“Can Daft Punk Play At My House?”
A case study of music sampling and copyright.

By Alan Hui

Submitted in fulfilment of the degree of Bachelor of Arts (Media and Communications) (Honours)

Department of Media and Communications, Faculty of Arts, The University of Sydney

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Abstract

This thesis analyses and discusses the tensions between sampling and copyright by posing the question: ‘Can Daft Punk Play At My House?’. It examines one particular case of music sampling - the Soulwax Shibuya Re-remix of LCD Soundsystem’s Daft Punk Is Playing At My House to consider the ways in which copyright views sampling as infringement and to what extent copyright can subsist in a work of sampling.

Following Chapter One on methodology, Chapter Two reviews the relevant legal, cultural studies and media studies literature to consider how sampling further challenges the copyright’s assumptions about author. Chapter Two demonstrates how sampling further challenges legal assumptions of what is a work and who is an author, and threshold tests, based on the concepts of originality, the idea-expression dichotomy and substantiality. It finds that the application of these assumptions and tests restrict the creative practice of sampling.

Chapter Three presents examines the case study recording through the interpretations of music commentators and brothers Stephen and David Dewaele, two of the four members of Soulwax. It also examines the case study through further interpretations of the case study by four relevant experts in the musical and legal fields, the subjects of primary interview research. Chapter Three finds that with the exception of the Licensing Manager’s view, all other interviewees, commentators and artists recognise the cumulative, creative contribution of Soulwax’s sampling over and above its reproduction of prior work by LCD Soundsystem, Daft Punk and other artists. It further finds by signing a contract with EMI, Soulwax gains access works for sampling but loses control of the rights in its Re-remixes.

Chapter Four discusses the shortcomings of existing music industry licensing and contractual agreements, analyses prospective solutions and identifies future challenges. Chapter Four shows that the application of copyright law, based on the problematic assumptions about the author discussed in Chapters Two and Three, and industry practice of sampling clearance, discussed in Chapter Three, contribute to the tragedy of the anti-commons. It further shows by entering into contracts with copyright owners, who are often not creators or authors, artists make this tragedy perpetual. It argues that a number of prospective solutions, particularly, Creative Commons and recognition of transformative works, under a fair use doctrine or a compulsory licensing system, make some progress to avoiding this tragedy. It identifies extreme sampling that stretches the threshold of recognisability and the sampling of oral cultures as future challenges for sampling and copyright.
Statement of Original Authorship

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text. I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis. I further certify that all human research in this study was conducted in strict accordance with the Human Ethics protocol approved by the Human Research Ethics Committee of The University of Sydney (Reference Number 11920).
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Chapter One: Methodology

This thesis analyses and discusses the tensions between sampling and copyright by posing the question: ‘Can Daft Punk Play at My House?’. It examines one particular case of music sampling - the Soulwax Shibuya Re-remix of LCD Soundsystem’s *Daft Punk Is Playing At My House* (the Re-remix), from the Soulwax album *Most Of The Remixes* to consider the ways in which copyright views sampling as infringement and to what extent copyright can subsist in a work of sampling.

The study is based on qualitative methods which best aligns with key copyright concepts - of author, originality, the idea-expression dichotomy and substantiality – which are used to determine whether copyright subsists in a work and whether that copyright has been infringed by a subsequent work. A quantitative study on sampling, with the intrinsic aim of generalisability, is impossible since there are no published figures on the extent to which sampling is used in commercially sold music, as compared to annual data on record sales eagerly published by the copyright industries that are often the basis of economic studies considering the impact of file sharing (see, for example, Liebowitz 2005). It is impracticable to design a quantitative study that aims generalise from a sample to a population of unknown size.

Chapter Two builds an interdisciplinary foundation for this thesis by reviewing the relevant legal, cultural studies and media studies literature on sampling and copyright. This review considers how sampling further challenges the copyright’s assumptions about author. This review presents significantly conflicting perspectives in the literature; as Eisenhardt notes, the “juxtaposition of conflicting results forces researchers into a more creative framebreaking mode of thinking than they might other be able to achieve. The result can be deeper insight into both the emergent theory and the conflicting literature” (1989:544; emphasis in original).

Chapter Three examines tensions between copyright and sampling in the case of the Re-remix. The Re-remix is chosen as the case studied for a number of reasons.

Firstly, the Re-remix brings questions of authorship to the forefront through relation between the title of the piece and samples that are used. The way in which Soulwax inserts samples of Daft Punk recordings into LCD Soundsystem’s original recording leaves little doubt that *Daft Punk Is Playing At My House*. Yet, the fact that LCD Soundsystem, rather than Daft Punk or Soulwax, is credited as the author of the original version and the Re-remix of *Daft Punk Is Playing At My House* raises questions about sampling clearance and permission at the heart of the question posed by the title of this thesis.
Secondly, the Re-remix demonstrates the divergence of creative practice and copyright evident in the Soulwax's straddling of the commercial and underground worlds. In November 2005, Soulwax released an untitled remix of *Daft Punk Is Playing At My House* on an underground album released under the pseudonym. This remix is identical to legitimately-released 2007 Re-remix, but lacks the permission of the latter release. On the album, Soulwax, along with three other artists are all listed under thinly veiled aliases: Soulwax, as Soulass; Xavier de Rosnay, one half of Justice, as Just X; DJ Mehdi as Idhem; and Feadz, as Zdaef. With no labels, track names, catalogue numbers or other common commercial identifiers, this album is a quintessential underground release.

Thirdly, the Re-remix demonstrates that transformative works are often cumulative works, and specifically that products of sampling can be combined with other creative elements. The Re-remix is an evolution of the Soulwax Shibuya Mix of *Daft Punk Is Playing At My House* which was released with the original unmixed version and featured a rearrangement with a new structure and sounds from drum beat machines and other synthesisers. To this first mix, the Re-remix inserts samples from recordings by Daft Punk and other Daft Punk-related artists to provide the quotation and appropriation that is implied in the title of the original LCD Soundsystem recording.

Fourthly, the Re-remix possesses a genealogy that illustrates the complexities created by sampling many recordings. The Re-remix samples the original version of LCD Soundsystem's *Daft Punk Is Playing At My House* and a number of Daft Punk recordings, including *The New Wave, Oh Yeah, Teachers, Harder Better Faster Stronger, Aerodynamic, Rollin' & Scratchin', Burnin', Rock'n Roll, Digital Love* and *Revolution 909*. The Re-remix also samples two recordings by one of the two artists of Daft Punk, Thomas Bangalter; the first released under his own name, titled *Spinal Scratch*, and a second released under his pseudonym Stardust, titled *Music Sounds Better With You*. The Re-remix also resamples a number of recordings sampled by Daft Punk, Thomas Bangalter and Stardust: *George Duke's I Love You More*, sampled in *Digital Love*; *Edwin Birdsong's Cola Bottle Baby*, sampled in *Harder Better Faster Stronger*; *George Benson's The World Is A Ghetto*, sampled in *Spinal Scratch*; and *Chaka Khan's Fate* sampled in *Music Sounds Better With You*. A diagram illustrating the sampling genealogy of the Re-remix is provided in Appendix One.

The Re-remix's genealogy is made more complex by the fact that copyright law recognises that each of the eighteen sampled recordings have both an underlying musical work; those with lyrics also have an underlying literary work. A comparision of lyrics in the Re-remix and the original version of *Daft Punk Is Playing At My House* is provided in Appendix Two. As Challis notes, “sampling without permission will usually violate two copyrights – in the sound recording copyright (usually owned by an artist or their record company) and
the copyright in the song itself (usually owned by the songwriter or their music publishing company)” (Challis 2003:np). In the cases where a sample involves lyrics, the copyright in the lyrics, a literary work, may also be involved.

Fifthly, the Re-remix is a product of a contractual agreement between Soulwax and EMI, a multinational corporation which controls the rights to the sampled works and recordings in its subsidiary music publishers and recording companies. This enables the study to not only examine primary tensions between copyright and sampling, but also secondary tensions between contractual agreements, enabled by copyright, and sampling.

Sixthly, the Re-remix itself and many of the sound recordings it samples have enjoyed chart success; these are more likely to be the subject of tensions between sampling and copyright. The Re-remix chosen resides on an album that reached the top 50 charts in a number of national music markets. Many of the Daft Punk and LCD Soundsystem sound recordings that the Re-remix samples also reached the top 50 charts in a number of music markets; for example, shortly after its 2005 release, LCD Soundsystem’s original, unmixed version of *Daft Punk Is Playing At My House* topped the UK Dance Chart and reached number 29 on the UK Singles Chart.

**Figure 1: The releases of the original, first mix, the second mix, and the third mix, which is the focus of this case study.**

*Daft Punk Is Playing At My House* [Original]
February 2005
Track 1
*Daft Punk Is Playing At My House*
Released under DFA Records (affiliated with EMI)
Available from retail outlets

*Daft Punk Is Playing At My House* (Soulwax Shibuya Mix)
February 2005
Track 2
*Daft Punk Is Playing At My House*
Released under DFA Records (affiliated with EMI)
Available from retail outlets
Chapter Two focuses on developing a set of interpretations about the tensions between sampling and copyright in the chosen, in accordance with Stake’s guidance on the case study method:

“Case study research is not sampling research. We do not study a case primarily to understand other cases. Our first obligation is to understand this one case.”

(Stake 1995:4)

One of the key means of achieving this understanding of the case study is “vigorous interpretation” (Stake 1995:9). Stake elaborates on importance of interpretation, arguing that “[k]nowing that other interpretations exist than those of researchers, the sophisticated researcher presents one or more of those others” (1995:9). This study provides such vigorous interpretation of the case study by including the interpretations of music commentators and through prior interviews, brothers Stephen and David Dewaele, two of the four members of Soulwax. It further undertakes primary interview research to seek out further interpretations of the case study by four relevant experts in the musical and legal fields:

1. Dr Matthew Rimmer, Senior Lecturer and Associate Director of Research, ANU College of Law. He has published widely on copyright law and information technology, and other intellectual property areas. He is the author of Digital Copyright and the Consumer
Revolution: Hands off my iPod which includes a section on sampling and mash-ups and has completed a PhD on The Pirate Bazaar: The Social Life of Copyright Law. He is a member of the Copyright and Intellectual Property Advisory Group of the Australian Library and Information Association, and a director of the Australian Digital Alliance.

2. A former licensing manager at one of the big four music publishers - Universal Music Group, Sony BMG, Warner Music Group – with over a decade of experience in music publishing. She will be referred to as Licensing Manager (LM).

3. An intellectual property academic and former head of a world-leading law faculty. She is a leading thinker in intellectual property law. She has released a comprehensive volume on Intellectual Property and is well published in law journals on the subject of copyright. She is involved in the World Intellectual Property Organisation. She will be referred to as Intellectual Property Academic (IPA).

4. An internationally-renowned Australian composer and lecturer in composition and media technology at a leading Australian music school. She teaches a course in digital music composition. Her compositions are commissioned and performed by leading Australian and international performing arts institutions. She has completed a PhD on music composition. She will be referred to as Composer Lecturer (CL).

Prior to her interview, CL is played the sound recordings in, and sampled by, the case studied, to enable her to provide an expert opinion on the nature of sampling in this case. This was done under the guidance of common law in past music copyright cases. In reviewing the decision of Justice Wilberforce in Francis Day & Hunter Ltd v Bron, Justice Willmer of the United States Appeal Court was unable to overturn the earlier decision as the appeal court did not have the input of musical experts who “illustrated the technical evidence which they gave by demonstrations, both vocally and on the piano, a pleasure the Appeal Court had not enjoyed” (quoted in van Caenegem 2002:64). This principle is also evident in the earlier United Kingdom case of Austin v Columbia Gramophone Co Ltd, in which Justice Astbury stated in that “[i]nfringement of copyright in music is not a question of note for note comparison’ but falls to be determined ‘by the ear as well as by the eye’” (quoted in Ricketson and Richardson 2005:278; line references removed).

In accordance with ethics requirements which bind this thesis, all of the above-listed experts were offered guaranteed anonymity to give them the ability to speak candidly; Dr Matthew Rimmer indicated that he would prefer to be a named subject.
As Olson and Rueter note, “[i]nterviews are the most common method for eliciting knowledge from the expert” (Olson and Rueter 1987). However interviews face a problem when used with the case study method. Stake touts “case study as being noninterventive and empathetic...we try not to disturb the ordinary activity of the case, not to test, not even to interview” (1995:12). Stake resolves this problem, arguing that “[t]wo principal uses of case study are to obtain the descriptions and interpretations of others... [q]ualitative researchers take pride in discovering and portraying the multiple views of the case. The interview is the main road to multiple realities” (1995:64). Stake’s view is clearly that interviews are highly appropriate for gaining a wealth of interpretations for deeper understanding of the case study.

As Stake notes, the purpose of an interview is to gain “description of an episode, a linkage, an explanation” (1995:65). Given the highly qualitative and complex nature of many concepts in sampling and copyright, interviews provide ample opportunities for experts to speak candidly about their interpretations of the case study and opportunity for the researcher to follow up and probe during the interview. By comparison, qualitative data collection methods such as survey and questionnaire provide less flexibility and depth that is needed for eliciting in-depth expert interpretations.

Semi-structured interviews have been chosen over structured and unstructured forms of interviews. Minichiello et. al. point out, “researchers using structured interviewing assume that they know what sort of information they are after” (Minichiello et. al. 2005:64). Given that the purpose of interviews is to gain a variety of interpretations, it is prudent to avoid anticipating the interpretations of experts, making the structured interview unsuitable. Unstructured forms of interviews are also inappropriate as they do not guide the expert to deal with issues that are specific to the case study; “the expert can get side-tracked, or may assume that the elicitor has knowledge which she/he has not” (Hoffman et. al. note 1995:134).

In this study’s semi-structured interviews, experts are given substantial freedom to discuss the case study with issue-oriented questions to guide the conversation. This is in line with Stake’s recommendations:

“Qualitative case study seldom proceeds as a survey with the same questions asked of each respondent; rather each interviewee is expected to have had unique experiences, special stories to tell. The qualitative interviewer should arrive with a short list of issue-oriented questions”

(Stake 1995:65)

Chapter Four uses findings from the case study in Chapter Three to analyse existing, prospective solutions to the tensions between sampling and copyright,
and identify future challenges. It examines shortcomings in the current systems of copyright, contractual agreements and licensing and reviews prospective solutions, particularly Creative Commons licenses, the fair use doctrine for transformative uses and compulsory licensing for transformative uses. Finally, it identifies some aspects of sampling that challenge the application of copyright.
Chapter Two: Literature Review

Sampling is “the process of recycling sound fragments previously recorded by other musicians for use in new recordings” (Bergman 2005:623). Ben Challis takes a broader view, stating: “Sampling can be simply defined as the incorporation of pre-existing recordings into a new recording” (Challis 2003:np). Sampling is “largely a digital phenomenon, involving the conversion of an analog sound to digital information through periodic “snapshots” of its electrical signal (and the reversal of this process when sound is generated” (Butler 2006:60). The tension between copyright and sampling is succinctly expressed by pop-music critic Neil Strauss who asks: “Sampling is (a) creative or (b) theft?” (Strauss 1997:28). David Metzer proposes that sampling is both; in other words, “creative theft” (Metzer 2003:161).

Sampling as creative theft has two vital musical lineages - musical quotation and appropriation. Ronald Rosen argues that sampling is an extension of musical quotation, noting parallels to Tchaikovsky's quotation of battle songs in the 1812 Overture and Mendelssohn's quoting of Dresden Amen in his Reformation Symphony (Rosen 2008:315). Alternatively, Kembrew McLeod locates sampling in the tradition of appropriation: “Appropriation is an important method that creative people have used to comment on the world for years, from the radical Dada art of the early twentieth century to the beats and rhymes of hip-hop artists today” (McLeod 2005:24).

Sampling extends the creative practices of quotation and appropriation. Metzer notes “not only can any sound be borrowed, but also, with the capabilities of computer editing, almost anything can be done to that sound” (Metzer 2003:164). McLeod concurs, noting that “once it was introduced in the mid-1980s, the digital sampler allowed for a new method of musical appropriation. Hip hop producers could now manipulate recorded sound in a more complicated and sophisticated way” (McLeod 2005:77). In addition, sampling has been common practice in diverse range of recent genres of music including the dub of 1960s Jamaican reggae (Bergman 2005:623; Hebdige 1987:14; Vaidhyanathan 2003:138), blues and jazz in the African American tradition (McLeod 2005:30), hip hop of 1970s New York (Fitzgerald and O'Brien 2005:159) and rap (Schumacher 1995:253). One creator of the case study recording considered in this thesis, David Dewaele of Soulwax, bluntly notes that sampling enables them to transcend genres, as “a big “fuck you” to dance and DJ culture. We were frustrated. Y'know, what's up with these guys showing up with three hours of deep house? It's boring us to death!” (Katigbak 2002:np).

