FAIR DEALING IN MUSIC- A CASE FOR MASH-UPS

by

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Fair Dealing in Music - A Case for Mash-ups

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Abstract: Fair dealing in Canada is liberalizing itself. However, it is time to test whether the water is deep enough to incorporate newer changes in the field of music which changes in technology bring in. The endeavor is to take the case of mash-ups and a hypothetical 20-part mash-up artist and examine whether the doctrine of fair dealing is potent enough to apply in his case. I compare and contrast the *Feist* approach on ‘creativity’ with the Canadian ‘skill and judgment’ approach in *CCH* and infer that the Canadian approach is not too far removed from doing justice to the efforts of a mash-up artist in selecting and arranging pieces of music to bring a coherent whole into existence, by treating borrowed pieces of music as fair dealing.
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1. INTRODUCTION

The research question I address is whether mash-ups merit a fair dealing analysis. The first part deals with the peculiarities of musical works. The second part deals with the technological changes that have considerably altered both the art and business aspects of music. In light of the first two parts, the third part examines whether more liberalized interpretation of fair dealing is warranted and feasible in case of music mash-ups. Here, I invoke the *Feist*\(^1\) approach, which upheld an intellectual creation which was based on borrowed facts, so long as the compilation showed a modicum of creativity on the part of the compiler. After comparing the *Feist* approach with the ‘exercise of skill and judgment’ approach in *CCH*\(^2\), I conclude that an artist could claim copyright in a mash-up if he shows relevant skill and judgment in selecting pieces of music to make his own compilation mash-up. Moreover, so long as skill and judgment are evident an artist’s compilation, the borrowed pieces of music, individually, should be treated as fair dealing.

Thus, this thesis is a case for music mash-ups. By a mash-up I mean the borrowing of a musical piece and incorporating it into a piece of a song, almost unaltered. Mash-ups are an extreme version of sampling. Sampling involves some changes to the original song on the part of the sampler, but the total feel of the sampled piece still remains substantially similar to the original piece.\(^3\) In this thesis, I consider the case of a hypothetical mash-up artist who takes twenty different parts from various songs and builds them into a coherent whole. By falling back on cases in the US and their invocation of the fair use doctrine, I juxtapose the Canadian and American

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3. Online: http://www.dictionary.com/browse/mash-up: Mash-up, definition: recording that combines vocal and instrumental tracks from two or more recordings.
jurisdictions. Music-sampling cases in the US present a very interesting picture. From the ‘thou shalt not steal’ dictum uttered in a music-sampling case, courts have evolved to recognize the de minimis defense in music sampling in a recent case. It is also interesting to explore the evolving copyright doctrine beyond the field of music to understand the richness of and developments in the fair dealing doctrine, to see if music samples acting as building blocks in the creation of new music can find a place in the public domain. Hypothetically, if a court were faced with a case wherein there were a samples from various songs, “selected and arranged” in order to make a new creation such borrowing ought to fall under the fair dealing doctrine.

At the outset, I set out the peculiarities of musical works, where I emphasize on the point that borrowing has remained a part of the musical tradition. Complexities have only increased with globalization and increased access to music through technological advances. Hence, both the extent and geographical expanse of borrowing have increased. This has even led to the development of newer musical genres such as sampling and mash-ups which essentially build upon existing works to further extend the creativity in existing musical skill and literature out there. This has brought sampling and mash-ups under the wrath of the current copyright regime. Secondly, there is also a lot of subjectivity in the interpretation of musical works and debates about the use of expert testimony or the lay listener to analyze substantial similarity. I take the position that the Feist approach, which necessitates a modicum of creativity in the selection and arrangement of factual works, is best suited for music sampling and mash-ups, especially for our hypothetical of the twenty-part mash-up artist. Where interpretation of the musical structure and an analysis of its narrative elements is required, the total concept and feel or the lay listener test is more apt and a
conventional fair dealing analysis is more suitable. It also aligns with the enumerated list of purposes such as research, criticism, parody or satire, which the doctrine of fair dealing already recognizes through legislation.

The advent of the new technologies, ease of access to music, the Internet and peer-to-peer file sharing, limits to musical creativity with the limited baggage of notes available and the chilling effects on musical creativity through the constant fear of ensuing litigation through dicta such as: No sampling without a license, are justification to: Why music mash-ups require the recognition of the de minimis defense to rule out litigation at the outset, or resource to a more liberal invocation and grant of the fair dealing analysis where substantial similarity is found. In citing these rapid changes, I emphasize that the law has to come to terms with these rapid changes, and make leeway and encourage the possibilities of the creation of newer genres of music and not chill creativity.

With the inherent complexities in the area of music analysis and further complexities added in the business of music and access to newer music, a more liberal invocation of the fair dealing doctrine is necessitated. Borrowing of elements of various songs and copying and pasting each of them to create a coherent whole, could still be considered fair use. Here, the creativity standard proposed by Feist comes to our aid. This would encourage the “Progress of science and Useful Arts” which is the rationale behind the American copyright regime. This also falls in line with the liberal invocation of fair dealing Post-CCH in Canada.

It is true that the doctrine of fair dealing in Canada is based on purposes enumerated in the legislation. Thus, use of works that are substantially similar to other works, is considered as fair dealing if they fall under one of the enumerated purposes of research, criticism, parody or satire.
Scholars have deemed that neither the American nor Canadian enumerated purposes are exhaustive. Hence, creation of music mash-ups only for the purpose of encouraging development of newer genres in music, should be a valid enough purpose for legitimizing the *Feist*-based creativity in mash-ups as fair dealing or exempt under the doctrine of *de minimis* for borrowed pieces of shorter lengths.

The *Feist* approach can only come to our aid when we allude to factual compilations in literary works while discussing music mash-ups. Thus, a twenty-part music mash-up would be more akin to a compilation of a telephone directory in verbal works. Any musical work that falls under narrative fact works, would be apt for scrutiny under a conventional fair dealing analysis. For example, a biographer can copy his facts and make them look substantially similar to another biographer’s work, despite the use of different expressions. It could be possible that the total concept and feel the two biographies remains the same. The same can happen to a sampling artist. The total concept and feel of a sampled song can be substantially similar to another song, consciously or sub-consciously copied by the sampling artist. Yet both songs might want to convey different messages. Here, the totalities approach can come to our aid. If the total concept and feel of the song can convey or be interpreted by the intended audience as a criticism, parody or satire, even narrative fact-based musical works can be interpreted as fair dealing.

It is crucial to acknowledge right at the outset that *Feist* did not expressly lay down the standard for fair dealing. So, a work could be original, yet infringing at the same time.\(^4\) *Feist* is basically a case that deals with the standard of originality. It was an instance of the narrowing of

\(^4\) I am grateful to my supervisor, Prof. Stern for his comments on originality and the Feist standard.
originality. Many years later, in Canada, \textit{CCH} navigating along the same lines, ‘narrowed originality and expanded fair dealing in the same breath’\textsuperscript{5}. As further explanation, post-\textit{CCH}, it has become a lot easier for works to pass the muster of originality. When this threshold is lowered, the umbra of originality shrinks and more and more works would fall under the penumbra of fair dealing, so long as they fall under one of the enumerated purposes of fair dealing. A mash-up artist would want to fall under this penumbra. \textit{CCH}, thus, narrows originality, expands fair dealing, and asks the artists to justify their infringing works as falling under one of the enumerated purposes of fair dealing. As I set out later in the course of this paper, these enumerated purposes are firstly prone to an expansion of the existing choice of purposes. Alternatively, they are not exhaustive; hence newer purposes can be created with industry-specific demands.\textsuperscript{6} In light of the intervention of newer technologies that are significantly changing the face of the music industry, the mash-up phenomenon necessitates this narrowing of originality and the expansion of fair dealing in tandem.

Eventually, keeping the creativity in the music industry intact necessitates the invocation of an expansive public domain. The phenomenon of peer-to-peer file sharing, ease of access to music has changed the perceptions of commercial and non-commercial success. Actual values of songs are difficult to determine. Hence, commercial scale is but one of the variables artists take into account. Hence, not permitting sampling without license would only increase the red tape and chilling effects on creativity. It would not necessarily affect the commercial success of the samplees. On the other hand, encouraging the de minimis defense for shorter samples, or liberally invoking the fair dealing defense would only enhance creativity; perhaps even promote the original songs by making listeners go back to tracing the source of the sampled pieces.

