

**DIGITAL SAMPLING AND CULTURE JAMMING IN A REMIX WORLD: WHAT DOES THE  
LAW ALLOW?**

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ABSTRACT

[279] This article looks at the way in which intellectual property law, in particular copyright and trade mark law, deals with the free culture practices of digital sampling and culture jamming. It considers the recent US case on digital sampling, *Bridgeport Music Inc v Dimensions Films Inc*, and its relevance to Australian law, along with the critical issues of substantial part, moral rights and fair dealing. This analysis is applied to a short case study of MP3 Blogs. In relation to culture jamming, the article considers the legality of using trade marks as part of social commentary under Australian, Canadian and US trade mark law. The article explores the way in which Creative Commons Licences and the current Fair Use Review of the Commonwealth Attorney General can solve some of the existing problems and enhance participation in our ever growing remix culture. The article concludes by calling for greater clarity in the law in relation to the free culture practices of sampling and culture jamming in order to sponsor social and creative innovation.

The purpose of this article is to examine the extent to which we are lawfully allowed to draw upon our cultural environment as part of our discursive practices. To what extent are we 'free' to access and reutilise that which surrounds us?

At the Straight Out of Brisbane Arts Festival in December 2004 a participant explained that they could go out into the forest and paint a picture of the trees without breaching any intellectual property laws, yet to paint a picture of the human made environment of billboards that line the M1 Highway between Brisbane and the Gold Coast could breach the law. They explained that sampling their environment was like using the English language [280] in the process of talking and billboards as much as the trees were part of their cultural environment. What right did they have to 'jam'

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with these artefacts of modern day life? What right did they have to sample music or culture more broadly as part of their creative activity?

The fact that people want to utilise their environment in their creative activity is not the only point to note here. Nowadays technology is making this even easier to achieve. New digital technologies along with the internet have opened up enormous potential for what has become known as 'remix' — cutting, pasting, mashing, sampling etc. No longer are end users or consumers seen as passive receptors of information, but rather in the process of distributed and peer production, consumers can take on the role of producers to become what Creative Commons legal counsel Mia Garlick calls 'content conductors'.<sup>2</sup>

Specifically, this article will consider the legal issues that arise in relation to the distinct yet related creative and social practices of remix known as digital (music) sampling and culture jamming. The picture is not particularly encouraging. There appears little scope for sampling music without the permission of the copyright owner under fair dealing (Australia) or fair use (USA) doctrines, especially in relation to the sound recording and especially where there is no 'transformative' use.<sup>3</sup> While Australian law will still consider whether a 'substantial part' of the original material has been reproduced through the sampling, the approach in the recent US decision of *Bridgeport Music Inc v Dimension Films Inc*,<sup>4</sup> applying a somewhat similar quantitative/qualitative test, is to suggest that any copying of the sound recording will amount to an infringement. It is unclear to what extent Australian courts would follow this decision and decide that copying any amount of a sound recording is a reproduction of a substantial part of the original material. The suggestion is that Australian courts should not adopt the *Bridgeport* approach as a rigorous 'substantial part' doctrine informed by an understanding of the creative innovation system<sup>5</sup> — especially in its digital and remix aspects — is vital to allowing flexibility in our copyright system and innovation in our information society. The limitation of fair

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<sup>2</sup> Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004) 283–4.

<sup>3</sup> On the notion of 'transformative use' see *Campbell v Acuff-Rose Music Inc*, 510 US 569 (1994).

<sup>4</sup> 401 F 3d 647 (6th Cir, 2004), *en banc* rehearing and revised opinion 410 F 3d 792 (6th Cir, 2005).

<sup>5</sup> On this notion see Anne Fitzgerald and Brian Fitzgerald, *Intellectual Property in Principle* (2004) chapter 1; John Howkins, *The Creative Economy: How People Make Money From Ideas* (2001); John Hartley (ed), *Creative Industries* (2005); DCITA, *Creative Industries Cluster Study*, vols 1–3 (2004).

dealing doctrine in promoting innovation makes this even more apparent. The implementation of a more tolerant doctrine of fair use so as to facilitate creative innovation (through the current review of fair use by the Commonwealth Attorney-General)<sup>6</sup> and widespread use of modalities such as permission in advance Creative Commons styled licences provide hope for the creative class that some sampling will be allowed. The expectation that every second or note of recorded music must be paid for and therefore cannot be utilised without permission is too rigid and ignores the fact that the creativity of today builds on that of the past quite often without any compensation being paid.<sup>7</sup>

In relation to culture jamming and copyright and trade mark law, once again Australian law is deficient in providing clear guidance as to the extent to which creativity can draw upon the surrounding environment. US copyright and trade mark law permits a degree of culture jamming by way of trade mark parody, yet Australian law is largely silent on this issue. To this end Australian law needs to clearly define the extent to which trade marks, particularly well known marks, can be utilised without the permission of the copyright and trade mark owner for political, social and creative activity. In a vibrant democracy we deserve the right to remix and jam with these cultural artefacts to 'some degree'.

#### [281] MUSIC SAMPLING

The term music sampling refers to the process by which a producer or artist making a recording, samples a sound or series of sounds from its original context and then makes a new use of it. In its more technical sense this process is referred to as digital sampling, which involves the use of digital technology to enable the recording and storage of sounds and their reproduction in a host of aural formats.<sup>8</sup> This process is achieved by breaking down the wave forms that characterise the different sounds and converting them into a precise numerical form.<sup>9</sup> This information is then coded into a digital synthesiser, enabling the artist or producer to manipulate the sound bites

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<sup>6</sup> See further, Brian Fitzgerald, 'Fair Use for "Creative Innovation": A Principle We Must Embrace. A Submission in Response to the A-G's Issues Paper on Fair Use and Other Copyright Exceptions' (2005); <<http://www.law.qut.edu.au/about/staff/lstaff/fitzgerald.jsp>>.

<sup>7</sup> *Emerson v Davies*, 8 F Cas 615, 619 (CC Mass, 1845); W Landes and R Posner, 'An Economic Analysis of Copyright Law' (1989) *Journal of Legal Studies* 325, 332.

<sup>8</sup> Paul Weiler, *Entertainment, Media, and the Law* (2nd ed, 2002) 412.

<sup>9</sup> *Ibid.*

(samples) in a number of different pitches, echoes, speeds, tones and rhythmic combinations.<sup>10</sup> The courts have taken a similar approach to these generic industry definitions in considering what music sampling and digital sampling encompass. Most recently in *Bridgeport Music Inc v Dimension Films Inc*, the United States Court of Appeals for the 6th Circuit held that digital sampling is a term of art, in adopting the definition commonly accepted within the music industry.<sup>11</sup> In *Newton v Diamond*, Schroeder CJ held that 'sampling entails the incorporation of short segments of prior sound recordings into new recordings.'<sup>12</sup> Similarly, in *Jarvis v A & M Records*, Ackerman DJ held that digital sampling involves the conversion of analogue sound waves into digital code.<sup>13</sup> Elaborating on this process Ackerman DJ described it 'as similar to taping the original composition and reusing it in another context.'<sup>14</sup>

This notion of sampling is not a novel or new one, indeed it may well be argued that it is something which is a part of culture and freedom of expression that has been alive for centuries. However, the origins of sampling in its current musical and digital context can be traced to the reggae musicians of Jamaica in the 1960's who in turn influenced the rap and hip-hop culture in urban New York in the late 1970's.<sup>15</sup> It was here that an African-American musician from the Bronx, Afrika Bambaata pioneered the practice we now know as music sampling.<sup>16</sup> Through sampling the electronic beats of German pop group Kraftwerk, Bambaata was able to lay the foundations for an entirely new culture of music, which embraced the use of sampling.<sup>17</sup> Today this practice of music sampling is not only confined to rap and hip-hop culture. Its influence can also be seen in movements like pop, funk, dance, house, techno, trip-hop and acid jazz.<sup>18</sup>

An ability to sample lawfully yet without the permission of the copyright owner is an important part of a dynamic creative innovation system because it allows content (eg

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<sup>10</sup> Ibid 413.

<sup>11</sup> 401 F 3d 647, 655 (6th Cir, 2004); 410 F 3d 792, 798 (6th Cir, 2005).

<sup>12</sup> 349 F 3d 591, 596 (9th Cir, 2003).

<sup>13</sup> 827 F Supp 282, 286 (DNJ, 1993).

<sup>14</sup> Ibid.

<sup>15</sup> Rachael Carnachan, 'Sampling and the Music Industry: A Discussion of the Implications of Copyright Law' (1999) 8 *Auckland University Law Review* 1033. See also *Newton v Diamond*, 349 F 3d 591, 593 (6th Cir, 2003).

<sup>16</sup> Carnachan, above n 15, 593.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

a portion song) to be negotiated instantaneously and without friction. Under copyright law we are entitled under certain conditions (including payment of a statutory licence fee) to record a song without the permission of the copyright owner of the song,<sup>19</sup> but we cannot copy a sound recording of a song unless we have the permission of the copyright owner of the sound recording. If we are allowed to sample a sound recording without permission then a road block or veto power over creativity is removed and a space for re-use or free culture is opened up. Having to pay for samples might also prove expensive for an artist who merely wants to experiment with sounds in a process of creativity.<sup>20</sup> The focus of this article then is to ask when can sampling be undertaken without the [282] permission of the relevant copyright owner and without the need to pay compensation?