As sampling simultaneously uses and produces creative material, sampling artists like Soulwax are hybrid producer-users, which Axel Bruns terms “produsers” (Bruns 2006), or hybrid producer-consumers, which Alvin Toffler terms “prosumers” (Toffler 1980). The challenge of the two-sided producing
and using sampling practice to copyright is particularly troubling for David Dewaele. When asked about the phenomena of digitalisation and file-sharing, Dewaele responds: “As a user-consumer, I think it’s one of the best things to happen in years. As an artist who should get paid—something has to give, something has to change somewhere. But it’s not really clear what it is” (quoted in Katigbak 2002:np).

Dewaele’s argument that the creative practice of sampling has been greatly aided by digitalisation and file-sharing is in stark contrast with the more common characterisation of file-sharing of digital music as a form of theft or piracy, challenging the exclusive right of reproduction under copyright law; that is, the right to make copies. This right was once central to copyright, to the point that it was “commonly termed the fundamental copyright right” (Litman 2001:176), and enjoyed a natural protection; that was, that the cost of creating new copies typically exceeded the cost of buying a legitimate copy. The audiocassette, followed by a succession of digital audio formats such as CD, mp3 and digital audio tape, have enabled users to make cheap, perfect copies. As Jessica Litman notes “[d]igital reproduction posed a potent threat, record companies argued, because it permitted the recording of countless perfect copies” (Litman 2001:59). The rise of file-sharing of digital music and other media, first through peer-to-peer systems and now the more elusive torrent systems, has further eroded the natural protection of the right of reproduction, enabling individuals to access and share cheap, perfect copies of recordings.

An often overlooked benefit of file-sharing is access to a virtual library of works for sampling artists, which greater creative exploitation of three particular attributes of digital formats, “fidelity, compression and malleability” (Goldstein 1994:197). As media futurist Gerd Leonhard argues, copyright “is no longer about copies, it’s no longer about the right to copy, it’s no longer about reproduction – it’s about how music is being used and how to participate in those much larger revenues” (Leonhard 2007:6-7.). Leonhard is echoed by Litman who argues that “[t]he right to make copies, though, is not fundamental to copyright in any sense other than the historical one” (Litman 2001:177). In effect, Leonhard and Litman redirect attention to the rights to make adaptive, derivative and transformative works, and those rights enshrined in fair use and fair dealing exceptions that continue to be important in promoting the objective of copyright, the progress of the arts and the continuing production of creative works.

One particular manifestation of sampling artists using file-sharing is MP3 mash-ups “where thousands of bedroom composers are creating new songs by smashing together two different songs and putting them on the Internet for free” (McLeod 2005:72). File-sharing networks act allow these composers to both access, create and distribute works. The sensibility of MP3 mash-ups
“echoes philosopher Jacques Derrida’s writings, in which he encouraged readers to play with the text—mocking, deconstructing, and reconstructing it” (McLeod 2005:72).

Vaidhyanathan argues that “profound creativity requires maximum exposure to others’ works and liberal freedoms to reuse and reshape others’ material.” (Vaidhyanathan 2003:186). While file-sharing has vastly increased potential exposure to works, creators have lost liberal creative freedoms to “perfect” technological and legal measures, copyright’s response to file-sharing. In Australia, these measures have been created by the US Free Trade Agreement Implementation Act 2004 (Cth), which has adopted many of the measures of the infamous Digital Millennium Copyright Act 1999 (US) and the controversial Copyright Term Extension Act 1998 (US), which increased the term of copyright for authored works to seventy years after the death of the author. These measures have limited the potential collaborative cultural production noted by one early commentator of the Internet:

“In many respects, the conditions of the Internet environment today resemble those which prevailed at other moments of polymorphous collaboration, unrestrained plagiarism, and extraordinary cultural productivity – such as the Elizabethan stage or Hollywood before 1915.” (Jaszi 1992:319)

Sampling requires not only access to sound recordings but also to underlying musical works in compositions and literary works in lyric. As permission must be sought for each work, in a process known in the licensing industry as sampling clearance, a complex system of transactions is created, leading to what Heller describes as “the tragedy of the anti-commons” (Heller 1998:624). The increase in the scope of copyright furthers this tragedy and “starves the public domain of raw material” (Vaidhyanathan 2003:186). Such starvation was a particular concern to seventeen leading economists in a 2002 amicus brief in Eldred v Ashcroft, challenging the constitutionality of the Copyright Term Extension Act 1998 (US) in the United States Supreme Court. These economists, including five Nobel laureates from diverse schools of economic thought, represent a consensus amongst economic theorists that longer copyright terms limit access to works for derivative use and have significant economic and social cost:

“When copyright holders are numerous, it is costly to negotiate and reach agreements with all of them. One result is a “tragedy of the anti-commons”: when too many parties have actual or potential vetoes on the creation of an economically valuable object, that object will tend to be underproduced. The resulting costs to society take two forms: the expenditure of resources to organize and complete these agreements,
and a reduction in works created due to the higher costs of producing them.”

(Akerlof et. al. 2002:13)

Restricted access to works compound the limitations laid down by the first legal precedent on sampling, a “terse sixteen-hundred-word ruling that all but shut down the practice of unauthorized sampling” (Vaidhyanathan 2003:141). In the ruling, for the 1991 case of *Grand Upright Music, Ltd v Warner Bros. Records*, judge Kevin Thomas Duffy of United States District Court for the Southern District of New York admonished the sampling artist Biz Markie with the Seventh Commandment: Thou shalt not steal. Duffy clearly saw sampling as akin to theft or piracy, devoid of intrinsic creativity; to him all sampling was theft. McLeod notes, following the Duffy judgement, that the “new sample licensing rules didn’t differentiate between collaging small sonic chunks and using entire choruses” (McLeod 2005:68).

Duffy’s judgement echoes the views of Juan Carlos Thom, a Los Angeles musician, playwright and legal academic. Thom argues that “[o]ne of the main reasons that digital sampling is difficult to conceptualize [sic] is because digital piracy occurs during record production, not subsequently” (Thom 1988:331). Thom concludes that “[d]igital sampling is a pirate’s dream come true and a nightmare for all the artists, musicians, engineers and record manufacturers” (Thom 1998:336).

Thomas Schumacher points out the underlying flaw in Thom’s argument, that that sampling “is quite distinct from the practices of illegal record pressing... and home-taping... [t]his point is missed sorely by Thom” (Schumacher 1995:268). David Metzer concurs with Schumacher’s assessment of Thom’s argument, noting that “lawyers have witnessed only half of the act of quotation: drawing upon a pre-existent piece” (2003:166). Metzer notes that “there is no distinction between pirates copying recordings and artists quoting from those recordings. When applied so blindly, copyright becomes an obstacle to creative expression” (Metzer 2003:170; footnote references removed).

This “blind” application of copyright law to the creative practice of sampling reveals shortcomings in legal assumptions of what is a work and who is an author, and threshold tests, based on the concepts of originality, the idea-expression dichotomy and substantiality.

Vaidhyanathan argues that because “[a]ny person with a series of recorded tracks from old songs can fuse them together with a $2,000 electronic mixer and rap over the bed of other people’s music, creating a new “work” composed by dozens of “author”” (2003:14), “[s]ampling seemed to undermine the very definitions of “work,” “author,” and “original” – terms on which copyright law

Sampling particularly challenges copyright’s conceptualisation of the author in at least three ways. Firstly, as Goodwin notes, the rise of sampling technology has “eroded the divisions... between human- and machine-performed music” (Goodwin 1990:262), which questions whether human authorship is the only form of authorship that should be considered. Indeed, Goodwin argues that “[w]e have grown used to connecting machines and funkiness” (1990:263).

Secondly, by making artists an author and a user simultaneously under the gaze of copyright, sampling extends the critique of the concept of the author. For example, Foucault argues that “[t]he coming into being of the notion of the ‘author’ constitutes a privileged moment of individualization [sic] in the history of ideas” (Foucault 1979:141; emphasis in original). A key significance of Foucault’s argument to copyright law is that “the idea of “authorship” was neither natural nor inevitable, but represented only one possible means to the end of constraining the “proliferation of meaning”” (Jaszi 1992:293). By challenging the privileged contribution to meaning by authorship, sampling further undermines one of the foundations of copyright.

Thirdly, sampling greatly extends problems of cumulative authorship for copyright, as “[a]rtists collaborate over space and time, even if they lived [sic] centuries and continents apart” (Vaidhyanathan 2003:139). Copyright’s granting of exclusive rights to individual authors ignores the fact that all creation is some extent derivative; as Spence notes, ”[s]ince at least the creation of the world, nothing has been created ex nihilo” (2007:26). Hebdige notes that the phenomenon of ‘versioning’ in reggae, a form of sampling which involves continuous borrowing and recycling of musical standards, shows that “no one has the final say. Everybody has a chance to make a contribution. And no one’s version is treated as Holy Writ” (Hebdige 1987:14; quoted in McLeod 2005:70). Barthes also recognises the issue of cumulative authorship: “What I write about myself is never the last word.” (Barthes 1977:120; quoted in McLeod 2005:70; emphasis in original). Indeed, sampling can wrest control of works away from their original ‘authors’. As Shrage notes, “we don’t just collaborate with people; we also collaborate with the patterns and symbols people create” (Shrage 1990:41).

Metzer recognises that sampling brings prior authors into new recordings, even without their physical presence in the recording studio, asking “[w]hy use just the melody of “Big Yellow Taxi,” when you can have Joni Mitchell singing that melody?” (Metzer 2003:164). When listening to the Re-remix, it is difficult to deny that Daft Punk is really playing at your house when samples of Daft Punk
recordings are woven into the LCD Soundsystem original. Sampling technologies "give the "death of the author" a new meaning, especially when authors really do die but are then resurrected in advertisements and songs" (McLeod 2005:167).

Fourthly, sampling furthers the tragedy of the anti-commons by adding to the complexity of “allocating responsibility [to authors] for, and rights over, either separate parts of the joint creation or the joint creation as a whole” (Spence 2007:26). Jaszi notes that, in legal jurisdictions that recognise joint authorship, each joint author is “entitled to use and authorize [sic] the use of the work as though he or she were solely responsible for its creation” (Jaszi 1992:315). This creates a system allows interests in prior works to restrict the production of new creative works. Even if copyright resolves the dilemma of joint authorship with prior authors in new recording, it still faces a more complicates process of

Sampling’s challenge to copyright’s conceptualisation of the author is well summarised by McLeod:

“The things that DJ Derrida, Funckmaster Foucault, and Roland 808 Barthes wrote about in the late 1960s and 1970s foreshadowed, in part, the way today’s young adults have been brought up reading and playing with fragmented, hyperlinked texts and images. The manner in which my college students use the Internet and editing software has severely damaged the myth of the individual genius author, for it gives them the tools to freely collage image, music, and text”.

(McLeod 2005:73)

By challenging the conceptualisation of author, sampling also challenges copyright’s conceptualisation of originality, a “fundamental principle of copyright [which] implies that the author or artist created the work through his or her own skill, labor [sic], and judgement” (Nelson and Dwight 1982:251-261; cited in Vaidhyanathan 2003:20). Van Caenegem states this view more simply: “Copyright will only subsist in an original work” (Van Caenegem 2006:39).

Walter Benjamin argues "that which withers in the age of mechanical reproduction is the aura of the work of art... the technique of reproduction detaches the reproduced object from the domain of tradition" (Benjamin 1935:3, translated in 1968:219), “which must be traced from the situation of the original” (1935:3, translated in 1968:219). McLeod clarifies Benjamin argument “that mechanical reproduction undermines traditional ideas of originality because it overwhelms the “aura” of the original work. The aura decays and the distance between the work and the audience shrinks” (McLeod 2005:128). From Benjamin's position, it is possible to argue that sampling extends mechanical reproduction’s challenge to the aura of the original work. As Metzer
notes, sampling as quotation is transgressive theft that “gives a sound new associations... [and] is a fetishist act that surrounds a sound with an aura of illegality” (Metzer 2003:172). Thus, the aura of the original is displaced by the aura of the illegal.

Goodwin mounts an alternative argument, that “the Age of Plunder is in fact one in which pop recuperates its history, rather than denying it” (1990:271). Goodwin argues that sampling may in fact reverse the decay of the aura of the original, “enhance the power of the aura of the original moment of recording” (Goodwin 1990:270), leading to the “fetishization [sic] of the “original” recorded moment...[and] no doubt have the capacity to break the barrier between the original and the copy” (1990:270).

Both Mezter and Goodwin make valid arguments about sampling’s challenge to, and enhancing of, the original. As Metzer argues that “[q]uotation – recalling – is a two sided gesture: the original and the transformation. With sampling, both sides are expanded: material can be quoted from more sources, and more can be done with it” (Metzer 2003:163). A work of sampling is both a derivative work, as it uses prior works, and a transformative work, as it features creative contributions over and above the mere reproduction of prior works. While derivative uses are commonly recognised as fair uses by copyright, transformative works are only recognised as fair use in limited copyright territories, notably the United States. Sampling demands a reconfiguration of copyright’s protection of the original as it plunders the original, and in this act of quotation, appropriation and transformation, simultaneously enhances the original and creates a new original.

Currently, originality, as a key test for copyright subsistence, subjects sampling to a double standard of protection. As Loughlan argues, “[s]ince originality is a prerequisite for copyright in works, the level at which the standard of originality is set is of great importance” (Loughlan 1998:36). Ryan Littrell notes, based on the judgement in the United States Supreme Court of the landmark 1991 case of Feist Publications, Inc v Rural Telephone Service Company, Inc, “[i]n order for a work to be copyrighted, it need only exhibit an “extremely low” level of originality” (Littrell 2001:193). This low originality standard hinders sampling artists by ensuring that copyright permission must be sought for the sampling of almost all copyright material.

However, the same low originality standard does not ensure that copyright may subsist in a work of sampling. Ricketson and Richardson argue that in cases of derivative works, such as works of sampling, the “requirement for originality is satisfied in these instances by the original contribution made by the alleged author in ‘working on’ the pre-existing material, through the acts of selection, arrangement, translation, and so on” (2005:214). However, Loughlan notes two
common law principles for originality in relation to copyright that hinder Ricketson and Richardson’s argument:

1) “the work must not have been copied from any other work”; and
2) “where the form of expression of a work shows the application of some degree of knowledge, judgement, skill or labour by the author, that work may be original enough for the subsistence of copyright.”

(Loughlan 1998:36)

These two principles echo are echoed in the judgement of Feist Publications, Inc v Rural Telephone Service Company, Inc: “Originality, as the term is used in copyright, means only that the work is independently created... and that it possesses at least some minimal degree of creativity”. Although sampling may satisfy Loughlan’s second principle, it clearly fails the first principle. This illustrates a key challenge of sampling to copyright; as Metzer notes that “[c]opyright rests upon a distinction between copying and creation. Sampling collapses that distinction. The sampler is at once a copying instrument – a recording device – and a creative instrument – a machine used for transformations” (Metzer 2003:170; footnote references removed). The current originality standard fails to account for the creativity in transformation.

Sampling also challenges the idea-expression dichotomy, which provides unfettered access to a public domain of ideas, but demands permission for access to expressions. As Peterson J states in University of London Press Ltd v University Tutorial Press Ltd, copyright acts “are not concerned with originality of ideas but with the expression of thought... The originality which is required related to the expression must be in an original or novel form” (quoted in van Caenegem 2006:39). Thus, sampling of ideas is unrestricted, while sampling of expressions is controlled.

Copyright law has typically viewed sound recordings as expressions because they are fixed in a tangible form; as Carlos Thom argues, “[s]ounds are not ideas, but expressions, and therefore copyrighted works” (Thom 1998:336). This view of copyright is challenged as “with sampling, musicians can borrow sound, not just melodies, rhythms, or harmonies” (Metzer 2003:164). Commenting at the early days of digital composition, Kenneth Gaburo notes that “[o]ne of the profound realizations [sic] regarding electronic music composed for tape is: the tape is the notation is the music is the tape. There are no other scores, notations, histories, books, documents, records which can stand in for it” (Gaburo 1986:50 cited in Burt 1994:72). This leads Vaidyanathan to argue that the idea-expression dichotomy is an irrelevant threshold test for sampling:

“Sampling is transformation: using an expression as an idea; using what was once melody as a beat, an element of rhythm. Sampling is not theft.
It’s recycling. If we define an expression by what it does, instead of what it did, it no longer counts as an expression”.

(Vaidhyanathan 2003:145)

In the application of copyright law, the idea-expression dichotomy has attempted to support cumulative creation, by balancing the rights of prior and subsequent authors. Sampling makes the idea-expression dichotomy arguably irrelevant, and difficult to apply at best, and requires a new test. One potential test, separating merely reproductive uses from transformative uses, is considered in detail in Chapter Four.