\textsuperscript{5} Abraham Drassinower, \textit{What’s Wrong with Copying}, (Harvard University Press, 2015), at 43

\textsuperscript{6} \textit{Ibid}, Prof. Drassinower states: It is entirely plausible, perhaps even more probable, that one originality standard may be more conducive to “balance” in one industry or field of activity and another in another industry or field of activity.
2. MUSICAL WORKS AND TECHNOLOGICAL CHANGES

2.1 Peculiarities of musical works

Music is an art that appeals essentially to the ear. When this art becomes a part of analysis in a courtroom, the pendulum often swings with expert testimony, with a highly technical analysis on the one end and the lay listener describing his perceptions about the musical piece on the other. This analysis can be strenuous, time consuming and often marred with subjectivity.

When two more variables of technology and commercial survival are added to the mix, things get further complicated. For a brief idea about these complexities, in the first part, I lay out changes the music industry is facing due to the impact of the new technologies. These changes are reason enough to hypothesize about our 20-part mash-up artist. The current practice in the music industry of compulsory licensing, moreover, with many artists having only a very peripheral understanding of how copyright law operates, is such that we are depriving ourselves of the ease in creation of newer music. Who knows, the process of facilitating music mash-ups could eventually lead to the creation of a stand-alone, musical genre, which it is even currently, to a great extent. But, under the current practice, creators have to pay a license fee for borrowing even a small piece of music from other song. As a further corollary to this, if a person wants to use various small samples for a single song, he has to pay the license fees for all of them. This either increases a lot of hassle and leaves the possibility of creation this kind of music only to people who have the ability to pay the license fees; or leaves them with the recourse to use the samples illegally. The latter occurs either due to the ignorance of the current copyright law, or sometimes because artists
do this to rebel this complicated process. Others find alternatives around the system, such as recourse to the Creative Commons forum. This is devastating and creates unnecessary red tape to our cultural progress. There is a constant impending fear of being sued. As Lawrence Lessig claims, the copyright clause in the US constitution is the “Progress clause”, but the current copyright regime is clearly antithetical to this.

I do not however claim that we outdo the licensing process altogether. Instead, I propose a more liberal invocation and interpretation of the de minimis doctrine, in case of smaller music samples and a conventional fair dealing analysis where the infringing use goes beyond the de minimis standard. In Canada, Post-CCH, it is clear that a more flexible standard of fair dealing is being used. Hence, my endeavour in this paper, is to analyze whether the time is ripe to include borrowed music pieces in mash-ups as well under the ambit of fair dealing, for the purposes of judicial economy and cultural progress. If not by an elaborate legislative amendment exercise, at least through the common law!

While discussing the peculiarities of musical works, and how different music is compared to other works of art, at the outset, it is important to note ‘the tradition of borrowing’ as one of

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7 See Johnson Okpaluba, (2010) “Free Riding on the Riddim? Open Source, Copyright Law and Reggae Music in Jamaica” in Copyright and Piracy, (ed. Lionel Bentley, Jennifer Davis, and Jane C. Ginsburg), at 383-384: When in 1991, a US Federal Court found against a hip-hop artist who had used an unauthorized sample, it was thought that the decision would kill hip-hop music and culture. Hip-hop artists wanting to use sales, risked being sued for copyright infringement if they failed to clear the samples. But, Strict enforcement of copyright law has not stopped the production of hip-hop music, it merely changed the sound of hip-hop and altered creative opportunities for some artists by making it more expensive to produce using samples. In some instances though, it has caused artists to become more innovative and can lead to interesting artistic opportunities.


9 Supra note 2

10 Lisa Macklem, “This note’s for you - or is it? Copyright, Music and the Internet”, (2012) Journal of International Media and Entertainment Law: The author cites Olufunmilayo B. Arewa: Musical borrowing is a pervasive aspect of musical creation in all genres and all periods. Copyright doctrine does not adequately
the important features of the music industry. Demers terms this as allusion, where the erstwhile artists wrote or performed in a style similar to another artist. According to Demers, this practice was unregulated and almost expected of artists. However, with the advent of technology, what an artist could not only allude to, he can now actually reproduce mechanically. Technology empowered the artists to reduce their efforts by simply borrowing instead of ‘recreating’ the piece of music, but this facility was frowned upon by courts. One judge even related sampling to theft and did not pay heed to the defense’s argument that sampling was an established practice among rap musicians. Thus, while this practice is especially entrenched in music, people have not shied away from describing all creative and intellectual activity as referential. According to Judge Leval, “all intellectual property is in part derivative.” A further hindrance to boosting originality in music is the nature of musical notes itself. Some claim that original music can no longer be created, as the possibilities of combinations of notes have practically been exhausted.

Secondly, musical analysis is marred with a lot of subjectivity. The total concept and feel of a song takes the music beyond the capacities of hearing and listening. John Butt refers to an

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reflect the reality of such borrowing. Instead, copyright doctrine incorporates notions of Romantic authorship that assumed independent and autonomous authorship and even genius in the creation of original musical works. This individualistic and autonomous vision of musical authorship, which is central to copyright law, has de-emphasized the importance and continuity of musical borrowing practices generally.


12 ibid, at 7.

13 Leval, Pierre N. “Toward a Fair Use Standard” (March 1990) Harv L Rev Vol. 103 No. 5, at 1109 Also see Supra note 5, at 22-23: The author states that Disney’s additions to his works were based on works that were borrowed. Sometimes the borrowing was slight. Sometimes it was significant. In various cases, Disney ripped creativity from the culture around him, mixed this creativity with his own extraordinary talent, and then burned that mix into the soul of his culture. Rip, mix and burn!

14 Michelle, Francis V., Musical Copyright Infringement: The Replacement of Arnstein v. Porter - A More Comprehensive Use of Expert Testimony and the Implementation of an "Actual Audience" Test, 17 Pepp. L. Rev. 2 (1990), at 498. The author states: "It is claimed that all possible combinations of these thirteen notes already exist in the public domain, and that original music can no longer be created. Difficulty in achieving originality in a musical work creates equal difficulty in ascertaining whether a work has been copied. Practically every original idea the composer can think of has appeared somewhere before; it is a matter of probabilities, and every day the number of new possibilities grows less."
“implied listener”\textsuperscript{15}, who essentially takes music beyond these capacities of hearing and listening. Such a listener becomes one with the music almost at a subjective level, such as the whole becomes more than the sum of its parts. The tradition of borrowing and being influenced takes a further stance at subjectivity, when being influenced makes you inadvertently ‘copy’ someone’s work. Such inadvertence gets punished\textsuperscript{16}. However, according to Livingston and Urbinato, the composition process is not so neatly cabined, and influences are almost inevitable in the music field. Luke McDonagh\textsuperscript{17} also cites one such instance, citing the case of \textit{Bright Tunes v George Harrison's Music}. The Music Copyright Infringement Resource\textsuperscript{18} database describes the case thus:

\begin{quote}
The court’s tone is almost apologetic in determining that Harrison’s use of the melodic kernels of plaintiff’s universally popular number, in the same order and repetitive sequence and set to “identical harmonies”, compelled it to conclude that Harrison unconsciously misappropriated the musical essence of “He’s So Fine”.

Needless to say that some artists would not be exaggerating if there is an uproar at their end over the current copyright regime’s chilling effects of creativity.
\end{quote}

\textsuperscript{15} See Butt, John, “Do Musical Works Contain an Implied Listener? Towards a Theory of Implied Listening” 135, Journal of Royal Musical Association, Special Issue no. 1

\textsuperscript{16} Livingston, Margit and Urbinato, Joseph “Copyright Infringement of Music: Determining Whether What Sounds Alike is Alike”, 15 Vand J Ent L & Prac 2, at 267: The author cites a 1924 case: Fredfisher, Inc v. Dinningham, where Judge Learned Hand agreed that the defendant composer had probable subconsciously copied a piece from the plaintiff’s work. The judge even found this details of having borrowed credible, yet felt constrained to find infringement.

