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# Mashups, remixes and copyright law

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The current buzz in the internet world is about “mashups” and “remix”. This article explores the question as to the legality of engaging in the practices of mashing and remix of copyright material as a part of cultural existence and expression – without the permission of the copyright owner. In the context of mashups, the article will look at the increasing number of video and website mashups and what this means for copyright law; while in the context of remix the article will consider the recent Dean Gray remix and what copyright law is willing to permit in this regard.

## Remix Culture

We now inhabit a ‘remix culture’, a culture which is dominated by amateur creators – creators who are no longer willing to be merely passive receptors of content. Instead, they are demanding a much broader right, a right to mashup and remix material – to take on the role of producers – to cut, paste, sample or jam with content, in order to produce something which is distinctive of their own social and creative innovation. Fuelling this ‘remix culture’ has been the rise of new digital technologies, along with the internet, which has made it even easier to re-use and remix the existing store of knowledge and culture, producing a new dimension of creativity. The challenge for creativity and the economy of digital content production is the extent to which mashup and remix artists should be allowed to borrow – in a seamless manner - from the past to create the future? If I can see the content and can technically reuse it, should the current law and business models prevent such capacity or should they change to prosper a culture of creativity and innovation?

## Mashups

A mashup is a visual remix, commonly a video or website which remixes and combines content from a number of different sources to produce something new and creative. Mashups provide internet users with an innovative and creative way of using and viewing material on the internet. The term mashup is not something which is new or novel, indeed people have been remixing and mashing different things since the beginning of human existence. The term mashup largely derives from the hip-hop music practice of mixing two or more songs together to form something new, more commonly known as music sampling or in its digital context, digital sampling.<sup>1</sup>

There are an ever increasing number of mashups which are available on the internet, with two of the most commonly found mashups being video and website mashups. These two types of mashups raise many interesting and contentious issues in regard to copyright law, with most of the content for these mashups being sourced from third parties who have not given their permission for it to be “mashed” and remixed.

## Video mashups

Some examples of video mashups include taking the trailer for Stanley Kubrick’s classic horror film, *The Shining* and mashing it into a trailer for a feel good family

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<sup>1</sup> For an overview of music sampling see Brian Fitzgerald and Damien O'Brien, ‘Digital sampling and culture jamming in a remix world: what does the law allow?’ 10(4) 2005 *Media and Arts Law Review* 279, 281.

film or taking Steven Spielberg's thriller, *Jaws* and mashing it with love songs to make a love film, *Must Love Jaws*, taking Michael Jackson's famous music film clip for the song *Thriller* and remixing it with Celine Dion's face and mashing the latest iTunes advertisement for Apple's iPod to make the iTunes silhouette's do many different things. There are also numerous politically motivated mashups, with many featuring the United States President George Bush and the war in Iraq. Examples of these include a mashup which features video footage of raids by United States and Iraqi soldiers to the tune of Elvis Presley classics or footage from the Iraq war set to Limp Bizkit's song 'Break stuff'.

### **Internet website mashups**

In addition to the many video mashups, there are also a variety of website mashups available on the internet. For example a mashup could take live content from one source on the internet, such as traffic data and mix it with online maps from Google, Yahoo or Microsoft to produce real time traffic updates available on virtual maps. One notable mashup which uses this platform is ChicagoCrime, a mashup which mixes police data from the Chicago Police Department's database of reported crimes with Google Maps.<sup>2</sup>

The resulting mashup enables citizens to view crimes that have been committed in their neighbourhood, with each individual crime being plotted on Google Map, right down to where the crime was committed in the street. Another prominent mashup is Supreme Court Zeitgeist, which takes the United States Supreme Court website and mixes it with current news, opinion and gossip about the United States Supreme Court and other Federal and State Courts.<sup>3</sup>

Mashups are also of significance for collaborative innovation and e-Research, with some disciplines already enabling data from different sources to be combined seamlessly through the use of scientific and scholarly mashups. For example, currently a bioinformatician can access gene sequences from the GenBank database, its homologues from the BLAST assignment service and the ensuing protein structures from the Swiss-Model site, all through one scientific mashup.<sup>4</sup> Likewise, an astronomer can retrieve all available data for an object taken by different telescopes through one scientific mashup, instead of having to check each source individually.<sup>5</sup> These mashups are not only restricted to closed knowledge communities, but also extend to open knowledge communities. An example of this is UniProt, the world's largest protein database, which is currently developing its existing public interfaces to protein sequence data, to enable outside users to freely remix and mash its content.<sup>6</sup> Similarly, the ISpecies mashup enables users to search a species name and retrieve data from GenBank, academic literature from Google Scholar and images from Yahoo image search.