The creative practice of digital sampling also poses problems for copyright’s substantiality test, under which only use of samples that are substantial constitutes infringement. Common law has applied the principle of de minimus non curat lex, which translates to ‘the law cares not for trifles’, to exempt insubstantial samples from the radar of copyright (Rosen 2008:315). An important case of de minimus sampling is the case of Newton v Diamond, in which composer James W. Newton claimed that the Beastie Boys sampled a three note sequence, lasting six seconds, from his composition Choir. The Beastie Boys obtained a license to sample the sound recording of Choir from ECM Records but did not obtain a license from Newton to use his composition.

The United States Court of Appeals for the Ninth Circuit affirmed the summary judgement of the District Court that the Beastie Boys’ sampling was de minimus and therefore permitted without a license from Newton. However, the judgement in Newton v Diamond is an ambiguous precedent for de minimus use as the case does not actually address whether a de minimus standard would apply to the sampling of sound recordings. As Fitzgerald and O’Brien note, “Newton is a confusing precedent as the Beastie Boys had licensed the sound recording so what was in issue was simply sampling of the music or score” (Fitzgerald and O’Brien 2005:169).

Copyright is also challenges by the use of substantial and recognisable samples which are often central to the creative practice sampling, particularly as a form of quotation. Rosen argues that the application of the de minimus standard to cases of digital sampling of existing works confirms that “the courts have seldom if ever considered the history and established practice of musical quotation” (Rosen 2008:315). Consequently, creators are restricted to the use of trivial, usually unrecognisable samples which are of little creative value in an act of quotation.

An important illustration of copyright’s restriction on the use of substantial samples is evident in its application to mash-ups, which splice many samples from two or more song together. A key case to consider is DJ Danger Mouse’s
The Grey Album which, as the name implies, splices a large number of substantial samples from The Beatles’ White Album and Jay-Z’s The Black Album. As Rimmer notes, “The Grey Album is not a minimalist piece of sampling; on the contrary, it is a maximalist appropriation of the work of The Beatles and Jay-Z. It is doubtful that a court would dismiss the amount of copying as merely trifling” (Rimmer 2007:138). Upon the album’s 2003 release, Brian Burton, who creates under the artist name of DJ Danger Mouse, received a cease and desist letter from EMI, owner of the rights to the sound recording of the White Album. DJ Danger Mouse complied with the letter and ceased distribution shortly afterwards. As Challis notes, “the position in UK and US law now seems to have reached the point that any "recognisable" use would infringe” (2003:np). This restricts potential creativity, as sampling is often attractive to composers precisely because it enables the use of a recognisable part.

More recently, sampling has entirely confounded the substantiality test in copyright in a case that closes the door to the already limited de minimus standard. The judgement of the United States Court of Appeals for the Sixth Circuit in Bridgeport Music Inc v Dimension Films Inc, overturning an earlier District Court ruling, found that even de minimus sampling constitutes copyright infringement. In this case, Bridgeport Music sued Dimension Films for using a sample of a two-second, three-note, arpeggiated chord solo guitar riff from the rap song 100 Miles and Runnin’ in the soundtrack of the film I Got the Hook Up. The sample was altered by lowering the pitch, looping the sample and extending it to 16 beats. The looped sample is featured five times in the film’s soundtrack. In its judgement, the Court unequivocally stated 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”. As Fitzgerald and O’ Brien note, quoting from the judgement of Justice Guy, the “message from Bridgeport Music Inc v Dimension Films Inc, is clear, ‘get a license or do not sample’” (Fitzgerald and O’Brien 2007:169). Justice Guy’s judgement echoes an earlier contention that “any kind of sampling without the consent of the copyright owner will prima-facie amount to infringement” (Challis 2003:np). In short, the substantiality test prevents the creative practice of sampling without permission.

The literature reviewed demonstrates that the creative practice of digital sampling stretches copyright’s ability to both enable and protect works of sampling, particularly by challenging legal assumptions of what is a work, an author and original, and legal threshold tests of originality, the idea-expression dichotomy and substantiality. Copyright law has sidestepped this challenge, deferring the responsibility to existing copyright owners in music publishers, holding rights to musical and literary works, and recording companies, holding rights to sound recordings. McLeod argues that this severely limits the creative practice of digital sampling. He notes particularly that “[i]n the case of digital
sampling, the primary barriers to creativity revolve around the fact that copyright owners can: (1) censor the sampling of sounds they own; (2) demand prohibitively expensive fees; and (3) assert that all unauthorized sonic quotations are theft” (2005:110).

For sampling, the current system of copyright is part of what Marshall McLuhan describes as the “rear-view mirror society” (McLuhan and Fiore 1967:100), which tends to view the present in terms of the past. McLuhan writes that the implication of the rear-view mirror society is that:

“many of our institutions suppress the direct experience of youth, who respond with untaught delight to the poetry and the beauty of the new technological environment...”

(McLuhan and Fiore 1967:100)

In the case of sampling, the institution of copyright is suppressing the experience of this generation of sampling composers, and existing music publishers and recording companies view sampling artists, their works and creative practices in terms of the status quo. This rear-view mirror society labels all unauthorised copying piracy or theft, and engenders a system of ‘incentive’ based on exclusive rights where the interests of existing creativity restricts new creativity. For sampling artists, “this only door for them is slammed in their faces by a rear-view mirror society” (McLuhan and Fiore 1967:100).

The following chapter examines the case of the Soulwax Shibuya Re-remix of LCD Soundsystem’s Daft Punk Is Playing At My House to develop understanding of the creative practice of sampling, the relevant role of copyright and licensing. The chapter also examines the validity of the succinct metaphors of Canadian sampling artist John Oswald: “If creativity is a field, copyright is the fence” (quoted in Metzer 2003:170).
Chapter Three: Case Study

Composer Lecturer (CL) uses a hypothetical to illustrate the difficulty in attributing authorship in the Re-remix. He raises a parallel example to the Soulwax’s quotation of recordings by Daft Punk, LCD Soundsystem and other artists, in a hypothetical piece titled:

“Siegfried Interlude Number One. Siegfried is obviously based on Wagner’s opera because they used different themes from it and, you know, chop ‘em up and put in new rhythms... Now, is that Wagner arranged by me or is it my work using themes by Wagner?”

(see Appendix Six)

Matthew Rimmer adds to CL’s hypothetical, noting that “copyright law works on a very traditional kind of a notion that there’s particular author who creates a musical work” (see Appendix Three). Copyright’s assumptions about authors and their work are echoed by Stephen Dewaele of Soulwax, who likens the complexity of joint authorship that Soulwax faces to schizophrenia:

“[S]ometimes we are a rock band, sometimes we play dance music, sometimes we play the remixes that we’ve made for other people live, sometimes we make documentaries, sometimes we are 2 Many DJs. It’s really hard to explain. I think we’re very schizophrenic people” (quoted in Szmanda 2008:np).

CL views the Re-remix as a product of musical quotation, a creative practice that is now controlled through copyright:

“It’s an example of using someone else’s melodies in your piece and people have done it throughout history... musical quotation. It goes right back to medieval times... composers do, have and always have, really, done this thing where they will use other people’s material. And it’s because of copyright laws now that it’s an issue.”

(see Appendix Six)

IPA contends that “I think you ought to be able to quote work where it’s necessary in order to comment on the work itself or its author” (see Appendix Five). CL concurs with IPA, adding that in this case of quotation, Soulwax particularly needed access to Daft Punk’s works to fulfil the missed potential of the LCD Soundsystem original:

“Daft Punk Is Playing At My House. Well, it’s a nice phrase but the original song didn’t have anything to do [with Daft Punk], I was expecting something to do with Daft Punk and I couldn’t hear it... it just makes sense that if Daft Punk is playing at my house, you have to reference Daft
Punk in there. Otherwise it could be anyone playing at my house. *Lindsay Lohan is Playing at My House*. It could have said that, really, and it wouldn’t have made any difference.”

(see Appendix Six)

David Dewaele argues that Soulwax can create new value in a work through the transformative nature of sampling, arguing that “if a track is not that good, it makes it sometimes easier because you can just take a little part that you like and you just use that. Most of the remixes that we do just take a little bit and then we completely redo it” (Arthanayake 2008:np).

CL concurs with Dewaele’s assessment of the potential of sampling in exploiting works, arguing that the Re-remix is

“a little bit more creative. And it’s obvious because the first song, Daft Punk is Playing at My House is boring. It’s pretty standard. There’s not much going on in it apart from the fact the way it’s sung is slightly interesting”

(see Appendix Six)

CL suggests that the final Re-remix is more creative than the original, unmixed version. She notes that Soulwax combines sampling with “more colours and things in there, a new drum beat” (see Appendix Six) to create their Re-remix, a piece that is “harder listening; there’s more in it and there’s more diverse themes” (see Appendix Six). She argues that the additional creative input in the Re-remix is likely not to displace the popularity of the original:

“If you had to say which of these was more popular, you’d say the first one [the original] because it’s more straightforward. A bit boring, but the last one [the Re-remix] was actually more interesting because it had different layers going on”

(see Appendix Six).

Rimmer notes that Soulwax gains an aura of transgression by releasing the untitled remix on *Bootleggers with Respect Vol II* in breach of copyright law, as an artist who

“Likes to be massively infringing through a mash-up because they then have the kind of aura and halo of transgression and piracy... certain kinds of transgressive artists will not want to abide by the law and indeed gain a certain kind of cache in terms of their underground status by being in breach of copyright law.”

(see Appendix Three)
Potentially, Soulwax may be leveraging their underground status from the untitled remix in its release of the Re-remix on *Most of the remixes*.

However, the consequence of such transgression for the untitled remix is, as Licensing Manager (LM) notes, that its release is “null and void then because if they didn’t get permission then they have no rights to it. Technically they can be forced to pull all copies from the shelf and destroy them” (see Appendix Four). This is consistent with unavailability of the record untitled release following EMI’s release of the Re-remix.

In a 2007 interview, Brothers Stephen and David Dewaele, of Soulwax, contend that the burden of sampling clearance was overcome by signing with EMI:

“...the reason we did the album with EMI, is because they own the rights for most of the artists... it was really convenient ‘cause most of the people used to be on Virgin or like Parlophone.”

*(Analog Magazine 2007:np)*

LM contends that the EMI would encourage Soulwax to sign over rights to the Re-remix to EMI subsidiary music publishers and recording companies, in exchange for rights to sample its material, using a ‘carrot and stick’ approach:

“You’d want it to go ahead. It’s more money. Another CD out there with your songs on it that you’re getting royalties for... It’s a no brainer... we’re going to wipe of the face of this earth and take them to the cleaners, or they’re going to start paying these royalties properly and we’re going to get it all legit... yes, they’ll get a legal letter from the lawyers of the company but if we can come to an amicable solution, it doesn’t have to involve courts and a lot of expense. What business isn’t going to take that?”

*(see Appendix Four)*

CL notes that the opinion of authors may be of limited relevance when gaining permission for works because publishers, through contractual agreements, often own the rights: “if they ask me permission, I would say yes. Go ahead. But this is a work that I own, right? Not my publisher. Because my publishers own my copyright” (see Appendix Six).

LM confirms CL’s point, that for works created during the period of a contract, permission often lies with publishers, not composers. She points out that “with a music publisher, what you’d normally do is sign a deal with someone [so] that you own the rights to every song they create within that period of time” (see Appendix Four). LM also provides an insight into how royalties were likely to have been apportioned in the contractual agreement between Soulwax and EMI.
She argues that the case study piece, made up almost entirely of samples from Daft Punk and LCD Soundsystem, is a medley:

“If you’ve got a three minute song, and two point nine of that three is made of up of works that you control, I’d just be sitting there going I want a lot. That whole song is my creator’s. So a hundred percent of the music publisher royalties… You didn’t really create a song. You made a collage or a medley. In musical terms, you’ve made a medley of works that we created… The record company would do the same kind of thing.”

(see Appendix Four)

Matthew Rimmer notes that LM’s emphasis on granting permission “is the traditional kind of record industry approach… everything has to be cleared, everything has to be paid for, everything has to be licensed” (see Appendix Three). CL provides a number of alternatives to the LM’s view of a product of sampling as a medley, and her way of apportioning royalties in the Re-remix, but is ultimately unable to determine the most appropriate expert or person to decide whether the sample should be cleared:

“I think it has to be recognisable by the average person. Maybe it’s got to be accessible to the composer of the first piece… maybe the lay person isn’t the answer… and then the problem is when they’re [the composer of the first piece] dead, then what do you do? And then you go to court. Or do you have to? Well, that’s what ends up happening. And you do get estates who, like Yoko Ono, who are very protective.”

(see Appendix Six)

IPA takes a different approach to LM on the issue of whether the Re-remix is a medley:

“I think the question as whether or not it is a medley is an interesting one. It partly depends upon the extent to which the recoding creates a new work that can be called something more than a medley. Whether or not it’s a medley… is irrelevant for the purpose of copyright law because if it takes more than a substantial portion of the original work then it is an infringement whatever you might call the end result.”

(see Appendix Five)

While the question of whether the Re-remix is medley may be irrelevant for the purpose of copyright law, LM argues that it may be relevant for the purpose of licensing:

“T’m just going to go ‘essentially a Daft Punk song, pretty much all Daft Punk so 100% of the royalties’. You can release it on an album, you can
have it there and you've got other things on your album that you're getting money from but you're not getting money from this track. We're getting the money.”

(see Appendix Four)

While able to access material for sampling in the Re-remix through a contract with EMI, Soulwax is acutely aware that this contract does not necessarily overcome authors’ and moral rights. When asked in a 2008 interview whether artists have any input into how the songs are sampled by Soulwax, Stephen Dewaele is frank: “No, but they can turn it down. They can be like ‘it's shit.’ And so far we’ve been very lucky, no-one’s said no” (quoted in Szmanda 2008:np).

IPA notes that these moral rights limitations have historical roots:

“...copyright began as a form of censorship. It began in the privileges that were granted on the Stationer's Company so that only they could produce particular kinds of work. And the purpose of that was effectively for the Crown to be able to limit the sorts of things that were published. And copyright has never ceased having the function of being able to control who can speak and what they can say... I think the intuition that there is a special relationship between us and the things we create and that ought to be recognised in some way by the law is pretty powerful.”

(see Appendix Five)

IPA also articulates some concerns that Daft Punk may have about Soulwax sampling their work. She raises one hypothetic case that suggests that the objective of copyright goes beyond mere incentive:

“Imagine if this group is a neo-Nazi group that decides to put a Daft Punk compilation together because they think that Daft Punk express their particular, have a particularly aggressive... approach to the world that fits neatly with a neo-Nazi message. Well Daft Punk may want to be disassociated from the group that is attempting to recode them. And that's very interesting because that's a wholly different sort of consideration for why you might want copyright protection than the justification that really talks about incentive for the creation and about the dissemination of work.”

(see Appendix Six)

LM concurs, citing the scenario where “there’s something that creators wouldn’t want to say, like a derivative work that might be pro beating women, just taking samples of words and stuff like that pro-rape, pro-Nazi revolution” (see Appendix Four). CL also concurs with these two views, again repeating the
example of the use of a sample in a neo-Nazi expression: “Like if I quote something and put it into a neo-Nazi song, then the original composer of that work won’t like that so it’s more problematic” (see Appendix Six).

In an interview published on the day of the release of Most of the remixes, David Dewaele speaks of a Daft Punk recording, Rollin’ and Scratchin’ and suggests that its use in the Re-remix is tributary:

“This track came out in 1996, when I was 21, and at the time I was mainly into the Beatles and American west-coast rock. This track changed all that. It was the first techno song I ever liked because it was such a consciously stupid track, but so funky and soulful with its stupidness.”

(quoted in MacInnes 2007:np)

However, IPA suggests that even by being tributary to Daft Punk, the Re-remix may not overcome moral rights issues, even if it meets the incentive function of copyright because copyright is

“grounded in the same kind of considerations that surround moral rights. And then what’s kind of interesting in the sort of case you’re looking at... is it merely about the economics of the music industry or is it really about saying also that Daft Punk may not want a tribute from this particular group?”

