

Remix: aberration or evolution?

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Abstract

The legal status of remix is subject to the change of the technological landscape. Already known since the Convention of Berne, remix and its various modern types - such as sampling, mash-ups - have become a part of the aesthetic of our era. Furthermore, technological evolution has made remixing incredibly easy for everyone. So, since technology nowadays makes art, new questions may arise. Besides the classic issues concerning the remix itself, for instance, whether the sequel of a movie is considered to be a remix or a new different work, emphasis is drawn to the legal status of sampling. Whether does sampling infringe copyright, and if so, how? Should DJ Danger Mouse ask for permission in order to release his "Grey album"? Which is the legal status, on the one hand, of the artists of already existing works and, on the other hand, of those of new ones? Moreover, the remix and its different types may as well infringe the author's moral right and may also give birth to other new issues regarding authorship. This problematic leads us inevitably to the basic question of striking the balance between the freedom of expression and the copyright protection for remix. That balance has been regarded of such an importance, that a strong discussion has already been started over the launch of a new "transformative works" exception.

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The emergence of new technology has offered new outlets for creativity and has provoked innovative forms of collaboration. Millions of people cut, paste and recombine segments of existing musical works, movies and photographs to create new derivative works. Such creative appropriation has given birth to entire new art forms: remixes, mashups, bootlegs, sampling and more.

Technological evolution has made remixing incredibly easy for everyone. The result is that members of the public participate actively in the production of music. In blurring the distinction between consumers and producers, the digital tools are challenging the ideas of creativity and authorship.

Therefore, even though remix is not new as a concept for the intellectual property, new issues have arisen about the copyright system. In the first place, the legal framework will be exposed (Part I). Secondly, as remix has not remained the same over time, its evolution will be examined (Part II), which will lead us finally to the question of whether remix could be seen as aberration (Part III).

I. The Remix legal framework

Remix as a concept is not new. The Berne Convention provides that "Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work"¹. The Greek Copyright Law 2121/1993 in its second article provides that: "The term work shall, in addition, designate translations, adaptations, arrangements and other alterations of works or of expressions of folklore, as well as collections of works or collections of expressions of folklore or of simple facts and data, such as encyclopedias and anthologies, provided the selection or the arrangement of their contents is original. Protection afforded to the works listed in this paragraph shall in no way prejudice rights in the pre - existing works, which were used as the object of the alterations or the collections"². Both the Berne Convention and the Greek law protect the arrangements of music and the adaptations, the remix. Technically, the remix is referred to as an adaptation of a musical work by altering its lyrics or melody.

Obviously, a precondition of a remixed work is a preexisting work. This means that it is not important if the preexisting work is original or not³, if it is protected by copyright or not⁴. Furthermore, it is not important if the preexisting work has been published or not, given that the work is protected since its creation. There is no need for it to be published or communicated to the public in order to be protected by copyright. However, it is essential that the work has left the private sphere and has been "incorporated" into a tangible support. The protection of a remixed work is independent from the value and the destination of the work⁵.

Originality is the key component for the copyright protection. The remix of the past work must contain elements of creative style so that the remixed work will be characterized by individuality and originality⁶. On the contrary, a remixed work that does not present originality is not a derivative work, but a simple reproduction of the

¹ Art. 2 par. 3 of the Berne Convention for the Protection of Literary and Artistic Works.

² Art. 2 of the Greek Law 2121/1993

³ Eir. Stamatoudi *in* L. Kotsiris/Eir. Stamatoudi, *Commentary to the Greek Copyright law*, Sakkoulas Athens-Thessaloniki 2009, p. 56

⁴ Besides, under the Greek Law the alterations of expressions of folklore are protected as derivative works, even though folklore expressions are not protected as such.

⁵ L. Kotsiris, *Intellectual Property*, 4th ed, Sakkoulas, Athens- Thessaloniki, 2005, p. 83

⁶ G. Koumantos, *Intellectual Property*, 8th ed., A. Sakkoulas, 2002, p. 137

preexisting work⁷. Besides, for this reason, it is admitted that modifications to the past work must be significant; otherwise the work is not considered as derivative.

It could be argued that in case of a remix, a higher level of originality should be required. The remixed work would then be really derivative and would not only exploit the notoriety of the past work. However, there is the danger of subjective judgments, thus this thesis should be rejected.

