch up' with the increasing popularity and widespread nature of music mash-up creation, through the legalisation of this technological and creative practice.