
Mash-Ups: A Collision of Creativity and the Law

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Table of Contents

	<u>Page</u>
Introduction.....	1
A Bundle of Rights	1
Sampling.....	2
Slip-Cueing, Beatmatching, and Remixes	2
Mash-ups.....	4
Legal Troubles	5
Sampling Recordings	7
Fair Use.....	8
Purpose and Character of Use.....	9
Nature of Copyrighted Work	11
Amount/Substantiality of Copying	12
Effect on Market.....	12
Summary of Fair Use Analysis.....	13
Licensing.....	14
Open Licensing.....	16
Steal.....	17
Conclusion	18
Liner Notes for CD	1

Introduction

This paper explores the history and legal implications of the new ‘mash-up’ genre of music, also called ‘bastard pop.’ To understand what a mash-up is, one must also understand sampling and remixing, as these three terms can have overlapping definitions. For some, remixing and sampling define a culture. For others, sampling is a technique and a remix is an alternate version of a song. The line between a mash-up and a remix is not always clear. The CD accompanying this paper is to help illustrate some of the distinctions made between these terms. References are made to tracks on the CD in footnotes, and the tracks are also explained in the liner notes.

A Bundle of Rights

Before defining the different musical terms, a quick refresher on copyright law as it relates to music is in order. Copyright is thought of as a bundle of rights. Rightsholders have the right to control the distribution of copies of their works; the public performance and/or display of their works; and the creation, distribution, and public performance and/or display of *derivative works* based on their works. In the case of a musical recording, there are (at least) two copyrighted works involved: the recorded performance and the song itself (the “underlying musical work”).¹ Many popular “recording artists” are not songwriters and do not write the songs they record. The song can be further divided into the lyrics and the melody, and each may belong to a separate rightsholder.

¹ 17 U.S.C. § 114(d)(2)(A)(iii) (2004).

Sampling

The invention of the phonograph allowed for the recording and replay of sounds. One of the earliest known examples of “sampling” is a comedy sketch about listening to the radio which included a few seconds of music from different phonograph records to simulate the music heard while “twisting the dials.”² But without the ability to edit records once recorded, sampling meant playing a record on one phonograph at precisely the right instant while re-recording on another phonograph.

Editing of audio recordings was first made practical by the invention of magnetic tape recorders in the 1940s. Besides editing by simply cutting and splicing different segments together, magnetic tape editing equipment allowed people to alter the recorded sounds: slow it down, speed it up, reverse it, filter it, and loop it.³ Beginning in the late 1970s, digital sampling equipment was developed that allows samples to be used as an instrument in a new recording.

Slip-Cueing, Beatmatching, and Remixes

At its simplest, a remix is an alternate version of a song. Remixes (and even mash-ups) can be created “live,” without using sampling equipment. All that is needed is two record players, two records, and a technique called slip-cueing.

Slip-cueing involves playing one record while cueing a second record to a specific point by slowly spinning it with your hand while listening on headphones, holding the second record still while the record player continued to spin underneath a felt pad, and then releasing your hand

² The Happiness Boys (Billy Jones and Ernest Hare), *Twisting the Dials* (Victor 1928) (CD Track 1).

³ *The Alchemists of Sound* (BBC Four television broadcast, May 28, 2005). *See also* Buchanan & Goodman, *The Flying Saucer* (Luniverse Records 1956) (CD Track 2), which uses sped-up recordings for the martian’s voices.

so that the second record starts exactly in sync with the first playing record. Beatmatching builds upon slip-cueing by playing two songs in the same tempo (or syncing up the tempos using speed adjustment controls on the record players) simultaneously, overlaying one on top of the other.

These two techniques, slip-cueing and beatmatching, were invented in 1968 by New York City club DJ Francis Grasso.⁴ Grasso, who had prior experience as a club dancer, used these techniques to create a continuous mix of music, with one song flowing into the next.⁵ As Grasso perfected his technique, he began to lengthen the period of time that two songs would overlap.⁶ This usually involved playing a percussion-heavy song like Chicago Transit Authority's "I'm a Man," with sexually charged vocals, like Led Zeppelin's "Whole Lotta Love."⁷ Because the "mixing" was live, it was not considered a remix.

Just as these modern DJ techniques became common, record producers began using new technologies in the production studio to make singles that were not well-suited for beatmatching. In response, so-called "DJ services" began using tape recorders to make club-friendly "remixes" and re-releasing them on promotion-only "white label" records for club DJs.⁸ The typical "disco remix" would involve lengthening the song and punching up the sound.⁹ As special-purpose sampling devices became cheaper and more powerful, remixers used more and shorter samples.