#### *What Does Copyright Law Allow?*

In determining what copyright law will allow in relation to music sampling, it is first necessary to identify the relevant rights which may exist in original material. Under the *Copyright Act 1968* (Cth) a single composition of recorded music may give rise to a number of different types of copyright. These include economic rights in the literary work (lyrics), musical work (score), sound recording and performance of the song as well as moral rights in the lyrics, score and more recently performance of the song. Each of these rights will be considered separately below.

In regards to the literary and musical aspect of recorded music, s 32 of the *Copyright Act 1968* (Cth) provides protection for an original literary and musical work. In the context of music sampling, song lyrics are recognised as a literary work and are therefore afforded protection under the *Copyright Act*.<sup>21</sup> There is no definition of a musical work however, it is generally accepted that this category protects the method of production, rather than any artistic or aesthetic qualities of the work.<sup>22</sup> Under this any combination of sounds and noises will be protected by copyright, provided it is in a fixed form.<sup>23</sup> Copyright infringement in either the literary or musical work will occur where the sampler does any of the acts within the copyright owner's exclusive

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<sup>19</sup> *Copyright Act 1968* (Cth) ss 54–65.

<sup>20</sup> Note, 'A New Spin On Music Sampling: A Case For Fair Play' (1992) 105 *Harvard Law Review* 726, 727–8.

<sup>21</sup> *Copyright Act 1968* (Cth) s 10(1).

<sup>22</sup> Fitzgerald and Fitzgerald, above n 5, 99.

<sup>23</sup> *Ibid.*

rights.<sup>24</sup> In the case of music sampling this will most often occur where the literary or musical work is reproduced in a material form.<sup>25</sup> In order to prove infringement in either the literary or musical work the copyright owner will need to show that the infringing sample was a reproduction of the original work, and that a substantial part has been reproduced.<sup>26</sup> These two requirements are discussed in detail below in relation to copyright in a sound recording.<sup>27</sup>

The other right in relation to recorded music and the one which is most commonly associated with music sampling is copyright in a sound recording. A sound recording is defined to mean the aggregate sounds embodied in a record and will therefore extend to the recording of sounds on the most common medium, CD.<sup>28</sup> Under s 85(1) of the *Copyright Act* an owner of copyright in a sound recording has the exclusive right to make a copy of the sound recording, cause the recording to be heard in public, communicate the recording to the public and enter into a commercial rental arrangement in respect of the recording. Copyright infringement in a sound recording will occur where a person who is not the copyright owner does any of the acts within the copyright owner's exclusive rights.<sup>29</sup> This most commonly occurs in music sampling where a copy of the sound recording is made which embodies the original recording. In order to prove the infringement of copyright, the copyright owner will need to show that the infringing sample was a reproduction of the original material, and that a substantial part of the original sound recording has been reproduced.<sup>30</sup>

[283] The first of these requirements is that there must have been a reproduction of the original sound recording. What this requires is that there must be 'a sufficient degree of objective similarity between the two works' and 'some causal connection

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<sup>24</sup> *Copyright Act 1968* (Cth) s 36 — including the right to reproduce the work in a material form, to perform the work in public, to communicate the work to the public, or to make an adaptation of the work: s 31 (1).

<sup>25</sup> *Copyright Act 1968* (Cth) s 31(1)(a)(i).

<sup>26</sup> Fitzgerald and Fitzgerald, above n 5, 144.

<sup>27</sup> Note that the *Bridgeport* decision suggests that this analysis be undertaken separately for the lyrics/music and sound recording as reproduction of a substantial part of a sound recording brings into play different considerations: 401 F 3d 647, 655 (6th Cir, 2004). Cf 'Amici Curiae Brief of Brennan Center for Justice at NYU Law School and EFF in *Bridgeport Rehearing*' (20 January 2005); <<http://www.fepproject.org/courtbriefs/bridgeport.pdf>>. See also *Newton v Diamond*, 349 F 3d 591 (6th Cir, 2003)

<sup>28</sup> *Copyright Act 1968* (Cth) s 10(1).

<sup>29</sup> *Copyright Act 1968* (Cth) s 101(1).

<sup>30</sup> Fitzgerald and Fitzgerald, above n 5, 144.

between the plaintiff's and defendant's work'.<sup>31</sup> In the context of music sampling what must be shown is that the sample embodies the actual sounds from the original sound recording.<sup>32</sup> In order to establish this it is useful to rely upon digital sound technology, which is able to detect whether the sounds that are embodied in the original sound recording have been reproduced.<sup>33</sup> This is achieved by isolating the original sound recording and the sample.<sup>34</sup> A sampler is then used to graph the amounts of particular frequencies in the sounds, thereby establishing if there has been a reproduction of the original sound recording.<sup>35</sup>

Assuming there has been a reproduction of the original sound recording, it is then necessary to consider the second requirement of whether a substantial part of the original sound recording has been reproduced.<sup>36</sup> The issue which arises here and one which is particularly crucial in regards to music sampling as most cases concern the use of very short samples, is what will amount to a substantial part? The general test for a substantial part was stated by Lord Pearce in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* as 'whether a part is substantial must be decided by its quality rather than its quantity'.<sup>37</sup> This test was affirmed by Mason CJ in *Autodesk Inc v Dyason (No 2)* who held that 'in determining whether the quality of what is taken makes it a 'substantial part' of the copyright work, it is important to inquire into the importance which the taken portion bears in relation to the work as whole: is it an essential or material part of the work?'.<sup>38</sup> The High Court approved Mason's CJ statement in *Data Access Corporation v Powerflex Services Pty Ltd* where it was held that 'in determining whether something is a reproduction of a substantial part of a [copyright work], the essential features of the [work] should be ascertained by considering the originality of the part allegedly taken'.<sup>39</sup> The High Court also referred to the definition of substantial part in *Network Ten Pty Ltd v TCN Channel Nine Pty*

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<sup>31</sup> *Francis Day & Hunter Ltd v Bron* [1963] Ch 587, 614.

<sup>32</sup> Helen Townley, 'Sampling: Weapon of the Copyright Pirate?' (1993) 12 *University of Tasmania Law Review* 102, 105.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Copyright Act 1968* (Cth) s 14(1).

<sup>37</sup> [1964] 1 WLR 273, 293.

<sup>38</sup> (1993) 176 CLR 300, 305.

<sup>39</sup> (1999) 45 IPR 353, [84]. On the approach taken in the US see *Newton v Diamond*, 349 F 3d 591, 594–6 (6th Cir, 2003).

*Ltd.*<sup>40</sup> In this case Kirby J explained that a small portion in quantitative terms may constitute a substantial part having regard to its materiality in relation to the work as a whole.<sup>41</sup> More recently in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* it was held that whether a part taken is a substantial part or not, involves an assessment of the importance of the part taken to the work as a whole.<sup>42</sup>

Applying a strict approach to this test of qualitative importance, it would appear that where a recognisable portion of a song has been sampled then a substantial part will have been reproduced.<sup>43</sup> However, applying a more liberal approach, a substantial part will only have been reproduced where the sample takes a portion of the song which has led to its popular appeal or commercial success. This was alluded to in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* where Finkelstein J held that one of the determining factors is the economic significance of that which has been taken.<sup>44</sup> While the issue of substantial part was not closely [284] considered in *Universal Music Australia Pty Ltd v Miyamoto*,<sup>45</sup> as the samples in question were entire songs, the recent United States decision in *Bridgeport Music Inc v Dimension Films Inc*,<sup>46</sup> tends to favour the strict approach in determining what will amount to a substantial part. In this case the court held that even where a small part of a sound recording is sampled, then the part taken is something of value and will therefore infringe copyright.<sup>47</sup>

Another type of right which arises in relation to recorded music is that of performers' rights. Previously under the *Copyright Act* performers had quite limited rights and did not obtain copyright in the sound recordings of their performances.<sup>48</sup> However, as a result of the Australia–United States Free Trade Agreement and the enactment of the *US Free Trade Agreement Implementation Act 2004* (Cth), significant changes have

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<sup>40</sup> (2004) 78 ALJR 585.

<sup>41</sup> *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585, 605; see also 589 (McHugh ACJ, Gummow and Hayne JJ); *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* (2005) 216 ALR 631, [50].

<sup>42</sup> (2005) 216 ALR 631, [52]. Editor's note: see also Melissa de Zwart, 'TCN Channel Nine v Network Ten (No 2)' (2005) 10 *Media & Arts Law Review* 249.

<sup>43</sup> Mathew Alderson (ed), *Current Issues in Music Law* (1998) 62.

<sup>44</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* (2005) 216 ALR 631, [12].

<sup>45</sup> [2003] FCA 812 (Unreported, Lindgren J, 18 July 2003).

<sup>46</sup> 401 F 3d 647 (6th Cir, 2004); 410 F 3d 792 (6th Cir, 2005).

<sup>47</sup> *Bridgeport Music Inc v Dimension Films Inc*, 401 F 3d 647, 658 (6th Cir, 2004); 410 F 3d 792, 801–2 (6th Cir, 2005).