Moreover, if the remixed work presents the necessary originality but its nature differs essentially from the nature of the preexisting work, the remix won't be considered as derivative work, but as an autonomous original work, as the past work had merely been the source of inspiration⁸. The dilemma whether a work is derivative or original is more complex when we refer to additions to an incomplete work. For instance, the musical work "Requiem" remained unfinished, because of the author's death, Wolfgang Amadeus Mozart and finally, one of his students Franz Süssmayr, completed it. In this kind of cases, the most appropriate solution is to consider the contributions by third persons as derivative- remixed works. Nevertheless, if the contributions cannot be distinguished, then the work should be considered original and new as a whole.

Furthermore, the remix artist should obtain all the necessary permissions from all the copyright holders so that the remixed work is legal. The Greek Law requires that the protection of the derivative works is provided without prejudice to the copyright in the original work. The intent is obviously to protect the authors of the past works and recognize their cultural contribution. Besides, for the same reason, the law requires not only permissions to create a remix but also another permission to allow the remix's economic exploitation.

The licences should be restricted and concrete according to the duration, the breadth and purpose, otherwise their interpretation should be according to good faith, professional ethics and the purpose of the contract.

Once all requirements are satisfied, the remix goes its own way and is entitled to its own separate copyright. The remix artist has all the rights as first creator has, both moral and economic rights. Moreover, for every new act of exploitation, a reward must be paid to the author of the preexisting work. Usually, in practice, this reward has already been agreed upon the granting of the licence.

⁷ M - T. Marinos, *Intellectual Property*, 2nd ed. A. Sakkoulas, 2004, p. 94

⁸ G. Koumantos, *Intellectual Property*, 8th ed. Ant. Sakkoulas Athens 2002, p. 136

The remix is also an author's economic right. In the third article of Law 2121/1993, it is expressly provided that the author has the exclusive right to allow or prohibit an adaptation of his work. Particular interest presents the fact that the Greek Law does not contain any similar provision concerning the performers. However, this right could sufficiently be covered by the right of reproduction⁹.

II. Remix as an evolution

Nowadays, rapidly changing technology is transforming traditional methods of communication and expression. Moreover, digital technology and the Internet have made it possible for everyone to mix and mash others' works with little difficulty and no authorization. Consequently, the concept of remix has evolved over time. After all, it's part of the natural evolution of all things digital. Before concentrating on remix culture, it is important to point out whether the ringtones constitute a remix. At the same time, as this phenomenon is not limited to music, we will refer to "remixed" films, the up-to date case of 3D movies and the classic one of sequels.

Firstly, regarding the ringtones, the crucial question is whether a ringtone (or realtone or ring back tone) constitute a remix. This is an important issue if we think how profitable the mobile market is. A ringtone is the sound made by a telephone to indicate an incoming call or text. In our view, the transformation that the original musical work sustains, is not significant enough to make us accept an adaptation to the original sound recording. Thus, a ringtone is not a remix and therefore, its maker is not an author according to copyright law. However, a ringtone and usually its low quality could infringe the author's moral right¹⁰.

Apart from the profitable market of ringtones, the film industry faces the evolution of "remix". The crucial question is whether a 3-D version of a movie is a new work or not. The legal effects are important, as for instance the duration of the copyright protection for the film will extend and new licenses will be required¹¹. As

⁹ Besides, the same argument was used concerning the provision of the right of modification for the performers, included in the Basic Proposal for WPPT. Eventually the provision was deleted on the basis that the need for protection was sufficiently covered by the right of reproduction. O. Morgan, *International Protection of Performers' Rights*, Hart Publishing, Oxford and Portland, Oregon, 2002, p. 171

¹⁰ P-Y. Gautier, *Propriété littéraire et artistique*, 6th ed. PUF 2007, p. 105

¹¹ For instance, this is the case that has arisen concerning the 3-D version of Titanic, where a painting of Pablo Picasso appears again in the film. So, the Artists Rights Society has asked to be paid again, given that the 3-D movie is a new work and, as such, is not covered by the previous agreement.

there is no need to go into details, it suffices to remind that the adaptations must be significant in order to constitute a derivative work. The 3-D techniques are not, in our view, so important as to consider that we are in the presence of a new work - a derivative one.