⁴ Albert Goldman, *Disco* (1978), *excerpt available at* <http://ped111251.tripod.com/francis.htm> (last updated May 24, 2004).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Wikipedia, *Remix*, *at* <http://en.wikipedia.org/wiki/Remix> (last modified May 16, 2006).

⁹ *Id.*

The technique of sampling, which was used to create remixes, evolved into an art form all its own. The aesthetic focused on the samples, not on the original song. Copyright law had yet to catch up with the technology, and it was commonly believed that short samples were not infringing. Sampling reached its peak with the albums “Paul’s Boutique” by the Beastie Boys and “Fear of a Black Planet” by Public Enemy.¹⁰

Mash-ups

Whereas a remix (usually) keeps the essential structure of the original song intact (or at least uses samples mostly from a single song), the typical “A vs. B” mash-up combines the vocals from one song with the melody of a second song in such a way that both are still easily identifiable. “A mash-up is a completely new track—a track that sounds like an original recording ... as if it had always been like that ... as if it was actually recorded by the original artists. But what really makes a mash-up unique—and different from remixes—is that it uses elements of tracks from different genres.”¹¹ One excellent example combines Eminem’s “Without Me” and a ragtime piano.¹²

¹⁰ Pete Rojas, *Bootleg Culture*, Technology & Business, Salon.com, Aug. 1, 2002, at <http://archive.salon.com/tech/feature/2002/08/01/bootlegs/index.html>; Beastie Boys, *Hey Ladies*, on Paul’s Boutique (Capitol Records 1989) (CD Track 4). “Hey Ladies” contains at least 16 samples. Brad S. Benjamin, Paul’s Boutique Samples and References List, at <http://www.moire.com/beastieboys/samples/hey ladies> (last modified July 6, 2003).

¹¹ Manriki and Soundhog, *Music: Mashups - Origin and History*, Slurry Magazine (on file with the Internet Archive Wayback Machine, at <http://web.archive.org/web/20050206190909/http://www.slurrymagazine.com/manriki.html> (last visited May 18, 2006)).

¹² Freelance Hairdresser, *Marshall’s Been Snookered* (Eminem vs Winifred Atwell) (2002), at <http://www.atwew86.dsl.pipex.com/freelancehairdresser/index.htm>. (CD Track 11).

As discussed in the previous section, beatmatching can produce something that sounds roughly like a mash-up, but it can only be sustained for a short period of time.¹³ To make a true mash-up requires sampling at least two entire songs. This poses a number of copyright problems.

Legal Troubles

The copyright law has a compulsory licensing scheme for songs (“nondramatic musical works”) that allows anyone to make and distribute recordings once recordings have been distributed to the public with the authority of the rightsholder.¹⁴ It is important to note that this applies only to songs, not recordings of songs. The statute is meant to allow “cover” versions of released songs. The benefit of this compulsory licensing scheme is that the original artist cannot refuse to license a work. But even when cost is not an issue, there are limitations to the compulsory license.

A “cover” must not “change the basic melody or fundamental character of the work.”¹⁵ Rearrangements are only allowed “to the extent necessary to conform it to the style or manner of interpretation of the performance involved.”¹⁶ Although there are no published cases which flesh out the boundaries of this restriction, an interesting example is the song “Rapper’s Delight” by Sugar Hill Gang. Sugar Hill Gang wanted to “sample” the melody from the song “Good Times” by Chic, but because they did not have access to sampling equipment, they instead used a house

¹³ Grasso himself could only play two records simultaneously for up to two minutes, but the average song is much longer. Goldman, *supra* note 4.

¹⁴ 17 U.S.C. § 115 (2004).

¹⁵ 17 U.S.C. § 115(a)(2) (2004).

¹⁶ *Id.*

band playing the melody over and over again.¹⁷ Sugar Hill Gang's record label did not obtain a compulsory license for its unauthorized use and was subsequently sued by a member of the band Chic. Although the case settled out of court, the copyright holder reportedly received a "hefty cut" of all future royalties.¹⁸

A related technique long used by remix artists is the "sound-alike." Whereas a "cover" is not necessarily meant to sound like the original recording, a sound-alike is a cover meant to be indistinguishable from the original recording. Weird Al Yankovic has made a career from parodying popular songs by re-recording sounds with sound-alike instrumentation and alternate lyrics. But because of concern over lawsuits, even he doesn't release a parody until he has obtained permission from the artist and the copyright holder.¹⁹ Although sound-alikes may be an excellent alternative to the cost and trouble of licensing short samples, they are unlikely to be helpful for mash-up artists for the same reason compulsory licenses are of little use: the mash-up can't change the "fundamental character" of the work.²⁰

¹⁷ Paul Morley, *Words and Music* 169 (2003). *See also* Sugar Hill Gang, *Rapper's Delight* (Sugarhill Records, 1981) (CD Track 3).