<sup>48</sup> Fitzgerald and Fitzgerald, above n 5, 124.

been made to the protection of performers' rights under the *Copyright Act*. These changes have included extending the current ambit of performers' rights by granting performers' ownership of copyright in the sound recordings of their performances.<sup>49</sup> This is in addition to the existing performers' rights to authorise recording and broadcasting of the performance, and the right to prevent the knowing copy, sale, distribution or importation of unauthorised recordings.<sup>50</sup> As a result of these changes to the *Copyright Act* the person at the time of recording who owned the record and the performer who performed the performance are now co-owners of the copyright in equal shares.<sup>51</sup> It should also be noted that provisions have been introduced to prevent performers claiming compensation for infringement of copyright in a sound recording<sup>52</sup> and for infringement of performers' rights arising from the same event.<sup>53</sup>

The other type of right which arises in regards to recorded music and has the potential to pose a significant obstacle for music sampling is that of moral rights. Moral rights are personal rights belonging to the author or creator of the copyright work, which exist independently from the economic rights mentioned above.<sup>54</sup> Under the *Copyright Act* there are three types of moral rights which are recognised. These are the right of attribution of authorship, the right not to have authorship falsely attributed and the right of integrity of authorship.<sup>55</sup> The first of these moral rights, the right of attribution of authorship involves the right to be identified as the author of the work if any 'attributable acts' are done in respect of the work.<sup>56</sup> The second moral right provides the author of the work the right not to have authorship of the work falsely attributed.<sup>57</sup> Given the nature of music sampling, it can be argued that the first of these moral rights is almost always infringed as musicians rarely credit the work they have sampled.<sup>58</sup> However, further questions need to be asked as to whether the

<sup>49</sup> *Copyright Act 1968* (Cth) s 22(3A).

<sup>50</sup> *Copyright Act 1968* (Cth) s 248G.

<sup>51</sup> *Copyright Act 1968* (Cth) s 97(2A).

<sup>52</sup> Under s 85 (1) and as distinct from performers protection, in order to prevent double dipping.

<sup>53</sup> *Copyright Act 1968* (Cth) s 248J(4), (5).

<sup>54</sup> Fitzgerald and Fitzgerald, above n 5, 118.

<sup>55</sup> *Copyright Act 1968* (Cth) s 189.

<sup>56</sup> *Copyright Act 1968* (Cth) s 193.

<sup>57</sup> *Copyright Act 1968* (Cth) s 195AC. Under s 195AG (1) it is an act of false attribution for a person to knowingly deal with an altered work or reproduction of an altered work as if it were the unaltered work or reproduction of an unaltered work of the author. An insubstantial alteration is not covered by this provision: s 195 (2).

<sup>58</sup> Nicola Bogle, 'Does Black and White Make Gray? A Critical Analysis of the Legal Regime Governing Digital Music Sampling' (2005) 61 *Intellectual Property Forum* 10, 17.

sampled material adequately identifies the moral rights holder<sup>59</sup> or whether it was reasonable in all the circumstances [285] not to identify the author.<sup>60</sup> It should also be noted that the right of attribution only applies in relation to a substantial part of the work and therefore in instances where a substantial part has not been reproduced this will not be an issue.<sup>61</sup>

The third moral right of integrity involves the right not to have the work subjected to derogatory treatment which would demean the creator's reputation.<sup>62</sup> Once again the potential for infringement (in relation to the music and lyrics, but interestingly not the sound recording) arises as sampling by its very nature involves some degree of manipulation, which could lead to the demeaning of the creator's reputation.<sup>63</sup> However, the critical issue to determine is the extent to which digital sampling debases an original work. Does taking a part of a sound recording and/or placing it in another context impact upon the integrity of the lyrics or the music? As there are no moral rights in the actual sound recording,<sup>64</sup> joined with the fact that a sound recording can be made of music and lyrics pursuant to a statutory licence (ie the author cannot veto the recording)<sup>65</sup> there seems merit in the suggestion that the moral right of integrity in relation to recorded music must permit a broad range of approaches in the face of any attempt at creative censorship, although racist or other abhorrent forms of communication would be questionable.<sup>66</sup> Once again it should be

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<sup>59</sup> *Copyright Act 1968* (Cth) s 195.

<sup>60</sup> *Copyright Act 1968* (Cth) s 195AR.

<sup>61</sup> *Copyright Act 1968* (Cth) s 195AZH.

<sup>62</sup> *Copyright Act 1968* (Cth) s 195AQ.

<sup>63</sup> Bogle, above n 58.

<sup>64</sup> *Copyright Act 1968* (Cth) s 189.

<sup>65</sup> *Copyright Act 1968* (Cth) ss 54–65.

<sup>66</sup> See further Matthew Rimmer, 'The Grey Album: Copyright Law and Digital Sampling' (2005) 114 *Media International Australia* 40, 48–50; Elizabeth Adeney, 'Moral Rights/Statutory Licence: The Notion of Debasement in Australian Copyright Law' (1998) 9 *Australian Intellectual Property Journal* 36; Michael Blakeney and Fiona Macmillan 'Journalistic Parody and Moral Rights under Australian Copyright Law' (1998) 3 *Media & Arts Law Review* 124. The meaning of debasement as provided for by *Copyright Act 1968* (Cth) s 55(2) — no statutory licence granted where debasement of the musical work occurs (no equivalent provision in s 59 in relation to lyrics) which was repealed by the *Copyright Amendment (Moral Rights) Act 2000* (Cth) — was considered by the Federal Court of Australia in *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1997) 37 IPR 1. This case concerned whether a techno adaptation of a musical work by the group Excalibur debased the original work. The Full Federal Court held that in assessing the notion of debasement the court must take a broad approach, paying due regard to the community's wide spectrum of tastes and values. Accordingly, the techno adaptation was held not to have debased the original work. In *Morrison Leahy Music Limited v Lightbond Limited* [1993] EMLR 144 Morrit J held that the use of samples from an original work by George Michael did amount to derogatory treatment. In coming to this conclusion, Morrit J favoured the argument of the plaintiffs that the sampling of parts of the music had completely

noted that the right of integrity only applies in relation to a substantial part of the work and therefore in instances where a substantial part has not been reproduced this will not be an issue.<sup>67</sup>

It should also be noted that in accordance with *US Free Trade Agreement Implementation Act 2004* (Cth) moral rights will extend to performers. Performers' moral rights will include the right of attribution of performership, the right not to have performership falsely attributed and the right of integrity of performership. However, these changes are yet to come into effect, as they are contingent upon Australia's [286] obligations under the *WIPO Performances and Phonograms Treaty* entering into force.

Once it has been determined that an infringement has occurred we would then need to determine if a fair dealing exception relating to criticism, review, research, study or news reporting is applicable.<sup>68</sup> It is generally accepted that the scope for a fair dealing argument under the current law in the context of sampling would be very small.<sup>69</sup> In contrast the fair use doctrine in the US has supported some forms of 'transformative' sampling most notably in the area of parody.<sup>70</sup> It is also important to note that the current fair dealing provisions in the *Copyright Act* do not remove liability for the infringement of moral rights.

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altered the character of the original work. In *Confetti Records v Warner Music* [2003] EWCH 1274 (Ch) which concerned an alleged derogatory treatment of a composition in a remix by a UK garage band Lewinson J held 'that the mere fact that a work has been distorted or mutilated gives rise to no claim, unless the distortion or mutilation prejudices the author's honour or reputation': [150]. Here, the court was unable to find that the original author's honour or reputation had been prejudiced, thus the claim for derogatory treatment failed. Would one be able to argue that the author's moral rights of integrity in relation to music and lyrics were infringed in the critiquing rap recasting of Roy Orbison's classic, 'Oh Pretty Woman' by 2 Live Crew, held to have the potential to be fair use by the US Supreme Court in *Campbell v Acuff-Rose Music Inc*, 510 US 569 (1994)?

<sup>67</sup> *Copyright Act 1968* (Cth) s 195AZH.

<sup>68</sup> *Copyright Act 1968* (Cth) ss 40–43, 103A, 103B, 103C, 104.

<sup>69</sup> See the analysis of the fair dealing provisions below in the context of MP3 Blogs.

<sup>70</sup> *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994). See further Bogle, above n 58, 16–17; Rimmer, above n 66, 44–5; Ben Challis, 'The Song Remains the Same: A Review of the Legalities of Music Sampling' (December 2003) 3(2) *Music Business Journal* <<http://www.musicjournal.org/03thesongremainsthesame.html>>; Marjorie Heins, 'Trashing The Copyright Balance' (21 September 2004) <<http://www.fepproject.org/commentaries/bridgeport.html>>; Note, 'Sixth Circuit Rejects De Minimis Defense to the Infringement of A Sound Recording Copyright' (2005) 118 *Harvard Law Review* 1355.

*Sampling Case Law*

In Australia we have very little case law on the issue of sampling. The closest we have is *Universal Music Australia Pty Ltd v Miyamoto*,<sup>71</sup> a case where entire songs were sampled onto compilation style CDs and it is no surprise that Lindgren J in the Federal Court of Australia was not prepared to entertain any excuses based on the concept of music sampling. *Universal Music Australia Pty Ltd v Miyamoto* concerned an action for copyright infringement brought by a number of recording companies against five DJs, who had remixed a number of tracks from different recordings and then produced a remix CD. The five DJs claimed that they had only produced the CDs in order to raise their profiles and satisfy audience demand.<sup>72</sup> Nonetheless Lindgren J held that the remix CDs constituted copying of a substantial part of the sound recordings and therefore were an infringement of ss 101 and 103 of the *Copyright Act*.<sup>73</sup> As this case concerned infringing samples that were entire songs and not smaller parts of songs the court did not closely consider the crucial issue of what will amount to copying of a substantial part of a sound recording in the context of music sampling.

