Legal mash-up

Remixing is part and parcel of life in the internet age but, asks Marsha Gentner, do they infringe copyright?

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After more than two years of study and investigation, an all-day public meeting at the headquarters of the US Patent and Trademark Office, four roundtables in different parts of the country and soliciting and receiving dozens of comments, the Department of Commerce Internet Police Task Force released its *White Paper on Remixes*, *First Sale*, and *Statutory Damages* on 28 January this year.[1] The task force was created in 2010 to conduct a comprehensive review of the nexus between privacy policy, copyright, global free flow of information, cyber security and innovation in the internet economy.[2] The white paper is an effort to reassess copyright policy as it evolves in the digital age, focusing on three areas for recommendations and suggestions for possible statutory changes and other concerted action. These are remixes, the first-sale doctrine of the Copyright Act and statutory damages as an alternative remedy for copyright infringement.

The paper recommends amendments to the Copyright Act statutory damages provisions to give more flexibility to judges and juries to address the equities involved in such remedies, but finds that in the context of today's digital transmissions market, the current first-sale doctrine is working fairly well such that no changes are warranted at this time. On the subject of remixes, however, the task force essentially took a punt, recognising that the system might not be working so smoothly, but apparently being unable to find common ground among the various stakeholders, or even within the body of certain stakeholders, to really do anything about it.

Here we examine who the stakeholders are in the remix context, the issues being confronted in the rapidly evolving internet, entertainment and social media world and why, ultimately, the task force concluded that, for now, the status quo should (or, at least, would) remain.

What are remixes?

As the white paper notes, remix is a term of art in the music industry.[3] But in the context of the task force's examination, this term has a much broader meaning. A remix, as used in the white paper, is a work "created through changing and combining existing works to produce something new and creative – as part of a trend of user generated content (UGC) that has become a hallmark of the internet." [4] A remix is anything from that adorable two-year old doing her best impression of Adele, to professional music mash-ups and sampling, to Harry Potter fan fiction.

Many remixes fall within the Copyright Act's definitions of derivative works, compilations or collective works.[5] Absent a defence such as fair use, these categories of works, to the extent they are not authorised by the owners of the copyrighted works that they incorporate, are infringements.[6]

Who are the stakeholders?

Large, institutional rightsholders and representatives, such as the music recording, motion picture and publishing industries and licensing societies, represent one camp of the stakeholders in remix copyright issues. Another camp, of course, consists of the remix creators. As the white paper points out, this is an extremely diverse group, including both amateurs engaging in non-commercial self-expression and professionals who remix for profit. Many in this group, for example music recording artists, are on both sides of the remix fence. Comprising yet another category are the third-party internet platforms – such as YouTube, Spotify and Instagram.

The current legal framework for remixes

Whether a particular remix constitutes a fair use – which, statutorily, is a complete defence to copyright infringement – is a multi-

factor, often fact-intensive determination.[7] The boundaries of the fair-use defence are difficult to predict, especially since there are considerable disagreements among the courts even as to the governing legal precepts of fair use as applied to arguably derivative works.[8] This presents challenges for all of the stakeholder camps in dealing proactively with remix issues.

The alternatives from the status quo considered

The task force considered two possible, fairly significant, changes in the Copyright Act for remixes: a specific exemption of remixes as infringing works and compulsory licensing for music remixes. According to the white paper, "there was virtually no support for either option among stakeholders".[9]

With respect to a UGC-specific exemption for remixes, the white paper reports that among all of the stakeholders and commentators there was only one proponent of such an approach.[10] A particular challenge to the express exemption approach is the difficulty in drawing a line between commercial and non-commercial uses. Often, even remixes that begin as amateur expressions evolve, such as on YouTube, into highly monetised commercial endeavours.

As for the compulsory licence, the copyright-owner stakeholders opposed this mechanism as unduly impinging their ability to maintain approval of how their works are used. This is a creative right especially critical to music recording artists, who identify this as one of the most important deal points in contract negotiations.[11] On the other side, remix creators bristled at the notion that they should have to pay any amount for what they view as legitimately fair uses. Practical considerations also weighed against this option. The daunting task of developing a universal database of musical works and recordings and determining how remix uses would be tracked and licence revenues fairly divided were among the concerns.