\textsuperscript{17} McDonagh, Luke T. (2012) “Is creative use of musical works without a licence acceptable under Copyright?” International review of intellectual property and competition law, 43 (4). pp. 401-426. ISSN 0018-9855

Accessible Online: http://eprints.lse.ac.uk/41658/, at 14. The author states: With regard to tune copying, some of the world’s most famous pop musicians have faced legal difficulties concerning infringement, even where the copying involved occurred “as a result of the subconscious mind”. For example, in the US case of Bright Tunes v. George Harrison, the melodies and chord structures of two songs were examined. It was found, under US copyright law, that there was “substantial similarity” between the song “My Sweet Lord” and the earlier work “He’s So Fine”. Also see footnote 110: It has been noted that in the UK a case of subconscious copying of tune fragments by a musical composer could potentially lead to a claim of infringement.

\textsuperscript{18} Music Copyright Infringement Source (Database sponsored by Columbia Law School and the USC Gould School of Law) Online: http://mcir.usc.edu/cases/1970-1979/Pages/bightharrisongs.html
One of the most polemic topics around the copying of musical works, however, arises around the use of experts or lay listeners. Infringement cases related to music become peculiar because of the analysis of technicalities associated with music, the role of expert evidence versus the perception of copying in the eyes of a lay listener. To cite some of the general peculiarities: such cases are heard not only on the note-to-note comparison but they also engage the component of “effect on the ear”.\(^{19}\) Moreover, when an “average lay observer” identifies a “recognizable part”, not essentially in terms of length, but in terms of quality, as copied, the action of copyright infringement of a substantial part of the copyrighted work can become successful. If the society does not view something as copying, the allegedly infringing work does not potentially harm the market of the original work,\(^{20}\) making the role of expert evidence unduly cumbersome and unnecessary. However, as Keyes noted, there are no established principles guiding the lay listeners, and “musical perception is an inherently subjective process that differs from individual to individual”\(^{21}\). Some, however, claim that the lay listener has an untutored ear and is musically illiterate\(^{22}\) and thereby not the ideal person to judge copying.

The rationale behind the lay listener test is “to ascertain the effect of the alleged infringing work upon the public, that is, upon the average reasonable person”. Supporters of expert testimony on the other hand, find “experts’ guidance essential for the court and the jury to understand what constitutes the ideas and language of music”\(^{23}\) and the technicalities associated with the note-by

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20 ibid


22 Supra note 14, at 500-501, author states: Indeed, the determination of the existence of substantial similarity and, thus, improper appropriation rests on the trier of fact's interpretation of whether the lay listener would find substantial similarity between the alleged infringing work and plaintiff's complaining work.

note comparison. A telling illustration of expert-lay listener dichotomy could be an incidence in Indian Idol 2009. The policy of the reality show dictated that the jury be present to comment on the performance of each of the contestants, but it was for the general public to vote for the best contestant. In one of the shows, an angry jury walked out as a protest, after the public votes made a mediocre singer win. In recounting this experience later, one of the members of the jury, Sonu Nigam, said that he felt that the audience was not ‘capable’ of judging.

In the US, in the late 19th and early 20th century, judges relied on their own musical sensibilities to resolve infringement cases. Later, in Arnstein v Porter, it was observed that the ordinary listener is the best suited to resolve such cases. Further, when ‘questions arose such as, whether the jury really know what they are hearing?’ experts took the stage. However, problems associated with expert testimony are such that with the vast expanse in the field of music, expert testimonies often cancel each other out because of conflicting testimonies. Needless to say, this arduous process and an impending fear of being sued might lead an artist to give up creating mash-ups altogether.

2.2 How technology has changed the music industry and the confused the understanding of the ‘lawful’ and the ‘unlawful’.

According to Lisa Macklem, “artists and users find the current copyright system confusing and costly.” One of the probable causes for confusion is a history people being sued for hefty damages. This keeps lurking a risk of being sued all the time. Lawrence Lessig cites the example

24 Online: http://www.india-forums.com/forum_posts.asp?TID=232335 Sonu Nigam explained: We had to ring a warning bell in the audience’s mind. We don’t know what stand to take now. We’re confused. The channel (Sony TV) say that we have to go by audience poll since that’s the format for Idol all over the world.”
25 See Supra note 11
26 Supra note 10
of an IT student who was threatened to be sued by the RIAA claiming $250,000 in damages. This IT student had merely tried to create a google-like search engine, with one fourth of the database as music files. The student ended up paying $12,000, a part of his student savings as settlement. Another cause for confusion is an imperfect understanding of the copyright law in the society. In her book, Joanna Demers cites a number of interesting hoaxes about copyright infringement that end up confusing the average consumer/creator. Moreover, with the gradual changes in the copyright law and growth of bypasses (some lawful and others unlawful) to circumvent the current copyright regime operating at a parallel level, there is an impending challenge in distinguishing copyrights from copy wrongs!

Secondly, technology has also led to a rapid democratization of music. According to Kurt Dahl, it has led to empowerment of individual artists. He states that artists are finding newer ways to sustain in the market and following the management model such as making 360 deals with their record-labels. With drops in the sales of CDs, they are moving towards concert revenues and advertising. According to Dahl, the problem today is not so much of piracy, but that of obscurity. Democratization of music has brought a lot of music out there. Apart from abundance, one more lacuna is that that copyright regime largely protects the economic interests of the artist. Nevertheless, were we to recognize artists’ particular styles and tones as copyrightable, that would stifle

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27 Supra note 8, at 48-52
28 Supra note 11, at 5-6
29 See Patrick Burkart, *Music and Cyberliberties* (Connecticut: Wesleyan University Press 2010), at 2 The author states: Musicians and fans are challenging the current business model of digital distribution in four ways by: 1. Bypassing copy protections on music files 2. facilitating anonymous file sharing 3. developing commercial alternatives to doing business with major labels and 4. creating software innovations that provide open and multipurpose alternatives to closed systems.
future creative efforts.\textsuperscript{31} If this is so, a logical conclusion would be that if music-mash-ups were recognized as fair dealing, artists’ monetary interests would not be severely jeopardized with the rise of newer avenues such as concert sales. Moreover, the up-side of this arrangement would be to empower budding mash-up artists who have to give up their artistic endeavor due to not having money to pay the licence fees or the hassle involved in it.

The point I would like to dive at is, artists’ preoccupation is not that of being freed from the shackles of piracy. If the whole bigger and more evil picture of piracy does not scare them away, it would not be unreasonable to expect artists objecting to someone making ‘creative use’s small portions of their songs. All the more, what we could accomplish is cultural development. Hence, it would not be a far-fetched idea to claim that sampling and music mash-ups could achieve more good than harm.

3. FAIR DEALING

3.1 Expansion of the idea of fair dealing

It is legitimate to question this idea of expansion of the concept of fair dealing. After all is it really necessary as people are still finding ways to survive in this confusion? According to Johnson Okpaluba, “Strict enforcement of the copyright law has not stopped the production of hip-hop

\textsuperscript{31} Tamara J. Byram “Digital Sound Sampling and a Federal Right of Publicity: Is It Live or Is It Macintosh?”, (1990) 10 Computer L.J. 365, The author also states that Copyright law is not probably best suited to take care of musicians’ economic rights and to “their goal of maintaining control over the uses of their sound” (in the age of music sampling). On the point of the current copyright regime not fairly suited to the current world of music, see the \textit{Feist} decision at para 33, where the court quotes S 102(b) of the American Copyright Act, “which identifies specifically those elements of a work for which copyright os not available: “In no case does copyright protection for an original work of authorship extend to an idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work”.” None of these factors cater to the music field of music that is more concerned with tone and style and its appropriation or misappropriation. Further, an additional complexity in the field of music copyright arises due to the existence of two different copyrights in the same song, one in the sound recording and another in the musical composition.
music”. It has caused artists to circumvent the current process and take recourse to existing bypasses or caused them to become more innovative32. Does this mean that the deterrence of monetarily hefty and complicated licenses for creating mash-ups is actually incentivizing creativity? One eventually learns to survive! Critiques could say that bypasses such as the Creative Commons are available, why insist on fair dealing in mash-ups? The CCH of course recognizes ‘alternatives to the dealing’ as one of the six factors in the fair dealing analysis. However, as Lawrence Lessig states:

“All cultures are free to some degree. The hard question however is: “How free is this culture? How much and how broadly is the culture free for others to take and build upon?”33

Thus, the argument that existing alternatives are already there and that they should suffice, would only result in a compromise and not a satisfaction of the artists’ creative interests. It also goes against the tradition of borrowing from others’ works, that is broadly recognized in the music industry.