In a later hearing for damages in *Universal Music Australia Pty Ltd v Miyamoto*, Wilcox J scolded the five DJs for their flagrant disregard of the applicant's rights.<sup>74</sup> He found that all five respondents had deliberately infringed copyright law for ultimate financial gain.<sup>75</sup> He went on to further comment that there was a culture within the music industry of blatant disregard for copyright restrictions, based on an ill-conceived perception that sound recording companies were wealthy multinationals and therefore fair game.<sup>76</sup> However, Wilcox J did acknowledge that '[i]f the respondents' infringements of copyright had been limited to [the] creation of one or more of the compilation CDs for use only by the respondent himself, so as facilitate his presentation on a particular occasion, I would have taken a less serious view of the infringements.'<sup>77</sup> However, the decisive factor in this case was that the respondents

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<sup>71</sup> [2003] FCA 812 (Unreported, Lindgren J, 18 July 2003).

<sup>72</sup> *Universal Music Pty Ltd v Miyamoto* (2004) 62 IPR 605, [12].

<sup>73</sup> *Universal Music Pty Ltd v Miyamoto* [2003] FCA 812 (Unreported, Lindgren J, 18 July 2003) [23], [26].

<sup>74</sup> *Universal Music Pty Ltd v Miyamoto* (2004) 62 IPR 605, [24].

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid* [26].

went beyond the production of the compilation CDs for their own use.<sup>78</sup> Instead the respondents, motivated by their own ultimate financial gain, knowingly trampled on the applicants' rights, thereby infringing copyright.<sup>79</sup> Unfortunately this case does not provide clear guidance for digital sampling of smaller amounts of material.

[287] The recent US decision in *Bridgeport Music Inc v Dimension Films Inc*<sup>80</sup> has thrown the law on sampling into somewhat of a spin. For years American and UK courts have allowed very small (*de minimus*) amounts of songs to be sampled but *Bridgeport* challenges that approach.<sup>81</sup> In *Bridgeport* the United States Court of Appeals for the 6th Circuit overturned a District Court finding that the very small (*de minimus*) amount of sampling in this case did not amount to copyright infringement. At issue was the use of a sample from the rap song '100 Miles and Runnin' in the sound track of the movie 'I Got the Hook Up'. The allegedly infringing sample was a two second, three-note solo guitar 'riff' which was copied, the pitch lowered and then looped and extended to 16 beats.<sup>82</sup> This sample then featured in five places with each looped segment lasting for approximately seven seconds. In an action for copyright infringement Higgins J of the Middle District Court of Tennessee held that the infringement was *de minimis* and therefore not actionable.<sup>83</sup> However, this decision was overturned on appeal with the Court of Appeals for the 6th Circuit finding that 'no substantial or *de minimis* inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording'.<sup>84</sup> Severely limiting the application of the notion of *de minimis* use in cases concerning music samples, the judges held that even where a small part of a sound recording is sampled, the part taken is something of value.<sup>85</sup> In their view this was the only logical conclusion, since if you cannot pirate the whole sound recording there is no reason

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<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> 401 F 3d 647 (6th Cir, 2004); 410 F 3d 792 (6th Cir, 2005).

<sup>81</sup> Challis, above n 70; Amici Curiae Brief, above n 27.

<sup>82</sup> *Bridgeport Music Inc v Dimension Films Inc*, 401 F 3d 647, 652 (6th Cir, 2004); 410 F 3d 792, 796 (6th Cir, 2005).

<sup>83</sup> 230 F Supp 2nd 830 (MD Tenn, 2002).

<sup>84</sup> *Bridgeport Music Inc v Dimension Films Inc*, 401 F 3d 647, 654 (6th Cir, 2004); 410 F 3d 792, 798 (6th Cir, 2005).

<sup>85</sup> *Ibid* 401 F3d 647, 658 (6th Cir, 2004); 410 F 3d 792, 801–2 (6th Cir, 2005); *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* (2005) 216 ALR 631, [19].

why you should be able to lift or sample something less than the whole.<sup>86</sup> The message from *Bridgeport Music Inc v Dimension Films Inc* is clear, 'get a license or do not sample'.<sup>87</sup>

The court also made the point that their decision would not serve to stifle creativity as anybody was free to make a new sound recording of the composition.<sup>88</sup> In their view sampling acts to provide a savings in production costs and should not be allowed at the expense of the person who made the original sound recording.<sup>89</sup> This view to some extent underestimates the creative innovation involved in sampling and privileges the notion of the taking of value and saving of production costs.

This decision appears to show a changing attitude within the courts in regards to music sampling infringements. Previously, courts had been willing to allow the use of music samples based on the legal maxim of *de minimis*, 'the law cares not for trifles'. This was demonstrated in *Newton v Diamond*,<sup>90</sup> where the majority held that the unauthorised use of a music sample by the group Beastie Boys, was *de minimis* and therefore not actionable. In reaching this decision the majority was of the opinion that the use of a brief sample, consisting of three notes separated by a half-step over a background C note, was insufficient to sustain a claim for copyright infringement.<sup>91</sup> Admittedly *Newton* is a confusing precedent as the Beastie Boys had licensed the sound recording so what was in issue was simply the sampling of the music or score. There is conjecture over whether the strict approach of *Bridgeport* or the more flexible approach of *Newton* will become the dominant approach in the US,<sup>92</sup> however, it is suggested that Australian courts in determining whether a substantial part has been reproduced should blend the reasoning of both cases.<sup>93</sup>

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<sup>86</sup> *Bridgeport Music Inc v Dimension Films Inc*, 401 F 3d 647, 658 (6th Cir, 2004); 410 F 3d 792, 801–2 (6th Cir, 2005).

<sup>87</sup> *Ibid* 401 F 3d 647, 657 (6th Cir, 2004); 410 F 3d 792, 801 (6th Cir, 2005).

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid* 401 F 3d 647, 657–8 (6th Cir, 2004); 410 F 3d 792, 802 (6th Cir, 2005).

<sup>90</sup> 349 F 3d 591 (9th Cir, 2003).

<sup>91</sup> *Ibid* 603.

<sup>92</sup> See Amici Curiae Brief, above n 27.

<sup>93</sup> See further Note, above n 70.

[288] MP3 BLOGS

*What Are MP3 Blogs?*

Since their inception in early 2003, MP3 blogs have rapidly become the latest evolution in how people choose to share their favourite music in the digital environment. The concept of an MP3 blog essentially involves the combination of an online journal, with a music column that features MP3 music files that are available for download.<sup>94</sup> Generally, MP3 blogs contain one or two tracks from a CD album available for download. This is usually accompanied by the traditional blog which features a commentary or review on the track and the artist. Readers are then encouraged to download the music, read the accompanying review and share their thoughts online. The MP3 files that are contained on the blogs are generally either available for download directly from the blog itself or via a link to another site where the MP3 files have been uploaded. However, in most cases the MP3 files are usually only available to download for a couple of days. By their very nature most MP3 blogs tend to feature obscure ‘musical nuggets’, those hard to find often outdated tracks which are restricted to a particular musical sub-genre or theme. MP3 blogs tend to fall into two categories, those that provide music with the copyright owner’s permission and those that do not. It is the latter which will have implications for copyright law.

*What Does Copyright Law Allow?*

Thus far MP3 blogs have managed to avoid the wrath of the music industry and are therefore yet to be legally challenged.<sup>95</sup> However, it has been well documented that they exist within a so called legal grey area, and it may only be a matter of time before the law turns its attention to MP3 blogs. Recently the Recording Industry Association of America stated that in terms of piracy MP3 blogs are an issue which

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<sup>94</sup> Rick Ellis, ‘MP3 Blogs Combine Reviews with Music Files’ (2004) *NBC13 Technology* <<http://www.nbc13.com/technology/3369203/detail.html>> at 8 April 2005.

<sup>95</sup> Cf *Commonwealth Director of Public Prosecutions v Ng, Tran and Le* (Unreported, Sydney Central Local Court, Henson DCM, 18 November 2003) where Peter Tran, Charles Ng and Tommy Le ran a website called MP3 WMA Land. The website essentially provided free MP3 music downloads to 390 commercially available CD albums and 946 singles. The site was said to have received some seven million hits during its operation, with an estimated loss to copyright holders of up to \$200 million. The court found the three defendants guilty under s 132(2)(b) of the *Copyright Act 1968* (Cth) for knowingly distributing copyrighted work, to an extent that prejudicially affects the owner of copyright. Tran and Ng both received prison sentences of 18 months, suspended for three years; in addition to this Tran was fined \$5000 and Ng and Le ordered to perform 200 hours community service. See also *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 (Unreported, Tamberlin J, 14 July 2005); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 (Unreported, Wilcox J, 5 September 2005).

they are closely monitoring and that at any time they could decide to make enforcement a priority.<sup>96</sup> The main reason for the survival of MP3 blogs is their relatively low profile, with even the most popular MP3 blogs having only a few thousand regular visitors.<sup>97</sup> This is a far cry from the millions of people who engage in peer to peer file sharing through programs like WinMx or Kazaa. In addition to this most MP3 blogs tend to feature music which is no longer termed as mainstream, and has often been out of the public eye for a long time.<sup>98</sup>

However, despite these factors while MP3 blogs continue to feature tracks without the permission of the copyright owner they run the risk that they will infringe copyright law. Under the *Copyright Act 1968* (Cth) bloggers will infringe copyright when they do any of the acts within the copyright owner's exclusive rights.<sup>99</sup> In the context [289] of a sound recording, this will most often occur on MP3 blogs where the host blogger makes a copy of the sound recording or where they communicate the recording to the public by posting it to the blog.<sup>100</sup> In this scenario — that is posting by the host blogger — there will also most likely be a copyright infringement of the musical and literary work, as well as the sound recording. This infringement in the musical and literary work will occur where the copyright owner's exclusive rights are infringed, by either reproducing the work in a material form, communicating the work to the public or performing the work in public.<sup>101</sup> In light of the recent decision in *Universal Music Australia Pty Ltd v Cooper*,<sup>102</sup> host bloggers also need to be mindful of authorisation liability for facilitating copyright infringement through hypertext linking.