(see Appendix Five)

IPA notes that regardless of its potentially tributary nature, the Remix under current copyright law, “if it takes more than a substantial portion of the original work then it is an infringement” (see Appendix Five). IPA notes that the Re-remix and other derivative works challenge the application of copyright law: “Works which are derivative are themselves are creative and you don’t want to prevent the creation of derivative, creative works” (see Appendix Five). She also notes that exceptions in copyright law already exist to alleviate some of these difficulties, particularly in relation to parody, private research and study. She also argues that free speech arguments are problematic when used to justify sampling under copyright law:

“In the circumstances in which you’re looking at the use of the work because of the range of cultural values for which there is no adequate substitute, then I think it becomes much more tricky because there’s a free speech interest arising from the part of the recoder but presumably there’s also some kind of free speech right on the part of the copyright owner to have their work represented in some way free of distortion.”
CL puts her view on sampling under copyright law more plainly: “I think that copyright laws at the moment do stifle creativity. I’m a copyright owner. I own intellectual property and my publishers do but I think it’s a problem. I think it stifles creativity” (see Appendix Six). CL notes that this view does not excuse derivative works that are mere reproductions, noting that “in Mozart’s time, you’d get people who actually copied the music out and sell it as their own. You don’t want that. That’s not right” (see Appendix Six). IPA concurs with CL’s view, arguing that copyright should have different treatment for merely reproductive and transformative uses:

“So in the situation where I merely want to reproduce your song, then I think copyright would say that the song is widely available and you’ve contributed nothing new to the culture. But in the context in which you are contributing something new to the culture, then that is precisely the kind of activity that copyright would say that it wanted to protect.”

Rimmer states a case for copyright reform to enable creation of the Re-remix:

“Copyright law needs to be remade and reworked so that it acknowledges that the limited exclusive moral rights provided to authors and owners in return for the larger, public benefit of gaining access to those musical works and sound recordings but also being able to use that material as the basis for education, and research, and learning, and teaching but also for the creation of new works.”
Chapter Four: Possible solutions and future challenges

In Chapter Three, Composer Lecturer (CL) poses a hypothetical: If she composes a piece that quotes Wagner, “is that Wagner arranged by me or is it my work using themes by Wagner?” (see Appendix Six). In the case of the Re-remix, copyright brushes aside the complexities of authorship to answer to answer ‘Wagner arranged by me’, as the full title of the Re-remix on the album art is ‘LCD Soundsystem – Daft Punk Is Playing At My House (Soulwax Shibuya Re-remix)’. Thus, the authorship of LCD Soundsystem precedes the authorship of Soulwax. The current application of copyright law extends this view of authorship to other sampled works, ensuring that the authorships of Daft Punk, Thomas Bangalter, Stardust, Edwin Birdsong, George Duke, George Benson and Chaka Khan also precede that of Soulwax; as a consequence, Soulwax must seek permission from all of these prior authors.

This situation is the quintessential tragedy of the anti-commons: “When there are too many owners holding rights of exclusion, the resource is prone to underuse” (Heller 1998:624). Akerlof et. al. concur, adding that “[w]ould be new creators face increased transaction costs: the necessity to engage in costly locating... and bargaining with multiple parties. These higher costs give new creators less incentive to produce” (Akerlof et. al. 2002:13).

The tragedy of the anti-commons is a particular impediment to Soulwax who were required to negotiate permission for at least three types of copyright material – literary works, musical works, sound recordings and, in some jurisdictions, performers rights – and navigate the international maze of collecting societies, music publishers and record companies, which differ for each territory where the rights are held. The process of sampling clearance has more similarities to a scavenger hunt – one in which only lawyers can participate - than a trip to the virtual library of works enabled by digital formats and file-sharing.

Soulwax must also determine whether materials they sample are still in copyright, a process that is already perplexed by different scopes in different copyright territories and will become more complex as more derivative works are created. As Carlos Thom notes, “digital sampling will present the incongruous result of a copyrighted work which is both protected by copyright but also part of the public domain” (Thom 1998:336). This further perplexes sampling clearance and deepens the tragedy of the anti-commons.

The Re-remix is merely the latest struggle that Soulwax has faced in clearing permission for sampling. Under their alter egos, 2 Many DJs, Soulwax faced sampling clearance issues on their 2002 album As Heard on Radio Soulwax Pt. 2. According to a leading, online, European music magazine, 2 Many DJs were only able to gain sample clearance for 114 recordings for the album, out of 187 that
were used in the making of the album (NME 2002). In addition, 62 recordings were denied permission and 10 recordings which had untraceable copyright owners were not used (NME 2002). One recording, *Shake Your Body*, was included on the album without permission as the copyright owner was untraceable but the recording was considered by the artists to be important to the album. This echoes the experience of Australian artists The Avalanches who faced extended delays by awaiting sampling clearance for their critically-acclaimed and chart topping album release, *Since I Left You*, a mash-up of an estimated 3,500 samples, which faced extended delays while lawyers cleared rights.

In releasing the Re-remix, Soulwax avoids the clearance issues of *As Heard on Radio Soulwax Pt. 2* by signing a contract with EMI record companies and music publishers in exchange for ownership to the rights of the new copyright material. Soulwax diplomatically refers to their “convenient” relationship with EMI which owned the rights to most of the artists sampled in the Soulwax Shibuya Re-remix (Analog Magazine 2007:np) despite having already created and released the recording on an underground label without permission two years prior. Here, convenience is code for control. Such control is also acknowledged by the Beastie Boys, who like Soulwax are signed to EMI, even despite the welcome judgement in *Newton v Diamond* that enabled their creation and release of work with *de minimis* samples. The Beastie Boys have expressed a vote of no-confidence in the *de minimis* standard by releasing the vocal tracks, known as *acapellas*, of over thirty of their recordings on a dedicated website, http://www.beastieboys.com/remixer/, explicitly for others to remix.

The extensive control in these contractual agreements allow EMI to dispense with threshold tests, those of substantiability and *de minimus*, the idea-expression dichotomy and originality, which are already stretched to apply to sampling. Thus, the music industry contracts displace the delicate balance of threshold tests with controls on use and demand for royalties.

In clearing samples in the Re-remix for release through EMI, Soulwax overcomes the tragedy of the anti-commons only to surrender their work to the same tragedy through a self-perpetuating cycle of licensing. EMI music publishers and recording companies demand sampling clearance from Soulwax for sampling their copyright material in the Re-remix. Soulwax gains this clearance by signing over some or all of the rights of their creation, the Re-remix, in contracts with EMI music publishers and recording companies. These same music publishers and recording companies demand sampling clearance from the next generations of artists for the use of the Re-remix. Schumacher argues that this cycle of licensing is an attempt by recording companies to control sampling.
“Record companies, as owners to the copyrights to the recorded sounds, have tried to take back what have become widely popular tracks from the DJs and engineers who are using them in new mixes.”

(Schumacher 1995:268)

The case study of the Re-remix also reveals that subsistence of copyright in a creation of sampling may not return royalties to its author. As Licensing Manager (LM) argues, the common approach to sampling clearance for the Re-remix and other maximalist uses would be to charge one hundred percent of royalties in exchange for such a use (see Appendix Four). This is based on LM’s view that the Re-remix is “a collage or a medley”, a mere reproduction of substantial parts of existing copyright material (see Appendix Four). LM’s view concurs with a study that argues, based on a 2003 music industry contract seminar, that artists cede control to music industry conglomerates such as EMI through contracts:

“For example, if an artist wants to include a sample from another record, major right holders often insist on a controlling interest of 50% to 100% of the rights in the new track. EMI demands that these rights are preserved even in future remixes where the original sample may no longer be recognisable. Remixes of whole songs typically require assignment of 100% of the rights in the new (adapted) track.”

(Kretschmer 2005:7)

LM’s view of the Re-remix and other creations of sampling as medleys is in stark contrast with that of sampling artist and culture jamming icon, Negativland, which has been involved in the development of Creative Commons licenses:

“There’s a crucial difference between bootlegging another’s work and the creative transformation of it. Collage is a technique that has an undisputed currency in virtually all art forms today. Originally, copyright was designed to prohibit the piracy or bootlegging of complete works; that was and remains a worthy goal. But copyright is now also routinely used to prohibit collage, as if it were no different from outright piracy. With Creative Commons, we’re trying to build a license that will allow copyright holders to invite transformation of their works – even for money – while preventing this sort of verbatim bootlegging.”

(quoted in Haughey 2003; cited in Rimmer 2007:272)

CL mounts an argument for copyright subsisting in Soulwax’s original contributions to the recording, arguing that the Re-remix is more creative than the original unmixed recording and the first mix as it combines new synthesised sounds, more diverse themes and samples of Daft Punk recordings which, in his
view, completes the quotation implied in the title of the recording (see Appendix Six). However as CL concedes, an artist in Soulwax’s situation is unlikely to own the material they create as this ownership is traded for permission to access material for sampling; instead, it is LM’s perspective that prevails in practice.

Thus, licensing creates an incongruous situation where copyright may subsist in the work of sampling artists in recognition of their original contributions, but future uses of those works returns little or no revenue to these sampling artists. As Vaidhyanathan notes, such a “tightly regulated system does nothing but squeeze new coins out of old music and intimidate emerging artists” (2003:145). As Spence notes, “if the intellectual property systems are keen to reward creative activity, distinguishing between mere reproduction and cumulative creation is vital” (2007:26).

Lawrence Lessig attempts to tackle this exact problem, separating mere reproduction from cumulative creation by employing two slightly different terms for this purpose: copies, referring to mere reproductions, and remix, which is transformative work (Lessig 2008:255). Lessig also proposes that copies and remixes are viewed differently under copyright law for cases of professional and amateur creativity (Lessig 2008:254). This creates a matrix of copyright as follows:

<table>
<thead>
<tr>
<th></th>
<th>Professional</th>
<th>Amateur</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Copies</strong></td>
<td>@/free</td>
<td>free</td>
</tr>
<tr>
<td><strong>Remix</strong></td>
<td>@/free</td>
<td>free</td>
</tr>
</tbody>
</table>

(from Lessig 2008:254)

Lessig makes two propositions relating to remix through this matrix:

1. Amateur Remix should be deregulated as a free use;
2. Professional Remix should be deregulated partially to create a “broad swath of freedoms for professionals to remix existing copyrighted work”.

(Lessig 2008:255)

When applied to the Re-remix, Lessig’s separation of professionals and amateurs is arbitrary and, at best, vague. It is unclear whether Re-remix is an example of professional or amateur creativity, given that the LM argues that it shows little creative merit as a medley, while CL argues that is far more creative than the LCD Soundsystem original. It is foreseeable that sampling artists, when defending a work of sampling such as the Re-remix, will be eager to label their work as amateur to escape the need for permission, and conversely, while
existing copyright owners will be eager to label the same work as professional to maximise royalties. Lessig poses no solution to this problem.

In addition to separating professional and amateur creativity, Lessig further proposes that “regulation could be avoided most simply by exempting ‘noncommercial’ uses from the scope of the rights granted by copyright (Lessig 2008:254). Lessig himself acknowledges that “the line [between commercial and noncommercial] is hard to draw” (2008:254), asking “what happens when a commercial entity wants to use this amateur creativity?” (Lessig 2008:256). To this, he answers: “In these cases the noncommercial line has been crossed, and the artists plainly ought to be paid— at least where payment is feasible” (2008:256).

However, Lessig avoids the more difficult and complementary question of how to treat cases where a ‘noncommercial’ creator wishes to sample works of ‘commercial’ creation. This is possibly the case of the untitled remix on Bootleggers with Respect Vol II where Soulwax could mount a case that its underground release is a noncommercial use. Without an answer to this second question, Lessig’s separation of commercial from noncommercial remains contentious, and merely discovers another path to the tragedy of the anti-commons by replacing costs of sampling clearance with costs of separating noncommercial from commercial use. Thus, like DJ Dangermouse’s The Grey Album, Soulwax’s Re-remix is “yet another example of a creative work that literally had no place in this world; it was stillborn legally, even if it’s very much alive creatively” (McLeod 2005:155).

Creative Commons licenses are an alternative solution to Lessig’s propositions. With the exception of licenses that specify no-derivatives, all other Creative Commons licenses enable the creation of derivative works without permission. This creates a different compromise to Lessig’s proposal in Remix, as creators of copyright material are given the opportunity to explicitly enable derivative works, which has the potential to prevent future works from suffering the tragedy of the anti-commons.

Creative Commons licences make significant progress in enabling derivative works but remain limited in their application to sampling as they only enable lowest common denominator uses. In the case of the Re-remix, none of the sampled copyright material has been released under a derivative-enabling Creative Commons license. It is particularly difficult to imagine that EMI will release its works and recordings under a Creative Commons licence as common practice. However, even in the case that some of the seventeen recordings sampled in the Re-remix are subsequently released under Creative Commons, it is a distinct possibility that different artists will choose types of licenses. If EMI releases its LCD Soundsystem recordings and works under an ‘Attribution No
Derivatives’ Creative Commons license that permits commercial use with no modification, and its Daft Punk recordings and works under an ‘Attribution NonCommercial’ license that permits modifications but only for noncommercial use, Soulwax would be limited to noncommercial, no modification uses and would not be able to create or commercially release its Re-remix.

Like Lessig’s matrix, Creative Commons licenses are also afflicted by the class of noncommercial use licenses as there is little consensus on what constitutes a noncommercial use. APRA/ACMOS, the collecting society representing the Australian music publishers and record companies has expressed uncertainty about the nature of noncommercial use under Creative Commons. Indeed, even collaborators behind the Creative Commons project admit that the noncommercial use is ambiguous:

“[E]veryone seems to agree that uses where people make money that involve advertising are commercial, while “personal and private” uses are noncommercial... other than that there isn’t one clear definition of noncommercial, with most people making judgment calls based on the details of the use in question”.

(Creative Commons Australia 2009:np)

Creative Commons licenses will remain only part of the solution as they provide no mechanism to creators present and future from the control rooted in the past. As Rimmer notes, “[t]he Creative Commons movement has been concerned that recording artists are unable to avail themselves of Creative Commons licences in some circumstances, because they have assigned ownership of their economic rights to copyright collecting societies” (2007:274). As Schumacher notes, the contradictions in “legal doctrine, through its assigning of copyrights to corporate subjects and its definition of originality as origin in the individual author... have been consistently resolved in the interests of copyright holders” (Schumacher 1995:259). Even with the proliferation of the least restrictive Creative Commons licenses, past control will continue to breed control, for generation after generation of work. This is true for Soulwax, which hands control of their works and recordings to EMI in exchange for access to works by Daft Punk, LCD Soundsystem and others, and indeed for other sampling artists contracted to commercial music companies. As McLeod argues, “[a]rt that relies on literal quotation is still at the mercy of the original artist, or, more likely, a layer of managers, lawyers, and accountants” (2005:155). The Re-remix is no exception.

One prospective alternative to Creative Commons is the theory of Derivative Work Independence. This theory is commendable for reducing complexity of licensing to deal directly with the tragedy of the anti-commons and to cover all works, past and present. It views the tragedy of the anti-commons as a
particular economic deterrent to derivative works: “The transaction costs associated with the downstream use of music are naturally high because multiple works are needed for marketable downstream use” (Loren 2003:721). Derivative Work Independence would reduce the transaction costs of sampling clearance in the Re-remix by providing “that the creation of the derivative work results in a new and independent property right independent from any pre-existing works that were incorporated into the derivative work” (Loren 2003:705). In the case of the Re-remix, Soulwax would be required to clear fewer samples, and future creators would only need to clear one sample, the Re-remix, and not the other seventeen samples used in the Re-remix.

Loren suggests threefold changes to copyright to enable Derivative Work Independence:

1. Allowing creators to obtain permission to use both a sound recording and its underlying musical work from the sound recording copyright owner;
2. Repeal the compulsory license for mechanical reproductions of musical works; and
3. Treating sound recordings similarly to musical works with regard to the rights granted to copyright.

(Loren 2003:704)

The usefulness of Derivative Work Independence may be limited, given that requires significant action of the part of legislatures, and has little precedent value, having been rejected by 1990 case of Stewart v Abend in the United States Supreme Court. It is also afflicted by the same constraint on Creative Commons, that it cannot be retrospectively applied to past copyright materials. Nonetheless, it is a worthwhile proposition as a serious attempt to address the tragedy of the anti-commons.

Fair use is an alternative response to the tragedy of the anti-commons, as “a hard-edged economic instrument that will excuse an unauthorized use of a copyrighted work as being a fair one any time it is too costly for the parties to negotiate a licence” (Goldstein 1994:170). A key advantage of fair use over Creative Commons is that it applies to all copyright material, not just material that is released under Creative Commons licenses. In the case of the Re-remix, there are two signs that negotiating licenses for samples is too costly. The first is that Soulwax initial releases the Re-remix as the untitled remix on Bootleggers with Respect Vol II without permission, and the second is that the Re-remix is released not through negotiation clearance but rather by being contracted to EMI. The Re-remix is emblematic of the wider case for fair use.
Vaidhyanathan argues that fair use is a key component of thin copyright, that is “just enough protection to encourage creativity, yet limited so that emerging artists, scholars, writers, and students can enjoy a rich public domain and broad “fair use” of copyrighted material” (Vaidhyanathan 2003:15-16). Vaidhyanathan believes that there “could be room for unauthorized [sic] sampling within American copyright law. It could and should be considered fair use... Because they are not working in the same way as in the original song, they are inherently different from their sources. But most importantly, samples add value” (2003:145). Indeed, this value is implicitly acknowledged by EMI in signing Soulwax to sample and remix its works by LCD Soundsystem, Daft Punk and others. It was also noted by one music commentator, reviewing Most of the Remixes on its release for BBC Music, who argued that Soulwax had, to their first mix of ”Daft Punk Is Playing At My House”, thrown in chunks of the French robots’ own tunes to create even more of a masterpiece” (Wade 2007:np).