The next question that one has to address is how much borrowing is fair for the purpose of this expanded definition of fair dealing? This is a valid question as, fair dealing is rightly described as “incredibly shrinking or extraordinarily expanding”34. Judge Leval also acknowledges that while the 4-factor test in the US is sufficient for a fair use analysis, he is not in favour of bright line rules. He states:

We should not adopt a bright line standard unless it were a good one, and we do not have a good one. We can nonetheless gain a better understanding of fair use and greater consistency and predictability of court decisions by disciplined focus on the utilitarian, public-enriching objectives of copyright and by resisting the impulse to import extraneous policies.35

32 Supra note 7
33 Supra note 8, at 30
35 Supra note 13, at 1135
Since a bright-line rule is elusive, it would be a lost cause to look for an exact standard. The current trends in sampling and mash-ups necessitate a more liberal interpretation of fair dealing, not a bright-line rule essentially. This should not be perceived as too lofty of an expectation as, fair dealing is after all a principle, a flexible standard.

3.2 On the Feist approach

The crux of the Feist case is the distinction it draws between facts and factual compilations. In this case, Rural was a telephone company that published a typical telephone directory (with names and addresses listed alphabetically). Feist publications aimed at creating a larger directory covering a greater geographic area, covering around 11 telephone companies’ listings. Among these 11 companies, it was only Rural that refused to license its listings to Feist and later sued Feist for copyright infringement when it took those listings despite Rural’s refusal to license.

The Feist project of gathering information from “11 different telephone service areas” for covering a wider geographic area and creating its own larger telephone directory, has very close resemblance to the hypothetical 20-part music mash-up artist, who gathers his information from 20 different songs in order to create his own song.

The Feist case presents some important take-away for our hypothetical mash-up artist. Firstly, Feist not only vehemently opposes the ‘sweat of the brow’ approach, but it also clarifies the misunderstandings around it. When Rural contended that Feist should have gone door-to-door to obtain its own data of telephone numbers and addresses, the Court did not let this argument

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36 See Ariel Katz, Fair Use 2.0: The Rebirth of Fair Dealing in Canada, in Michael Geist, ed., The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law, (Ottawa, ON: Ottawa University Press, 2013), at 140
37 Supra note 1
38 Supra note 1, para 7
stand. By aiming to clarify the mystery, (the court’s explanation turned out to be not quite clarifying eventually) surrounding “independent creation”\textsuperscript{39}, the court stated that the ‘sweat of the brow’ courts “absolutely precluded authors from saving time and effort by relying upon the facts contained in prior works”\textsuperscript{40}. They wanted authors to independently create their own facts.\textsuperscript{41} The court’s version of an “original work” at paras 40 and 41, was as follows:

To merit protection, the facts must be selected, coordinated, or arranged “in such a way” as to render the work as a whole \textit{original}... A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e. without copying that selection or arrangement from another work), and that it displays some minimal level of creativity.

The court’s stance here can be explained as one that supports all evolutions in works. It does not oppose authors’ relying on existing selections or arrangements. All the court is asking, for “the progress of science and useful arts”, is that artists take their borrowing to the next level by exercising at least some amount of creativity to further independently create a newer selection or arrangement from borrowed data. Thus, borrowing per se is not bad. Importance lies in what an artist further does from a borrowed work. This dictum of the court unfortunately fell on deaf ears, as became evident from the ‘thou shalt not steal’ and ‘no licensing without sampling’ dicta in post-\textit{Feist} music sampling cases.\textsuperscript{42}

\textsuperscript{39} Supra note 1, para 28
\textsuperscript{40} Supra note 1, para 30
\textsuperscript{41} Supra note 1, The Court further clarifies this at para 43: he 1909 Act did not require, as “sweat of the brow” courts mistakenly assumed, that each subsequent compiler must start from scratch and is precluded from relying on research undertaken by another. Rather, the facts contained in existing works may be freely copied because copyright protects only the elements that owe their origin to the compiler - the selection, coordination, and arrangement of facts.
\textsuperscript{42} Newton v Diamond 349 F.3d 591 (9th Cir. 2003)
The *Feist* decision in all, was not well-received. Rather, it confused the courts in applying the creativity standard in future cases. One possible source of confusion could be the juxtaposition of the words novelty and creativity, which almost mean the same, yet are used to convey seemingly opposite positions on the court’s part. The court states at paras 40 and 41 that we do not require novelty, and that authors can rely on selection or arrangements that others have used, but we still require some form of creativity; authors should not be copying selection and arrangement from other works.

*Feist* undoubtedly introduced a new standard which was “the creativity standard” in the US copyright jurisprudence. Hence, mere selection and arrangement of data that occurs, for example, in compilation of telephone directories would not be worthy of copyright protection. However, what constitutes creativity can be moot. It is the judges’ interpretation of a creative mind that would eventually tilt the balance in favor of the artist or the other way around. Often, courts also look at the subjective, evaluative choices of the selector, focusing on the particular categories of chosen, by not looking at the overall format of the work. The music sampling and mash-up industry is at a crossroads where it is seeking respect as a genre. The practices of computer-generated music and advanced technological techniques available to experiment with samples of music might

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44 Online: http://www.thesaurus.com/browse/novelty: Novelty and creation have been cited as synonyms

45 See Alfred C. Yen, “The Legacy of *Feist*: The Consequences of the Weak Connection Between Copyright and the Economics of Public Goods”, (1991) Boston College Law School, at 1346-1347: In other cases, copyright policy, and not esthetics, will be the determining factor. This will occur because decisions about creativity come perilously close to matters of taste, and not judgment. Each judge knows that his or her conception of creativity may not be shared by anyone else... If the creativity of a given compilation is unclear, the question will be resolved by asking whether a finding of creativity (i.e., an extension of copyright protection) would actually advance “the progress of Science and useful Arts. (Online: http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1913&context=lsfp)

46 *Supra* note 43, at 813 and 819
as well lead to a stand-alone musical genre in itself. And, by making artists subject to the compulsory licensing scheme, one begs the question of whether we are stifling creativity by scaring away artists from the rigorous licensing regime.

Secondly, the *Feist* case had one more consequence on the perception of originality. It denounced the sweat of the brow approach while adopting a more *qualitative* creativity standard. However, in case of our hypothetical mash-up artist who takes 20 different samples and collates them to form a new song, it is his selection and arrangement of pieces of music that bring out his skills as an artist. This selection and arrangement, if coherent, should suffice in keeping up with the requirement of originality, and ‘creation’ of original hooks or riffs should not be crucial. What the compulsory license scheme currently lacks, is the attention to the whole picture.\(^{47}\) The total concept and feel test works best for mash-ups. Thus, samplers can take recourse to the de minimis defense. For mash-up artists, let us consider the example of our 20-part mash-up artist. Since, he is using 20 different songs’ pieces to create his own coherent whole, the song, taken as a whole, is not going to look substantially similar to any particular song, should he weave his pieces together well. If his borrowed pieces are analyzed individually, he risks being sued by 20 artists whose pieces of songs the mash-up artist has borrowed. If his song is seen as a whole, his creativity falls under the *Feist* creativity of ‘choice’ of selection and arrangement of music pieces. Further, his

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\(^{47}\) This happened in the SaReGaMa case (*Saregama India Ltd. v Mosley*, 687 F.Supp.2d 1325 (S.D.Fla. 2009)), where only the sampled piece consisting of three notes was analyzed at great length, with the expert form the plaintiffs, SaReGaMa, admitting that he examined only the sampled piece and did not take into consideration the work as a whole. Looking at the work as a whole, can be certainly tricky, as, a 3-second sampled piece would definitely make the copying seen diluted when it is seen as part of the whole song than when examined in isolation. Thus, post-SaReGaMa, would we expect short samples considered in whole songs as not affecting the creativity in the sampled song either qualitatively or quantitatively, thus allowing the de minimis use in virtually any song containing a short sample?
individual borrowing from 20 different songs would fall under fair dealing since the pieces would be individually qualitatively and quantitatively insubstantial.