However, this real time, worldwide collaboration of information poses many interesting issues. One of the major impediments to scientific and scholarly mashups is the reluctance of many organisations and institutions to share data online in the face

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<sup>2</sup> <http://www.chicagocrime.org/>

<sup>3</sup> <http://judgejohnroberts.com/>

<sup>4</sup> Declan Butler, 'Mashups mix data into global service', *Nature* 439(5) January 2006, 6.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

of copyright or privacy restrictions. This reluctance does, however, appear to be changing with organisations such as Google, GenBank, UniProt and the World Health Organisation developing interfaces which enable researchers to collaborate online in a lawful way.

### **Dean Gray - Remix**

Green Day is a popular punk rock band from San Francisco. Their recent album *American Idiot* has made them one of the most popular bands in the world. Dean Gray is a group from Perth in Western Australia. In early December 2005 they uploaded to the internet a remix version of Green Day's album *American Idiot* styled *American Edit*. Within days they received a cease and desist letter on behalf of Warner Bros and Green Day. Dean Gray's remix is interesting and to many it will be refreshingly creative.

Dean Gray is like many of a new generation of amateur creators. They can sit at home in the bedroom and produce the most wonderful things. Most often they do not want money. Merely, they wish to share the finished product with the world. How do we harness the creative energy of the Dean Grays across the distributed landscape of the internet? A critical issue in economic and social terms becomes whether there is anything wrong with Dean Gray's creative expression? Have they robbed the sound recording corporation of an opportunity in the derivative market? Have they "ripped off" the reputation and notoriety of Green Day? Have they made money from their endeavour? Are non substitutable, non commercial derivatives such a bad thing for our culture? What value do we put on creative and transformative use? Or will the answer be simply that Dean Gray must pay for a licence?

### **Copyright law**

The exclusive rights of the copyright owner over acts such as reproduction/copying, communication, adaptation and performance – unless licensed openly – by their very nature reduce the ability to negotiate copyright material without permission.<sup>7</sup> Therefore, mashups and remix will inevitably encounter legal problems when the whole or a substantial part of the original material has been reproduced, copied, communicated, adapted or performed – unless a permission has been given in advance through a voluntary open content licence like a Creative Commons licence, there is fair dealing involved (the scope of which is extraordinarily narrow), a statutory licence exists, or permission has been sought and obtained from the copyright owner. Generally, the courts consider what will amount to a substantial part by reference to its quality, as opposed to quantity<sup>8</sup> and the importance the part taken bears in relation to the work as whole<sup>9</sup>. However, in the context of mashups and remix this issue

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<sup>7</sup> *Copyright Act 1968* (Cth) ss 31, 85-88.

<sup>8</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, 294; *Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* [2005] FCAFC 53 [10], [53].

<sup>9</sup> *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300, 305; *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 45 IPR 353, [84]; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585, 589, 605; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* [2005] FCAFC 53 [12], [50]-[52]; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2005] HCATrans 842 McHugh and Kirby JJ.

remains uncertain under the *Copyright Act*, with there being little judicial authority on the issue.<sup>10</sup> It is most likely that mashups and remixes will have to be interpreted on a case by case basis to determine whether any infringement of copyright has occurred. The issue of moral rights, particularly the moral right of integrity and the notion of reasonableness also need to be considered.<sup>11</sup>

Arguably the United State doctrine of fair use provides a broader (though not unlimited) scope for artists to remix and mashup copyright material, than the Australian fair dealing provisions. One view suggests that the introduction of a single open-ended fair use defence which is sufficiently flexible to adapt to new uses that emerge with technological developments, such as mashups and remix – but also certain enough to provide guidance to copyright owners and users, would be of some benefit.<sup>12</sup>

