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THE *PLEXURE* OF COPYRIGHT INFRINGEMENT

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Abstract:

This paper reflects on copyright law as it relates to musical works by examining a work entitled *Plexure* by the Canadian composer John Oswald that is made up entirely of unlicensed samples from other works. While the recording industry views works like Oswald's to be infringing on copyright, this paper argues that these types of transformative works should be allowed under the fair use, or fair dealing, provisions of copyright law, and that to disallow them ultimately stifles creativity and the advancement of culture in general. The paper argues that there needs to be an expansion of the current fair use laws to include a broader interpretation of works of transformative appropriation like Oswald's *Plexure*.

Richard McKibbon is a master's student at the University of Toronto's Faculty of Information where he studies Archives and Records Management. He currently works with audio collections at the Canadian Lesbian and Gay Archives where he has been volunteering for the past two years, and upon completing his degree in July hopes to find more opportunities to work with recorded sound in a professional capacity. As a musician who has often used digital sampling in his own work, Richard has a vested interest in the amendments to the Canadian Copyright Act, in particular, those that concern fair dealing.

Editor's Note: Richard McKibbon's "The Plexure of Copyright Infringement" is the winning submission for this year's CAML Student Paper Award. Though the paper was written in November of 2010, certain references therein have been updated for the purposes of publication in this issue of CAML Review.

In 1993, the Japanese record label Avant released a twenty-minute piece of music by composer John Oswald entitled *Plexure*.¹ This work of intense audio collage was one of many precursors to today's genre of mashups and was itself influenced by earlier proto-mashup artists, such as William S. Burroughs² and John Cage.³ Oswald has continued working on this piece over the years, has allowed other artists to tinker with it, and as recently as 2010, has re-released *Plexure* on his own label along with some updated mixes.⁴

Plexure presents an interesting case in regards to current copyright law, as it is entirely made up of unlicensed samples. In the eyes of the major record labels and recording industry lobby groups, this is tantamount to theft;⁵ however, many scholars and citizen groups interested in the intersection of creativity and the law believe that work like Oswald's should be allowed under the fair use, or fair dealing, provisions of copyright law. Furthermore, to disallow works of transformative appropriation that are now becoming ubiquitous in our society is stifling to public creativity and the advancement of culture in general. While scholars such as Lawrence Lessig have devised new forms of licensing that give artists the chance to determine for themselves how they wish their material to be used,⁶ I argue that a better approach is to expand the current fair use laws to include a broader interpretation of works of transformative appropriation like *Plexure*.

Plexure, along with much of Oswald's work, has been described as a musical collage.⁷ As an artwork, its purpose can be multifold, and lies somewhere between the intent of the creator and its reception by the listener. Oswald states that one of the reasons he created *Plexure* was to explore "an audible situation which constantly skirts the threshold of legibility."⁸ This is achieved by taking millisecond-long samples from close to one thousand popular songs that were recorded between 1982 and 1992 (the first ten years of the CD era), and weaving them together⁹—often blending one or more artists at a time—into a twenty-minute piece consisting of twelve movements and twenty-one sub-movements.¹⁰

1. "Plunderphonics Discography," Plunderphonics, accessed April 19, 2012, <http://www.plunderphonics.com/xhtml/xdiscography.html#plexure>.

2. Brian Duguid, "Interview with John Oswald," *EST Magazine* (September 1994), <http://media.hyperreal.org/zines/est/intervs/oswald.html>.

3. John Oswald, "Plunderphonics (or, Audio Piracy as a Compositional Prerogative)," in *Fair Use: The Story of the Letter U and the Numeral 2*, ed. Negativland (Concord, CA: Seeland, 1995), 215.

4. "Home of John Oswald's FONY Music Label," FONY, accessed April 19, 2012, <http://www.pfony.com/>.

5. "Negation!" Plunderphonics, February 9, 1990, <http://www.plunderphonics.com/xhtml/xnegation.html>.

6. Lawrence Lessig, *Free Culture* (New York: Penguin Books, 2004), 133-135, http://browse.reticular.info/text/collected/Free_Culture.pdf.

7. Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* (Athens, GA: University of Georgia Press, 2006), 127.

8. Norm Igma, "Plexure: Norm Igma Questions John Oswald," Plunderphonics, accessed April 19, 2012, <http://www.plunderphonics.com/xhtml/xinterviews.html#plexure>.

9. Duguid, "Interview with John Oswald."

10. "Plunderphonics Discography."