Some transformative uses are already recognised as fair use, particularly for parody, under the Australian fair dealing and United States fair use provisions. The fair use for parody in sampling has perhaps been best established by the 1994 case of Campbell v Acuff-Rose Music, Inc in which the United States Supreme Court, reversed the position of Court of Appeals, ruling that 2 Live Crew’s sampling of Pretty Woman was a parody and therefore fair use. As Goldstein notes, “[w]riting for the Court, Justice David Souter categorically rejected the notion that the commercial success of the 2 Live Crew album foreclosed a fair use defense” (Goldstein 1994:34). While Justice Souter is careful to limit fair use for transformative use to parody, he also states a wider case for transformative use: “The goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works” (quoted in Goldstein 1994:34). Vaidhyanathan echoes Souter, arguing that a “looser system – and broader definition of fair use – would encourage creativity” (Vaidhyanathan 2003:145).

However, EMI, other music publishers and record companies are unlikely to support a fair use for transformative uses as they fail to acknowledge the creativity in sampling beyond mere reproduction, viewing mash-ups and sampling as medleys. As Metzer notes, sampling “has often been dismissed as unoriginal, a mere assembling of other musicians’ sounds and melodies” (2003:160). This ignores the skill, judgement and originality in sampling that Goodwin emphasises: “Samplers are often used on remixes, because they can... be used to manipulate, extend, and/or condense the structure of a song, as well as its texture, arrangement and timbre” (Goodwin 1990:271; emphasis in original).

Compulsory licenses are another means to address the tragedy of the anti-commons, removing the veto power of prior creators over new creators by
requiring “that the copyright owner makes his work available to users at a given price, usually fixed” (Peitz and Waelbroeck 2004:50). Like fair use, compulsory licensing can enable access to all copyright works, unlike Creative Commons which applies only to material that is released under Creative Commons licenses.

McLeod argues that in relation to *The Grey Album*

“[t]he amount of material taken from Jay-Z and the Beatles is so large that it seems reasonable that Danger Mouse should pay for his use of it, especially if the CD were commercially available on a wide scale. It’s very hard to convincingly claim that this kind of borrowing is “fair.””

(McLeod 2005:156)

McLeod’s argument, which applies to the Re-remix, a maximalist use of the works of LCD Soundsystem, Daft Punk and many other composers, favours compulsory licensing over fair use. Goldstein disagrees with McLeod, arguing that

“[f]air use operates on the pragmatic notion that half a loaf is better than none: without it, the copyright owner would get no revenues because the costs of negotiating a license are insuperably high, while the prospective user would for the same reason get no copy; with it the copyright owner still gets nothing, but the user at least gets to make a copy.”

(Goldstein 1994:170)

Applying Goldstein’s analogy on fair use to the Re-remix, Soulwax would get half a loaf, and EMI would starve. But, a starving child is unlikely to make a harmonious family. Compulsory licensing arguably strikes a better balance, recognising value in cumulative authorship and sharing revenues. Compulsory licensing would enable EMI and its existing artists to gain some revenue, while also allowing Soulwax to gain efficient access to material for sampling without signing up with EMI.

Liebowitz argues that there remain four particular difficulties with compulsory license models that are relevant to sampling:

- How to overcome the inefficiencies of a license fee;
- How to accurately determine a fixed price;
- How to determine the amount of revenue that should be raised through these licenses, particularly in the long term; and
- How to distribute the money raised.

(Liebowitz 2004:11-14)
Liebowitz perhaps overstates the remaining difficulties for compulsory licensing, given that a practical model to guide compulsory licensing for transformative use exists; as McLeod notes, compulsory licensing has operated in the United States for one hundred years since the passing of the Copyright Act 1909 (US):

“The act established a “compulsory license” for sound recordings, which allows musicians to record copyrighted songs in whatever style they see fit, as long as they don’t alter the lyrics and they pay the copyright owner a standardized [sic] fee set by Congress… Radio stations, by purchasing another kind of compulsory license, also don’t have to get consent from copyright owners to broadcast a song, even if it’s in a context the copyright owners believe is negative. Instead, radio stations purchase a license, report what was played and pay a lump sum to ASCAP, BMI, and SESAC, the organizations [sic] that collect royalties for copyright owners.”

(McLeod 2005:110)

In considering prospective responses to the tragedy of the anti-commons, it should be remembered that while EMI et. al. deny the creativity in sampling, they are amply aware that sampling is increasingly a mainstream means to creating music. Serazio raises a “critical counterpoint to reading the mash-up as resistance: the fact that the music culture hegemony has been able quickly to absorb and adapt to the mash-up phenomenon. Indeed, Big Music has now effectively re-appropriated the underground art of re-appropriation” (Serazio 2008:87-88). Both artists and music commentators are also aware of this. David Dewaele of Soulwax notes, “[i]t’s kind of funny now that we were rebelling against the whole mainstream music thing and now what we do has become the mainstream” (quoted in Johnson 2005:3; cited in Serazio 2008:87). Similarly, DJ and music commentator Nihal Arthanaayake notes, “a Soulwax club reworking of your track provides a kudos, a coolness by association that artists are literally queuing up for” (Arthanayake 2008).

Sampling is a means of finding new value in existing music libraries of copyright material and “the Age of Plunder is in fact one in which pop recuperates its history rather than denying it”. (Goodwin 1990:270; emphasis in original). However, as this case study shows, the current system of licensing, contractual agreements and copyright limits the choices for future creators. As McLeod notes, “when copyright owners can demand a large percentage of the new song’s royalties… it makes it impossible to legally release interesting collages” (McLeod 2005:94).

The Re-remix was created and released commercially through a contractual agreement EMI which trades future rights in the Re-remix for access to the
copyright material of pre-existing creators in creating the Re-remix. This leads to a perpetual tragedy of the anti-commons, as the sampling clearance “process rarely involves the original musicians who wrote or recorded the music because, in many cases, they do not even own the songs’ copyrights” (McLeod 2005:98). Industry ownership also limits the use potential responses to the tragedy of the anti-commons, particularly Creative Commons licenses which give creators the option of choosing whether to participate in future creativity.

Paul Goldstein once anticipated these potential challenges that sampling would create for copyright. He asked “[w]hat will happen when sampling shreds their works into bits and pieces, free for users to recombine into entirely different forms?” (Goldstein 1994:31). Over one decade later, the creative practice of sampling is heavily mediated by complex and restrictive industry contractual agreements and licensing practices, first in access to copyright material for sampling, and then in subsistence in creations involving sampling. This leads McLeod to answer Goldstein’s question: “In the end, everyone loses: the samplers, the samplees, the uncredited musicians, and the public, which has been denied the opportunity to hear the full creative potential that digital sampling once promised” (McLeod 2005:104-105). To McLeod, the creative practice is all but compromised by the tragedy of the anti-commons; the result is a “stagnant sampling cesspool” (McLeod 2005:120).

The primordial element in McLeod’s stagnant cesspool is copyright’s obsession with the individual genius author, which ignores the fact that almost all creativity builds on prior creativity, and forces copyright to recognise the concept of cumulative creation. Copyright has used the threshold test of the idea-expression dichotomy to separate out the creative contributions in the expressions of prior and subsequent authors while enabling cumulative creation based on ideas. By extending musical quotation and cultural appropriation to include the use of sound recordings in cumulative creation, previously viewed as expressions, sampling collapses the idea-expression dichotomy. The threshold test of substantiality, restricting the use of a substantial part of an original expression, becomes meaningless. Nonetheless, these tests are applied to cases of sampling, all but fencing in the creative practice, leaving artists to the mercy of exorbitant licensing fees or contractual agreements where they sign over all the rights and most of the royalties to their works.

The case study of the Re-remix shows that new tests are required to balance the creative contributions of prior and subsequent authors. One test, the separation of purely reproductive and transformative uses, can be applied through a fair use doctrine or compulsory licensing system.
It should be recognised that even if one finds that there is no creativity in sampling in the Re-remix, the use of samples is just one creative input during the production of electronic music; as Butler notes “[f]our main functions – synthesis, process, sampling and sequencing – are essential to production” (2006:60). The creativity in rearrangement, sequencing, the inclusion of drum machines, and the synthesis of quotations and new material, should not be overshadowed by the practice of sampling. However, as long as copyright continues its attachment to a traditional notion of an individual, genius author, it will treat creativity and theft and wholly exclusive concepts and continue to be challenged by sampling, quotation and appropriation.

Even if transformative use is recognised, copyright will still be challenged by more extreme uses of sampling that challenge what sampling artist John Oswald refers to as the “threshold of recognizability [sic]” (Duguid 1994:np; quoted in Metzer 2003:171). This reflects the ability of sampling artists to expose works “irretrievably to a potentially indeterminate degree of sampling, rearrangement and recombination” (Goldstein 1994:31). Metzer notes a critical issue at this point:

“To cross that line would be to annul quotation. In other words, if the borrowed material is transformed beyond recognition, especially if the original has never been stated, then there is no evidence of a borrowing. Once altered so severely, the dynamics between original and transformation that define quotation disappear; as all that is left is a strange new sound rather than a transformed old sound.”

(Metzer 2003:171)

Indeed, one sampling practice, known as “breakbeat science” (Shapiro 1999:viii) already challenges this threshold of recognisability, by using

“many very short samples – for example, a single snare drum hit instead of an entire drum-set pattern – which they usually alter in the studio (for example, snare hits are often reversed). In this way, complex breakbeat-like patterns are cobbled together from an array of diverse sources.”

(Butler 2006:80)

There are further challenges for sampling and copyright in the international context. As Lee Marshall notes, “[a]s copyright becomes increasingly internationalised, however, those involved in oral cultures find that copyright leaves them vulnerable to exploitation” (2005:89). David Hesmondhalgh studies a case of such exploitation by one independent “West-London-based record company, Nation Records, which specializes in forms of electronic dance music in which the sampling of non-Western sounds plays a prominent part”
(Hesmondhalgh 2000:280). The seriousness of this and countless other cases was underlined by Francis Gurry, the current Director-General of the World Intellectual Property Organisation, at a recent address delivered in August 2009 (Gurry 2009).

Vaidhyathanathan notes that prior to the landmark 1991 United States District Court judgment in *Grand Upright Music, Ltd v Warner Bros. Records* which “all but shut down the practice of unauthorized [sic] sampling” (Vaidhyanathan 2003:142), “[a]ll was not well for the creative process... Anarchy was not paradise” (Vaidhyanathan 2003:140). Without resolving tensions between sampling and copyright, the music industry will witness a new anarchy, an unpredictable divergence of copyright and defiant creative practices, including not only sampling but also new ways of quotation and appropriation. The only certainty would be a continuation of “non-copyright responses... [where] a significant creative element of society no longer accepts the current structure of copyright, with long exclusive rights bundled in the hands of major right holders”(Kretschmer 2005:8).
Appendices

Appendix One: Recordings sampled by the Soulwax Shibuya Re-remix of Daft Punk Is Playing At My House

Can Daft Punk Play At My House?  Page 44 of 79
### Appendix Two: Comparison of literary works in original version and Re-remix of *Daft Punk Is Playing At My House*

<table>
<thead>
<tr>
<th><strong>ORIGINAL VERSION</strong></th>
<th><strong>Soulwax Shibuya Re-Remix</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Well Daft Punk is playing at my house, my house</strong></td>
<td><strong>Well Daft Punk is playing at my house, my house (Oh yeah)</strong></td>
</tr>
<tr>
<td>I'll show you the ropes kid, show you the ropes</td>
<td>I'll show you the ropes kid, show you the ropes</td>
</tr>
<tr>
<td>I got a bus and a trailer at my house, my house</td>
<td>I got a bus and a trailer at my house, my house</td>
</tr>
<tr>
<td>I'll show you the ropes kid, show you the ropes</td>
<td>I'll show you the ropes kid, show you the ropes</td>
</tr>
<tr>
<td>I bought fifteen cases for my house, my house</td>
<td>I bought fifteen cases for my house, my house</td>
</tr>
<tr>
<td>All the furniture is in the garage</td>
<td>All the furniture is in the garage</td>
</tr>
<tr>
<td>Well, Daft Punk is playing at my house, my house</td>
<td>Well, Daft Punk is playing at my house</td>
</tr>
<tr>
<td>You've got to set them up kid, set them up</td>
<td>You've got to set them up kid, set them up</td>
</tr>
<tr>
<td>You've got to set 'em up ooh ooh yeah</td>
<td>You've got to set 'em up ooh ooh yeah</td>
</tr>
<tr>
<td>You've got to set them up, set them up</td>
<td>You've got to set them up, set them up</td>
</tr>
<tr>
<td>Well Daft Punk is playing at my house, my house</td>
<td>Well, Daft Punk is playing at my house</td>
</tr>
<tr>
<td>I've waited seven years and fifteen days</td>
<td>I've waited seven years and fifteen days</td>
</tr>
<tr>
<td>There's every kid for miles at my house, my house</td>
<td>There's every kid for miles at my house</td>
</tr>
<tr>
<td>And the neighbours can't...call the police</td>
<td>And the neighbours can't...call the police</td>
</tr>
<tr>
<td>There's a fist fight brewin' at my house, my house</td>
<td>There's a fist fight brewin' at my house</td>
</tr>
<tr>
<td>Because the jocks can't...get in the door</td>
<td>Because the jocks can't...get in the door</td>
</tr>
<tr>
<td>When Daft Punk is playing at my house, my house</td>
<td>When Daft Punk is playing at my house</td>
</tr>
<tr>
<td>You've got to set them up kid, set them up</td>
<td>You've got to set them up kid, set them up</td>
</tr>
<tr>
<td>You've got to set 'em up ooh ooh yeah</td>
<td>You've got to set 'em up ooh ooh yeah</td>
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<tr>
<td>You've got to set them up, set them up</td>
<td>You've got to set them up, set them up</td>
</tr>
<tr>
<td>You've got to set 'em up ooh ooh yeah</td>
<td>You've got to set 'em up ooh ooh yeah</td>
</tr>
<tr>
<td>You've got to set them up, set them up</td>
<td>You've got to set them up, set them up</td>
</tr>
<tr>
<td>ORIGINAL VERSION</td>
<td>SOULWAX SHIBUYA RE-REMIX</td>
</tr>
<tr>
<td>------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>(cowbell solo)</td>
<td></td>
</tr>
<tr>
<td>Well everybody's lined up at my house, my house</td>
<td>Well everybody's lined up at my house, my house</td>
</tr>
<tr>
<td>And Sara's girlfriend is working the door</td>
<td>And Sara's girlfriend is working the door</td>
</tr>
<tr>
<td>Got everybody's PA at my house, my house</td>
<td>Got everybody's PA at my house, my house</td>
</tr>
<tr>
<td>All the robots descend from the bus</td>
<td>All the robots descend from the bus</td>
</tr>
<tr>
<td>There's a freakout brewin' at my house, my house</td>
<td></td>
</tr>
<tr>
<td>In the basement...</td>
<td></td>
</tr>
<tr>
<td>'Cause Daft Punk is playing at my house, my house</td>
<td>'Cause Daft Punk is playing at my house, my house</td>
</tr>
<tr>
<td>You've got to set them up kid, set them up</td>
<td>(instrumental solo)</td>
</tr>
<tr>
<td>You've got to set 'em up ooh ooh yeah</td>
<td>You've got to set 'em up ooh ooh yeah</td>
</tr>
<tr>
<td>You've got to set 'em up ooh ooh yeah</td>
<td>You've got to set them up, set them up</td>
</tr>
<tr>
<td>You've got to set 'em up, set them up</td>
<td>You've got to set 'em up ooh ooh yeah</td>
</tr>
<tr>
<td>You've got to set 'em ooh ooh yeah</td>
<td>You've got to set them up, set them up</td>
</tr>
<tr>
<td>You've got to set 'em ooh ooh yeah</td>
<td></td>
</tr>
<tr>
<td>You've got to set them up, set them up</td>
<td></td>
</tr>
<tr>
<td>And never never let them go</td>
<td>And never never let them go</td>
</tr>
<tr>
<td>No never never never let them go</td>
<td>No never never never let them go</td>
</tr>
<tr>
<td>Oh never never never let them go</td>
<td>Oh never never never let them go</td>
</tr>
<tr>
<td>Let 'em go</td>
<td>Let 'em go</td>
</tr>
<tr>
<td>Never never never let them go</td>
<td>Never never never let them go</td>
</tr>
<tr>
<td>Oh never never never let them go</td>
<td>Oh never never never let them go</td>
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*Can Daft Punk Play At My House?*
Appendix Three: Selected transcript of interview with Dr Matthew Rimmer

Interviewer (AH): In this particular track, it does feature as you say a mash up of substantial – let’s not say substantial - long sections of the pieces from which it samples together with short snippets or short slivers. In addition to that, adds its own drum beat and a new sequence in which they are held, and it’s not a full copy of any particular section. Suppose that in the future, EMI sells ownership of that sound recording to another record label. Now when it was held within its own library, there was no issue because it owned everything, both the samples and the work that used sampling. Let’s say after EMI sells it off, another sampler, say Mr X, wants to sample that Soulwax track. Who will own the copyrights, and in what parts, of the Soulwax work?