Assuming an action for copyright infringement can be made out against an MP3 blog, one issue which does arise is whether MP3 blogs fall within the defence of fair dealing under the *Copyright Act*. In particular, it may be argued that MP3 blogs come

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<sup>96</sup> Bill Werde, 'The Music Blog Boom' (2004) *Rolling Stone*; <[http://www.rollingstone.com/news/story/\\_/id/6479068?rnd=1095273257416&pageid=rs.Home&has-player=true&pageregion=single1&](http://www.rollingstone.com/news/story/_/id/6479068?rnd=1095273257416&pageid=rs.Home&has-player=true&pageregion=single1&)> at 18 April 2005.

<sup>97</sup> Wikipedia, 'MP3 Blog'; <[http://en.wikipedia.org/wiki/Mp3\\_blog](http://en.wikipedia.org/wiki/Mp3_blog)> at 8 April 2005.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Copyright Act 1968* (Cth) ss 36(1), 101(1).

<sup>100</sup> *Copyright Act 1968* (Cth) s 85(1)(a), (c). The posting of the sampled work on the internet might also infringe the copyright owner's right to allow the recording to 'be caused to be heard in public': s 85(1)(b).

<sup>101</sup> *Copyright Act 1968* (Cth) s 31(1)(a).

<sup>102</sup> [2005] FCA 972 (Unreported, Tamberlin J, 14 July 2005).

within the fair dealing defence of criticism or review.<sup>103</sup> Under this provision a musical or literary work or a sound recording may be fairly dealt with, without infringing copyright for the purposes of criticism or review.<sup>104</sup> There is no definition of criticism or review within the *Copyright Act*, however, it has been held that the words criticism and review are of 'wide and indefinite scope which should be interpreted literally'.<sup>105</sup> In *Warner Entertainment Co Ltd v Channel 4 Television Corp PLC*, Henry LJ stated that the question to be answered in assessing whether a dealing is fair or not is 'is the [work] incorporating the infringing material a genuine piece of criticism or review, or is it something else, such as an attempt to dress up the infringement of another's copyright in the guise of criticism'.<sup>106</sup>

The issue which then arises is whether the commentary and review posted on MP3 blogs will be sufficient to constitute criticism and review under ss 41 and 103A of the *Copyright Act*. Given the differing nature of each MP3 blog it is not possible to provide one complete answer; rather each site will need to be assessed on a case by case basis. However, it is possible to identify a number of key indicators which may suggest whether the fair dealing defence of criticism or review will be applicable in a given case. The primary determining factor will be the amount of commentary which is featured on the MP3 blog itself. In the case where an MP3 blog contains quite detailed commentary, a court may be inclined to view it as a genuine piece of criticism or review. This is to be distinguished from those sites that do not contain detailed commentary and are likely to be viewed as an infringement of copyright. Another determining factor will be the number of tracks that are available for download on the MP3 blog. Where there are only one or two tracks available, a court may be more willing to allow the criticism or review defence. However, MP3 blogs which contain an entire album or a substantial number of tracks will most likely not be afforded the defence of fair dealing. In summary, it would appear that as a general guide, where an MP3 blog is *prima facie* nothing more than an attempt to disguise copyright infringement, the defence of fair dealing will not be allowed. However, if the MP3 blog is a genuine piece of criticism or review, and is on a small scale, then a court may be inclined to allow the fair dealing defence.

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<sup>103</sup> *Copyright Act 1968* (Cth) ss 41, 103A.

<sup>104</sup> Fitzgerald and Fitzgerald, above n 5, 171.

<sup>105</sup> *TCN Channel Nine Pty Ltd v Network Ten Ltd* (2001) 50 IPR 335, [66].

<sup>106</sup> (1993) 28 IPR 459, 468.

[290] CULTURE JAMMING

*What is Culture Jamming?*

Culture jamming is part of a movement; a desire to change how the world currently operates — where individuals are replaced by corporations in a culture of consumerism. The term culture jamming refers to a form of social and political activism, a resistance movement to the hegemony of popular culture which utilises the mass media to criticise and satirise those very institutions that control and dominate the mass media.<sup>107</sup> Culture jammers are revolutionaries, they intend to incite and provoke social and political upheaval, ultimately for change.<sup>108</sup> They are discontent with the control that politicians, corporations and capitalism have taken over the mass media and society in general and wish to free the public from what they see as a propagandised world. Their technique is to take conventional forms of mass communication such as corporate advertising and imitate the visuals, either logos or slogans, subtly altering the intended message to express dissenting opinions.<sup>109</sup> Culture jamming may take a number of different forms and mediums, however it is mainly restricted to the internet, posters, billboards and personal apparel like t-shirts. Some popular examples of culture jamming include:

- Subvertising — this involves undermining the authority of corporations and politicians that impose capitalism and consumerism, and sabotaging their efforts to control the minds of the public.<sup>110</sup>
- Guerrilla communication — this is the intervention in the more conventional processes of communication in order to grab the audience's attention and express unconventional views.
- Google bombing — this involves the manipulation of search engine results to link search keywords with negative or humiliating phrases and websites.
- Billboard liberation — this is a practice used against corporate and political advertising, whereby critical and often cynical messages replace the original message while still remaining visually similar.<sup>111</sup>

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<sup>107</sup> See generally Communication Studies, University of California, 'What is Culture Jamming?' (2004); <<http://www.bol.ucla.edu/~nsajous/>> at 12 April 2005; Kalle Lasn, *Culture Jam: How to Reverse America's Suicidal Consumer Binge — And Why We Must* (1999).

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> For an example of subvertising see <<http://www.subvertise.org>>.

*What Does The Law Allow?*

It is impossible to define all of the legal issues associated with culture jamming, as these will largely depend upon the medium or form in which the culture jamming takes.<sup>112</sup> However, by using ‘billboard liberation’ as an example it is possible to identify a number of legal issues which may arise in similar cases of culture jamming. The first legal issue which may arise in this instance of culture jamming is the potential for the logo or slogan used in ‘billboard liberation’ to infringe copyright. Under the *Copyright Act 1968* (Cth) copyright infringement will occur where the culture jammer does any of the acts within the copyright owner’s exclusive rights.<sup>113</sup> Using the example of ‘billboard liberation’ this will most likely occur where the culture jammer either reproduces in a material form or communicates to the public an artistic work.<sup>114</sup> An artistic work is defined to mean a painting, drawing or photograph, whether or not the work is of artistic quality.<sup>115</sup> This definition will therefore incorporate the images [291] and drawings which feature heavily in billboard liberation. Where there is also accompanying text, this will also infringe copyright in the literary work when it is reproduced in a material form or communicated to the public.<sup>116</sup> The text featuring in ‘billboard liberation’ will be classed as a literary work as it is a particular form of expression through which the ideas or information are conveyed.<sup>117</sup> The scope for a defence of fair dealing based on parody is extremely limited and would most likely be unsuccessful.<sup>118</sup> This form of culture jamming also has the potential to infringe the

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<sup>111</sup> For an example of billboard liberation see <<http://www.billboardliberation.com>>.

<sup>112</sup> Culture jamming may also lead to criminal charges or property based actions: see *O’Shane v John Fairfax & Sons* [2004] NSWSC 140 (Unreported, Smart AJ, 16 March 2004) [29] referring to a recent example of this in relation to a Berlei bra billboard.

<sup>113</sup> *Copyright Act 1968* (Cth) ss 36(1), 101(1).

<sup>114</sup> *Copyright Act 1968* (Cth) s 31(b). See *Compagnie Generale des Etablissements Michelin ‘Michelin&Cie’ v National Automobile Aeroscope, Transportation and General Workers Union of Canada (CAW-Canada) (TD)* [1997] 2 FC 306; *British Columbia Automobile Assn v Office and Professional Employees International Union Local 378* [2001] BCJ No 151.

<sup>115</sup> *Copyright Act 1968* (Cth) s 10(1).

<sup>116</sup> *Copyright Act 1968* (Cth) s 10(1).

<sup>117</sup> *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; *Blackie & Sons Ltd v Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396. Note that copyright will not usually subsist in very short titles, slogans or phrases although the law is inconsistent on this issue: Fitzgerald and Fitzgerald, above n 5, 88–9; Jill McKeough, Andrew Stewart and Philip Griffith *Intellectual Property in Australia* (3rd ed, 2005) 164–5.