The effect of this weaving together of so many minute fragments of information is one of confusion. The samples pass by so quickly that listeners, in the time that it takes them to realize that they may have identified a sample, have already been bombarded by a long sequence of other samples that, in turn, may trigger identifications. Oswald states that “ideally, for the average listener, you wouldn’t be able to put your finger on anything in *Plexure* and say ‘I know what that is,’ but you’d have this perhaps disturbing sense the whole time that there’s a lot of stuff in there that you’ve heard before.”¹¹

The elusive nature of the samples, for the listener, is contrasted by their actual content. In contrast to many sample-based works, which rely on various technical effects to obfuscate or otherwise significantly change the nature of the sampled sound, Oswald utilizes a technique he calls “electroquoting ... which entails cloning, making exact replicas of the sources, and maintaining the precise quality of the digital masters throughout the process of recomposition.”¹² While the samples may at times be layered on top of each other, Oswald claims that if one were to dissect the recording and compare one layer of a sample to its original source, it would be found to be identical: “It is an electroquote; it’s not the sort of sampled paraphrase you find in a rap bed track.”¹³

The notion of a digital audio clone that “skirts the threshold of legibility”¹⁴ when presented in a musical composition raises interesting questions. Is Oswald guilty of copyright infringement, or of stealing intellectual property owned by others? So far, although he has never obtained licenses to use any of the samples found on *Plexure*, Oswald has not been taken to court. However, his previous release, *Plunderphonics* (1989) in which he manipulated whole songs by artists such as the Beatles, Dolly Parton, and Michael Jackson, was “suppressed and destroyed” by the Canadian Recording Industry Association (CRIA).¹⁵ Upon releasing *Plunderphonics*, Oswald believed that because he was not attempting to sell the CDs, and because he had credited all the artists whose songs he had used, he “was not breaking the law.”¹⁶ However, CRIA president Brian Robertson disagreed, stating that “what this demonstrates is the vulnerability of the recording industry to new technology... All we see is just another example of theft.”¹⁷ By attempting to “set an example for the legitimacy of electronic sampling in music,”¹⁸ Oswald was forced to settle out of court with the CRIA for infringing on their clients’ copyright,¹⁹ and agreed to hand over all remaining copies of *Plunderphonics*, and the master tapes, to the CRIA to be

11. Duguid, “Interview with John Oswald.”

12. Igma, “Plexure: Norm Igma Questions John Oswald.”

13. Ibid.

14. Ibid.

15. Kevin Holm-Hudson, “Quotation and Context: Sampling and John Oswald’s *Plunderphonics*,” *Leonardo Music Journal* 7 (1997): 21.

16. David Gans, “The Man Who Stole Michael Jackson’s Face,” *Wired Magazine* 3, no. 2 (February 1995), http://www.wired.com/wired/archive/3.02/oswald_pr.html.

17. Quoted in “Negation!”

18. “Negation!”

19. Gans, “The Man Who Stole Michael Jackson’s Face.”

“crushed.”²⁰ Luckily, as Oswald notes, “these were analog lawyers,” who didn’t seem to realize that the digital copies already circulating made his master redundant and ensured the continuing existence of his work.²¹

What makes *Plexure* so different from *Plunderphonics* is the legibility of the samples. While each piece on *Plunderphonics* consists solely of one “stolen” song that, although manipulated, is clearly identifiable, *Plexure* consists of one piece containing samples from approximately one thousand songs that are theoretically unidentifiable. This is compounded by the fact that they are presented in a manner meant to confuse the listener. While *Plunderphonics* incessantly manipulates the original sources, and arguably re-presents them as very different pieces, *Plexure* goes several steps further in creating a wholly new work.

Examples of the transformative nature of *Plexure* are many. By transcribing the music found in sections of *Plexure* to musical notation, Kevin Holm-Hudson was able to examine the work and found that the manner in which Oswald uses samples “is fundamentally different from that of most popular-music artists.”²² The analysis also demonstrated “the considerable amount of composition and transformation the artist brings to his material while still paradoxically aiming for a threshold of recognition by the listener.”²³ Joanna Demers points to the fact that *Plexure* is generally devoid of “regular beats or grooves,” which she believes demonstrates a “much higher degree of originality” than the compositions it samples from.²⁴ Oswald, speaking of the transformative nature of his own work, states that in the case of *Plexure*, because of the use of so many sources, “there is also a greater quantity of synergistic information.”²⁵ The referential nature of the piece and the constant juxtaposition of sources creates new information that isn’t to be found in any of the sources on their own, thus creating a wholly new dimension to the work.²⁶ One further example of the transformative nature of *Plexure* is indicated by Holm-Hudson, who states that while many artists sample elements of melody and rhythm from songs, Oswald is more concerned with timbre, and generally eschews those standard aspects of sampling. Holm-Hudson asserts that “one of the most important implications of *Plexure*, applied to contemporary music, may be that we are increasingly cognizant of timbre, rather than melody or harmony, as the element that conveys identity in piece of music.”²⁷ If this is true, it has serious implications for copyright law, which traditionally biases melody as a strong indicator of identity.²⁸

As we have seen, while *Plexure* is entirely made up of unaltered snippets of other artists’ recordings, it can be argued that it is different enough from these sources to be considered

20. “Negation.”