¹⁸ Wikipedia, The Sugar Hill Gang, at http://en.wikipedia.org/wiki/The_Sugarhill_Gang (last modified May 15, 2006).

¹⁹ Wikipedia, Weird Al Yankovic, at http://en.wikipedia.org/wiki/Weird_Al_Yankovic (last modified May 19, 2006).

²⁰ 17 U.S.C. § 115(a)(2) (2004).

Sampling Recordings

The sampling of “found sounds” poses no copyright problems.²¹ But the sounds being sampled today are usually those of other artists. At first, many believed that if a sample was short enough and/or unrecognizable, it would fall under the fair use defense to copyright infringement.²² In the 1981 case *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, the court held that when an artist is unsuccessful in obtaining permission to use a sample consisting of three words and “a portion” of another artist’s musical work, it infringes the copyright in the musical work.²³ Although only a district court case that didn’t speak to the issue of whether sampling infringes copyrights in sound recordings,²⁴ this case was seen as a clear ruling that unlicensed sampling of any kind was illegal.²⁵ The issue was clarified in *Bridgeport Music v. Dimension Films*, which held that all unlicensed sampling (with the possible exception of a single note) is infringing.²⁶ The opinion did leave open the possibility of a fair use defense on remand.

²¹ Prior to 1972, there was no federal copyright protection for recordings. U.S. Copyright Office, Information Circular 56 – Copyright Registration for Sound Recordings, at <http://www.copyright.gov/circs/circ56.html> (revised December 2004).

²² 17 U.S.C. § 107 (2004).

²³ 780 F. Supp. 182, 183 (D.N.Y. 1991). See also Biz Markie, *Alone Again*, on I Need a Haircut (Cold Chillin Records, 1991) (CD Track ##).

²⁴ The case did not involve the copyright in the sound recording because the plaintiff had not established ownership of the copyright in the sound recording, a necessary first step to a claim of infringement.

²⁵ Rojas, *supra* note 10. See also Wikipedia, Sampling (music), at http://en.wikipedia.org/wiki/Sampling_%28music%29 (last modified May 18, 2006).

²⁶ 410 F.3d 792 (6th Cir. 2005).

Fair Use

Copyright explicitly defines the rights of copyright owners and then gives general guidelines for when these rights can be claimed by consumers. Fair use is the term used for using a copyrighted work in a manner that is normally allowed only with the permission of the copyright holder. Fair use is meant to be a defense for such uses, not a clear definition of what uses are permitted.²⁷

Section 106 of the Copyright Act states that copyright owners have the exclusive right to do and authorize the creation and distribution of copies, display and perform works in public, and create derivative works.²⁸ Section 107 defines fair use as a limit on those exclusive rights and lists four factors to be used in determining whether a use is a fair use:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.²⁹

The fair use doctrine requires courts to avoid rigid application of the copyright statute when “it would stifle the very creativity which that law is designed to foster.”³⁰ These factors are not to

²⁷ Julie E. Cohen et al., *Copyright in a Global Information Economy* 492-94 (2002).

²⁸ 17 U.S.C. § 106 (2004).

²⁹ 17 U.S.C. § 107 (2004).

³⁰ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994), citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

be treated in isolation. “All are to be explored, and the results weighed together, in light of the purposes of copyright.”³¹ The following sections discuss each of these factors in turn.

Purpose and Character of Use

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court explained that the thrust of the profit/nonprofit distinction lies not in whether the user’s sole motive was financial gain, but in “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”³² But whereas the defendant in *Harper & Row* intended to supplant Harper & Row’s “commercially valuable right of first publication,”³³ in the digital sampling context, the sample is almost always taken from an already distributed work.³⁴ Furthermore, allowing this first factor to weigh against a finding of fair use simply because the musician used the sample in a song runs counter to the copyright statute’s requirement of an ad hoc determination.³⁵

But the purpose and character element of the fair use defense also includes uses for the purpose of parody. “Parody appropriates commonly known elements of a prior work to make humorous or critical comment on *that same work*, whereas satire uses commonly known

³¹ *Id.* at 578.

