

MUTINY ON THE PIRATE SHIP: INDIGENOUS INFRINGEMENT AND THE DEVELOPMENT OF A MEDIA ASSET

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INTRODUCTION

This paper proposes an alternative approach for independent producers of indigenous content who for cultural or economic reasons are unable to build a business relationship with copyright stakeholders in the music industry. Instead of constructing the challenges facing these “creative upstarts” as a battle between independent voices from developing nations against the corporate agendas of United States (U.S.) and Europe-based media giants (or talent), this article examines collaborative alternatives that the music industry could initiate to cultivate a mutually beneficial relationship that mediates cross cultural tensions and avoids costly, ineffective litigation.

At the heart of this proposal is a collaboration that leads to a win-win for indigenous mash-up artists and copyright stakeholders. In return for a voluntary collective license from the music industry, indigenous content producers would accept creative nurture and career guidance from industry representatives and legal access to the licensors’ content. Such collaboration, without the taint of serial infringement, could mean that the music industry could work together with the independent producer to promote and mainstream the talent’s music. For stakeholders opting out of a voluntary collective licensing regime, a negotiation between an emergent artist and industry may also lead to the same result. If done right, either licensing approach would avoid the costs and baggage of cross-cultural litigation. Instead, new markets for the industry’s catalog may open up and,

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creativity would be enhanced, and, with luck, new talent would emerge as mainstream media assets for record companies.

I. UNDERSTANDING THE CHALLENGE

The advent of inexpensive and easy-to-use digital audio technologies has opened the floodgates to creation and distribution models that fall outside the control of established copyright stakeholders. One needs only to browse through YouTube to see the current model of take-downs of copyrighted content by the music industry and movie studios under the Digital Millennium Copyright Act.¹ The easy case for these stakeholders is the wholesale theft of content. Few would argue that the poster of the comedy bit from the Daily Show or the Looney Tunes fanatic who wants to share a favorite Bugs Bunny short should have free rein to reproduce and distribute Viacom or Time Warner clips.² In the absence of a contract with a copyright owner, a content website has no legal obligation to search its postings for copyright infringement.³ As a consequence, enforcement can be labor-intensive and time-consuming for stakeholders.⁴ And while video content sites have begun to strike ad revenue deals with copyright owners that require sites to rely daily on search bots, it can be a Sisyphean task to root out obvious infringers, many of whom think that mere attribution to a copyright owner is sufficient for a performance license.⁵ The tougher cases, creatively but perhaps not legally, are the mash-up postings, which are even harder to locate and take down.⁶

Mash-ups are derivative works that can take on many forms.⁷ At its least transformative, a mash-up can be a teacher's video of kindergarten students synched to the soundtrack from Star Wars,⁸ a thematic compilation of *Tom*

1. See also 17 U.S.C. § 512(c) (2010).

2. See generally MuhaddithDotOrg, *Jon Stewart Daily Show, P.1 Ground Zero Mosque Islamophobia*, YOUTUBE (Sept. 5, 2010), <http://www.youtube.com/watch?v=pUcHQmUEICc>; Aboharby1, *Looney Tunes – Bugs Bunny in Arthurs Court*, YOUTUBE (July 25, 2011), <http://www.youtube.com/watch?v=JX1nl3LaUOY>.

3. See § 512(c).

4. See Evan D. Brown, *Online Copyright Infringement Presents Some Special Issues*, 21 DCBA BRIEF 20, 22 (Oct. 2008).

5. See Chris Glidden, *Mel Blanc: The Man of a Thousand Voices*, YOUTUBE (June 6, 2011), <http://www.youtube.com/watch?v=JRlmb0xAtBs; Lovergurlz10001, Anderson and Kelly>, YOUTUBE (Mar. 13, 2010), <http://www.youtube.com/watch?v=4jICseBsrvs>.

6. See, e.g., *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2003); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325 (S.D. Fla. 2009), *aff'd*, 635 F.3d 1284 (11th Cir. 2011).

7. Eduardo Navas “differentiates between reflexive (e.g. Web 2.0 applications), regressive (e.g. music remixes) and regenerative (discursive and dynamic) forms in order to reconsider current remix in both modern and postmodern contexts.” STEFAN SONVILLA-WEISS, *MASHUP CULTURES* 21 (2010).