The issue concerning the sequel of a film is a whole different story. In brief, the sequel is an alteration of the past work that borrows the plot - the story and the principle characters to the sequel. In our opinion, the sequel is not a new original work, but a derivative one, and therefore, the creators must get the permissions of the rightholders in order to proceed to the production of a sequel. That was also, the decision of a French court concerning the sequel of the film "Alien" where the judges pointed out that permissions must be sought and this even before the creation of the sequel¹².

However, the primordial influence of the evolution of remix is in the sector of the music industry. Specifically, sampling and mashups are art forms that stir the waters of mainstream musical landscape and consequently of copyright. Sampling is the process of taking a small portion of a sound recording and digitally manipulating it as a part of a new recording¹³. In contrast, mashups contain no original content, but they are the combination of preexisting copyrighted songs¹⁴.

Over time, the use of sampling has become more and more creative. At the same time, sampling violates the author's moral and economic rights. In 2004, DJ Danger Mouse digitally sampled vocals from "The Black Album" by Jay-Z and laid those vocals over music sampled from the Beatle's "White Album". His album entitled - for obvious reasons - "The Grey Album" generated enthusiasm but drew the displeased attention of the record companies who owned the Beatle's catalogue (for copyright and for the sound recordings). The response to the cease-and-desist letters that followed the distribution of the Grey Album, was the "Grey Tuesday", which encompassed a twenty-four-hour period during which the public could download the album free of charge. The response of the public was massive and over 100.000 copies were downloaded that day¹⁵.

¹² CA Paris, 4e ch. A, 12 May 2004, Roger et Lazid Iaichouchene c/ Ste Twentieth century Fox Film Corporation, Comm. Electr. Jan. 2005, p. 28, obs. Ch. Caron

¹³ R. M. Vrana, The Remix Artist's Catch-22: A proposal of compulsory licensing for transformative, Sampling-Based Music, 68 Wash & Lee L. Rev. 811 (2011), p. 811

¹⁴ Emily Harper, Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm, Hofstra Law Review 39/2010, p. 408

¹⁵ Ronald S. Rosen, Music and Copyright, Oxford University Press New York, 2008, p. 569

Even though sampling is a transformative means of creation, it infringes the authors' rights. Since it is a derivative work, prior authorization is required in order to create and exploit a sample. In a United States sampling case, *Bridgeport Music Inc. v. Dimension Films*, the Court formulated a bright-line rule, that any sampling, regardless of how minute, constituted copyright infringement¹⁶.

However, sampling is part of a compositional technique, as mashups, and its special effects are not always dependent upon the identification of the original source of the samples employed¹⁷. So, when the original sound recording has been so transformed that is no longer recognised even by an individual familiar with this kind of music, it is arguable whether we are in presence of a derivative work, that needs prior permission and clearance for the rights, or in presence of an original new work. Nevertheless, such an admission would run the risk of legalizing copyright infringements, as the sample artists would bury their samples within the new musical work so that they cannot be noticed. By contrast, in the US case of *Newton v. Diamond*, the Court held that the sample was minimal, that the two records weren't substantially similar and also that the public would not recognize any appropriation of Newton's composition, concluding that no infringement had taken place¹⁸.

In practice, the artists and their record companies either refuse to grant permissions, or the costs are very high and thus discourage artists from sampling. The fact that the legal cases on sampling are few is not indicative, as it is due only to the fact that it is in the interest of the involved parties to settle out of court.

III. Remix as an aberration?

Remix may infringe the author's moral right. The integrity of the work is at risk when it comes for a remix. Artists are hesitant, even sometimes opposed to the fact that their works are being remixed. At the same time, remix culture supporters consider that the copyright protection of remix is keeping them from being creative. So, could remix be seen as aberration?