³² *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985); *but see* *New Era Publications Int’l, ApS v. Carol Publishing Group*, 729 F. Supp. 992, 996 (S.D.N.Y. [year]) (“The mere fact that a work [which uses copyrighted materials] may produce pecuniary gain for its author or publisher is not dispositive of a claim of fair use.” (citation omitted)), *aff’d in part, rev’d in part on other grounds*, 904 F.2d 152 (2d Cir.), *cert. denied*, 498 U.S. 921 (1990).

³³ *Id.*

³⁴ A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 Fla. St. U.L. Rev. 135, 146 (1993).

³⁵ “Because fair use is ‘an equitable rule of reason,’ an exclusive list of fair uses does not and should not exist, as each case is to be determined on an ad hoc basis.” *Id.* at 145, quoting 1976 House Report 1476 at 5679.

elements of a prior work to make humorous or critical comment on *another subject*.”³⁶ The parody must have some “critical bearing on the substance or style of the original composition.”³⁷ “Courts have allowed parody claims only where there was a discernable direct comment on the original.”³⁸

In the following excerpt, mash-up artist Party Ben describes the motivations behind his concept album “American Edit,” a mash-up of the Green Day album “American Idiot” and samples from George W. Bush, Smokey Robinson, Brian Adams, Johnny Cash, John F. Kennedy, Garry Glitter, Aerosmith, Oasis, Missy Elliott, U2, Queen, The Sex Pistols, and more.

Interviewer - Was that [Dean Gray album] done out of satire or tribute or both?

Party Ben - Dude, totally both. I think that’s the great thing about the whole bastard pop culture. There’s this weird cross-over of appreciation and total mockery of the ...

Interviewer - It can range though. Some tracks you can definitely tell it’s meant to be more mocking. I guess for me, with the American Edit one, because I loathe that whole album to begin with, there’s no way I can interpret it any other way. Even though some of the tracks are actually really rich and you can tell there was a lot of effort put into them.

Party Ben - That was kind of the goal. We tried to make ... Neither me or Team 9 [co-producer on the album] really liked Green Day in general. We appreciate kind of where they’re coming from. It’s kind of like the Pearl Jam phenomenon. ... It’s like paying tribute to the idea and kind of turning American Idiot into something we might listen to. That was kind of our number one goal. And then there were subsidiary goals of either poking fun of certain aspects of it or elucidating parts of it that we thought were maybe not as well-expressed, like adding to the anti-Bush sentiment that was a little bit subtle on the album and we kind of brought that out in a couple of places. We didn’t set out with an agenda though. And that was our

³⁶ *Dr. Seuss Enters., L.P. v. Penguin Book USA, Inc.*, 924 F. Supp. 1559, 1567 n6 (D. Cal. 1996) (emphasis added).

³⁷ *Campbell*, 510 U.S. at 580.

³⁸ *Dr. Seuss*, 924 F. Supp. at 1569.

goal. ... We were kind of “Let’s just fuck with American Idiot and we’ll just see what we come up with. We’ll just see where it goes and not really know if we want to make fun of it or if we want to appreciate it ... we’ll just mix stuff together and see how it turns out.”³⁹

While good faith is not *central* to the fair use analysis,⁴⁰ Party Ben states that the primary goal was “paying tribute” to Green Day but their technique was “just mix[ing] stuff together and see[ing] how it turns out.” Is a tribute a commentary on the original work? Does just mixing stuff together merely “avoid the drudgery in working up something fresh?”⁴¹ Does parody need to be the only purpose, the primary purpose, or just one of many purposes behind an act that is otherwise infringing? The answers to these questions are unclear. What is established is that “[p]arody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived).”⁴²

Nature of Copyrighted Work

This factor is of little significance for the subject of mash-ups. Courts give more weight to plaintiffs claiming infringement of unpublished works and also focus on “whether the work was creative, imaginative, and original, ... and whether it represented a substantial investment of time and labor made in anticipation of a financial return.”⁴³ Since most mash-ups are of popular commercial songs, this factor will weigh heavily against a finding of fair use. Interesting, though, that if the fair use defense is found to not apply to a mash-up because it sampled merely to

³⁹ *The RU Sirius Show: Show #36 – PARTY!!! with Party Ben* (podcast), at <http://www.rusiriusradio.com/?p=85>. See also Dean Gray, *American Jesus*, on *American Edit* (2005) (CD Track ##).