8. See, e.g., KurtSchwengel, *Star Wars Target (Med)*, YOUTUBE (Jan. 17, 2009), <http://www.youtube.com/watch?v=Ixraucy5yFl>.

and Jerry favorites,⁹ or any one of a thousand non-parodic amateur performances of *Call Me Maybe*¹⁰ or *Gangnam Style*.¹¹ More transformative mash-ups are creative, often novel, amalgams of copyrighted content, enhanced with complementary melodies, reimagined rhythms or overdubbed new content.¹² Mash-ups are typically posted on “produsage” sites, such as *YouTube* and *Open Source*, which are essentially catalysts for mash-up culture.¹³ These “produsage” sites provide a location where mash-ups may be posted and easily accessed and shared by others: [Axel] Bruns argues that produsage is about establishing a kind of organizational structure for community-driven, collaborative content creation online leading to significant new creative and informational resources that are challenging mass media industries through a number of key universal principles: for example, by means of open participation, communal evaluation; fluid heterarchy, ad hoc meritocracy; unfinished artifacts, continuing process; common property and individual rewards.¹⁴

In other words, mash-ups allow for a “participatory culture,” while “increasing media empowerment of young people.”¹⁵ In fact, the existence and easy-to-use nature of “produsage” sites has expanded society’s understanding of literacy beyond a set of personal skills to “a set of social skills and cultural competencies, vitally connected to our increasingly public lives online and to the social networks through which we operate.”¹⁶

In most cases, these mash-ups are not sufficiently transformative to be fair use,¹⁷ especially when extended portions of copyrighted material are used.¹⁸ Even so, enforcement of copyright law against mash-ups can be spotty since many amateur postings fly under the radar, unless they go viral. Equally challenging for stakeholders are live DJs who create mash-ups in

9. TheTicklingfan101, *A Couple of Tom and Jerry Scenes*, YOUTUBE (Feb. 19, 2011), http://www.youtube.com/watch?v=L3BI_mo30ug.

10. See, e.g., DuskY1991, *Carly Rae Jepsen - Call Me Maybe (My Rendition)*, YOUTUBE (July 11, 2012), <http://www.youtube.com/watch?v=nv5a1gOE-b0>; GuitarMatician *Call Me Maybe Pops Concert Performance My Allie and Me*, YOUTUBE (May 20, 2012), <http://www.youtube.com/watch?v=bOhXNtIxn6U>.

11. Taraptree, *Rendition of Gangnam Style by HD Studio Volunteer Students*, YOUTUBE (Oct. 6, 2012), <http://www.youtube.com/watch?v=WHO0tT2PvNU>; All About Ohio, *The OU Marching 110 - Gangnam Style - Halftime*, YOUTUBE (Sept. 22, 2012), <http://www.youtube.com/watch?v=fY1nlwZ9XXE>.

12. *Mashup (music)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Mashup_\(music\)](http://en.wikipedia.org/wiki/Mashup_(music)) (last visited Feb. 13, 2013).

13. STEFAN SONVILLA-WEISS, *supra* note 7, at 19.

14. *Id.* at 19-20.

15. *Id.* at 20.

16. Henry Jenkins, *Remixing Moby Dick* in STEFAN SONVILLA-WEISS, *supra* note 7, at 100.

17. See 17 U.S.C. § 107 (2006).

18. See Emily Harper, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, 39 HOFSTRA L. REV. 405, 406 (2010).

unlicensed venues.¹⁹ The result has been the rise of a vibrant, thriving mash-up culture online and offline in places that effectively operate outside the surveillance regimes of copyright stakeholders.²⁰

Mash-up culture is perhaps at its most robust today in the world music scene.²¹ In the last twenty years, indigenous forms of mash-up compositions have gained currency in specific global markets.²² The mash-ups have different names and distinct musical vibes: the best known being *tecnobrega* in Brazil, *kuuro* in Angola, *bubbling* in Suriname, and *kwaito* in South Africa.²³ But, despite their musical differences, each of these grassroots musical forms share common characteristics that may prove challenging to established copyright stakeholders.²⁴ In each case, independent creative upstarts make free use of copyrighted music without license and without regard for the legal consequences of copyright infringement.²⁵

Ana E. Santos has carefully described the emergence of some of these indigenous forms in a paper presented at a 2012 conference on “creative upstarts.”²⁶ *Tecnobrega* DJs, for example, create and record mash-ups at organized club parties called sound systems, and hand-off the recordings to local vendors who press CDs for sale—often for as little as \$1 US—on the streets.²⁷ Santos points out that the party organizers comply with local laws (except intellectual property), sell tickets, and create often lengthy CDs that use the back catalog of the major record labels, including recordings by Pink Floyd, Queen, Lady Gaga and Coldplay.²⁸ There are variations in the business models of the other forms—*kuuro* focuses more on the party than

19. See Ana Santos, *Nurturing Creative Industries in the Developing World: The Case of Alternative Systems of Music Production and Distribution*, 21 MICH. ST. INT’L L. REV. (2013).

