Nouveaux processus de creation / New process of creation: derivative / transformative works, mash-up, wiki authorship

July 9th 14h30 – Session A

Atelier n°2 – workshop nr. 2

Georges Azzaria

Laval University, Quebec City

Georges.Azzaria@fd.ulaval.ca

The session started by viewing a mash-up/comment on copyright by Negativland: http://www.youtube.com/watch?v=TTrHwH2gEY8

The first part of the session examined 3 questions: art, law and authors.

Art

2 questions guided the first part of the session:

1. Is copyright more like a follower than a leader in regard to creation?
2. Did art radically changed since the first copyright laws: is the law aesthetically obsolete?

Derivative / transformative works and mash-up are about using pre-existing work to create a new work. The debate is not really on originality but on appropriation and on authorisation**.** Today more and more authors are like Middle Ages artists: changing, interpreting, re-appropriating. For them, existing work becomes a material, like paint used to be. An author is inspired by the society, with all the images, sounds, words that composes it. Therefore, the type of property proposed by copyright is no longer the rule.

Here are some of the examples/quotes that were commented:

- Marcel Duchamp, in 1919, drawing a beard and a moustache on Mona Lisa. The hairy Mona Lisa is probably the first example of appropriation.
- Sherrie Levine could be seen as a radical appropriator.
- Jeff Koons: « all visual imagery should be available to the artist [...] When visual imagery gets copyrighted, it is taking away a vocabulary not only from the artist but total public »
- John Cage composed in 1950 *Imaginary Landscape no. 4*, a musical composition for twelve radios playing different channels.
- Dick Hebdige, *Cut 'n' Mix: Culture, Identity and Caribbean Music*, New York, 1987, Routledge: "The hip hoppers "stole" music off air and cut it up. Then they broke it down into its component parts and remixed it on tape. By doing this they were breaking the law of copyright. But the cut 'n' mix attitude was that no one owns a rhythm or a sound. You just borrow it, use it and give it back to the people in a slightly different form. To use the language of Jamaican reggae and dub, you just *version* it."

Law

Some copyright principles were exposed and some questions were raised:

- The author has the right to authorise the uses of his work
- The main differences between mash-ups and derivative works:
    - Authorisation
    - Moral rights
- There is a huge grey zone between a mash-up and a derivative work so it is not always clear to understand when an authorisation is needed.
- Are legal exceptions permeable to mash-ups? Mash-ups are not necessarily fair dealing (pastiche, work of critique …).
- From which standpoint should we look at question of the new process of creation? Authors rights or public rights?
    - Authors rights, natural rights: limited exceptions
    - Public rights: more accessibility
- What about de minimis exceptions?

The Canadian CCH decision was presented, along with this quote:

"The following factors help determine whether a dealing is fair: the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing, and the effect of the dealing on the work." *CCH Canadian Ltd*. v. *Law Society of Upper Canada*, 2004 SCC 13.

We also discussed the US *Campbell* c. *Acuff-Rose Music, Inc* decision, as well as the *Bridgeport Music* c. *Dimension Films* 410 F.3d 792 (6th Cir. 2005) where the judge declared: « get a licence or do not sample ».

Author

Considering copyright was established with the cult of self authorship, the 18th century philosophy and the idea that an author could earn a living with is work, some changes arise with wiki authorship: work in perpetual change, written by many, not as concerned with copyright as the 18th century author was. Wiki shakes a foundation of copyright: property/royalties as an incentive to create.

After pointing out that a mash-up is not a wiki, because of the lack of authorisation, the following conclusion was presented for discussion: mash-up and wiki attack the pillars of copyright but don't destroy it.

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The second part of the session was the presentations of the four panellists. Here are the abstract written by each of them.

Federico Mastrolilli (Italy)

> Many of the creative process in (post-)modern and contemporary music have been characterized by the phenomenon of intertextuality, that is, the referencing, borrowing and incorporation of fragments of existing cultural texts or media ephemera into new works. Avant-garde creators have long acknowledged the centrality of appropriation – not only of protected material, but also spoken word excerpts and found sounds - in their

creative practices. To adopt a definition by French art critic Nicolas Bourriad, in the last century creativity has shifted from production to post-production.

Techniques evolved from analogue collage (Dadaist experiments, musique concrète, tape recording) to digital sampling (hip-hop, dj culture, mash-up), but the key element of contemporary culture - the awareness that the world is just a possibility of meanings, signs that are exchanged, adapted and *detoured* - stayed the same.

Only in the last decade, though, the orientation of this underground music production has taken the form of nostalgic retro-activity ("retromania", to use musical critic Simon Reynolds neologism). Due also to the technological innovations that made access and capture of sounds easier, musicians use the past as an archive of raw materials through which excavate (the so-called "crate-digging") in order to re-discovery subcultural capital. As Reynolds put it, creation is propelled forward by a sort of "cultural economics" in which esoteric influences are consciously acquired and then dropped when they eventually depreciate with overexposure. Underground music vanguard is thus driven in search of rarer grooves and earlier and discarded forms of popular music.