<sup>118</sup> See *Compagnie Generale des Etablissements Michelin ‘Michelin&Cie’ v National Automobile Aeroscope, Transportation and General Workers Union of Canada (CAW-Canada) (TD)* [1997] 2 FC 306 holding that ‘criticism’ under the Canadian fair dealing provisions does not include parody; *TCN Channel Nine v Network Ten* (2001) 50 IPR 335, [66]; *AGL Sydney Ltd v Shortland County Council* (1989) IPR 99, 105–6; cf *TCN Channel Nine v Network Ten* (2002) 118 FCR 417, [98]–[104], [116]. See generally Ellen Gredley and Spyros Maniatis, ‘Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright’ [1997] 7 *European Intellectual Property Review* 339. On the

creator's moral rights of attribution of authorship, the right not to have authorship falsely attributed and the right of integrity of authorship.<sup>119</sup>

Another legal issue which arises in relation to 'billboard liberation' is the infringement of registered trade marks. In Australia protection is conveyed upon those trade marks which are registered under the *Trade Marks Act 1995* (Cth). Trade marks are defined as 'a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person'.<sup>120</sup> This definition of a trade mark will therefore convey protection upon any 'letter, word, name, signature, numeral, device, brand, heading, label, aspect of packaging, shape, colour, sound or scent' providing it is distinctive.<sup>121</sup>

Prior to the introduction of a dilution style provision into Australian trade mark law in 1995,<sup>122</sup> the trade mark holder would have had to prove that culture jamming created consumer confusion as to the source of goods or services leading to an action for trade mark infringement<sup>123</sup> or passing off.<sup>124</sup> Since the enactment of s 120(3) of the *Trade Marks Act* which provides protection for well known trade marks, which are typically owned by multinational corporations or national companies with a high market share,<sup>125</sup> a registered trade mark will be infringed where a person uses a mark that is the same or deceptively similar to a well known mark as a trade mark (regarding unrelated goods or services) where use of the mark is likely to indicate a connection with the well known mark and thereby adversely affect the interests of the registered

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application of fair use doctrine in these circumstances see *Leibovitz v Paramount Pictures*, 948 F Supp 1214 (SDNY, 1996).

<sup>119</sup> *Copyright Act 1968* (Cth) s 189; Gredley and Maniatis, above n 118, 341, 344.

<sup>120</sup> *Trade Marks Act 1995* (Cth) s 17.

<sup>121</sup> *Trade Marks Act 1995* (Cth) ss 6, 41.

<sup>122</sup> On this notion see: Brian Fitzgerald and Emma Sheehan, 'Trade mark Dilution and the Commodification of Information: Understanding the "Cultural Command"' (1999) 3 *Macarthur Law Review* 61; *TRIPS* Art 16.

<sup>123</sup> *Trade Marks Act 1995* (Cth) ss 120(1) and (2); Fitzgerald and Fitzgerald, above n 5, 69–75; *Mattel Inc v NCA Records Inc*, 296 F 3d 894, 900 (9th Cir, 2002) cert. denied 537 US 1171 (2003); *Elvis Presley Enterprises v Capece*, 141 F 3d 188 (5th Cir, 1998).

<sup>124</sup> See generally: Mark Davison, Kate Johnston and Patricia Kennedy, *Shanahan's Australian Law of Trade Marks and Passing Off* (3rd ed, 2003) 571; *Clark v Associated Newspapers Ltd* [1998] 40 IPR 262, 268.

<sup>125</sup> Fitzgerald and Fitzgerald, above n 5, 370.

owner.<sup>126</sup> [292] Interestingly the Canadian case of *Compagnie Generale des Etablissements Michelin 'Michelin & Cie' v National Automobile Aeroscope, Transportation and General Workers Union of Canada (CAW-Canada) (TD)*<sup>127</sup> suggests s 22 of the *Canadian Trade Marks Act* — a dilution provision broadly similar to the Australian provision — would not be enlivened in parody situations as in such circumstances there is no 'use of the mark as a trade mark'.<sup>128</sup> In the *Michelin Case* the NAATGW Union in seeking to recruit workers of the Michelin company depicted the Michelin man or 'Bibendum' (a marshmallow rotund figure composed of tyres) on leaflets distributed to workers in a manner so as to suggest he was just about to step on and squash a Michelin worker. The Canadian Court of Appeal held that this was not trade mark infringement of any kind but was a substantial reproduction of copyright material and therefore an infringement of Canadian copyright law. The *Michelin Case* would suggest that in Australia in most instances using a trade mark for the purpose of parody would not infringe s 120 (3) as it would not be 'use of a mark as a trade mark.'<sup>129</sup> This would allow some forms of 'billboard liberation' but copyright infringement could still be an issue. However as dilution laws aim to protect the value of the well known mark and ridiculing potentially devalues a mark, arguments for infringement will continue to be made and until there is a clear ruling on this issue there can be no certainty that the Canadian approach will be fully adopted in Australia.<sup>130</sup>

As well known trade marks become part of our constructed reality and cultural environment one school of thought suggests we should have a broader right to access and utilise them as part of cultural discourse.<sup>131</sup> A number of US cases have

<sup>126</sup> *Trade Marks Act 1995* (Cth) s 120(3). To determine whether a mark is well known, it is necessary to consider the 'extent to which the trade mark is known within the relevant sector of the public, whether as a result of the promotion of the trade mark or for any other reason': s 120(4).

<sup>127</sup> [1997] 2 FC 306.

<sup>128</sup> See further *British Columbia Automobile Assn v Office and Professional Employees International Union Local 378* [2001] BCJ No 151; M Bibic and V Eatrdes, 'Would Victoria's Secret Be Protected North of the Border? A Revealing Look at Trade-Mark Infringement and Depreciation of Goodwill in Canada' (2003) 93 *The Trade mark Reporter* 904.

<sup>129</sup> Fitzgerald and Fitzgerald, above n 5, 372–5; *Philmac Pty Ltd v Registrar of Trade marks* (2002) 126 FCR 525; *Coca-Cola Co v All-Fect Distributors Ltd* (1999) 96 FCR 107; *The Australian Steel Company Operations Pty Ltd v Steel Foundations Ltd* (2003) 58 IPR 69.

<sup>130</sup> Ellen Gredley and Spyros Maniatis, 'Parody: A Fatal Attraction? Part 2: Trade Mark Parodies' [1997] 8 *European Intellectual Property Review* 412, 419–20.

<sup>131</sup> Patricia Loughlan, *Intellectual Property: Creative and Marketing Rights* (1998) 168ff.; R Dreyfuss, 'Expressive Genericity: Trade marks as Language In the Pepsi Generation' (1990) 65 *Notre Dame Law Review* 397; Fitzgerald and Sheehan, above n 122.

considered the issue as to what extent a well known trade mark may be reproduced or re-used as a medium of expression or a part of free culture. In *Lucasfilm Ltd v High Frontier*,<sup>132</sup> George Lucas unsuccessfully tried to bring an action for trade mark infringement against public interest groups who had labelled Ronald Reagan's plans for outer-spaced weaponry, 'Star Wars'. The court held that despite the fact that the original meaning derived from the trade use, courts cannot regulate descriptive non-trade use, without becoming language police. The court further held that trade marks laws are designed to regulate unfair trade competition, not the development of the English language in everyday human discourse. This case can be contrasted with *San Francisco Arts & Athletic Inc (SFAA) v US Olympics Committee (USOC)*,<sup>133</sup> where the US Supreme Court held that SFAA's promotion of an event called the 'Gay Olympic Games' was in breach of the *Amateur Sports Act* which allowed USOC to prohibit commercial and promotional use of the word 'Olympic'. In this instance free speech and cultural discourse reasoning, that the word was now part of the common language, was rejected by the US Supreme Court.

In relation to parody the US courts have tended to allow trade marks to be reproduced on goods and even sold so long as it is a 'take off' and not a 'rip off'.<sup>134</sup> However the introduction of a federal trade mark dilution law [293] has brought some uncertainty in the case law as to the legality of parody, yet there seems to be a clear argument that 'non commercial speech' (in essence social commentary) involving a mark is protected by the First Amendment and such use will not amount to dilution.<sup>135</sup> The critical question will be whether parody devalues the mark? And if the answer is yes, the further question will be whether the parody devalues the mark in its ability to draw consumers or only within a broader social consciousness?<sup>136</sup>

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<sup>132</sup> 622 F Supp 931 (1985).

<sup>133</sup> 483 US 522 (1987).

<sup>134</sup> *Nike Inc v 'Just Did It' Enterprises* 6 F 3d 1225, 1227-8 (7th Cir, 1993); *The Coca Cola Co v Gemini Rising Inc*, 346 F Supp 1183 (ED NY, 1972); *Anheuser-Busch Inc v L & L Wings Inc*, 962 F 2d 316 (4th Cir, 1992); G Mayers, 'Trade mark Parody: Lessons from The Copyright Decision in *Campbell v Acuff-Rose Music Inc*' (1996) 60 *Law & Contemporary Problems* 181.

<sup>135</sup> See *Mattel Inc v Walking Mountain Productions*, 353 F 3d 792 (9th Cir, 2004); *Mattel Inc v NCA Records Inc*, 296 F 3d 894 (9th Cir, 2002) cert. denied 537 US 1171 (2003); *Dr Seuss Enterprises v Penguin Books USA*, 109 F 3d 1394 (9th Cir, 1997); Gredley and Maniatis, above n 130.