Matthew Rimmer (MR): I think it’s worthwhile trying to break down the different approaches that exist to the question of digital sampling, remixing. I mean one thing I’ve noticed... I guess the first approach is those who do not care about copyright law at all, and indeed, like to be massively infringing through a mash-up because they then have the kind of aura and halo of transgression and piracy and, you know, breaking the law. And I think that’s one kind of particular approach. I mean, certain kinds of transgressive artists will not want to abide by the law and indeed gain a certain kind of cache in terms of their underground status by being in breach of copyright law. So, I think that should be remembered. I think the issue could be that DJ Danger Mouse’s approach in terms of, you know, in his way of dealing with that.

Second approach I guess is the licensing approach which I guess is the traditional kind of record industry approach in terms of everything has to be cleared, everything has to be paid for, everything has to be licensed. And, moreover, you know, a work can be bought and sold in terms of its economic rights. So to transfer the ownership, you then have a get a new license.

A third approach would be to rely on the flexibilities which exist within copyright law. So this is where the defence of fair use comes into play in the United States, the defence of fair dealing in Australia. So, defence of fair use, developed by Justice Joseph Storey in the United States has been codified in the 1976 Copyright Act and has been used to cover a wide array of uses. And Pamela Samuelson in a recent article about unbundling fair use has tried to break down some of the policy objectives being asserted by the defence of fair use. Now she says the defence of fair use has been applied to everything from, you know, parody, news reporting, time shifting, photocopying, reverse engineering, caching websites, providing links to material on the Internet. And, you know, there’s been a big debate about the scope of fair use, especially in the United States. There’s quite different traditions to the jurisprudence. One tradition, exemplified by the Acuff-Rose decision was one that exercises
transformative use as a guiding theory to explain the operation of the defence of fair use. And that approach obviously can accommodate certain forms of sampling. I guess the second tradition is much more one that focuses on commercial applications, the impact on commercial markets. Pam Samuelson kind of suggests that, you know, there’ve been a number of other suggestions about how the defence of fair use can be fixed. Some people argue that there should be certain factors included like market failure and fairness and guidelines explaining the conceptual operation of the use of fair use in the given context and thinking about, you know, certain safe harbours with certain sorts of uses. She tries to take the view that we should look at fair use through the lens of certain kinds of policy objectives. She argues that fair use is much more coherent if you think that fair use is designed amongst other things to promote freedom of speech and expression, particularly political freedom of speech, the ongoing process of authorship, learning, access to information so she kind of suggests that, you know, authors necessarily have to rely upon the works of the public domain and subject to copyright protection in order to then create new works. But she also says there’s need for fair use to protect competition and technological innovation and there’s also an interest in protecting privacy in the interests of users. I’d add to that by saying that the great commentator William Patrick who now works for Google once made a very good suggestion that we also need to think about the interaction between copyright duration and fair use and his suggestion is that there needs to be greater capacity for fair use, the older a copyright work is. When copyright protection is life of the author plus seventy years especially for some of the very old works like Jones works of the 1920s and 1930s, like Carmina Burana and such classics, there needs to be a greater capacity to be able to use those works. So that’s a third approach. Fourth approach is that there should be some form of compulsory licensing, so greater compulsory licensing, so there should be some kind of remuneration but the owners shouldn’t be able to withhold permission to gain access to the works, so compulsory licensing is one kind of very distinct approach. A fifth approach is a much more moral rights regime. It’s all about a question of attribution, integrity and looking after the reputation of the author.

AH: Isn’t the fourth solution also contingent on moral rights, being permissive?

MR: Well, I think moral rights interacts with everything else in Australia. In the United States, moral rights don’t really play a part just because moral rights are not properly recognised, moral rights in relation to composers. Moral rights is very dependent upon the jurisdiction that you’re in. Sixthly, performers’ rights. So again the performers’ rights kind of perspective is very contingent upon the jurisdiction you happen to be in. A seventh perspective would be rely upon a Creative Commons licenses, rely upon licenses to put material in the public domain. I guess an eighth issue is really what constitutes a public domain anyway. And I guess there’s been a really fascinating constitutional challenge.
So you know that over the last decade that there's been a number of constitutional challenges with Sonny Bono Copyright Term Extension Act. One of the parallel actions has actually been successful. It's an action brought by Laurence Golan. Laurence Golan is a conductor. I think he was initially with the University of Denver but he's moved elsewhere to Phoenix. He's been successful in an action against the restoration of foreign copyright and he was concerned that a number of the major compositions especially by foreign composers would be inaccessible to his orchestra because of copyright issues. And eventually, a district court has just found this year that the freedom of speech First Amendment protection has been violated by the restoration of those works. And I think that that's not really a very well known principle but critically important kind of principle, first one of those actions to be successful. There are about four or five of them. The Eldred against Ashcroft is the most important one in terms of precedent but we finally have this little case saying that the Copyright Term Extension Act can in certain circumstances have an adverse impact on freedom of expression.

AH: What about originality specific in digital compositions, where the previous unit we used to analyse originality, for example by note, by rhythm, by melody, by harmonies – are still mentioned in judgements of originality in digital compositions but they are not as relevant because you’re dealing with...

MR: [interjecting] Yeah, well I think they're kind of interlinked questions about what is a musical work. And the courts have generally thought about a musical work in terms of a very traditional form of hermeneutics in terms of a musical work having a beginning, a middle and an end, and have also emphasised that people can’t disassemble a musical work and apply for a separate kind of protection in relation to you know, the first five seconds of the musical work, then the next five seconds of the musical work. So, bound up with the notion of a musical work is the notion that there has to be some sort of originality but also some sort of unity, I guess, in terms of the notion of what a musical work is. But, also there needs to be some sort of substance. So, there’s lots of cases in relation to the definition of works about whether 'Exxon' can be a literary work. The equivalent for a musical work is whether a small snatch of music can be a musical work or a piece of silence or, you know, something that is very minimalist indeed. So sometimes those kinds of questions get interlinked with one another but in terms of the threshold requirements, originality, the distinction between ideas and expression in some kind of material form – that can sometimes be tricky in terms performances – you know fixing something in terms of a musical work. And then for infringement, there are substantiality and those sorts of things. But, I mean, my kind of particular perspective [pause] I mean, hermeneutics is a good way to think about it. I mean who kind of creates the meaning in terms of a musical work. I mean copyright law works on a very traditional kind of a notion that there’s particular author who creates a musical
work. Equally, one can think about hermeneutics in terms of certain listeners and consumers playing a role in terms of the creation of certain works, but also certain kinds of interpretive communities. Have you seen The Boat That Rocked?

AH: No.

MR: About pirate radio? Well, it’s quite a silly film. It’s not a very well written film. I quite like the performances. But what it does really well is to show, you know, how pirate radio created certain interpretive communities and introduced them to certain kinds of musical works and that’s kind of quite important too, in terms of, you know, the fantastic array of different ways that we listen to music whether it be radio or iTunes or satellite radio or webcasts or even on films. They create a sense of community. And those communities, you know, reinterpret those musical works and give their own meaning to those musical works so [pause] Spicks and Specks is, kind of, a very much part of that particular program [pause] people in love with that culture, they have created their own meanings in terms of those particular works. And, perhaps, in terms of copyright law, we need to give greater recognition to the role played by the listeners of those musical works.

AH: How would that be done?

MR: In terms of recognising exceptions and defences and consumer rights in terms of time-shifting and format-shifting and space-shifting and the ability to organise one’s digital library of music and to have greater flexibility in terms of how one can gain access to musical works and rework musical works. The other great phenomenon is amateur hour. One doesn’t need to be a professional to make a musical work anymore. It’s so much easier in terms of the digital tools available. You can do your own amateur versions of musical works. So, I mean, I think it should be remembered that copyright law was designed to promote the encouragement of learning to use the phrasing of the Statute of Anne. You know, copyright law in some ways has been corrupted because record companies and music publishers have had an inordinate influence upon the fountain of copyright law and policy and as a result the original purposes of copyright law have become somewhat distorted and corrupted. I think copyright law needs to be remade and reworked so that it acknowledges that the limited exclusive moral rights provided to authors and owners in return for the larger, public benefit of gaining access to those musical works and sound recordings but also being able to use that material as the basis for education, and research, and learning, and teaching but also for the creation of new works. Philosophically speaking, I think that copyright law has real problems at the moment because there is a real abyss, you know, between what lawyers and bureaucrats and technocrats think about what copyright law is and then, you know, the communities built around peer to peer networks, I think that’s kind
of a free-for-all, and you have a slightly different community of those musical creators, for want of a better term, who have very mixed views about copyright law because they want to have careers in relation to music, whatever that may be, but on the other hand, draw upon and respond to and listen to and create works out of interaction with the corpus of works that exist.
Appendix Four: Selected transcript of interview with Licensing Manager

Interviewer (AH): To start, I’d be interested in how you see copyright as a system. What do you think the objective of having a system of copyright is?

Licensing Manager (LM): In a word, to protect the rights of the creators and, copyright’s good because having a system whereby works are protected. They have a right say how their work is used. They have the right to give people permission to make copies. If you’re a creator of something, you have those rights. And they also have the right to receive remuneration for use of those works.

AH: Let me tell you a little bit about the case study that I’m doing for my work. And, maybe we can funnel it down a little bit. The case study I’m looking at is a song called *Daft Punk Is Playing At My House*. It was originally created by musicians who composed and recorded it. These artists were called LCD Soundsystem. It’s a tribute to Daft Punk, some French composers and recording artists.

LM: I know Daft Punk.

AH: I should point out [pause] trying to carefully cover all the bases here. So, Soulwax, a group of Belgian musicians and recording artists sampled a number of...

LM: [interjecting] Daft Punk songs...

AH: [interjecting] and LCD Soundsystem songs. Sorry, one LCD Soundsystem song – that’s the song *Daft Punk Is Playing At My House*. Now all of these artists are signed to the same music publisher – correct me if I’m wrong – EMI is a...

LM: [interjecting] EMI is a record company and a music publisher. EMI publishing and EMI records.

AH: EMI own the lot, as I understand.

LM: EMI own both the sound recording and the artists are signed to EMI records and EMI records owns the sound recordings and the songwriters within the band, the composers and authors of the songs and lyrics are all signed to EMI music publishing. So, EMI, lock, stock and barrel represents Daft Punk.

AH: That’s my understanding. I don’t have a copy of the contract in my hand but everything that I’ve read...

LM: [interjecting] EMI, EMI, EMI.

AH: Yeah.
LM: Which is frequently the case. If you’re putting a lot of money into an artist that you’re signing up, you will also [pause] they’re sister companies. It’s in the best interest of the company, the company as a whole to represent everything to do with those works. I mean, that’s just business.

AH: It just makes sense to buy the lot of rights or license the lot of rights?

LM: You sign a contract, an agreement with someone for a period of time and normally, there’s an advance involved and for that period of time, be it the artist or be it the record company [pause] the record company signs an artist or band, whatever, and they own a sound recording. The music publisher signs composers and authors of music and lyrics so the writers within that band, perhaps. And they own the songs. They own actual songs. So, for example, a record company would sign The Rolling Stones. A music publisher would sign Keith and Mick.

AH: OK.

LM: So Keith and Mick make more out of every Rolling Stones song than the rest of the band because they actually wrote the song. They get the publishing royalties as well as the recording royalties. In this instance, you’ve got people – whether the whole band writes or a couple of people in the band write. You’ve got it all with EMI which is, you know [pause] any company is going to try and [pause] if they’re fostering new talent, they’re going to try to make sure they own all the rights. Now, the contracts will normally have an advance involved, and so you own those rights for – it might be a five year contract, whatever. Old contracts used to be term of copyright but they don’t do those any more. For a period of time [pause] they’re very old contracts, well, they’re still being done [pause] for a period of time, you own the rights to the song. Normally, for a period of time. Or until the advance is recouped.

AH: You being the...

LM: [interjecting] the music publisher or the record company. Now, with a music publisher, what you’d normally do is sign a deal with someone [so] that you own the rights to every song they create within that period of time, so five years.

AH: And that’s own, not license? Not exclusively license, own?

LM: You technically own the rights to it. And technically, that’s what it is. You own the rights to it, to every song they create within a period of years.

AH: Within the period of that contract?

LM: Within the period of that five years and you have the right to represent that longer than that [pause] longer than those songs, longer than that period if the
advance hasn’t recouped. But after the end of that five year period, any new songs that they write, unless they extend their deal with you, you don’t get any new songs, you just get the original ones to recoup from unless they extend the deal. Now, if they’re a good publisher, if they’ve been working for you, well, you’re going to want to stay with the same person. It makes sense. But [pause] if they want to recoup their advances, they’re to make sure that they’re claiming all the money that’s due to you locally and from around the world and they try to get your song used so that they get that advance recouped. But hey, at the end of that first five years, best case scenario is that you want to renew with them, the advance is recouped and you get another advance. And that’s what everybody wants. Or it’s close to recouped and everyone’s happy. So with that scenario, all with the one company, so much easier if you wanted to license that sound recording. Say if you were going to [pause] if you wanted to license that song as the band [Soulwax] did it, you have to get permission for the sound recording from the record company and you’d have to get the actual music and lyrics of the song from the music publisher. Say you wanted to put that as it was recorded into an ad, you’d have to get the full permission and made sure you had a hundred percent of publishing before you put it in the song. If you were going to do a rerecord of the song, you just have to get the publishing rights ‘cause that is to the music and lyrics of the song.

AH: The first time that it was remixed, it was done as bootleg without permission. So actually Soulwax did this recording – the first remix of that song for another music publisher known as Espionage...

LM: [interjecting] Music publisher or a record company?

AH: Both, it’s a music publisher and a record company. But it has a very...

LM: [interjecting] It’s kind of null and void then because if they didn’t get permission then they have no rights to it. Technically they can be forced to pull all copies from the shelf and destroy them.

AH: Why do you think, then...

LM: [interjecting] Depending on what territory they’re in, they can be told to destroy them.

AH: That record is still something you can buy, not through mainstream record stores but you can get it online. There are online stores selling it.

LM: So it’s a bootleg?

AH: It is a bootleg.
LM: They’re not paying royalties to the correct people, probably.

AH: Why did EMI as a both a publisher and a recording company not pursue...

LM: [interjecting] They may have pursued them. They may have pursued them after the fact and come to an arrangement. They may have literally put their lawyers onto the phone and said ‘unless’ [pause] if you become aware of an infringement of your work that you own your first point of call is if it’s something that the creators would approve and OK, your creators are going ‘yeah, I’m actually OK with it or I like it’ your first point of call might be to ‘let’s just get it legal’. Let’s contact them. Say to them we’re going to wipe them of the face of this earth and take them to the cleaners, or they’re going to start paying these royalties properly and we’re going to get it all legit. So you’d [pause], first point of call’s going to be [pause], hey, it could be a whole bunch of guys that set up their own little company and don’t really get what the laws entail and so you discover even though under the Copyright Act, it doesn’t account for lack of knowledge, believe me, you have all the rights to go the jugular in Australia and in most territories. You have the rights to go the jugular. But, if it’s something that creators would agree with and that they’re OK with, you’ve talked to your clients, as a publisher or record company, with your clients and gone ‘what are we gonna do?’. We want to just get it under a legitimate licence. We want to license this other company and allow it to continue. And that might be your first point of call. So, what you might find is that EMI have gone to Espionage and said: ‘You’re in breach of copyright. We can take you to the cleaners. We’re proposing, instead of taking you to the cleaners and getting you to remove every copy of the shelves, if for all new copyrights, all new ones you print have to have this copyright message in the CD liner note and everything like that. And then it’s under license. And that you have to pay a fee to royalties and you have to account to it. Or we’ll shut you down.’ It might be phrased like that. It might not be initially but literally I mean they could. Depends if it’s a small company. If you’re dealing with a company that has a suite of lawyers. You going to try to legitimately license it. It’s business. It’s all money and it’s all business. So you get it legal, and that’s probably what’s happened. And then another one of their folds has done a version of it so that’s [pause], the flip side of that is if my creator doesn’t like the version, doesn’t want it to happen, me as a publisher, that publisher might turn around and go ‘no’. Not give you the option to license it. It might be more that a breach of our copyright, it can happen in an ad, it can happen in anything, ‘that ad’s a breacher’. Someone working for a small ad agency, they don’t get the laws to do with licensing songs. It’s complicated. They’ve put a song in the ad, they’ve changed the lyrics, they don’t even realise. If it’s a big ad agency they know. But if it’s a smaller little one, they may not know, may not realise and your first point of call is just ‘OK, yes it’s the song and it’s a minute, an OK use’, just try to license it. Otherwise, if the people wouldn’t agree to it, pull it from air immediately and here’s your fine.
AH: A carrot and stick approach?