¹⁶ Joshua Crum, *The Day the Digital Music Died*, *Brigham Young University Law Review* 943/2008, p. 957

¹⁷ Paul Theberge, *Technology, Creative Practice and Copyright in Music and Copyright*, 2nd ed., edited by Simon Frith and Lee Marshall, *Edinburgh University Press*, Edinburgh 2004, p. 151

¹⁸ Richard Salmon, *Sampling and Sound Recording Reproduction - Fair Use or Infringement*, *Entertainment Law Review* 21/2010, p. 174

Remix without the author's permission violates his moral right and more specifically the right to prohibit any distortion, mutilation or other modification of his work. The author's and artist's moral right could obstruct the use of a preexisting musical work to a new one. In France, for instance, it is admitted that any modification or alteration of the work infringes the author's moral right¹⁹. The author does not have to justify the alteration and its importance, otherwise the moral right would be weakened. Furthermore, in an interesting case in France that was dealing with a medley, mostly known as "*pot-pourri*", French judges had the opportunity to point out that the production of a medley is subject to prior permissions of the authors²⁰.

The issue whether an author of lyrics or music can object to a remix based on his moral right of integrity after having fully transferred its economic right to adaptation to the producer of phonograms, is of major importance. In such a case, as the Greek moral right is inalienable, the majority of scholars estimate that the appropriate solution is to examine the concrete circumstances under which the exercise of the moral right takes place. If the exercise is not justified, then it could be condemned as abusive²¹. Moreover the article 16 of the Greek Law provides that "the granting of consent by an author for an action or an omission which would otherwise constitute an infringement of his moral right shall be deemed to be a form of exercise of his moral right, and shall be binding upon him". According to this article, the consent provided by the author should mean that he couldn't later raise objections regarding the adaptation of his work. The solution, however, provided in a French famous case was different. The authors of the musical work "*On va s'aimer*" had signed a contract where there was an explicit clause that the assignees were entitled to exploit, and authorize third parties to exploit, the song in whole or in part even for advertising purposes, to amend the song, and to replace the original lyrics even by parody lyrics. The tune of the song was used in a television advertisement to promote a chain of low-cost restaurants called *Flunch*. The authors of the original song sued, amongst others, the owner of the exploitation rights and the restaurant, claiming that

¹⁹ Cass. 1re civ., 5 Dec. 2006, RIDA 1/2007, p. 359; See P-Y. Gautier, *Propriété littéraire et artistique*, 6th ed. PUF 2007, p. 265 ("En matière musicale, aucune altération ne doit être portée à la musique")

²⁰ CA Paris, 4e ch. 13 Feb. 2009, RLDI 2009/46, n° 1510, L. Raynard, *L'exploitation d'un medley musical non autorisée par l'auteur d'une des œuvres le composant porte atteinte à son droit moral*, RLDI 2009/49, p. 10

²¹ Eir. Stamatoudi *in* L. Kotsiris/Eir. Stamatoudi, *Commentary to the Greek Copyright law*, Sakkoulas Athens-Thessaloniki 2009, p. 111

using their song for advertising purposes and amending the lyrics infringed their moral right of respect. The French Superior Court decided finally that the remix of the lyrics of the song denatured substantially the musical work and that since no permission was given by the authors and as this remix caused infringement in their moral right, this remix was illegal²².

Moreover, the conflict between moral right and remix is founded on litigations between the co-authors of a musical work, when one of them is not fond of remix while the other has already given his permission for adaptation. Greek courts have not dealt yet with this situation, however French courts have already declared that the consensus of co-authors in order to remix the work is essential. In the case that a co-author has not been asked to grant his permission, he has the right to act against the others based on an infringement to his moral right²³. Although the appropriate solution seems to be the one analyzed above, as the opposite solution would result in depriving the authors from their right to act for the defense of their own contribution, it is evident that these conflicts could obstruct the creativity of new remixed works. This leads us to the criticism of copyright law by remix culture supporters.

The remix culture has become a trend of our era. There are many that argue that there is nothing new under the sun and that every new work is just imitation or derivative. The remix culture fans support that past works should be available so people can generate new works²⁴. They claim that the authors refuse to grant licenses so that new artists could sample and remix preexisting songs, which leads to non-creativity or illegal musical works. In overall, they think copyright protection as a barrier for creating, remixing and sharing cultural goods.

This misconception about copyright law is certainly due to the ignorance of the basic dichotomy of expression and idea. Copyright law does not protect the ideas, but the original works that are fixed in a tangible medium of expression. Since the ideas are not protected, anyone can be inspired by past works or make an idea evolve in his own way.