<sup>136</sup> *British Columbia Automobile Assn v Office and Professional Employees International Union Local 378* [2001] BCJ No 151, [165]-[168]; *Mattel Inc v Walking Mountain Productions*, 353 F 3d 792, 812 (9th Cir, 2004); *Mattel Inc v NCA Records Inc*, 296 F 3d 894, 902-7 (9th Cir, 2002) cert. denied 537 US 1171 (2003).

In terms of ‘billboard liberation’ which features a political message, it is necessary in Australia to consider the implied guarantee to free political speech. The courts have held that there is an implied freedom to communicate on political matters under the *Commonwealth Constitution*.<sup>137</sup> The implied freedom to communicate on political matters protects individuals against laws that would otherwise restrict this freedom. This body of law may therefore provide a defence to any action against a form of culture jamming which contains a political message.

It is suggested that a clearer principle needs to be embodied in Australian copyright and trade mark law to allow broader social and cultural use of trade marks and reduce the threat of being sued.

#### WHAT DOES THE FUTURE HOLD?

The great dilemma that faces the spirit of social or cultural innovation in Australia is the degree to which the law can respond to iron out these apparent roadblocks. One group — the owners — would feel happy having an enormous power of censorship and control over ‘appropriation’ or at least a statutory licensing scheme providing some remuneration while creatives and social innovators seek to harness the power of ‘remix’ to build out the future. One of the most powerful concepts that has arisen to assist creativity and social innovation is that of the Creative Commons. The CC movement asks copyright owners to consider sharing copyright material where appropriate and for stated purposes and aims to set up a mechanism for clearly articulating such a process of sharing in the internet world. On the back of this the Australian government has realised that copyright law is too inflexible and has sought to re-examine the way in which certain re-uses of copyright material without permission of the copyright owner should be facilitated. CC gives permission in advance and a more flexible fair dealing doctrine morphing into a fair use doctrine would provide a space where creatives and social innovators could harness to ‘some degree’ the existing store of knowledge and culture without permission of the copyright owner. This ability to negotiate copyright material upon the instance of seeing it and to innovate upon it and republish/distribute it provides a dynamic that

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<sup>137</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

the digital environment sponsors in a process of creative and social innovation. In terms of trade marks we need to consider reform of the law to more clearly articulate what type of re-use should be allowed.

### *Creative Commons*

In 2004 the Creative Commons (CC) project was launched in Australia.<sup>138</sup> Creative Commons aims to build a distributed information commons by encouraging copyright owners, where appropriate, to licence use of their material through open content licensing protocols and thereby promote better identification, negotiation and reutilisation of content for the purposes of creativity and innovation. It aims to make copyright content more 'active' by ensuring that content can be reutilized with a minimum of transactional effort. As the project highlights, the use of an effective identification or labelling scheme and an easy to understand and implement legal framework [294] is vital to furthering this purpose. This is done by establishing generic protocols or license terms for the open distribution of content that can be attached to content with a minimum of fuss under a CC label. In short the idea is to ask copyright owners — where willing — to 'license out' or distribute their material on the basis of four protocols designed to enhance reusability and build out the information commons.<sup>139</sup>

Through the Creative Commons licences a copyright owner of content, be it text, music or film, can place that material in the commons. These base licences have been 'ported' or adapted to Australian law as they have in a number of other countries throughout the world.<sup>140</sup> The CC licences provide that anyone can use the content subject to one or a number of the following conditions:<sup>141</sup>

- *attribution* of the author;
- *non-commercial* distribution;
- that *no derivative* materials based on the licensed material are made (that is, all copies are verbatim); and

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<sup>138</sup> See <<http://creativecommons.org.au>>.

<sup>139</sup> On the key motivations for sharing content see: Brian Fitzgerald, 'Structuring Knowledge Through Open Access: The Creative Commons Story' in Cushla Kapitzke and Bertram C Bruce (eds), *New Libraries and Knowledge Spaces: Critical Perspectives on Information Education* (2005).

<sup>140</sup> See <[creativecommons.org/international](http://creativecommons.org/international)>; <[creativecommons.org.au](http://creativecommons.org.au)>.

<sup>141</sup> All of the conditions are presented as options which the licensor may choose, except for the attribution condition which is now a default condition in each Creative Commons licence.

- *share and share alike* (others may distribute derivative materials based on the licensed material under a licence identical to that which covers the licensed material).

It is also important to point out that moral rights are asserted under the core terms of the current Australian version of the CC licence. While this presents a challenge for remix culture it is anticipated that further options regarding moral rights will be presented in future versions.<sup>142</sup>

The licence can be presented in common, legal or digital code language — by simply going to [creativecommons.org](http://creativecommons.org) and choosing a licence online. This is then linked to the work that you wish to give or licence out through the commons. Creativecommons.org reports there have been over 53 million ‘link-backs’ to Creative Commons licences (including over 20,000 to the Australian licence) in ways that has further promoted creativity, innovation and education.<sup>143</sup>

Like the free software movement, Creative Commons uses intellectual property rights as the platform on which to structure downstream user rights. By claiming copyright in the content that will go into the commons the owner can determine how that content can be used downstream; for example, to further develop the commons. However, unlike copyleft free software licences, Creative Commons does not *require* utilisation of material in the commons to carry with it an obligation to share further innovations back to the commons — this is only one of the four conditions, known as ‘share and share alike’, the copyright owner might employ.<sup>144</sup>

Creative Commons cannot solve all of the legal issues associated with digital sampling and culture jamming. However, what it will enable is the ‘building of active and distributed repositories of copyright content that can be utilised by creatives to

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<sup>142</sup> Brian Fitzgerald, ‘Creative Commons (CC): Accessing, Negotiating and Remixing Online Content’ in J Servaes and P Thomas (eds), *Communications, Intellectual Property and the Public Domain in the Asia Pacific Region: Contestants and Consensus* (2006 forthcoming).

<sup>143</sup> See eg <<http://www.onlineopinion.com.au>>, <<http://www.vibewire.net.au>>, <<http://www.creativecommons.org.au>>.

<sup>144</sup> See generally Fitzgerald and Fitzgerald, above n 5, 455.

build the next layer of creativity.'<sup>145</sup> It is through the building of these repositories that Creative Commons will enable music samplers to sample and culture jammers to jam freely, without the fear of litigation.

In relation to music CC has developed three different types of sampling licences (which are yet to be ported or translated into an Australian licence):

- [295] *The Sampling Licence*. This licence allows users to use part of the licensed material for any purpose other than advertising, but does not allow users to perform, display or distribute copies of the whole of the licensed material for any purpose.
- *The Sampling Plus Licence*. This licence allows users to use part of the licensed material for any purpose other than advertising. It also allows users to perform, display and distribute copies of the whole of the licensed material for non-commercial purposes.
- *The Noncommercial Sampling Plus Licence*. This licence allows users to use the whole or a part of the licensed material for non-commercial purposes<sup>146</sup>

In November 2004 *Wired* magazine released a CD containing a collection of 16 songs all distributed under the Creative Commons sampling licenses — thirteen under the sampling plus license and three under the non commercial sampling plus licence. The CD jacket encouraged readers to 'rip, mix, burn and swap till you drop',<sup>147</sup> activities which would otherwise have been prevented under the 'all rights reserved' copyright regime normally associated with the distribution of CDs. The release of the *Wired* CD symbolised more than just the free sharing of music, with 16 high profile artists recognising by 'doing' that sharing digital culture can be an advantage and not a threat.<sup>148</sup> Besides the licences CC also provides technical tools like ccMixer that assist musicians in understanding and innovating remix culture.<sup>149</sup>

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<sup>145</sup> Brian Fitzgerald and Ian Oi, 'Free Culture: Cultivating the Creative Commons' (2004) 9 *Media & Arts Law Review* 137, 140; Brian Fitzgerald, 'Creative Choices: Changes to the Creative Commons' (2005) 114 *Media International Australia* 83.

<sup>146</sup> See <creativecommons.org>.

<sup>147</sup> Thomas Goetz, 'Sample the Future' (2004) *Wired Magazine*; <<http://www.wired.com/wired/archive/12.11/sample.html>> at 15 April 2005.

<sup>148</sup> *Ibid.*

<sup>149</sup> In the words of CC General Counsel Mia Garlick 'ccMixer, [is] a site that invites musicians to exercise their rights to rip, mix and mash-up under those Creative Commons licenses that allow derivative works and sampling. The site enables musicians to see both who has remixed their work and

It must be noted that in Australia musicians that are members of certain collecting societies will have very little prospect of effectively utilising CC licences for their own creations without the permission of the relevant collecting society. The Australian Performing Rights Association<sup>150</sup> (APRA) takes an assignment of the rights of public performance and communication to the public, which subsist in musical works and lyrics.<sup>151</sup> The Australasian Mechanical Copyright Owners' Society (AMCOS) takes an exclusive licence over mechanical rights in relation to music and lyrics, including the right to make recordings.<sup>152</sup> The rights granted to both APRA and AMCOS cover all present and future music and lyrics owned by the member.<sup>153</sup> Accordingly, a member of APRA is generally not the owner of the right of public performance or communication to the public in his or her music and lyrics, and is thus unable to negotiate rights under Creative Commons licences, without APRA's permission. Likewise, a member of AMCOS is unable to give a license over the mechanical rights in his or her music and lyrics without the permission of AMCOS.<sup>154</sup> Both APRA and AMCOS provide methods for musicians to opt-out of the scheme on certain conditions, or to have the rights in a particular work licensed back to them for a particular purpose. 'Opt-out' means that the collecting society will re-assign all or a subset of public performance, communication or mechanical rights for every work owned by the member, and will cease collecting from the relevant streams.<sup>155</sup> It is not possible to opt-out for a smaller number of works, and a minimum of three months [296] notice is required for a re-assignment. This opt-out mechanism in essence makes CC licensing and the centralised collection of royalties exclusive of each other for every work owned by the member in one or more category of rights, which is not a viable option for most musicians. 'Licence-back' means the creator is granted a non-exclusive license to a particular work for a particular performance or set of

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to display the work they have remixed in creating their own music. People can see the relationships between the sampled tracks — similar to a genealogy of creativity': email correspondence with the authors, 7 October 2005. See further <<http://ccmixter.org/>>.