Samples are individually licensed, and there is no looking at the ‘whole’ song in order to assess the underlying creativity. The more samples an artist borrows, the more he ends up paying in licensing fees, whereas ironically, the more he borrows, the more he makes his creation substantially similar to one particular song.\footnote{See Robert C. Denicola, “Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works”, (1981) Columbia Law Review, Vol. 8, No. 3.: The author, in gist, says that collection of data itself may constitute original works as, originality in a person’s selection or choice of data can itself be a crucial component of creativity. Moreover, the author also provides a key view about the possibility of facts being freely available to copy and that stifling future incentives to create. At 531, he states: “Since it is a collection that as a whole that represents the original work of authorship, only copying sufficient to produce a substantially similar collection would generate potential liability”.

48 See Robert C. Denicola, “Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works”, (1981) Columbia Law Review, Vol. 8, No. 3.: The author, in gist, says that collection of data itself may constitute original works as, originality in a person’s selection or choice of data can itself be a crucial component of creativity. Moreover, the author also provides a key view about the possibility of facts being freely available to copy and that stifling future incentives to create. At 531, he states: “Since it is a collection that as a whole that represents the original work of authorship, only copying sufficient to produce a substantially similar collection would generate potential liability”.}

This also gives a creator an impression that borrowing is pre se bad. Where there is borrowing, there is no creativity, and this does not further the goals of the US copyright doctrine of “progress of Science and Useful Arts”. However, the problem of the current copyright regime is that it adopts a one size fits all approach to various genres and works of art. Via the example of sampling and music mash-ups, we see that creativity is being redefined in a whole new different way. This creativity leans technically more towards the sweat of the brow approach in its individual pieces, but the complete picture might be quantitatively and qualitatively different from the borrowed pieces. The literary world has long faced this dilemma through works of non-fiction and compilation of facts. In the music world, compilation of facts has arisen as an issue particularly with the advent of the new technologies, and the erstwhile music licensing regime seems to be falling short of answers to accommodate these changes. As Denicola rightly puts, originality is undisputed and is easily made out in works such as MacBeth and Ulysses, it is less so in the contexts of reports appearing in the Wall Street Journal.\footnote{Ibid, at 516} With the advent of new technologies we are
more likely to be in the grey areas as they occur in the latter example than outright novelty that arises in the former. Given the field of music and its tradition of borrowing, that we touched upon at the outset in this paper, creativity is crossing new bounds. In the context of “Rip, Mix and Burn”\textsuperscript{50}, the current copyright regime is finding it difficult to come to terms to newer realities in developments in the field of music.

3.3 How Canadian jurisprudence could respond to the issue of music mash-ups and sampling

Those who do not have the power over the story that dominated their lives, the power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts...Copyright should be wary of impairing that power.

-Salman Rushdie\textsuperscript{51}

Canada has not had a rich history of sampling lawsuits. However, with the ‘sampling’ issues pressing the music industry, the day when this question is posed to the courts is Canada, may not be too far away.

\textit{CCH}\textsuperscript{52} presented a whole new aspect of looking at originality and substantial similarity. It introduced the new parameter of “exercise of skill and judgment”. Paragraph 25 of the judgment is worth a mention:

An original work must be the product of an author’s exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be “original” and covered by copyright, creativity is not required to make a work “original”.

What is worth noting is the fact that the Court is concerned with unmeritorious creators juxtaposing various facts together and claiming the “cut and paste” work as their original creation. The Court does not stop at that, but further goes on to remark interestingly that “creativity is not

\textsuperscript{50} The term became popular through Apple’s advertisement. Online: http://www.criticalcommons.org/Members/ccManager/clips/apple-ad-rip.-mix.-burn

\textsuperscript{51} Wendy J. Gordon, Reality as Artifact: From Feist to Fair Use”, 55 \textit{Law and Contemporary Problems}, at 101-102

\textsuperscript{52} \textit{Supra} note 2
required to make a work original”. This could indicate that the Court expressly rejects the American creativity standard, but that is not quite it. As a further corollary to paragraph 25, a selection and arrangement of things that went beyond trivial skill and judgment would be acceptable under the Canadian fair dealing jurisprudence. A skillful selection and arrangement of facts, thus, could still come under the ambit of Canadian fair dealing. This is precisely what a mash-up artist would want in order to invoke the fair dealing exception.

At this juncture, it is interesting to compare the American viewpoint in this regard. Much of discussion in the US fair use revolves around transformative. Kennedy J, in Acuff-Rose, was vocal about precisely the same concerns about originality as were mentioned in CCH. He stated: “If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright, the financial incentive to create.” It would not be far-fetched to interpret Justice Kennedy’s views as rounding in on an expectation of a certain threshold of skill that would qualify a transformation of a work into a parody. Thus, Canadian fair dealing and the US fair use converge. Transformative use can be ascertained only when there is a certain exercise of skill by an artist, who looks at the borrowed material only as a building block towards his own creation.

To give a literary example, merely changing the names of characters in Jane Austen’s Pride and Prejudice and then claiming the work to be his own, would more likely be termed as a purely “mechanical exercise” and “use of trivial skill and judgment” by a Canadian court, and not transformative enough to pass the threshold of “transformative use” by an American court. Further, taking paragraphs from various texts of Shakespeare and presenting this collage of extracts as his own creation can be frowned upon. Thus, a reasonable person would agree that fair dealing requires more than that.

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It would be ideal for the copyright regime to focus on the peculiarities of various artistic
works and give each its own leeway and elasticity in interpreting “transformative use”. As an
illustration, it would be erroneous to apply the rightful denunciation of the cut and paste pseudo-
Shakespearean play to a mash-up artist. In crude comparison, our hypothetical 20-part mash-up
artist is undertaking exactly the same task as our pseudo-Shakespearean playwright, hence, both
fail to satisfy the fair dealing test by being too substantially similar to the borrowed works. How-
ever, there are various mitigating factors that we might need to take into consideration before re-
jecting the fair dealing defence to our 20-part mash-up artist.

The first mitigating factor would be the abundance of possibility of variations in expres-
sion\textsuperscript{54} in literature that has a wide range of vocabulary at writers’ disposal when compared to the
limited baggage of musical notes available to a musician. Literary artists have a lot more baggage
of words at their disposal. Exercise of skill can lead to lesser instances of being repetitive in ex-
pression, despite the use of the same idea. A musician cannot go beyond his baggage of twelve
notes. Permutations and combinations of these notes ought to exhaust the creativity in music. As
has been set out earlier, it is seemingly very difficult for someone to come up exactly with the
same works, even at a sub-conscious level, with a work that is substantially, literally similar to the
Ulysses or Hamlet.\textsuperscript{55} This would be one end of the spectrum, where exercise of intense skill and
judgment would be required on an author’s part, which would be difficult, or highly unlikely to
occur in the real scenarios. Since such a creation is highly unlikely to occur. At the other end of
the spectrum would arise the exercise of trivial skill and judgment, through our example of a person

\textsuperscript{54} Since copyright does not protect ideas, but protects only expression, a person of literature has more
possibilities for innovation, with language and its ocean of vocabulary, than a musician who works around
a limited number of musical notes.

\textsuperscript{55} Supra notes 48-49
merely changing the names of the characters of Jane Austen’s Pride and Prejudice, would be so trivial as to not attract the *Feist* approach.

However, the law does not work on these extremes; its aim is to look at the more reasonable situations. Hence, if we were to compare the *Feist* approach and juxtapose that with examples from the literary or musical fields, we would have to look at a more reasonably occurring realistic situation. Thus, telephone directories are fact-based compilations. The skill and creativity of the compiler lies in presenting the facts systematically and in the most user-friendly way possible. If a mash-up in the music world were to be compared to the compilation of facts in a telephone directory in the literary world, the courts would certainly have to focus more on the arrangement-aspect of the mash-up. It would be more akin to looking at a song, composed entirely of borrowed elements. The creativity lies only in the selection of appropriate pieces and arranging them into a coherent whole. This is the closest the *Feist* approach can take us while applying it to music mash-ups and that is the most apt application of *Feist*.