21. Gans, “The Man Who Stole Michael Jackson’s Face.”

22. Holm-Hudson, “Quotation and Context,” 23.

23. Ibid.

24. Demers, *Steal This Music*, 128.

25. Igma, “Plexure: Norm Igma Questions John Oswald.”

26. Ibid.

27. Holm-Hudson, “Quotation and Context,” 24.

28. Ibid.

an original work. Demers categorizes *Plexure* as a work of “transformative appropriation,” which is “the act of referring to or quoting old works in order to create new work.”²⁹ She argues that transformative appropriation was once common in music and protected by intellectual property laws that saw it as a legitimate practice known in musical parlance as allusion.³⁰ However, when the ability to record and duplicate sound became available, appropriation slowly started to become identified in the courts with concepts of plagiarism and piracy.³¹ By the late 1980s, around the time that Oswald’s *Plunderphonics* CD was seized by the CRIA, the ease of duplication, especially in the form of sampling, gave rise to a series of court decisions in the United States that effectively redefined copyright infringement to include most cases of transformative appropriation.³²

Demers points to the existence of the fair use provision of the American Copyright Act of 1976 as evidence that legislators, at that time, saw transformative appropriation as a legitimate practice.³³ Siva Vaidhyanathan describes fair use as a limitation on the rights of the copyright holder “which allows users ... to quote from, and refer to copyrighted works.”³⁴ Purposes for which this exemption is allowed include “criticism, comment, news reporting, teaching, scholarship, and research.”³⁵ In Canada, this concept is known as fair dealing, and although somewhat more limited, adheres to the same principles.³⁶ Scholars such as Vaidhyanathan believe that sampling “could and should be considered fair use,” pointing out that artists frequently use only small portions of a song, and the transformative nature of their use renders the compositions totally distinct from their original source material.³⁷ More importantly, Vaidhyanathan claims that “samples add value. They are pieces of language that generate new meanings in their new contexts.”³⁸ This is reminiscent of Oswald’s claim that *Plexure* creates new “synergistic information” from the juxtaposition of multiple samples.³⁹

Plexure can also be said to fall into the category of fair use, or fair dealing, in that it can be viewed as commentary, or criticism. Oswald claims that with *Plexure*, by weaving together sources from pop songs that are seemingly different, he is commenting on the inherently derivative nature of pop music itself.⁴⁰ Furthermore, in a manifesto entitled “*Plunderphonics* (or Audio Piracy as a Compositional Prerogative),” written in 1985, Oswald maintains that

29. Demers, *Steal This Music*, 4.

30. *Ibid.*, 8.

31. *Ibid.*, 7.

32. *Ibid.*, 9.

33. *Ibid.*, 27.

34. Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001), 27.

35. “Fair Use,” U.S. Copyright Office, accessed April 19, 2012, <http://www.copyright.gov/fls/fl102.html>.

36. “Copyright Basics - Fair Dealing (Canada) vs. Fair Use (U.S.),” Concordia University Libraries, last modified December 7, 2011, <http://library.concordia.ca/help/copyright/?guid=fdvsfu>.

37. Vaidhyanathan, *Copyrights and Copywrongs*, 145.

38. *Ibid.*

39. Igma, “Plexure: Norm Igma Questions John Oswald.”

40. Quoted in Demers, *Steal This Music*, 128.

“listening to pop music isn’t a choice” in modern society, as we are bombarded by it wherever we go, even in the form of music that “seeps through apartment walls and out of the heads of walk people.”⁴¹ Oswald views his sampling work as a right to critique the aural culture around him: “As curious tourists should we not be able to take our own snapshots through the crowd ... rather than be restricted to the official souvenir postcards and programmes?”⁴²

However, the right to critique or comment, provided by provisions such as fair use and fair dealing, is not guaranteed. Lawrence Lessig agrees that most sampling should fall under the category of fair use; however, he claims that in its current state, “few would rely upon a doctrine so weak.”⁴³ Lessig points out that the definition of fair use is extremely vague and the outcome of defending a case of copyright infringement on these grounds is uncertain at best.⁴⁴ Furthermore, the cost for an independent artist to fight a case in court is extremely prohibitive,⁴⁵ which might explain Oswald’s decision to settle out of court with the CRIA in the case involving his *Plunderphonics* CD. Conversely, the opposite route of purchasing licenses to legally use samples is often equally as expensive for young artists, thus leaving the right to create in this manner to the privileged few who can afford it.⁴⁶ It is precisely limitations such as these that have led Larry Lessig to claim that current copyright laws seriously impede creativity.⁴⁷