LM: Well, if it’s an income that your client would want, work with the people to get it legit. If it’s a use that they object, to the use of the song in that way, or has a licence with somebody else or whatever, that’s not to do with CDs or records, that’s more in the AMCOS world, it’s more like ‘guys you don’t have the permission. Pull it. You don’t have the permission and we’re not going to going to do a license with you. But, it’s a nice use and everyone’s happy and everyone wants it, your aims going to be get the money out of it and ‘next’. Get them to pay the license fee, educate them in the process, educate them about how it works, and try and do it in a positive way ‘cause if you do it in that positive way and they genuinely [pause], yes, they’ll get a legal letter from the lawyers of the company but if we can come to an amicable solution, it doesn’t have to involve courts and a lot of expense. What business isn’t going to take that?

AH: So as a business, would permission....

LM: You’ve got to accept that some people won’t know as much about the ins and outs of your business as you might. But if it’s a flagrant breach where it’s just a big ad agency, they know exactly what they’re doing, you’re just going to be going ‘guys?’. And part of the license fee will have a fine in there as well. And they’ll probably just pay up, if they’re smart.

AH: It’s been suggested that with these kinds of composers and recording artists that engage in sampling, that is a possibly more efficient way of exploiting the library of musical works, or literary works or sound recording that a publisher or a recording company might hold. Do you think that, say a publisher, might be more willing to exploit the work in that way because of the nature of the use rather than just give it to someone else who’s going to do something else with it, specifically for someone who’s making derivative work?

LM: Depends on who’s doing it and how they’re doing it. If they’re aware of the artists doing it and the kind of work that they do, yeah. And if maybe it could be more efficient if you [pause] if a sample is under thirty seconds and it’s one of numerous used in a song by a known artist, then it could be licensed by the mechanical and performance collecting society and the set of whatever. Maybe something like that could be worked out at some stage in the future and that would be awesome. Or they go to an online, very easy solution. But the problem comes, I can see both sides. I can see it’s really hard for people to try work out how the hell to license. I’ve got twenty samples in a song and it’s all over the shop. Where do I start? And it’s all different fees and it’s all a nightmare and they all want to make sure that they get the same fee pro rata for their song. They’ll all want. I can see that. However, I think I said to you, the flip side of that is a scenario whereby the original works are put together in such a way that, although it’s just sampling of original works that they’re put together in such a
way that it creates a derivative work that has, there’s something that creators wouldn’t want to say, like a derivative work that might be pro beating women, just taking samples of words and stuff like that pro-rape, pro-Nazi revolution that the original creator might go ‘woah, I so have a problem with my work being used, a sample of my work being used in a derivative work that is abhorrent to me as a creator and I don’t want my work being used in that because it suggests that I

AH: So the right to withhold permission should be held...

LM: [interjecting] Yeah. In cases like that, if I was a creator, I would want the right to withhold permissions. And again as a licensing manager for music publishers, there were certain songs that had rules to them. It could be that the writer is a vegan so they don’t want their song used in a McDonalds commercial. And they have that right.

AH: In this case, I think it would be difficult to interpret the final work as something that’s not attributed to the original song. The song is called *Daft Punk Is Playing At My House*, it’s saying that it’s a party, Daft Punk is playing, and it’s good. So, let’s assume just for a moment that LCD Soundsystem wouldn’t find this use to be derogatory to their own original work and that it doesn’t denigrate their name in any way and it’s not falsely attributed and they are correctly attributed.

LM: Then a great easy licensing system that makes it easy will be great.

AH: In those kinds of cases...

LM: [interjecting] You’d want it to go ahead. It’s more money. Another CD out there with your songs on it that you’re getting royalties for, both the artist and [the recording company], because half the royalties will go back to the original artist because they have to get a share of the artist’s royalties because if their song’s being sampled, the original song’s being sampled as well as the people that are doing the sampling, putting it together. They’ll get a much smaller percentage or they may get virtually nothing, depending on how it works. I mean, if the majority of the song is a Daft Punk song, they might get nothing on the publishing side. You might find that’s how it works. They might get a bit on the artist’s side but they’ll have to pay royalties but from the view of the publisher, if everyone was cool with it, it would be a like.

AH: A no brainer.

LM: It’s a no brainer.

AH: What kind of expert or lawyer or knowledge would you need to work out how much that license is worth? What kinds of things do you need to consider?
LM: Well, it would be... you'd be looking at the song. If you've got a three minute song, and two point nine of that three is made up of works that you control, I'd just be sitting there going I want a lot. That whole song is my creator's. So a hundred percent of the music publisher royalties. It's only to be split between these creators and you're not getting anything. You didn't really create a song. You made a collage or a medley. In musical terms, you've made a medley of works that we created so we're going to put the money to remuneration, divide it all up in this song, this song, this song, this song, work out timing, so do all that kind of stuff and listen and go 'OK, on the whole, so the publishing royalties go here'. The record company would do the same kind of thing, just analyse and go 'OK, you might get two percent of the royalties, this new artist might get two percent and the other ninety-eight percent would go here or here, would go according to the contract that we've done with Espionnage, it would be split according to that contract'. That contract with Espionnage may be that Espionnage gets two percent so Espionnage will get two percent, depending on the wording of the contract, either two percent of what EMI gets or two percent of a hundred percent, and then the balance would go to EMI as the people who represent Daft Punk as the original artists but it really depends on the splits in that contract and you just track it through the contract. You look at this work and go 'OK, this second derivative, how much did they create?' and you've got to estimate. You've got to look at it, how much it contains and how different it is and listen to the original work but on the whole if it's really getting down to small kind of stuff, I'm not gonna spend five days to do an analysis of it. I'm just going to go 'essentially a Daft Punk song, pretty much all Daft Punk so 100% of the royalties'. You can release it on an album, you can have it there and you've got other things on your album that you're getting money from but you're not getting money from this track. We're getting the money.
Appendix Five: Selected transcript of interview with Intellectual Property Academic

Interviewer (AH): What do you feel is the objective of copyright?

Intellectual Property Academic (IPA): Well, I feel that there are two accounts that you can give of the objective of copyright. The first has to do [pause] so [pause] the basic problem is if I wear your shirt, you can't wear it. If I sing your song, you can still sing it. So it's not immediately clear why the law should ever stop anybody singing anybody's song. And if you think that they should, you either have a story about the economics of the production and creation, sorry, production, creation, dissemination of intangibles or you tell a story about the relationship between a creator and the things that she creates. And in broad terms, the first says that in order to correct the market failure that arises because works are able to be reproduced in forms without there being any market transaction in which the costs of the creator and benefits to the user is internalised, because of that market failure, you need to correct it with some kind of legislative system. Then the scope of the question is “well, how much control of the works do you need to give the creator of the work in order to ensure that it is both produced by the creator in the first place then produced, then disseminated as widely as possible?” The second says something like, well, because the personality of the author is enshrined in the work or because she deserves control over the work because of her work or that it would be unjustly enriching a party who has used a work with creating, they are [pause] you should allow this [pause] you should recognise that special relationship between the creator and the thing that she has produced by giving her a period of control over the use of the work. I think none of these accounts gives a particularly coherent account of copyright and if you read the first chapter of that book that I have just directed you to, it’s all there in crystal clear clarity. I think none of them gives a particularly holistic account of copyright. But I think the intuition that there is a special relationship between us and the things we create and that ought to be recognised in some way by the law is pretty powerful and is probably the best justification for copyright.

AH: I’m going to move quickly into the case study so just a brief recap. In the 1990s to the early 2000s, Daft Punk released a number of recordings. Some of these involve sampling. In the early 2000s again, LCD Soundsystem released Daft Punk Is Playing At My House, a tribute to Daft Punk. Both of these artists were signed to music publisher and record label under the EMI umbrella. And then in 2005, Soulwax released a remix of Daft Punk Is Playing At My House involving samples with Daft Punk but without permission. They did it underground as a bootleg. And then in 2007, it was released commercially with full permission in its final. Now, Soulwax has said that it chose EMI to get access to these recordings and their underlying works, presumably for commercial
release and I think one reason for this is that sound recording is made up almost entirely of samples from the Daft Punk work and the LCD Soundsystem work. So it is unlikely to be the kind of work where a *de minimus* standard would apply. I spoke to one industry person about this and she was of the opinion that all of these samples in the song make it essentially a medley. Do you think that’s the case? And, what would be the shortcomings or...

IPA: [interjecting] Hard to comment on the particular work without ever having heard it. But I think the question as whether or not it is a medley is an interesting one. It partly depends upon the extent to which the recoding creates a new work that can be called something more than a medley. Whether or not it’s a medley or a new work or if you’ve created something more than a medley is irrelevant for the purpose of copyright law because if it takes more than a substantial portion of the original work then it is an infringement whatever you might call the end result. That presents a particular problem for intellectual property law, copyright law; that is the problem in which works which are derivative are themselves creative and you don’t want to prevent the creation of derivative creative works. The classic situation in which that’s usually discussed has to do with parody.

AH: LCD Soundsystem has not been known to sample. Daft Punk has been known to sample themselves before. Now, you’re talking about [pause] that there’s a particular problem when copyright law limits the kind of work that, I guess, it would seek to protect. Or...

IPA: [interjecting] I think the interesting question is... copyright began as a form of censorship. It began in the privileges that were granted on the Stationer’s Company so that only they could produce particular kinds of work. And the purpose of that was effectively for the Crown to be able to limit the sorts of things that were published. And copyright has never ceased having the function of being able to control who can speak and what they can say. At least in what they can say is dependent upon use of other people’s material. Now in the situation in which you have work that you might call merely derivative that’s not particularly a problem. So in the situation where I merely want to reproduce your song, then I think copyright would say that the song is widely available and you’ve contributed nothing new to the culture. But in the context in which you are contributing something new to the culture, then that is precisely the kind of activity that copyright would say that it wanted to protect. So the interesting question arises: “How does copyright negotiate the relationship between the original creator and the person that we’ll call the recoder?” As I say, that is the, the classic example of that is the parodic use of earlier work and if you look at that [omitted of anonymity purposes] article, you’ll see that what is say is that there are circumstances that the parodic use ought to be permitted and circumstances in which it ought not to be permitted.
In particular, I think that it ought to be permitted in situations where either, the use of the first work is necessary for comment upon the original work or its author, and to some extent that’s already recognised in exceptions to copyright infringement. Or the second and much more contentious and difficult situation is that in which the original work has become a kind of cipher or a shorthand for a range of values in the culture that might not otherwise be able to, possible to adequately express. So to take an example from trademark law, if I were to say “oh, that politician is a bit of Barbie where Barbie is a [pause] and [pause] or treated like a Barbie” where Barbie is a trademark, you might say “well, that’s true, it is a trademark but it’s also actually become a kind of shorthand in the culture or a particular vision of a woman that is particularly difficult to find an adequate substitute for”. And perhaps in that circumstance, the copyright as with trademark and other intellectual property that may potentially be an expressive activity of one order or other there ought to be some exception. It’s tricky though because that would have to be an exception fairly carefully limited. Otherwise it could become a back door for the mere reutilisation of work.

AH: Exclusive rights are granted as incentive. These include rights to exploit work in particular ways. Reproduction, adaptation...

IPA: Well they may be granted as an incentive but they may not be granted as an incentive at all. So, for example, I have copyright in my private letters. Presumably that copyright is not granted as an incentive to create my private letters nor granted as an incentive to publish my private letters. Neither of those things am I particularly keen to do and it probably wouldn’t be very good for society if I were to do it. There, actually, there copyright is granted to give me control over my work because it’s seen as important to give me a sphere of dominion over those things for the creations of which I am responsible. And there are various ways of theorising why that kind of control may be important. They are various autonomy-based justifications that people often allude to. I think that’s really interesting. What’s really interesting is, so in that context, copyright becomes much closer, grounded in the same kind of considerations that surround moral rights. And then what’s kind of interesting in the sort of case you’re looking at. Are you... is it merely about the economics of the music industry or is it really about saying also that Daft Punk may not want a tribute from this particular group? Imagine if this group is a neo-Nazi group that decides to put a Daft Punk compilation together because they think that Daft Punk express their particular, have a particularly aggressive or whatever approach to the world that fits neatly with a neo-Nazi message. Well Daft Punk may want to be disassociated from the group that is attempting to recode them. And that’s very interesting because that’s a wholly different sort of consideration for why you might want copyright protection, than the
justification that really talks about incentive for the creation and about the dissemination of work.

AH: Do think that there's a problem in a sound recording that these rights and given to the owner, whereas with underlying musical works and possibly literary works that the right is naturally granted to the author in the first instance? So, for example, if you were to sample the recording, you would also be sampling the underlying works. Would that be an issue?

IPA: I think that there are very strong justifications for copyright in underlying musical works. Whether the justification is for copyright in sound recordings which began at a time when it was believed that the art of sound recording was one that required an enormous amount of technical skill and was self-deserving of protection in one way or another, whether or not there needs to be an independent copyright for sound recordings is a much more open question.

AH: There's a tradition that's been mentioned in some of the literature... there's a tradition in music sampling that comes from quotation and that same tradition also underpins exceptions that are granted to academia so you can quote relevant sections within limits. Why shouldn't that apply to sound recordings or musical works?

IPA: Well of course, I mean, it does. So purpose of private research and study, you can or you use an insubstantial portion. I think the, that goes back to the kind of question I was talking about in relation to parody, that is, that I think you ought to be able to quote work where it's necessary in order to comment on the work itself or its author, in which case it could be said that [pause] or at least that it's necessary to protect the speech of the would be recoder. In the circumstance in which you're looking at the use of the work because of the range of cultural values for which there is no adequate substitute, then I think it becomes much more tricky because there's a free speech interest arising from the part of the recoder but presumably there's also some kind of free speech right on the part of the copyright owner to have their work represented in some way free of distortion. I would encourage you to have a look at that parody piece and try and think through some of these issues.
Appendix Six: Selected transcript of interview with Composer Lecturer

[Interviewer (AH): What did you think about the song [Harder Better Faster Stronger, as a composer?]

Composer Lecturer (CL): I was very surprised to hear that the Daft Punk original one, well the original Cola Bottle Baby, well, I didn’t know that, but that’s alright, well I don’t know everything. And they’ve obviously sped it up and changed the pitch slightly and that’s a [pause] in some ways, I’m not sure if it’s because I know the Daft Punk one a little better. It seemed to be tighter. I mean the other one was very tight. It’s just because they only use a small part, they’re actually doing more with less in the Daft Punk [track].

AH: Do you think that’s kind of finding more value in an older work perhaps?

CL: Yeah, it’s recontextualising it I suppose.

AH: Is it perhaps a new way of bringing it to an audience, or way to bring it to a new audience?

CL: I don’t it’s a way. I don’t think it’s their way for them to bring that to a new audience because they didn’t acknowledge, did they? Did they acknowledge where they got it from?

AH: I don’t think they did on the album. But, if they did? Let’s say if they did.

CL: Oh well, if they did, and they did it with permission.

AH: I’m pretty sure they did it with permission.

CL: They would have to, wouldn’t they? Otherwise they could sue you to blazes. Look, it’s an example of using someone else’s melodies in your piece and people have done it throughout history.

AH: So you’re talking about the history of musical quotation?

CL: Yeah, musical quotation. It goes right back to medieval times.

AH: Do you think it should be, in the context of copyright, which we have had for quite a few hundred years but particularly in the last century, when we had
copyright related to mechanical reproduction, do you really think that creators should be able to use it in the same way, to quote from the past?

CL: In general, well, the issue is: How far back are you going to go? And the whole sort of moral rights question. Like if I quote something and put it into a neo-Nazi song, then the original composer of that work won’t like that so it’s more problematic.

AH: Absolutely. You did mention before that it is like referencing a melody or a harmony or a rhythm from before. How is it different when you are actually referencing the exact recording? So not some kind of performance of it but the recording itself?