However, while discussing the mitigating factors, it is important to acknowledge the limitations of the *Feist* approach in certain scenarios. As we go closer to the reasonably possible situations, complexities arise. For example, Abramson mentions narrative fact works, which largely include biographies or articles based on someone’s life which entails narration of incidents. He states:

> Determining similarities between two directories is rather simple; counting common entries will suffice. Therefore, the infringement issue is fairly straightforward and there is little danger of dubious findings of infringement. By contrast, determining whether two narrative fact works are substantially similar can be quite difficult. There can be all sorts of takings; some almost verbatim, others more in the nature of paraphrase; some presented in a form very similar to the one utilized in the original work, others in quite a different form or order.  

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Abramson states that musical works are less amenable to verbal description, whereas, similarity in literary works is easier to depict or describe in the form of words. He, whoever does point out even literary works being similar in their ‘total concept and feel’.

If Abramson’s analysis is applied to musical works, a court’s judgment would likely be based on its perception of a musical mash-up. It is difficult to look at a mash-up as a narrative musical fact-work, unless the listener interprets the lyrics as conveying some story. Whether musical notes, and their arrangement, apart from the lyrics convey a story, is again an exercise in interpretation of an art-work. This would lie more in the perception of the listener. The fair dealing doctrine already recognizes some such modes of interpretation, such parody, criticism and satire. Hence, narrative fact works in music are in fact more amenable to falling under the ambit of the enumerated purposes of fair dealing, than factual compilations. Here, bright-line rules would be highly unlikely. Each case would depend on how the audience, here, the judge, reacts to a particular music mash-up. However, for mash-ups which require focus on selection an arrangement of borrowed musical works, Feist exists! Where Feist fails, mostly in cases of narrative musical fact works, the purposes of fair dealing themselves open the doors for the work to fall under the fair dealing exception.

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57 Ibid, at 148-149, Abramson states: “This might be possible in certain contexts. The subsequent author may convey the spirit instilled by the ideas of the original author without using many, or even any, of the first author’s words. A good example of the possibility of this phenomenon is demonstrated in The Nation. The real core of President Ford’s memoirs, at least from the stand point of commercial value, was Ford’s revelations about the disclosure in its article, neither directly quoting anything Ford had written nor reprinting any quotations Ford had cited, the article might still have taken the essence, the commercial “thunder” out of Ford’s memoirs. Once the “sensational” information Ford could reveal was printed and had received general currency, how many people were interested in reading the same information, in Ford’s own words, two weeks later in Time? Surely not as many as would have been interested had The Nation not printed its article. For this reason, the Supreme Court’s opinion regarding The Nation’s infringement is sensible and consonant with the underlying principle of copyright law to provide economic incentive to an original author.”
Craig and Laroche, hence, shun the totalities approach. They favor more the expert opinion for this reason.\(^{58}\) Echoing the same sentiment of introducing high unpredictability and volatility in copyright litigation, as set out earlier of there being no ‘social norm’ that would provide any meaningful standard on how a piece of music would be perceived by a ‘reasonable listener’\(^{59}\). Hence, it would be logical to conclude that in order to bring in an orderly approach to music copyright interpretation, expert opinion has to be valued significantly more than it is now. However, it is important to note here, that questions of interpretation of art would be better made by the intended audience of the work of art. It is thus the totalities approach or the lay listener approach we would eventually take recourse to. Expert opinion should better serve the purpose if it is restricted only to the note to note comparison, if necessary, to assess substantial similarity. If substantial similarity is found, the interpretation of the artwork should be left to the total concept and feel approach. Thus, in the case of mash-ups, after a recognizable part from a borrowed work is found, its interpretation would be better analyzed through the framework of the total concept and feel test, and not through expert opinion.

Secondly, musical facts, ideas are often difficult to sift from musical expression.\(^{60}\) While the former remain in the public domain, it is only the latter that deserve copyright protection. Now, copyright law recognizes the merger doctrine, which states:

“When the idea and the expression of the idea are inseparable, then the expression will not be copyrightable because it would necessarily give the author a monopoly on the expression of the underlying idea.”\(^{61}\)

\(^{58}\) Supra note 19  
\(^{59}\) Ibid at 55  
\(^{60}\) See Rosen on Music Copyright, infra 20  
Copyright, Originality, and the End of the Scenes a Faire and Merger Doctrines for Visual Works
Craig and Laroche explain some of the connotations of musical ideas. According to them, ideas in music could be something like precluding someone from writing a song on love. It would be highly unreasonable to preclude something from writing a song on falling in love. One more connotation can be that of pursuing the age-old wisdoms in music, for example, customary refrains or common chord progressions. Such musical ideas ought to lie, then, in the public domain. However, current musicians are prone to face a lot of difficulties if standards remain so vague. Put simply, the merger doctrine is very difficult to enforce in the field of music. Firstly, the tradition of borrowing in music remains, it has now become even more complicated with the rise of globalization. Borrowing from overseas has become a lot easier. Hence, what might be a customary refrain in African music or Indian classical music, would still lie in the public domain. This would make litigating in the field of music copyright more akin to extensive research-work in world music! The copyright law of North America does not mention Western classical music as the standalone authority and reference in interpretation of music. Given these difficulties in tracing the source of certain common chord progressions, the merger doctrine, though an excellent alternative to fair dealing, becomes difficult to enforce. Borrowing, and the expanse of music through ease of access, are thus making the dividing lines between ideas and expression in music thinner, making the merger doctrine seem either obsolete or unenforceable.

When it comes to other literary genres, brief phrases or mottos are deemed to unprotectible. However, the same defense is not available to a musician, ipso facto. Every copying, thanks to the practice of compulsory licensing, is deemed to be copying, right since the case of *Grand

62 Supra note 19, at 50
63 Online, see: http://www.copyright.gov/circs/circ34.pdf
Upright v Warner\textsuperscript{64} or has had to be expressly fought out through the invocation of the de minimis doctrine in Saregama. Thus, where the de minimis doctrine is commonplace in the literary genre, and has found express mention in the legislative commentaries in the US, such is not the case with music.

Thirdly, by convention, there are stand alone musical genres such as hip hop or the Jamaican reggae, that have relied exclusively on the tradition of borrowing and group compositions and have received immense audience appeal. Encouraging such musical genres to develop, runs the risk of opening the Pandora’s box and making such exceptions available to other works of intellectual authorship or performance such as literature or film-making. Much as this is unfortunate, courts can make explicit in their judgments, the peculiarities of music, and limitations of musical expression and existence of a common stock of expression in various musical genres that continue to remain in the public domain, historically. Hence, the invocation of the de minimis defense has to occur at the trial stage, and more frequently recognized, thus ruling out the whole tedious process of litigation. This would negate the chilling effect on creativity that the sampling debates promote. The field of music does not have to be a scapegoat. Progress of science and useful arts ought to be the aim of the copyright regime. The law has to adapt to the current industry practices, and keep pace with the current technological and global trends.

Moreover, as discussed at the outset, appreciation and interpretation of a work of art is often done by the public consuming this work of art. In this regard, courts and academics alike, have often oscillated between an expert opinion test and a lay listener test.\textsuperscript{65}

\textsuperscript{64} Supra note 18, “Get a license or do not sample,” Sixth Circuit Judge Ralph Guy states in a tone reminiscent of Judge Kevin Duffy, who opened his dreadful opinion in Grand Upright v. Warner (1991) with the biblical admonition “Thou shalt not steal.”

Online: http://mcir.usc.edu/cases/2000-2009/Pages/bridgeportdimension.html

\textsuperscript{65} See supra note 17
The *Arnstein v. Porter* case stated “The more valuable the material taken, the more likely that the taking will be found too much”\(^{66}\). The case relied on the totalities approach, weighed infringing works on how well it is received as whole, and not merely dissecting the infringing parts. In my opinion, “the total concept and feel” test should be crucial for a mash-up artist. When he borrows small extracts from number of songs to create a *coherent* whole, originality lies in striking this coherence. Should the new work have a character of its own, after building upon smaller borrowed works, a fair dealing defense for a mash-up artist would succeed. Moreover, this remains in line with the current US and Canadian jurisprudence.