Where do we go from here?

The conclusion of the task force/white paper examination of remixes leads right back to where it started, recommending an ad-hoc application of the fair use doctrine in the hope that stakeholder and industry guidelines and best practices, education and development of novel and alternative voluntary licensing models, such as intermediary licensing (eg, Kindle World and YouTube) and music micro-licensing for small scale users (eg Rumblefish),[12] will help fill the void of uncertainty.

In the meantime, what can you do if your business implicates remix/copyright issues?

If you are using remixes in the marketing and promotion of your business or as part of your business model, do not rely on assurances from your creative or business people or vendors that the necessary rights have been secured or that the remix is a fair use. Do not rely on tacit or even explicit assurances from remix creators that their use of copyrighted content for your purposes is authorised – demand written documentation from appropriate licensing authorities. Monster Energy Company found this out the hard way.[13]

If you are a music rightsowner, carefully weigh the risks and benefits of taking a stand against a particular remix or use – the PR fallout to a knee-jerk cease and desist or take-down demand can be devastating. Indeed, according to at least one Court of Appeals, copyright holders have a duty to consider, in good faith and prior to sending a takedown notification, whether allegedly infringing material constitutes fair use.[14]

No matter which side of the remix stakeholder issue you are on, have a carefully devised process and strategy for dealing with remix copyright issues, and, importantly, make sure it is fully implemented and rigorously followed. Decide who and how remix uses and issues will be vetted and determined, including what documentation will be required. On the rightsholder side, endeavour to develop non-case specific general parameters for taking – or not taking – action. Have alternative demand letters or communications carefully attuned to the varying circumstances remix issues present. The action you take or the letter you send to a large, direct competitor profiting off your rights should not be the same communication you have (if at all) with the sixth grader who used your music to accompany his poem on the agonies of adolescence.

And finally, be prepared to live with more than a modest amount of uncertainty regarding the creation and use of remixes. At least for the foreseeable future, that is the remix landscape.

Footnotes

1. The White Paper is available at http://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf?platform=hootsuite (last visited 8 February 2016).

2. Internet Policy Task Force, USPTO.GOV, http://www.uspto.gov/learning-and-resources/ip-policy/copyright/internet-policy-task-

force (last visited 8 February 2016). The Task Force's work on copyright policy is led by the United States Patent and Trademark Office ("USPTO") and the National Telecommunications and Information Administration ("NTIA"), in coordination with the Office of the Intellectual Property Enforcement Coordinator ("IPEC") in the Office of Management and Budget, and other divisions of the Executive Office of the President.

3. White Paper, at 6 n. 22.

4. White Paper, at 6.

5. *See* 17 U.S.C. §101 (Definitions).

6. *See* 17 U.S.C. § 106.

7. *See* 17 U.S.C. § 107. See also 4-13 NIMMER ON COPYRIGHT, § 13.05 (2015)

8. *See*, *eg Kienitz v Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014), cert. denied 135 S. Ct. 1555(2015), expressly rejecting the analysis of *Cariou v Prince*, 714 F.3d 694, 706 (2d Cir. 2013).

9. White Paper, at 24.

10. The proposed exemption would be modeled after a provision of the Canada Copyright Act, which exempts solely noncommercial works, the distribution of which would not have a substantial adverse effect on the actual or potential exploitation of or market for the preexisting work. White Paper, at 18 n. 113.

11. White Paper, at 9 n. 47.

12. For an explanation of micro-licensing, see https://www.sesac.com/rumblefish/index.aspx (last visited 10 February 2015).

13. See *Beastie Boys v Monster Energy Co*, 66 F. Supp. 3d 424 (S.D.N.Y. 2014) (jury awarded $2.2m in copyright damages for five-week use of remix containing unauthorized Beastie Boys music).

14. *Lenz v Universal Music Corp*, 801 F.3d 1126, 1138 (9th Cir. 2015).

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