### **Mashups, remix and reform**

There can be little doubt that to harness innovation in this area at a social, cultural and economic level law reform is needed. We would suggest in line with the work of our colleague Nic Suzor<sup>13</sup> that copyright law be reformed in such a manner as to allow certain reuses of copyright material without the permission of the copyright owner where those derivatives are highly transformative and do not impact upon the primary market of the copyright owner. There certainly appears to be a strong argument that non commercial derivatives, which do not compete with the market for the original material, should be afforded some defence to copyright actions. For example, in relation to the Dean Gray remix very few people would forgo the consumption or enjoyment of the original Green Day recording in preference to the remix or mashup. As Jason Schultz of Electronic Frontier Foundation contends, there should be some legal protection for mashups and remixes – ‘this is a battle over creativity, do we want a world where the law criminalises that?’<sup>14</sup>

Interestingly, Stanford Law Professor Lawrence Lessig believes that for the first time in history creativity by default is subject to regulation because of two architectural features.<sup>15</sup> First, cultural objects or products created digitally can be easily copied, and secondly, the default copyright law requires the permission of the owner.<sup>16</sup> The result is that you need the permission of the copyright owner to engage in mashups or acts of remixing. Lessig believes that the key to mashups and remix is ‘education – not about framing or law – but rather what you can do with technology, and then the law

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<sup>10</sup> For an analysis of copyright law relating to digital/music sampling see Brian Fitzgerald and Damien O’Brien, ‘Digital sampling and culture jamming in a remix world: what does the law allow?’ 10(4) 2005 *Media and Arts Law Review* 279, 282-287.

<sup>11</sup> Katherine Giles, ‘Mind the gap: parody and moral rights’ *Australian Intellectual Property Law Bulletin* 18(5) 2005 69.

<sup>12</sup> On this notion see: Attorney-General’s Department, ‘Fair Use and Other Copyright Exceptions’, *Issues Paper*, May 2005, 33; Copyright Law Review Committee, *Simplification of the Copyright Act 1968 (Cth) Report: Part 1* (1998) <[www.clrc.gov.au](http://www.clrc.gov.au)>

<sup>13</sup> Nicolas Suzor, *Transformative Use of Copyright Material* (LLM Thesis, Queensland University of Technology, 2006) <<http://nic.suzor.com/publications>>.

<sup>14</sup> Michael Hill and Jennifer Dudley, ‘Do the mixed-up movie mash’ Thursday March 9 2006, *The Courier Mail* 17.

<sup>15</sup> ZDNet <<http://blogs.zdnet.com/BTL/?p=2614>>.

<sup>16</sup> *Ibid.*

will catch up'.<sup>17</sup> He believes that trade associations – like mashup guilds – that survey practices and publish reports to establish norm or reasonable behaviours in the context of the community would be useful in establishing fair use parameters. Lessig also believes that Creative Commons and other licences, such as the General Public Licence are important mechanisms which mashup and remix artists can use to mitigate the impact of copyright law.

## Conclusion

The greatest challenge for us as lawyers is to understand how we can provide seamless access to knowledge, culture and creativity within the boundaries of law and economics. A mindset that requires us to control access “just because we can” loses sight of the very great potential the knowledge and creative economy promises to produce for Australia.

It had been hoped that the Attorney General’s proposals for reform of the law in this area would bring the law up to date with the technology and social practices of Australians by addressing and accommodating the innovation of mashing and remixing. However, the recent announcement of major copyright reforms by the Attorney-General would appear to be of little assistance for mashup and remix artists.<sup>18</sup> There appears to be no provision for any fair dealing exception for mashups or remixes which are highly transformative, non-commercial derivatives that do not compete with the primary market of the copyright owner. However, it is interesting to note the provision of a fair dealing exception for the purposes of parody or satire. The extent to which mashups or remixes may amount to parody or satire and thus be afforded the defence of fair dealing is something which will need to be examined in the future.

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<sup>17</sup> Ibid.

<sup>18</sup> Attorney-General’s Department, ‘*Major Copyright Reforms Strike Balance*’, 14 May 2006 <[http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media\\_Releases\\_2006\\_Second\\_Quarter\\_14\\_May\\_2006\\_-\\_Major\\_Copyright\\_Reforms\\_Strike\\_Balance\\_-\\_0882006](http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balance_-_0882006)>.