As for the Canadian legislative structure, S 29\(^{67}\) expressly lays out the purposes for which the defense of fair dealing can be allowed. These purposes include specific purposes such as parody, satire, criticism, etc. A lot of ink has been spilled over the fact that the legislature did not intend the list of these factors to be exhaustive.\(^{68}\) Rightfully so, I argue that mash-up artist need not justify his mash-up for one of the listed purposes. His effort in creating a coherent whole from borrowed pieces, should constitute an intellectual activity important and sufficient enough to let this mash-up stand on firm ground. Any additional purpose of creating a mash-up left for the artist to be proved would only create additional burden on him. Further, ultimately, an important aspect in appreciation of the price of art lies in its interpretation. A seemingly unintended piece of work may look like a satire to certain audience or criticism to others. Thus, proving a purpose for a

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\(^{67}\) *Copyright Act, R.S.C., 1985, c. C-42*, ss29: Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

\(^{68}\) *Supra* note 36, at 135, the author states: A few examples will suffice to show that the view that the list of enumerated purposes is exhaustive leads to such absurd consequences.
certain creation unnecessarily complicates an artists’ winning the fair dealing battle. I rather present the case of a mash-up artist who takes different pieces of music to create a coherent whole, more for the sake of creativity and contributing to the ‘development of useful arts’ than strictly for one of the purposes listed in the Section. Would this not be a reason enough to create? As for the Canadian jurisprudence, a mash-up artist would have to justify a relevant exercise of skill and judgment in his selection of musical facts and their arrangement. Should the artist be able to arrange his pieces such that the product of his borrowed pieces is coherent enough to let his creation stand alone, such borrowing would be fair dealing.

As CCH clearly stated, artists are not valued for their creativity. It stated that creativity is not required in order to make a work original. Creativity, as defined by Merriam-Webster, is “the ability to make new things or think of new ideas”.\(^69\) The CCH, thus, does not frown upon use of existing artistic material out there to be used as building blocks for further creation. Even in assessing transformative use, the focus should be on the effect of the total concept and feel of the new work on the audience, and not on the individual dissection of the borrowed pieces themselves.

Looking at the total concept and feel of a work also serves another purpose of qualitatively assessing works and not quantitatively assessing them. If the total concept and feel of a work can detract the listener from the individual borrowed pieces and make him focus more on the creative aspects in the song as a whole, such a song could still make its borrowed pieces qualify as fair dealing. This is also in consonance with the fair dealing theory that ‘substantial similarity be not only be quantitative, but also qualitative’.\(^70\)

Qualitative v. quantitative similarity

\(^{69}\) Merriam-Webster dictionary, online: http://www.merriam-webster.com/dictionary/creativity

\(^{70}\) Supra note 13, at 1123: In its relation to the market impact factor, the qualitative aspect of the third test – “substantiality” – may be more important than the quantitative.
This was contemplated by the District Court in *Bridgeport*, the leading case on sampling. The Court stated:

After listening to the copied segment, the sample, and both songs, the district court found that no reasonable juror, even one familiar with the works of George Clinton, would recognize the source of the sample without having been told of its source.  

The summary judgment given by the District Court grasps the nub of the inquiry in sampling cases, and recognizes the de minims defense as fair use. Unfortunately, since this decision was overturned on some points by the Sixth Circuit, these crucial views for sampling cases merely fell into oblivion. While the Court ran into technicalities of different rules applying for copyrights in sound recordings and copyright in music compositions, the defense of de minims copying is definitely not available in the case of sound recordings, since that involves physical taking of sounds from other tracks; for the case of musical compositions, the question of de minims copying remains moots, as the court does not directly address that. Moreover, the defence of fair use was not pleaded in this case, so the court openly invited courts to address this question in future cases, as and when it gets invoked.

Interestingly, the court distinguishes musical composition copyright from the sound recording copyright, and states that since a sound recording involves physical taking from a fixed medium, the taking is physical, rather than an intellectual one! A closer reading of this comment seems to suggest that since a sampler takes this extract “which is something of value”, the borrower owes this savings to the original creator and hence, ought to recompense the original sound recorder, who invested arguably invested efforts and more in creating the sound recording in the first place. An essential interpretation of this statement is that, it is not copying per se of the few notes that is bad, but it is the court’s concern that if de minims copying is recognized as a defense, future

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72 *ibid*
artists could unjustly enrich themselves by relying on someone else’s past physical efforts in creation. Thus, according to the courts’ current views, it is open for an artist to collect the paraphernalia for recording, and create the exact same sound track and then invoke the defense of de minimis copying.

However, this is unsettling as, the court rewards the artist’s physical work that led to the creation of the sound recording, and is more concerned about the act of physical taking rather than intellectual borrowing. This hinders efficiency and creates hurdles instead of encouraging future creativity. In any event, Intellectual property theory is long past the “sweat of the brow approach” and rewards intellectual creativity. No wonder, the copyright in photographs of monkey-selfies find appeal in belonging to the public domain and not in the author who set up the camera and waited for long hours for the right moment to take a shot.73

A more robust public domain is could be an answer to this. Expansion of the public domain will likely reduce the dilemmas the court brought forth after Bridgeport. According to Prof. Drassinower, a healthy public domain would do the following to achieve the balance between users’ rights and artists’ rights:

The metaphor of balance cannot help but suggest a related constellation of understandings and construals, including a construal of authorship as value-origination, of the “work” as an instance of value, of the public domain as a depository of commodities to be freely consumed by user, and, no less importantly, of the expansion of the public domain as a decrease in the price that the public must pay for the production of the works of authorship. It seems natural enough to suppose, for example, that by narrowing originality and widening fair dealing, the CCH decision more than like improves the lot of users at the expense of authors.74

Thus, if a fair dealing defense is allowed for mash-up artists, a large number of small musical pieces could lie in the ambit of fair dealing, doing away with the possible suggestion in

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73 “Can we subpoena the monkey? Why monkey self-portraits are likely in the public domain?” Online: https://www.techdirt.com/articles/20110713/11244515079/can-we-subpoena-monkey-why-monkey-self-portraits-are-likely-public-domain.shtml

Bridgeport of only the extreme of the solutions: either pay the license fee or physically create the sound recording yourself. With not recognizing even an iota of leeway to artists borrowing fractions of work, by not recognizing the defense of de minimis copying, the 6th Circuit treated sampling almost as an act incurring absolute liability. The court clearly states that artists should get a license rather than litigate\textsuperscript{75} which scares away a number of artists.

A further problem in the current practice of music copyright that hinders the use of de minimis copying is the compulsory licensing regime. By subjecting works of music to compulsory licensing, artists give away their ability of excusing certain non-consequential use of their works. At this juncture, it is interesting to connote Prof. Larissa Katz’s notion of a property-owner as an “agenda-setter”\textsuperscript{76} for the use of his property. By subjecting himself to this regime, the artist chooses an “all-or-nothing” approach to the use and marketability of his work. This leaves samplers with the only recourse of applying for a license before using any work, or not sample at all. The other extreme lies in signing up for a creative commons forum, where the artist almost surrenders any or all rights to his work. Hence, the idea behind recognizing the de minimis defense or even the broader and more wholesome fair dealing to music sampling and music mash-ups, is precisely that of finding a mid-way between these two extremes. The recognition of a de minimis defense calls not for a complete surrender of artists’ property rights over their creations and thus continue to incentivize future creativity at their end\textsuperscript{77}, but only a more robust public domain for aspiring artists to create and not remain held back in order to further create new music. Thus, recognizing the de minimis and broader fair dealing defense to music sampling would achieve a two-fold purpose. On the one hand, it would continue to incentivize current creators of music to

\textsuperscript{75} \textit{Bridgeport Music, Inc. v Dimension Films}, 410 F.3d 792 (6th Cir. 2005)
\textsuperscript{77} This is the goal of copyright anyway
create newer music after carving out the penumbra of exceptions under the public domain that would fall under fair dealing. On the other, it would help aspiring and struggling artists not to be hindered by exigencies of finances for license fees and rather focus on their creative efforts to deliver good music. Looking at the larger picture, this scheme would enhance cultural development by giving solace to numerous hip hop and reggae artists.

3.4 A more robust public domain

- Does this have to be at the detriment of the intellectual efforts of the current artists?

Wendy Gordon cites Cohen’s ‘if value then right’ theory thus:

X has created a thing of value; a thing of value is property; X, the creator of property, is entitled to protection against third parties who seek to deprive him of his property.”