⁴⁰ *Campbell*, 510 U.S. at 585, stating “Even if good faith were central to fair use ...”

⁴¹ *Id.* at 581.

⁴² *Id.* at 583 fn 17.

⁴³ Johnson, *supra* note 34, at 150.

“avoid the drudgery in working up something fresh,”⁴⁴ that would make it somewhat more likely that a subsequent court will find against the mash-up artists if they bring an infringement claim against someone who samples their mash-up.

Amount/Substantiality of Copying

For this element the court must consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”⁴⁵ Although at least one court has found that some samples may be so short so as to be *de minimis*, this exception doesn’t apply to mash-ups.⁴⁶ Mash-ups use most of the vocals of at least one of the sampled songs. Whether judged on a qualitative or quantitative basis, this factor will almost always be decided against mash-ups.

Effect on Market

This factor weighs the benefit gained by the copyright owner when use is deemed unfair against the benefit gained by the public when use is deemed fair.⁴⁷ This factor is “undoubtedly the single most important element of fair use.”⁴⁸ A plaintiff must show “by a preponderance of the evidence that some meaningful likelihood of future harm exists.”⁴⁹ “[I]f the defendant’s work adversely affects the value of any of the rights in the copyrighted work ... the use is not fair.”⁵⁰

⁴⁴ Campbell, 510 U.S. at 581.

⁴⁵ 17 U.S.C. § 107(3) (2004).

⁴⁶ United States v. Taxe, 380 F. Supp. 1010, 1014 (C.D. Cal. 1974), aff’d in part, vacated in part, 540 F.2d 961 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977).

⁴⁷ Johnson, *supra* note 34, at 154.

⁴⁸ *Harper & Row*, 471 U.S. at 566.

⁴⁹ Sony Corp. of Amer. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

⁵⁰ *Harper & Row*, 471 U.S. at 568 (citation omitted)(emphasis added).

But even if the effect is shown to *benefit* the copyright owner, it is quite likely that the defendant will lose the fair use analysis. This is because the alleged infringer has arguably made either a derivative work (infringing the right of the copyright holder to do the same), or has destroyed the development of a “customary price” for licensing samples.⁵¹ Courts have interpreted the effect on the market factor to also include a consideration of whether the challenged use or practice, if widespread, would have a detrimental effect on the industry as a whole.⁵² “[A] copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work, and ... the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor.”⁵³ Massive amounts of sampling without payment of compensation to the copyright owners would have a detrimental effect upon the music industry.⁵⁴

Summary of Fair Use Analysis

As is the case for sampling generally, a mash-up artist is not likely to be successful with a fair use defense if sued for copyright infringement. Although all four factors must be analyzed together, three of the four factors will almost always go against the mash-up artist. At the simplest level, unlicensed mash-ups deprive the holders of copyright in the original work(s) of the opportunity of making their own mash-ups.

⁵¹ *Id.* at 562.

⁵² Johnson, *supra* note 34, at 155, citing Sony, 464 U.S. at 451.

⁵³ American Geophysical Union v. Texaco Inc., 60 F.3d 913, 929 (2d Cir. 1994).

⁵⁴ Johnson, *supra* note 34, at 155.

But the same can be said of parody, yet it is allowed. If mash-ups are to sampling what parody is to satire, then even if unlicensed sampling is generally considered infringement, at least some unlicensed mash-ups may be allowed.

The choice to take protected elements from a copyrighted work is reasonable and fair only when it is necessary. It is necessary only when one of the targets of the satirist is the work itself, because only then is it fair to presume that the satirist has no alternative to infringement, and only then is it fair to presume that the author would not profit from the granting of a license.⁵⁵

A mash-up that transforms snippets taken from President Bush's speeches to seem like the President is singing the words to John Lennon's "Imagine" would seem to qualify as a parody for the sampling of the President's speeches.⁵⁶ But what about the use of Lennon's song? Is a mash-up that combines songs from different genres sufficiently transformative to be considered parody? What about a mash-up consisting only of two dance songs? Should the law only allow "experimental" mash-ups and not simple dance mash-ups? The simple answer to these questions is that most artists are unwilling to be the test case for setting new legal precedents. But there are other options.

Licensing

Mash-up artists can always license the works they use. Although the songwriters themselves are usually the copyright holders for songs, record labels are usually the copyright holders for recordings. There are now only four major record labels (each with many

⁵⁵ *Dr. Seuss*, 924 F. Supp. at 1569.