<sup>150</sup> See <<http://www.apra.com.au/>>.

<sup>151</sup> Australasian Performing Rights Association, *Constitution* cl 17; <<http://www.apra.com.au/corporate/downloads/APRA%20Constitution%2005.pdf>>.

<sup>152</sup> AMCOS, *Membership Agreement* cl 2; <[http://www.apra.com.au/writers/downloads/input\\_agreement-applicationformindividual5Nov2004.pdf](http://www.apra.com.au/writers/downloads/input_agreement-applicationformindividual5Nov2004.pdf)>.

<sup>153</sup> APRA, *Constitution* cl 17(a); AMCOS, *Membership Agreement* cl 1.1.1.

<sup>154</sup> Members of AMCOS are generally music publishers, but individuals can apply for AMCOS membership if they do not have a publisher.

<sup>155</sup> APRA, *Constitution* cl 17(c); AMCOS, *Membership Agreement* cl 2.6.

performances, or for a particular recording or other purpose.<sup>156</sup> However, as the licence granted is limited in duration and scope, it is not sufficient for use with Creative Commons licences.<sup>157</sup> A similar situation exists in some parts of Europe yet there is much more flexibility under the collection mechanisms established in the US.

More work needs to be done on developing a flexible mechanism for allowing musicians to negotiate rights under CC licences while still maintaining a workable model for the relevant collecting societies. This is a complex issue and CC will need to adequately address criticisms such as the interests of the musician are best met through an organised collecting mechanism, CC may not be in anybody's best interests and the existing system (eg where rights have been assigned) does not necessarily distinguish between commercial and non commercial performances.<sup>158</sup> Much of this criticism is a legacy of entrenched business models and consequently denies, as if it were a disruptive technology,<sup>159</sup> the potential of free culture.

In summary if you are a member of APRA or AMCOS the dynamic CC infrastructure is not conveniently and effectively available to you in relation to your own creations unless those organisations allow you to use it in a more flexible manner. Your American counterparts are not limited in this manner and many would see this as a distinct yet odd advantage in a free trade world where Australia and the US have sought to build a harmonious intellectual property law.

### *Fair Use Reform*

On the 18 February 2005 the Commonwealth Attorney-General, Phillip Ruddock announced a review of copyright law to examine whether a fair use exception should be added to the *Copyright Act 1968* (Cth).<sup>160</sup> In a speech outlining the Australian Government's copyright agenda for the next year, the Attorney-General

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<sup>156</sup> APRA, *Constitution* cls 17(g) and (h); AMCOS, *Membership Agreement* cl 2.6.6.

<sup>157</sup> We thank Nic Suzor for assisting us with this summary of the rights and obligations of APRA and AMCOS members.

<sup>158</sup> Emma Pike, 'What you need to know about Creative Commons' *M*, 15 March 2005; <[www.bmr.org/html/news/news53.htm](http://www.bmr.org/html/news/news53.htm)>; Sarah Faulder, 'What Creative Commons Really Means for Writers' (2005) *Music Week*; see also <[www.cisac.org](http://www.cisac.org)>.

<sup>159</sup> See further Clayton Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (1997).

<sup>160</sup> Attorney-General Phillip Ruddock, 'Copyright: New Futures, New Agendas', speech delivered at Australian Centre for Intellectual Property and Agriculture conference, Brisbane, 18 February 2005; <<http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/speeches>>.

acknowledged that some user groups expressed support for the introduction of ‘an open ended exception to copyright similar to the fair use provision in the United States.’<sup>161</sup> In response to the changing nature of copyright, the Attorney-General said that ‘a fair use provision may give the *Copyright Act* more flexibility to maintain the copyright balance in a digital environment.’<sup>162</sup>

There is no doubt that reform to this aspect of the *Copyright Act* is long overdue, and that the introduction of a fair use provision similar to that contained in United States law will go a long way towards solving the legal issues created by digital sampling and culture jamming.<sup>163</sup> The current fair dealing provisions in the *Copyright Act* are no longer capable of providing genuine fair dealing of content in the digital environment.<sup>164</sup> This is largely due to the fact that the current provisions are limited to a narrow range of activities which do not reflect the potential of the digital environment.<sup>165</sup>

[297] What is required is the introduction of a single open-ended fair use defence which is sufficiently flexible to adapt to new uses that emerge with technological developments, but also certain enough to provide guidance to copyright owners and users.<sup>166</sup> The harsh reality of the current *Copyright Act* is that even inconspicuous acts such as transferring music files to an iPod or making a back up copy of a CD are most likely an infringement of copyright.<sup>167</sup> These two commonplace activities while graphic demonstrations of the dire need for reform are merely the tip of the iceberg.

In implementing any doctrine of fair use the parliament needs to be mindful that fair use will not be thwarted by moral rights.<sup>168</sup> In a digital remix world the moral rights of attribution and integrity provide significant challenges to innovation and need to be

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<sup>161</sup> Ibid [38]

<sup>162</sup> Ibid [39]; see further Brian Fitzgerald, ‘Underlying Rationales of Fair Use: Simplifying the Copyright Act’ (1998) 2 *Southern Cross University Law Review* 153, 157.

<sup>163</sup> See further, Fitzgerald, above n 6.

<sup>164</sup> *Copyright Act 1968* (Cth) ss 40–43, 103A, 103B, 103C, 104.

<sup>165</sup> See also *Ashdown v Telegraph Group Ltd* [2001] Ch 685, 697–8 affirmed on appeal [2002] Ch 149, 171.

<sup>166</sup> 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).

<sup>167</sup> Ruddock, above n 160, [40]

<sup>168</sup> The scope of reasonableness under s 195AS will be important to this question: K Giles, ‘Mind the gap: parody and moral rights’ (2005) 18 *IPLB* 69.

carefully implemented. As some American scholars suggest moral rights are a transaction cost in the negotiation of culture and have the potential to stifle free speech in the spirit of censorship.<sup>169</sup> While acknowledging the value of moral rights we must guard against this potential in the remix world lest nothing will ever be remixed or transformed in a process of social comment and/or creativity.

## CONCLUSION

As this article highlights, the legality of the digital sampling of music needs to be clarified in order to sponsor creative and social innovation<sup>170</sup> by the following means:

- Clearly articulating how the notion of 'substantial part' will apply to music sampling. What amounts to a substantial part is yet to be clearly settled by the Australian courts and until this occurs this area of activity will be chilled by a lack of certainty and fear of being sued. If we are serious about creative innovation as an economic and cultural driver then we need to provide clear legislative or judicial guidance on what is allowed. A legislative solution could articulate the boundaries of sampling without permission of the copyright owner shading into a scheme where permission and compensation might be needed.
- Promoting the use of permission in advance mechanisms like Creative Commons licences where appropriate and encouraging collecting societies to support these initiatives.
- The introduction of a broad based fair use doctrine sponsoring parody and transformative use that does not fundamentally detract from the market of the original material. Sampling for purely private purposes should also be covered however a broad based exception for non commercial sampling would not be acceptable to many copyright owners or collecting societies as the sample could too easily be communicated to or caused to be heard by the public thereby damaging the market for the original material.

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<sup>169</sup> Consider W Fisher, 'Property and Contract on the Internet' (1999) 73 *Chicago-Kent Law Review* 1203.

<sup>170</sup> On creative and social innovation see: Lessig, above n 2; Howkins, above n 5; Hartley, above n 5; DCITA, above n 5; Ruddock, above n 160, [8].

- The availability of responsive and flexible commercial licensing mechanisms, whether statutory or otherwise, for sampling that will not be covered by the suggestions listed above.

In relation to culture jamming we need to clearly articulate what copyright and trade mark law will allow. A fair use provision that covered both would be welcomed. Section 122 of the *Trade Marks Act 1995* should be amended to provide an exception for defined areas of activity such as culture jamming. This should be mirrored in the *Copyright Act*.<sup>171</sup>

[298] The very heart of intellectual property law is about seeking a workable balance between the interests of many players in society — creators, owners, commercialising agents, performers, users, social commentators and the community to name a few. To this end Australian intellectual property law should allow some degree of sampling and culture jamming for no cost and without anyone's permission as this type of activity is the raw material of creative and social innovation. The time to address these issues seems to be well and truly upon us.

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<sup>171</sup> See, for example, the French and Spanish copyright law models. Under French copyright law an author may not prohibit a parody, pastiche or caricature. However, this exemption only applies if the parody imitates the work with humorous intent and does not create any confusion, injury or degrade the original author. Similarly, under Spanish copyright law parody is exempted from the author's right of adaptation, provided it does not confuse or harm the original work: Gredley and Maniatis, above n 118, 343–4.