Cohen was among the first critics of this theory that governed court decisions. He pointed out the circularity in the value/property approach, i.e. while legal protection tends to be based upon the economic value of a good, the economic value of this good depends upon the legal protection it gets! Gordon sees a fundamental mistake on the part of the courts “in moving automatically (emphasis added) from an is - exchangeable value - to ought - legal protection”, with no explicit reason adduced to such a stance. According to her, granting legal rights to protect all existing value to ensure increased productivity cannot always be successful. According to Dreyfuss, “courts are too quick to equate value with right; to leap from recognizing that consumers attach value to trademarks to concluding that trademark holders ought to have the right to capture that value for themselves”. Yes! Musicians should not be too quick in attaching a licence fee for every note from

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79 ibid at 178
their song that is borrowed. When a sampled song is taken as a whole, and the borrowed pieces act as building blocks towards the creation of a new song, such use ought to be considered fair use. Lessig treats intellectual property as an “instrument - which sets the groundwork for a richly creative society”. Heavily criticizing the if value, then right theory, Lessig adds that

It was this perspective that led a composers’ right organization, ASCAP, to sue the Girl Scouts for failing to pay for the songs that girls sang around Girl Scout campfires. There was “value” (the songs) so there must have been a “right” - even against the Girl Scouts... The “if value, then right” theory of creative property's never been America’s theory of intellectual property. It has never taken hold within our law.81

Thus, when mash-up artists use samples or pieces form other songs to create something new, they are merely using the borrowed pieces as building blocks. This borrowing has to be encouraged.

- How much would de minimis copying be? Where to draw a line?

According to Felix S. Cohen,

A thing of value is property: The actual value of a property is its capitalization at current market rates of the allowed and expected profit. However, in actual terms, the actual value of a property is a function of the court’s decision, and rather a mythical than economic fact.82

Today, with the file-sharing phenomenon, the actual value of a song is polemic. An artist can reasonably have no possibility of predicting how far his fame will take him, or will he be the victim of the difficulty of being found in the abundance of music out there.83 The latter part of Cohen’s comment is more telling in terms of unpredictability of the economic value of an artist’s creation. The Theberge case84 also teaches us the lesson that once an artist’s work is out there in

81 Supra note 8, at 18-19
83 Supra note 30, at 133
84 Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36, (Citing Théberge at para 9) Théberge reflected a move away from an earlier, author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace.
the public, he cannot control each and every aspect of its dissemination. However, if past decisions of the court are supposed to serve as guidance to future predictability of the courts’ approach, it is unfortunate to note that sampling and music mash-ups are tied up in a flood of unpredictability. A Canadian mash-up artist would, for example, face at least the following dilemmas. Right since Theberge and then down to the copyright pentology, Canadian courts have consistently gone on to recognize a robust fair dealing mechanism. In the sectors of education, music previews, etc. the Court has boldly asserted that not every use of copyrighted material can be termed as infringing use, thus, mash-up artists could rightfully have a reasonable expectation to be included in the ambit of fair dealing for de minimis copying. The common law reached the zenith of its aims at achieving a balance in users’ and artists’ rights through CCH, with the novel test of the “exercise of skill and judgment” and is now nothing but a function of the court’s decision, a rather mythical concept, and waiting for its bounds to be tested in a sampling that might potentially come before the courts of this country. While the courts in Canada have not split hairs on a sampling issue at great deal so far, the American courts, with an allegedly liberal fair use regime, sets unsettling examples. The Bridgeport and Newton v Diamond cases set precedents that have caused artists either to be overcautious and get a license for every bit before venturing into sampling or various artists like DJ Girl Talk sample all they want and wait to be sued, only to invoke the fair use

85 A set of five judgments rendered on July 12, 2012. The pentology clarified various newer issues prevailing in the field of copyright
86 See for example, Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36: The court ruled that short previews of music provided by music stores are considered fair dealing for the purpose of research by a consumer to enable them to determine what they want to purchase (Online: http://www.iposgoode.ca/2012/07/the-pentalogy-the-supreme-court-clarifies-canadas-copyright-law-in-five-major-decision/)
87 Supra note 36
88 See “Steal this hook? D.J. Skirts Copyright Law” Online: http://www.nytimes.com/2008/08/07/arts/music/07girl.html?_r=0
defense once sued. These extremes are out rightly antithetical to the notion of balance that copyright law strives to achieve. Recognition of the defense of fair dealing, thus, could be a good starting point towards achieving this balance.

The recognition of fair dealing for sampling could certainly disadvantage artists financially. However, the disadvantage caused would only be marginal, as, fair dealing has always been carved out as an exception to copyright infringement. Hence, the doctrine only protects the penumbra of relatively trivial or lesser amounts of substantially similar copying and does not encroach upon artists’ rights when there is substantial copying. Secondly, the recognition of the de minimis defense and the fair dealing defense to sampling could also raise the question of ‘how much is too much copying’ and introduce a new shade of grey to the already confusing field of music copyright. However, the music industry can do better from learning from other industries. The Education sector offers one of the greatest examples in the area of copyright reform. By allowing 10% systematic copying of a chapter or a work, the education sector is allowing for a systematic de minimis defense. Moreover, the all-pervasive of reasonableness could come to our aid. The law likes to look at a reasonable person when it drifts into the grey. The copyright balance would also be an attribute of this reasonableness. Hence, while recognition of the de minimis defense or fair dealing can raise concerns about giving too much leeway to samplers, a balanced and reasonable approach could bring us back on track. After all, all I am appealing for is the recognition of the defense of fair dealing and doing away with the current unfair dealing in case of mash-up

89 “Impact of education sector’s interpretation of fair dealing”: Online: http://accesscopyright.ca/media/bulletins/impacts-of-the-education-sector’s-interpretation-of-fair-dealing/ In 2012, the majority of Canadian universities, colleges and school boards outside Quebec adopted “fair dealing” content use guidelines that set out the education sector’s interpretation of what can be copied without compensation to creators or publishers. The guidelines promote the systematic copying of 10% or a chapter of a work, entire newspaper, journal or magazine articles, short stories and more. Since their implementation, all public elementary and secondary schools outside Quebec and numerous post-secondary educational institutions have ceased paying royalties for the copying of published works.
artists. Lastly, adulation for the *Feist* approach raises the possibility of encouraging diminished creativity in artists and rewarding mere selection and arrangement of things. However, only an extreme and far-fetched reading of *Feist* could lead us to this conclusion. That *Feist* rewards merely ‘cut and paste’ artists is one of the versions of such extreme reading. It would be highly unjust to call our hypothetical 20-part mash-up artist a mere compiler of facts. For him, coherence remains crucial and creativity in selection and arrangement of data itself takes the form of his contribution to creativity. Needless to say, this would involve an application of the mind and a certain working of a person’s intellectual faculties and only that ought to be rewarded.

4. CONCLUSION

I propose a more liberal use of the de minimis standard which will not necessitate the complex fair dealing analysis in the first place; and a conventional fair dealing analysis where the infringing work goes beyond the de minimis standard. In case of de minimis standard, the jurisprudence in the US has evolved from no allowing no sampling without license at all in *Bridgeport*\(^90\) to allowing the de minimis defense in *Saregama*\(^91\).

I recognize that regular fair dealing analysis would raise the following issues: 1. What would be the purpose of the use? The liberalized CCH jurisprudence should be of help of answer this question 2. What constitutes commercial and non-commercial nature in the case of infringing works? This will have to be determined on a case-be-case basis 3. Which test would apply in the substantiality analysis? Expert testimony for a note-by-note analysis where necessary, and the lay listener to analyze the impact on the market of the original work.

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\(^{90}\) *Bridgeport Music, Inc. v Dimension Films*, 410 F.3d 792 (6th Cir. 2005)

\(^{91}\) *Saregama India Ltd. v Mosley*, 687 F.Supp.2d 1325 (S.D.Fla. 2009)
The time is ripe to have clearer legislative or common law guidelines for sampling and mash-up artists. Many sampling cases get settled out of court and hence, there are no precedents to bank on. However, a reading of the leading Canadian jurisprudence on fair dealing shows a trend towards liberalized reading of the doctrine over time. This liberalized reading of the doctrine is highly conducive to the inclusion of sampling and music mash-ups under the scope of the principle. The legislature is not up to speed in catching up with the developments and influence of technology in the field of music; reforms in the latter seem an appropriate. An express recognition of the de minimis defense for sampling and mash-up artists would be a key legislative reform.