⁵⁶ Wax Audio, *Imagine This*, at <http://www.waxaudio.com.au/> (See CD Track 13).

subsidiary labels), which account for 85% of all music sales in the U.S.⁵⁷ A mash-up artist would at least have an easier time obtaining licenses for sampling the recordings if she takes all of her samples from just one label. And for the moment, let's assume that a compulsory license will insulate a mash-up artist from claims of infringing the underlying musical work.

So why wouldn't a record label want to release a mash-up? One of the first popular tracks to use sampling, Buchanan & Goodman's "The Flying Saucer,"⁵⁸ actually increased sales of the records it sampled.⁵⁹ Remixes allow artists to tap into different markets and have multiple hits from a single song.⁶⁰ Run-D.M.C.'s collaboration with Aerosmith on the song "Walk This Way" is believed by many to be the reason for the rap group's cross-over success.⁶¹ The DNA bootleg dance remix of Suzanne Vega's "Tom's Diner" was eventually licensed and re-released by Suzanne Vega to much success.⁶² The same can be said for mash-ups.⁶³ A mash-up is also the perfect way to breathe new life into a label's backcatalog. As one example, a mash-up of Blondie's "Rapture" and The Doors' "Riders on the Storm" was featured on a new greatest hits

⁵⁷ Bill Lamb, Top 4 Major Pop Record Labels, About.com, at <http://top40.about.com/od/popmusic101/tp/majorlabels.htm> (last visited May 18, 2006).

⁵⁸ Buchanan & Goodman, *The Flying Saucer* (Luniverse 1956) (See CD Track 2).

⁵⁹ Chuck Miller, *Dickie Goodman: We've Spotted the Shark Again*, Goldmine 447, <http://www.chuckthewriter.com/goodman.html> (last visited May 18, 2006).

⁶⁰ *History of the remix* (BBC radio broadcast, Jan. 19, 2005), available at <http://www.bbc.co.uk/1/extra/tx/documentaries/remix.shtml>.

⁶¹ Stephen Thomas Erlewine, All Music Guide, at <http://music.yahoo.com/ar-263080-bio--RunDMC> (last visited May 18, 2006).

⁶² Rojas, *supra* note 10. See also Wikipedia, Tom's Diner, at http://en.wikipedia.org/wiki/Tom's_Diner (May 4, 2006).

⁶³ *Id.*

album from Blondie.⁶⁴ The mash-up artist had created and released the track without obtaining consent from either band, but both bands were enthusiastic about the mash-up and worked with their labels to secure an official release.⁶⁵

Unfortunately, license fees can be high or licenses can be flat-out refused. Mash-up artists Richard X claims “[a] certain major label won’t let me use any samples I ask them to. We just got a report back from them saying, ‘Due to Richard’s earlier work, of which we are well aware, we will not be assisting him with any future projects.’”⁶⁶ Similarly, the group 2ManyDJs created an entire mash-up album in only 2 weeks, and then spent the next year attempting to obtain licenses for the hundreds of samples used.⁶⁷ A third of their requests were turned down.⁶⁸ The problem seems to be that many artists and labels will not license samples unless they are sure the new work will sell well enough to generate large royalties.⁶⁹

Open Licensing

If mash-up artists are unable to obtain licenses for popular songs, why not just use songs in the public domain? One problem is that the copyright terms have been repeatedly retroactively extended, so that few works produced since 1923 have entered into the public domain. To make

⁶⁴ Mark Vidler / Go Home Productions, “Rapture Riders” / Blondie v The Doors (March 2006), at <http://www.gohomeproductions.co.uk/riders.html>.

⁶⁵ *Id.*

⁶⁶ Alexis Petridis, *Pop will eat itself*, The Guardian, Mar. 27, 2003, at <http://arts.guardian.co.uk/critic/feature/0,1169,922797,00.html>

⁶⁷ Rojas, *supra* note 10.

⁶⁸ *Id.*

⁶⁹ *Id.*

matters worse, no copyrights on currently protected works will expire until the year 2019.⁷⁰ But there is a growing “free culture” movement which includes musicians who release their works into the public domain or use licenses with only “some rights reserved”—for example, giving others the right to freely sample their music as long as they include attribution.⁷¹ But a large part of the mash-up aesthetic is the sampling of *popular* music. “[B]ecause they depend on the recognizability of the original, mashups are circumscribed to a relatively narrow repertoire of Top 40 pop songs.”⁷² Few songs created before 1923 are still popular, and very little of what is popular today has been released under open licenses.