20. See, e.g., Emily Harper, *supra* note 18.

21. See generally Mashup (Music), WIKIPEDIA, [http://en.wikipedia.org/wiki/Mashup_\(music\)](http://en.wikipedia.org/wiki/Mashup_(music)) (last visited Feb. 13, 2013).

22. See Phil Morse, 5 Reasons Why DJs Should Make Mashups (Not Mixtapes) to Get Bookings, DIGITAL DJ TIPS (Feb. 9, 2011), <http://www.digitaldjtips.com/2011/02/djs-make-mash-ups-not-mixtapes/>.

23. Gary Duffy, *Tecnobrega Beat Rocks Brazil*, BBC, http://news.bbc.co.uk/2/hi/programmes/click_online/7872316.stm (last visited Sep. 3, 2013).

24. See generally Peripheries, Open Businesses and Creative Work: Interview with Ronaldo Lemos, LAB FOR CULTURE (Mar. 25, 2008), <http://www.labforculture.org/fr/users/site-e-users/site-members/jelena-vesic/51331/24201>.

25. See generally *id.*

26. See generally Santos, *supra* note 19.

27. Ana Elena Domb Krauskopf, “Fire, light, everything!”: Exploring Symbolic Capital in the *Tecnobrega* Dance Scene, 30, 44 (2009), available at <http://cms.mit.edu/research/theses/AnaDombKrauskopf2009.pdf>; *Tecnobrega*, RIOCHROMATIC (Nov. 17, 2011), <http://riochromatic.com/2011/11/tecnobrega/>; *Tecno Brega*, P2PFOUNDATION, http://p2pfoundation.net/Tecno_Brega (last updated June 22, 2007).

28. See Santos, *supra* note 19.

on large-scale CD distribution,²⁹ and kwaito stages huge parties in fields and has developed a studio culture³⁰—but the logic of grassroots ignorance *cum* defiance of intellectual property law exists at the core of each.

Because these indigenous mash-up forms historically have existed outside the mainstream marketplace, record labels, music publishers, performance rights organizations and other stakeholders in America and Europe have paid little attention to what is essentially a culture of infringement in the developing world.³¹ In that sense, one could argue that this is a solution in search of a problem. If all we are talking about are public performances and CD distributions with little or no impact on a copyright owner's business model, then why not just keep the status quo? Why not treat these grassroots infringers like a Carly Rae Jepsen wannabe on an open source file sharing website³² and ignore what you cannot effectively stop? Let them have their dance parties and sell CDs in the favelas of Belem, Brazil.³³

This article argues, however, that copyright stakeholders—from big media companies to individual artists—should care about this culture of infringement. For one thing, these are not amateurs looking for lightning to strike on a video distribution site.³⁴ Indigenous mash-up culture is professionally run, and the markets are huge.³⁵ Some of the tecnobrega sound system parties attract 10,000-15,000 people³⁶ and distribution on CDs and through file transfers represent a fluid market sector that is untapped and growing.³⁷ Moreover, the insularity of musical forms based on national, regional or cultural difference has become less pronounced in a web-based global marketplace.³⁸ Consider the unprecedented success of Psy's Gangnam Style in January 2013.³⁹ Who would have ever guessed that the

29. See Anastasia Tsioulcas, "Kuduro," The Dance That Keeps Angola Going, NPR MUSIC (Dec. 22, 2012), <http://www.npr.org/blogs/therecord/2012/12/26/167628341/kuduro-the-dance-that-keeps-angola-going>.

30. See generally Kwaito, WIKIPEDIA, http://en.wikipedia.org/wiki/Kwaito#Kwaito_record_producers (last updated Feb. 26, 2013).

31. See Harper, *supra* note 18.

32. True numbers of non-parodic amateur performances may not be knowable since many files are posted under spoofed or coded names that may not identify an unlicensed performance.

33. Belem, a city in the state of Para in Brazil, is the birthplace of tecnobrega. See Krauskopf, note 27, at 34.

34. See *id.* at 42.

35. See *id.*; Harper, *supra* note 18, at 408.

36. See Duffy, *supra* note 23.

37. Kwaito, *supra* note 30.

38. See Maressa Brown, 'Gangnam Style' Isn't Meaningless Just Because It's Not in English, THE STIR (Nov. 28, 2012), http://thestir.cafemom.com/in_the_news/147310/gangnam_style_isnt_meaningless_just.