Lessig asserts that current technology has enabled a participatory culture in which creative works like *Plexure* are inevitable, and that the law must adapt to this change, or risk turning a whole generation into criminals.⁴⁸ Lessig’s solution is the creation of the Creative Commons licenses, which attempt to provide an alternative to the “all rights reserved” mentality of current copyright law.⁴⁹ By using one of these licenses, artists can choose to only have some rights reserved on their creative output, thus allowing others to freely use their material.⁵⁰ However, the problem with these licenses is that they only apply to artists who choose to use them. While at some point far in the future, the majority of the world’s cultural output might be licensed under Creative Commons licenses, this does not help current artists, like Oswald, who wish to sample and manipulate their own contemporary culture. Furthermore, other musical appropriationists, such as Negativland, argue that

41. Oswald, “Plunderphonics,” 217.

42. *Ibid.*

43. Lessig, *Free Culture*, 54.

44. *Ibid.*, 50.

45. *Ibid.*, 54.

46. *Ibid.*

47. Larry Lessig, “Larry Lessig on Laws That Choke Creativity,” TED Talks (2007), http://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity.html.

48. *Ibid.*

49. “About the Licenses,” Creative Commons, accessed April 19, 2012, <http://creativecommons.org/licenses>.

50. *Ibid.*

artists shouldn't be allowed to impose any restrictions on the transformative repurposing of their material, except in the case of its use for advertising.⁵¹

Negativland believe that while the current vagueness of the fair use doctrine makes it of little use for those who wish to create transformative appropriations, "a huge improvement would occur if the Fair Use section of existing law was expanded or liberalized to allow any partial usage for any reason."⁵² In response to proposed changes to Canadian copyright law that have been put forth in bills C-61 (2008) and C-32 (2010), advocacy groups such as Appropriation Art and The Canadian Internet Policy and Public Interest Clinic (CIPPIC) have suggested changes to fair dealing that would greatly enhance the rights of artists to create works of appropriation. Appropriation Art points out that while Bill C-32 was an improvement over older legislation in that it "introduces an exception for creating mashups (29.21)," and adds "exceptions for parody and satire (29)," the problem lies in that the list of exceptions is exhaustive rather than illustrative.⁵³ This means that artists would have to defend their works as falling strictly within the categories of research, private study, education, parody or satire, which are those listed as permissible for fair dealing.⁵⁴ Both Appropriation Art and CIPPIC agree that the words "such as,"⁵⁵ or "including"⁵⁶ placed before the list of exceptions, rather than "for the purposes of"⁵⁷ would provide artists the freedom to produce works according to their individual creative processes.⁵⁸

As we have seen, current technology used by musicians to create new music has presented challenges to copyright law that have not been addressed, and the laws need to be changed to avoid the risk of curtailing legitimate creative practices and the growth of culture. Cases of transformative appropriation such as Oswald's work *Plexure* clearly fall under the provision of fair dealing; however, as the provision stands now, it is inadequate to protect artists from litigation by powerful record companies and lobby groups. The ability to critique and comment on the media that saturates our very existence is an essential right that should be protected by law. While voluntary licensing solutions like Lessig's Creative Commons licenses are helpful, they do not address the needs of contemporary artists to freely create and comment on their culture. The only way to achieve a situation where works like *Plexure* can exist without threat of legal suppression is to follow the example of groups like Appropriation Art and CIPPIC in lobbying the government to expand and enhance our current provision for fair dealing.

51. "Negativland's Mark Hosler on Copyright," blip.tv, May 13, 2006, <http://blip.tv/file/32105/>.

52. Negativland, "Fair Use," in *Fair Use: The Story of the Letter U and the Numeral 2*, ed. Negativland (Concord, CA: Seeland, 1995), 197.

53. Gordon Duggan, "Bill C-32 C-11 Response," Appropriation Art, October 2, 2011, <http://www.appropriationart.ca/785/>.

54. *Ibid.*

55. *Ibid.*

56. Canadian Internet Policy and Public Interest Clinic et al., "Canadian Copyright Law: A Consumer White Paper," Canadian Internet Policy and Public Interest Clinic (June 2008), www.cippic.ca/uploads/Consumers_Copyright_White_Paper-EN.pdf.

57. *Ibid.*

58. Duggan, "Bill C-32 C-11 Response."

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