Steal

As Igor Stravinsky once said, “A good composer does not imitate, he steals.”⁷³ Despite their illegality, mash-ups are becoming increasingly popular. They are publicized and distributed via the Internet, which is also a primary source for the a cappella tracks used in mash-ups.⁷⁴ These unlicensed mash-ups act as a calling card for their artists, who as a result are sometimes offered the opportunity to make licensed mash-ups. Instead of mash-up artists attempting to “clear” rights to use the works they have sampled first (as the law requires), they release their mash-ups illegally on the Internet, wait for the songs to become popular, and hope that the labels will reach out to them.

⁷⁰ PD Info, at <http://www.pdinfo.com/copyrt.htm> (last visited May 18, 2006).

⁷¹ See generally, Creative Commons, at <http://creativecommons.org/> (last visited May 18, 2006).

⁷² Kembrew McLeod, *Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist-Academic*, 28 *Popular Music and Soc’y* 79 (2005).

⁷³ Quoted in Kembrew McLeod, *Kembrew Gets Cease & Desist Letter from EMI*, at <http://kembrew.com/news/GreyCease.html>

⁷⁴ See McLeod, *supra* note 72.

Similar examples have already been given for remixes, but this sequence has also been followed with mash-ups. Richard X released a mash-up of the vocal from Adina Howard's "Freak Like Me" to Tubeway Army's "Are 'Friends' Electric?" It was later legally re-released with the Tubeway Army samples licensed and the Adina Howard vocals resung by the Sugababes and became one of the biggest-selling singles in the UK.⁷⁵ But as discussed above, Richard X has been completely alienated from any future dealings with one major label because of his actions.⁷⁶ Another option is what mash-up artist Freelance Hellraiser calls a "Lawyer's Mix": using a cover band to perform the mashed-up songs.⁷⁷

Conclusion

The problem with the legal approaches to releasing mash-ups is that the process of "clearing" rights for the samples used is more difficult than creating the music. As mentioned above, the group 2ManyDJs created an entire mash-up album in only 2 weeks, but then spent the next year attempting to obtain licenses for the hundreds of samples used.⁷⁸ Copyright was intended to reward artists for their efforts. In the case of mash-ups it is hurting artists and rewarding lawyers.

Maybe what is needed is a change in the copyright law. The biggest problem for mash-up artists is the right of copyright holders to control derivative works and the lack of a compulsory licensing scheme for sound recordings. But intellectual property is valued at \$5.5

⁷⁵ Petridis, *supra* note 66.

⁷⁶ *Id.*

⁷⁷ McLeod, *supra* note 72.

⁷⁸ Rojas, *supra* note 10.

trillion, equal to 47% of the U.S. GDP,⁷⁹ and it is unlikely that any changes to copyright law counter to the entrenched entertainment industry will be implemented.

For the near future, the mash-up genre will probably continue as a mostly illegal art form. Just as the music industry is essentially unable to prevent unlicensed distribution of original recordings via the Internet, it is also unable to prevent the creation and distribution of mash-ups. As the popularity of the genre grows and more labels realize its value, we will see more and more licensed mash-ups. Mash-up artists will adapt to legal realities in the same way sampling and remixing has adapted.

⁷⁹ Robert J. Shapiro & Kevin A. Hassett, *The Economic Value of Intellectual Property* (Oct. 2005), at http://www.usaforinnovation.org/news/ip_master.pdf