39. Matt Quinton, Gangnam Mile-Stone!, THE SUN, <http://www.thesun.co.uk/sol/homepage/showbiz/music/4709122/Psys-Gangnam-Style-hits-an-incredible-one-billion-YouTube-views.html> (last updated Jan. 3, 2013).

number one all-time single on YouTube would be a Korean language horse dance tune performed by an unknown hip-hop artist based in Seoul? Indeed, it is this very unpredictability of what goes viral that represents the biggest threat to copyright owners. If Psy can hit the big time with his original composition, what's to stop some tecnobrega DJ from going viral with a mash-up of The Rolling Stones or Madonna? Santos alludes to this problem in her discussion of a tecnobrega cover of one of Brazil's most famous compositions, *Aguas de Marco*.⁴⁰ A bossa nova hit of the 1950s by one of the country's best-known composers, *Aguas de Marco* is revered as an iconic song among Brazilians.⁴¹ Santos suggests that use of mainstream hits like *Aguas de Marco* and the U.K.-U.S. back catalogue may expand the appeal of tecnobrega within communities and extend its reach geographically.⁴²

II. TOWARD THE BUILDING OF A MEDIA ASSET

If indigenous mash-up culture is on a collision course with IP stakeholders, what should be done about it? What can be done about it? The answer, as proposed in this article, is to place stakeholders and upstarts on an alternative path of mutual interest—and one that avoids the prospects of foreign law copyright litigation in a potentially unfriendly jurisdiction. To make this happen, copyright stakeholders at the outset must accept that litigation will not stop this culture of infringement. While music publishers, record labels and performance rights organizations have deep pockets and first-rate legal representation, the prospect of litigation is not a good option. Since indigenous mash-up culture is a transnational phenomenon, using litigation to shut it down would mean fighting legal battles in a variety of jurisdictions, each with different laws and requiring specialized legal representation. It would also mean dealing with laws that may be more protective of independent artists than U.S. copyright law. In the post-colonial world, there has been a concerted movement to protect creative upstarts from exploitation by music industry companies.⁴³ Protections for authors in moral rights jurisdictions also can be an obstacle for owners of economic IP rights.⁴⁴

40. Santos, *supra* note 19.

41. ANTONIO CARLOS JOBIM, *Aguas de Marco (Waters of March)*(Corcovado Music Corp., BMI).

42. Santos, *supra* note 19.

43. See J. Joel Baloyi, *Demystifying the Role of Copyright as a Tool for Economic Development in Africa: Tackling the Harsh Effects of the English Copyright Law Heritage*, MICH. ST. INT'L. L. REV. (forthcoming 2013).

44. See, e.g., Cour d'appel [CA][regional court of appeal] Paris, civ. ch., Dec. 19, 1994, translated in ENT. L. REP., Mar. 1995, at 3, available at <http://www.unclaw.com/chin/teaching/iip/turner.pdf>.

Even if copyright owners somehow got their litigation ducks in order, underground infringers are not easy to find, are unlikely to participate in the litigation, and could be unable or unwilling to pay damages. Injunctive relief would likely also be fruitless against an infringing indigenous mash-up culture. If a DJ or a sound system is stopped at one venue, other DJs or venues would likely pop up to pick up the slack. And litigation between Anglo-American corporate stakeholder and grassroots artists in the developing world is fraught with public relations liability. Going after indigenous populations is not like sending a cease-and-desist letter to an infringing *Star Trek* website in Illinois.⁴⁵ Litigation could end up alienating potential new markets, which might view heavy-handed copyright enforcement through the prism of class-based economic inequality, cultural imperiousness, racial bias, and post-colonial exploitation. There could also be blowback in certain communities in the United States who might see this as an attempt to stifle diverse cultural expression.⁴⁶

Even in the U.S., mash-up creators can be viewed as good guy upstarts effectively beyond the reach of recording industry litigation.⁴⁷ Consider, for example, the case of DJ Greg Gillis, also known by his stage name, Girl Talk, one of the most famous quasi-underground mash-up artists.⁴⁸ Gillis is an example of a mash-up artist who, according to the *New York Times*, is a “lawsuit waiting to happen.”⁴⁹ In fact, his fans “scrupulously detailed all 372 pieces of copyrighted music he used on Wikipedia just hours after his album release.”⁵⁰ Gillis has had five successful mash-up albums, but has yet to be sued. Gillis has even “published all of his albums on a record label called ‘Illegal Art.’”⁵¹ “Illegal Art is a record label pushing the limits of sample-based music since 1998.”⁵² Additionally, Pittsburgh’s local representative, Mike Doyle, who indicated that “mash-ups might be a ‘transformative new art that expands the consumer’s experience,’” praised Gillis in the House of Representatives for being a “local guy done good.”⁵³ According to one source, Gillis has yet to be sued because he “would be a

45. *Star Trek Fan-nig the Flames*, CHILLING EFFECTS (July 29, 2001), <http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=7>.