²² Cass. 1re civ., 2 Apr. 2009, n° 08-10.194, F-D, Sté Universal Music France c/ Barbelivien : JurisData n° 2009-047839

²³ Cass. 1re ch. civ., 15 Feb. 2005, Ste PUBLICIS KOUFRA c/ Ste Productions et Editions Musicales CHARLES TALAR, RIDA 2005 n° 3, p. 415 ; A. Maffre-Baugé, Quand l'arrangement de l'oeuvre musicale derange le co-auteur de celle-ci, RLDI July 2007, p. 6 and TGI Paris, ref., 16 May 2007, RLDI 2007/28, n° 913, obs. L. Costes

²⁴ K. Matthew Dames, How 'Remix Rebels' Confuse Core Copyright, Information Today, September 2011, p. 24

Furthermore, no permission is required when the past works have entered the public domain. As it is commonly known, the duration of author's economic rights is specific and limited in time. Thus, after the expiration of the copyright protection, the new creators can alterate and remix the past works without permissions, without nevertheless causing any prejudice to the author's moral right.

Thirdly, there are exceptions that allow people to use even protected works in limited portions without obtaining permission or without requiring them to pay a license fee. Contrary to the fair use of American Copyright Act, which is a broad exception, the European Directive 2001/29/EC for the Information Society provides also exceptions that could allow some measure of flexibility regarding to remix, such as the quotation exception that allows quotations "for purposes such as criticism or review" (art. 5 (3)(d)). One of the most used exceptions is the exception for the purposes of caricature, parody or pastiche provided in the art. 5(3)(k) of the European Directive. Nevertheless, on a european level the exceptions are limited and their interpretation must be strict, as the CJEU has reminded in the Infopaq case²⁵.

Specifically for the exception of parody, the Greek Copyright Law does not expressly provide this exception, although it is admitted that the parody is a pinciple protected and established by the Greek Constitutional Law.

Furthermore, it was proposed in an official report in the United Kingdom to establish another exception for creative, transformative or derivative works, within the parameters of the Berne Three Step Test²⁶. This idea was reproduced also in the Green Paper on Copyright in the Knowledge Economy regarding the user-created content, adopted by the European Commission the 16th of July, 2008. Towards this approach and in response to the Green Paper, an amendment along the same lines was proposed by scholars in France but only for the works whose author has died. The amendment proposed was that the rightholder cannot prohibit the works created from a pre-existing work, whose author has died, with the reserve of the respect of the work's spirit, and this without prejudice to the right of parody, and with the condition of equitable remuneration²⁷.

²⁵ CJEU 4 ch., 16 July 2009, case C-5/08, Infopaq International A/S c/ Danske Dagblades Forening, Propr. Intell. 2009, p. 379, obs. V-L. Benabou

²⁶ Gowers Review of Intellectual Property, Dec. 2006, accessible to: <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf> (recommendation n° 11)

²⁷ C. Geiger, F. Macrez, A. Bouvel, S. Carre, T. Hassler and J. Schmidt, Quelles limites au droit d'auteur dans la société d'information ? Réponse au Livre vert sur le "droit d'auteur dans l'économie de la connaissance", Propriétés Intellectuelles July 2009, p. 231

However this kind of exception could become the "Pandora's Box"²⁸ and involves high risk, as it could generate a legal insecurity and protect illegalities as derivative works. It is important to acknowledge that remix nowadays may be easy, but there are protective laws for the past works and everyone should respect them. Remix may be the modern phenomenon of our times, but the remix culture should respect the preexisting works.

Conclusion

In conclusion, it is evident the remix already known and protected by copyright law is subject to technological landscape. The challenge for copyright law is to find the appropriate level of protection, which will promote rather than stifle creativity, recognizing the need to protect original works without inhibiting the creation of new or transformative ones. In other words, the struggle is to find the right system that will fairly compensate the artists while still encourage innovation. A solution could be sought in the Creative Commons Licensing system that provides greater access to copyrighted material. The importance of the remix is also significant for another reason. Remix is not restricted to the limits of music, but affects other sectors as well. For instance, sampling in art is relevant with the "appropriation art" phenomenon, which stretches copyright law to its very borders. Copyright law will certainly find the way to embrace the evolution of remix and not let the remix become aberration.

"Technology means you can now do amazing things easily,
but you couldn't easily do them legally"

Lawrence Lessig

²⁸ *Id.*