Liner Notes for CD

Track	Artist	Title	Year	
Sampling Examples				
1	The Happiness Boys (Billy Jones and Ernest Hare)	Twisting the Dials, Part 1	1928	One of the earliest examples of audio “sampling.” This comedy sketch about listening to the radio included a few seconds of music from different phonograph records to simulate the music heard while “twisting the dials.” The record was not a big seller. http://www.chuckthewriter.com/goodman.html
2	Buchanan & Goodman	The Flying Saucer	1956	“[T]his record is probably the first successful use of "sampling" in popular music. It was done with magnetic tape, as digital technology did not yet exist. Dickie Goodman and Bill Buchanan edited together this alien invasion skit out of popular songs, for which they were sued for multiple copyright infringements. Their record label came to an agreement with the publishers of the original songs, and the record went on to sell close to a million copies, spawning a whole genre of "break-in" or "snippet" records. The hit record also served to boost sales of the sampled songs, and spurred interest in their creators, many of whom were African-American singers whose original renditions had never been heard by a mainstream (white) audience. Ironically, a recently released retrospective CD of Goodman’s work substitutes an alternative version of "Flying Saucer" (with reworked snippets) for the original, most likely due to licensing problems.” http://www.illegal-art.org/audio/liner.html
3	Sugar Hill Gang	Rapper’s Delight	1981	Because the artists did not have access to sampling equipment, they instead used a house band playing the melody from the song “Good Times” by Chic over and over again. Morley p. 169
4	Beastie Boys	Hey Ladies	1989	From the album “Paul’s Boutique,” this song contains at least 16 samples, and the album is considered a high-water mark in the sampling genre.
5	M/A/R/R/S/	Pump Up the Volume	1987	First ever #1 UK chart hit from an independent label, and first to contain samples. http://www.answers.com/topic/marrs http://www.songfacts.com/detail.php?id=5949 http://www.4ad.com/colourbox/profile/?page=2

Track	Artist	Title	Year	
6	Biz Markie	Alone Again	1991?	“This Biz Markie song was at the center of a 1991 lawsuit by Gilbert O’Sullivan for its unlicensed use of 20 seconds from his song “Alone Again (Naturally).” was a major turning point in the evolution of hip-hop. Markie lost the case; the judge told him, verbatim, "Thou shalt not steal." With that, the era of carefree sampling was over. Sample-heavy albums in the vein of Public Enemy’s It Takes a Nation of Millions to Hold Us Back or the Beastie Boys’ Paul’s Boutique became impossibly expensive and difficult to release. Many artists continued to sample but retreated into using more and more obscure source material.” http://www.illegal-art.org/audio/liner.html
Mash-Ups				
7	Neil Diamond & Barbara Streisand	You Don’t Bring Me Flowers	1978	Diamond released the song on an album in 1977, and Streisand released a cover on the album Songbird in 1978. A radio DJ reportedly combined these separately-recorded versions into a “virtual duet,” which was so popular the song was re-recorded by the artists themselves and officially released in 1979. http://www.azcentral.com/ent/music/articles/0114mashups.html http://www.rollingstone.com/artists/neildiamond/albums/album/308875/rid/5943989/ - Says it was re-recorded w/ Barbara Streisand in 1979, but was already famous at that point. http://en.wikipedia.org/wiki/Neil_Diamond -
8	The Evolution Control Committee	Rebel Without a Pause (Whipped Cream Mix)	1994	From the album “Gunderphonic.” Considered to be the first pop acapella vs. instrumental mash-up. Mashers up Chuck D’s vocals from Public Enemy’s “The Rhythm, The Rebel”, from the Prophets Of Rage EP and the instrumentals of Herb Alpert and the Tijuana Brass’s song “Bittersweet Samba” from the album Whipped Cream and Other Delights.
9	Dean Gray	American Jesus	2005	From the album American Edit, which is a mash-up of the Green Day album American Idiot.
10	Freelance Hellraiser	A Stroke of Genius	2001	One of the most popular modern mash-ups. Combines Christina Aguilerra’s “Genie in a Bottle” and The Strokes’ “Hard to Explain.”
11	Freelance Hairdresser	Marshall’s Been Snookered	2002	Combines Eminem and a ragtime piano.

Track	Artist	Title	Year	
12	DJ Danger Mouse	What More Can I Say	2005	From the mash-up album, The Grey Album, which exclusively samples tracks from Jay-Z's Black Album and The Beatles' White Album.
13	Wax Audio	Imagine This	2005	Mash-up of speeches by President George W. Bush and John Lennon's "Imagine"
Experimental				
14	Steinski & Mass Media	The Motorcade Sped On	1986	"Steven Stein created this cut-up of Kennedy assassination coverage. His label, Tommy Boy, was unable to officially release it because CBS refused to grant clearance for the use of Walter Cronkite's voice. It was instead released as a white label 12-inch single." http://www.illegal-art.org/audio/liner.html
15	Evolution Control Committee	Rocked by Rape	1999	"Built from AC/DC's "Back in Black" and snippets from Dan Rather newscasts, this piece was released as a single in 1999 by Eerie Materials but then withdrawn under threat of litigation from CBS." http://www.illegal-art.org/audio/liner.html
16	Animals Within Animals	Hello	2001	A song made up of samples of every instance of a song using the lyric "Hello" they could find.