CL: Well, that’s it. If someone does a cover version of this piece in a pub, their band, no using the original samples, they’re still reusing the material in their own way. I suppose in this sense they’re taking it to a new level in that you’re reusing the audio, you’re actually reusing the sound. Now, what I meant before with regards to the Daft Punk [taps rhythm twice] the two quavers that comes from *Cola Bottle* [sings to previously tapped rhythm], that comes from that, and things start to get a little iffy, I mean, to my way of thinking because they’re actually in a funny sort of way, if they’re reusing someone’s audio, it’s obvious and they’re not passing it off as their own.

AH: So, you mean it’s obvious as in what way?

CL: Well, it’s obvious if you’re listening to it, and you’re listening to both of them, the first one’s copying from the second one. In the case of the rhythm, having like a musical [pause] well it’s only two notes, right? So it’s not very much. But two notes in a particular place in the bar with a particular two syllable word both end in ‘ah’ or ‘er’ if you’re an American, ‘harder’ or hardah’, ‘cola’, it’s even go the same stresses. So it’s not even just they’re just [sic] taking the sample, they’re starting to use some of the composed singing that goes on top.

AH: OK. That’s an interesting one, actually. Do you [pause] can you think of other examples of music perhaps that might use those same stresses?

CL: There probably are, but I mean there would be, I mean there would be.

AH: Then, do you think that’s something that is perhaps original enough to be considered just part, you know, considered an original part of that piece rather than something that belongs to the public domain?

CL: In this case, in these ones, there’s no doubt in my mind that they would have come up that rhythm because of what was in the song. So if they hadn’t had used that sample, then it would be much harder to prove. But because they’ve
used the sample, and obviously they've listened to it a lot of times, worked out the sample. They know the music. They've used a sample and they've used them in the same way. It's really a, I mean you know, that's another way they're taking. Even though it's just two little notes, well, two very important notes. Because in the case of the Daft Punk song [sings part of Harder Better Faster Stronger] they are four times in a row. It's like the whole rhythm of [pause]...

AH: That particular section?

CL: Yeah. And then they do more with it of course. [Sings another part of Harder Better Faster Stronger] so it's like the question and answer imitation type of thing.

AH: So almost like bebop?

CL: Yeah, well they're using the original [sings part of Cola Bottle Baby] and they're changing the idea. And composers have done that throughout history. You know, [sings main theme of Beethoven's Fifth Symphony] and then Beethoven makes the whole symphony. So they're sort of doing that in this, I suppose. Maybe that's, maybe it's deliberate, I don't know. I mean if it wasn't, that's fine, but from a listener's first time point of view, to me it's obvious that's what they did.

AH: I guess we should turn to the other two pieces that were involved here. LCD Soundsystem, the original firstly, and then the Soulwax mix which add drums beat and amongst other things rearranges it and finally, the remix, or the re-remix which end up being the same. What do you think about that type of use of sampling and that kind of rearrangement?

CL: Well, that's a little bit more creative. And it's obvious because the first song, Daft Punk Is Playing At My House is boring. It's pretty standard. There's not much going on in it apart from the fact the way it's sung is slightly interesting. Now what they've done in the remix is tried to make it a bit more interesting by adding more colours and things in there, a new drum beat. That's taking it from something you might hear somewhere to something that you'll hear on 2DayFM or Saturday night when you're doing the mixes or whatever. So it's quite a very [pause] the second one is very standard DJ, to my way of thinking, sort of mix. Daft Punk Is Playing At My House. Well, it's a nice phrase but the original song didn't have anything to do [with Daft Punk], I was expecting something to do with Daft Punk and I couldn't hear it. Whereas, and that's what made the third one, the Shibuya Remix or whatever it was much more interesting and much more creative and I dare say it wasn't as big as the original Daft Punk Is Playing At My House. Right? Wasn't as big, successful. But it's harder listening; there's more in it and there's more diverse themes. The fact that they, obviously they
used the Daft Punk things because the song actually references it and now I can hear it.

AH: So do you think that creatively, to your mind, that that third rendition of it was more creative than the first rendition of it?

CL: Oh yeah.

AH: But then you also said that you would imagine that the first one would be more popular...

CL: [interjecting] Well, it's more straightforward. If you had to say which of these was more popular, you'd say the first one because it's more straightforward. A bit boring, but the last one was actually more interesting because it had different layers going on, and stuff like that. But you have to also take into account, this is just my way of thinking about this and I have listened to a certain body of music, I find certain things more interesting that others. But I mean it just makes sense that if Daft Punk is playing at my house, you have to reference Daft Punk in there. Otherwise it could be anyone playing at my house. Lindsay Lohan is playing at my house. It could have said that, really, and it wouldn't have made any difference.

AH: If you were Daft Punk – well, there are two of them, let's say you were one of them – would you have thought a similar thing? If that was your work and someone was writing a song called Academic Composer is Playing at My House?

CL: Yeah, probably.

AH: Setting moral rights questions aside...

CL: [interjecting] You'd have to have some references to yourself in some way whether it was something you do or some piece of music you created or the way you talk or something. It has to, otherwise [pause] I mean in this case Daft Punk is Playing in My House. I don't know the lyrics but they're obviously trading on Daft Punk's name.

[CL is shown lyrics to the original and the Soulwax Shibuya Remix of Daft Punk is Playing at My House]

AH: By using the Daft Punk samples in *Harder Better Faster Stronger* and putting it in their re-remix of LCD Soundsystem, obviously they've used part of Edwin Birdsong's song. What do you think of that use as a composer, in terms of quotation?

CL: Well it depends how greedy you are. I mean if the composers of the first one, if they're thinking these guys are tracing it right back, they're doing something with my music and they didn't ask my permission. And, you know, there is that
way where you could be very upset. It, I mean, just composers are different. Some are precious about it, some are like, yeah, well, it doesn’t matter. Depends how financially secure they are. Some people are just happy for their works to be used and others want their work to be used and just want to be attributed and some say do whatever you want.

AH: You’re familiar as a composer yourself with the idea of having a sound recording that can also have underlying works – a literary work, the lyrics, and a musical work, the composition. That final track, which is the case study, we can hear the sound recording very clearly, there is no doubt that there’s a sound recording, and I think that you can identify the lyrics so there would be some form of literary work. But, where is the musical work? Where is the composition underlying that? Because you said before that it’s a way of referencing other people’s material? But in this case, they’re not referencing someone else’s musical work; they’re referencing someone else’s sound recording as well as other things. So wouldn’t you say that the sound recording itself is integral to the composition and it makes it difficult to separate the two?

CL: In terms of the lyrics, I mean, not really. You could take the lyrics. If it was a composer who has a concert this evening, John Corigliano. He’s used the lyrics of Bob Dylan set to his own music. I mean there’s plenty of composers who set people’s poems. More unusual to rip the lyrics out of a song to redo it so in terms of [pause]... Are you talking about the rights or what?

AH: One of the things is you have different rights in different types of works and of course the recording. So I’d be interested to know what part of this collection of works and recordings is the composition?

CL: The composition is, ah right, yes, OK.

AH: Very basically, where is musical work? And, maybe a question that helps you answer that, could anyone just use the musical work, without using the sound recording?

CL: Absolutely, you just create a new one. You just rerecord it, you play all the things in there. Hang on; the term musical work is a problematic one. You mean work that somebody’s actually doing things? Doing some work? Or do you mean where is the work?

AH: I mean the asset. The copyright asset.

CL: Oh right. Yeah, well there’s copyright in the original and there’s copyright in the bits that have been chopped up and there’s copyright in putting it all together. So, the person who’s put it together in this particular order who’s also organised these sounds in this particular way has a contribution. But, you would think that they would reference where they got it from. Now I’ve done a
similar sort of thing with the works of Schubert and I – he’s out of copyright but there’s no problem – and what I did was I chopped it up and remixed it in a classical sense. And so it’s like Schubert was DJ Franz or something. Now, I’d put that as my own piece.

AH: OK. Did you reference it?

CL: I referenced it. In the program notes, it’s made very clear that this is where it comes from. And in fact there’s a subheading I’ve put in also. But, it’s also very interesting to see [pause] I’ve also done it with a piece of Wagner and different people have put John Smith [actual name of interviewee omitted to preserve anonymity; all references to ‘John Smith’ and ‘Smith’ in this appendix substitute for actual name of interviewee]. In terms of attributing the composer in the program, they might put John Smith after Franz Schubert. So they might put that down there. Some people would in fact have gone so far to say ‘Wagner, arranged Smith’. Which I sort of did. But where is the line?

AH: Between arranging and creating a whole new work.

CL: Well, not a whole new work. But, then, do you have to [pause] is it enough to [pause] if I write a piece called Siegfried Interlude Number One. Siegfried is obviously based on Wagner’s opera because they used different themes from it and, you know, chop ‘em up and put in new rhythms so it becomes like ‘funky’ and stuff like that. Now, is that Wagner arranged by me or is it my work using themes by Wagner? And different people have different opinions on that. So I said I wrote it: ‘By John Smith’. But in the program notes, it’s made very clear that, as I said, other people will say ‘Richard Wagner, arranged John Smith. So it’s a tricky one and different people will approach it in different ways.

AH: What do you think might have happened if you weren’t arranging an author’s whose compositions aren’t out of copyright, like Rachmaninov?

CL: Well, if he’s not out of copyright, you have to ask permission. You have to ask their estate. And so there’s been people who are doing parts of Three Pieces for String from Stravinsky. Stravinsky wrote that in 1914 – I’m terrible with dates. 1914 or ‘15. So he wrote it way back, almost a hundred years ago. But because he only died in ’74 or ’75, that’s not going to come out of copyright until 2045 so people assume because it was written so long ago that they can use themes from it. In fact Stravinsky used themes from other people in that, they’ve recently discovered. He used, for example, the very famous opening from that piece. Everyone thought that he was making that amazing stuff and in fact it was a Lithuanian folk song. And they found a book that he got them all out of. Because they can reference it. It’s a book of Russian folk songs. So, composers do, have and always have, really, done this thing where they will use other people’s material. And it’s because of copyright laws now that it’s an issue.
AH: Do you lament that?

CL: Yeah. You know, in Mozart’s time, you’d get people who actually copied the music out and sell it as their own. You don’t want that. That’s not right.

AH: But that’s purely duplication of the same work in substitute for the original whereas this would be something different, wouldn’t it?

CL: It’s creating a new work from something else. And I think that copyright laws at the moment do stifle creativity. Now, luckily, I think there is [sic] exemptions [sic] for satire and stuff. I don’t know if that’s the case in this country or just in the US. But I think it’s a problem. I think people should be polite and attribute where they got things from. And even just in some form, just the program notes or the record label or the CD cover. So people know you didn’t come up with it. Or you can put it in the title if you want to. Like *Siegfried Interlude Number One*. Siegfried, everyone knows Siegfried is Wagner’s third opera in his Ring Cycle, so it’s obvious I’m referencing that. I think, I mean, personally I’m a copyright owner. I own intellectual property and my publishers do but I think it’s a problem. I think it stifles creativity.

AH: What would you say if someone wanted to use your work in this way?

CL: Firstly, if they ask me permission, I would say yes. Go ahead. But this is a work that I own, right? Not my publisher. Because my publishers own my copyright. But if I owned it, yeah. Personally, if they asked, as long as they attributed it and then I wouldn’t mind really. If it became a number one hit and they are making a whole lot of money, it also depends on how much they [pause], how integral it is to the piece. If they’ve got a whole thing like what Daft Punk did with that *Cola Bottle* and then their entire piece is based on that. You’d think, well, come on guys. You’d want a credit on there so you get a portion of the profits from that side of things.

AH: How do you think that should be determined? I guess with a more classical sort of composition, you may be able to rely on a more quantitative test. How much, how long? But that is quite a rough test. You might go for other things like say melody or harmony or rhythm or phrase or whether a particular phrase is repeated through a song as a motif.

CL: Absolutely.

AH: What kind of measures could you use for something like digital sampling which is cross genre?

CL: I think it has to be recognisable by the average person.

AH: So you think it has to be a lay person, has to be able to recognise it. On first listening or on multiple listenings? Because, for example, you couldn’t hear.
CL: No, I couldn't hear. I couldn't hear it in there.

AH: So what kind of lay person test would you be suggesting?

CL: Maybe it's got to be accessible to the composer of the first piece. But you have to give permission beforehand, not afterwards.

AH: So, how can you create it if you can't get permission beforehand?

CL: That's right, so you have to get permission beforehand.

AH: So, that's a catch-22. You're saying that the original authors should be able to know how it's being used, what's being used but...

CL: You should be able to say how are you using it. And they're going to say, well, we're going to use that as a motif throughout the entire piece. If someone said that to me, I'd say, sounds good, I want my songwriting credit on there so that ensures that you get a proportion of the money and we can, because, well I don't know. Proportion of the money. Because you'd be giving. That's another way to acknowledge where you've got something from. But if they were based [pause] some people have said to me that person, that student composer, are writing a piece of music exactly the same as yours. So I have a listen, I don't really think it is. So different people will have different things like people have said that to me and I honestly can't hear it. I might hear some vague similarities so maybe the lay person isn't the answer.

AH: So, you're not sure maybe a lay person, maybe the original creator.

CL: I think the original creator is always a good [pause] because they know it. They know it. They know it back to front. And maybe the original creator is, and then the problem is when they're dead, then what do you do?

AH: What do you do?

CL: And then you go to court. Or do you have to? Well, that's what ends up happening. And you do get estates who, like Yoko Ono, who are very protective.

AH: I want to pose a hypothetical to ask another question. Suppose that some point in the future, someone – let's call him Mr X – wants to sample this re-remix, and let's say they call the song Soulwax is Playing at My House. Let's say that Mr X uses a section of that re-remix that takes the sample from that re-remix that involves the contribution of Soulwax, obviously, of LCD Soundsystem, of Daft Punk and also of Edwin Birdsong. Let's say it's that section of the song which you heard before about ten, fifteen seconds long which involves all four of them together. Who should own the rights to what parts of it? And if you were an expert brought into help a record company resolve how to distribute the rights, could you work out how to separate the contributions?
For example the samples belong to some people, the selecting, arranging and manipulating belong to other artists.

CL: I think that I’m not a lawyer so I don’t know. You would require legal advice. You’d think that the easy way would be that they each get something ‘cause they’re each representing their audio. Talking about people being represented. I’m presuming, of course, that Edwin Birdsong actually wrote *Cola Bottle Baby*. What about someone else wrote it? Now, so that person who wrote it has to be credited even more than *Cola Bottle Baby* if they just performed it. So I think that the right thing to do is just spread it all around.

AH: I guess before that you said that this would require a legal expert to work it out. But what if a music expert came to you and said ‘I’m not able to work how substantial these uses are, how important they are to the creation of this work. I need someone to help me how we should work out each portion of it.’ Would there be someone you would turn to advice yourself or would there be some...

CL: [interjecting] Well, I could give an answer to that question.

AH: How would you go about it?

CL: Well, you’d trace it like what you’ve done. Where all of the different parts come from, how substantial it is or not. I mean, I don’t know. Part of me thinks, well, it’s all been part of the process of creation and presumably they’ve all got permission to use each others’ pieces at some stage. So you could just say divvy up evenly or divvy up in relation to for example, in the second last one, what are they doing? What are they doing with their royalty splits? How are they distributing it out? You just reallocate it based on those sort of broad figures. I mean I imagine that’s what you’d have to do.

AH: How about that section that you noticed where Daft Punk had borrowed Edwin Birdsong’s rhythm of those lyrics and used different lyrics? How would you work out the value of that? Let’s say the lawyer has brought you in at the point where Daft Punk is sampling Edwin Birdsong, how would you out something like that? Because there’s a difference. There’s obviously some value that’s been placed in the recording being sampled but this isn’t quite sampling, is it?

CL: This is the music.

AH: It’s sampling some sort of idea that might be classified as some kind of musical content.

CL: Or quoted. Part of the musical content. Well, you could go at it the same way. Particularly since they’ve based the whole song on that, on that rhythm, pretty much. I’d say ‘righto guys, that’s the whole song on this’. And they’ll say, ‘it’s
only two notes’. But then you’d say, ‘come on. It’s two notes at the beginning of
the bar in exactly the same, all that stuff I mentioned before.’ You’d think there’d
be a debt there. A debt to the original. Because they didn’t start [sings made-up
melody]. They start with exactly the same thing in both songs. Both the vocal
parts, first vocal parts are the same, pretty much.

AH: Lyrics aside.

CL: Lyrics aside. Exactly the same. Now, and not only that, but they go on and
use all that the whole time. If they just started with that and went on to
something completely different, well, you might get away with it a bit more. You
could say [pause] but I mean, you know, I’m sure you could look at that George
Harrison thing where the judge said ‘you’ve probably heard it subconsciously
but it doesn’t matter, you did it.’ This might be the case here, I don’t know.
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Legislation List

*Digital Millennium Copyright Act 1999 (US)*

*Copyright Act 1909 (US)*

*Copyright Term Extension Act 1998 (US)*

*US Free Trade Agreement Implementation Act 2004 (Cth)*