Stepping forward the hip-hop tradition, current cutting-edge micro-scenes as hauntology in the UK and hypnagogic pop in the US create new works – respectively - by recycling folklore, televisual or library music elements or re-enacting old-fashioned styles and genres through artificial treatments of decay and wear-and-tear. As happened with hipster general lifestyle (vintage clothing, outomoded appliances, etc.), undercurrents of contemporary music practices are experiencing a sort of "americanapparelization" or "instagramization" of forms, using techniques that create a pre-faded effect of deteriorated texture and dream-like montage. Some of them add the value of plugging into uniquely native resources and traditions, as hauntology groups that focus on revering the lost time of British nostalgia linked to radio-plays and television programming of the sixties and seventies. This emotional resonance sets the difference with mash-up producers, whose juxtapositions attitude is more conceptual and Duchamp-like and whose goal is to have as little original music added as possible, just enough to glue the two or more halves together.

Creation has become post-creation and pastiche is the common form of expression. Musicians are not interested in trying to create anything brand new, that is, originality has turned into stumbling across something that nobody else has referenced yet. The presentation will therefore briefly analyze the general aesthetics of new creative process in music, epitomized by the collective unconscious and shared memories philosophy of obscure record labels as LA's Not Not Fun and English Ghost Box, in order to set forth a discussion on the conceptually related copyright issues, which extend – *inter alia* – to the

notions of authorship, creativity, transformative fair use and exhaustion principle (applied to meanings rather than to physical formats).

Lisa Macklem (Canada)

User-generated Content is one of the sections in Canada's new amendment to its Copyright Act to receive the greatest interest and attention. The new section, 29.21, is specifically for "Non-Commercial User-generated Content" and falls within the Fair Dealing section of Exceptions in the Act. The Copyright Modernization Act which passed into law on June 30, 2012, contains numerous provisions that broaden the fair dealing exception to infringement. These new provisions provide clarity for both owners and users of copyright. The fair dealing exceptions are more clearly articulated as "Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright', and User-generated Content must pass a four part test. I will briefly give an overview to the new provisions, providing a comparison to the previous act and then touch upon some of the implications of these changes.

Avv. Angelisa Castronovo (Italy)

The derivative works. In particular, the sequel of a film production.

A derivative work is a work based on or derived from one or more already existing works. Also known as a "new version", a derivative work is copyrightable if it includes what copyright law calls an "original work of authorship". Any work in which the editorial revisions, annotations, elaborations, or modifications represent, as a whole, an original work of authorship could be considered a derivative work or a new version.

To be copyrightable, a derivative work must differ sufficiently from the original to be regarded as a new work or must contain a substantial amount of new material.

There are many different types of derivative works.

My presentation will focus in particular on one of these: the creation of a sequel of a film using characters and other elements from the original work.

The copyright on a sequel covers only new material, appearing for the first time in the film; it does not cover any preexisting material from the original.

Krystallenia Kolotourou (Greece)

Le droit moral et les œuvres dérivées/The moral right and the derivative works

Comme l'émergence de la technologie offre de nouveaux outils de création, le sujet du droit moral revient à l'actualité. Les prérogatives du droit moral et plus spécialement le droit au respect de l'œuvre est-il en danger à cause des œuvres dérivées? Peut-on admettre que l'exercice du droit moral par son auteur crée des obstacles à la création libre des œuvres dérivées? Il existe aussi des cas pratiques intimement liés avec le droit moral et les œuvres dérivées, comme par exemple le cas des coauteurs d'une œuvre qui ne sont pas d'accord face à une adaptation. Qu'est-ce qui va passer quand un auteur a transfert son droit d'adaptation au producteur, mais *a posteriori* il objecte en alléguant une violation de son droit moral? Les nouveaux genres des œuvres dérivées, comme *mashup, remix, sampling* (échantillonnage), *bootlegging*, *morphing* et le phénomène *d'appropriation art* bouleversent le paysage traditionnel du droit d'auteur et mettent en question -pour une fois encore - le droit moral de l'auteur ou de l'artiste-interprète.

The emergence of technology has offered new outlets for creativity and the moral right becomes once more a current issue. Are moral right's prerogatives and more specifically, the right of integrity in danger because of the derivative works? Could we admit that the moral right's exercise by the author creates obstacles to the free creation of the derivative works? There are also practical matters related to the author's moral right and the derivative works, as for instance the litigations between the co-authors of a work who do not agree between them concerning the adaptation of their work. What will happen when an author has fully transferred his right of adaptation to a producer, but *a posteriori* he raises objection based on an infringement on his moral right? The new art forms, such as mash up, remix, sampling, bootlegging, morphing and the appropriation art phenomenon stir the waters of traditional copyright system and challenge the author's and performer's moral right.

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The third part of the session was an open discussion on the presentations and on comparative law. At the end of the session, a study case was presented. This question discussed was the following: are the two following Jeff Koons decisions a good criterion for untangling lawful and unlawful appropriations.

***Rogers* c. *Koons*, 960 F.2d 301 (2d Cir. 1992)**

> See the images: http://cpyrightvisualarts.wordpress.com/2011/12/20/art-rogers-vs-jeff-koons/

***Blanch* c. *Koons*, 467 F.3d 244 (2nd Cir. 2006) 253**

> See the images:
>
> http://newsgrist.typepad.com/underbelly/2006/11/koons_wins_appe.html

The discussion took many avenues and ended by trying to determine if some legislations acknowledge a "right to quote" other than for literary works.