46. See Fiona Morgan, *Copywrong: Copyright Laws Are Stifling Art, But the Public Domain Can Save Us*, INDY WEEK (Dec. 3, 2003), <http://www.indyweek.com/indyweek/copywrong/Content?oid=1190873>.

47. See, e.g., Katie Simpson-Jones, *Unlawful Infringement or Just Creative Expression? Why DJ Girl Talk May Inspire Congress to “Recast, Transform, or Adapt” Copyright*, 43 J. MARSHALL L. REV. 1067 (2010).

48. Joe Mullin, *Why The Music Industry Isn’t Suing Mashup Star “Girl Talk,” PAIDCONTENT* (Nov. 17, 2010), <http://paidcontent.org/2010/11/17/419-why-the-music-industry-isnt-suing-mashup-star-girl-talk/>.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Girl Talk*, ILLEGAL ART, <http://illegal-art.net/girltalk/> (last visited Jan. 31, 2013).

53. Mullin, *supra* note 48.

ready-made hero for copyright reformers.”⁵⁴ “[I]f he were sued, [he would] have some of the best copyright lawyers in the country knocking on his door asking to take his case for free.”⁵⁵ If the recording industry can’t bring itself to sue a local mash-up artist over public relations fears, litigation overseas against culturally and racially different mash-up artists seems out of the question.

Once copyright stakeholders accept the futility of litigation, it becomes easier to argue that the real solution is not to fight infringing mash-up culture, but to embrace it. The crux of this model is similar to any brand-building model.⁵⁶ Tolerate, even encourage, infringement of your copyrighted content.⁵⁷ Let the DJs use your compositions or sound recordings. Help the street kids sell the sound system CDs in local markets. Through carefully thought-out policies, copyright owners may be able to nurture an underground artist into the mainstream. If a nurtured artist surges in popularity and develops marketability, then copyright stakeholders can leverage the prospect of litigation into a negotiation to sign the emerging artist to a record deal.

The idea here is to build up the underground artist to the point that he becomes a stakeholder in his own career. An artist who is a stakeholder has an incentive to negotiation, and the prospect of litigation may be a deterrent from walking away from a deal with copyright owners.

The benefits of this approach are manifold. For the music industry, the two principal potential benefits are increased market share for their catalogues and the acquisition of new talent. At a minimum, music stakeholders can increase awareness of their brand—their stable of talent—to non-mainstream markets in the hopes of bringing these emerging markets into the mainstream or by moving the mash-ups into a more mainstream marketplace. In the former instance, the music industry would be promoting their content to non-mainstream consumers of mash-ups in the hopes that, as the market matures, stakeholders can turn these consumers into paying customers. With global economic development, there is a real possibility that local populations with limited resources may see their disposable incomes rise. In 2010, “Brazil rank[ed] . . . second with a per capita annual personal disposable income” amongst the BRIICS countries, where consumer spending is a major factor.⁵⁸ In China, the annual disposable income per capita for urban households increased 10 times from 1991 to

54. *Id.*

55. *Id.*

56. See Nigel Morris, *Embracing Infinite Media*, Media Post Magazines (Sep. 28, 2012), <http://www.mediapost.com/publications/article/184117/embracing-infinite-media.html#axzz2IIIYyn8p>.

57. See Krauskopf, *supra* note 27, at 47.

58. David Hunkar, *Personal Disposable Income Among the BRIICS*, SEEKING ALPHA (Aug. 25, 2010), <http://seekingalpha.com/article/222240-personal-disposable-income-among-the-briics>.

2009 due to the rapid pace of urbanization.⁵⁹ Lastly, though “Angola [has experienced rapid] and prolonged economic growth, thanks to a boom in commodity prices and rapid development of oil and diamond production,” “the lack of structural reform, widespread inefficiency and weak governance are still jeopardizing the potential of economic growth to bring about social development.”⁶⁰ Even as things stand today, there is a potential marketplace that can be exploited by the music industry. Consumers of indigenous mash-ups, after all, are willing to pay to attend sound systems and purchase CDs. Even at a dollar a unit, record companies might come out ahead, especially if you add on the potential to extend the reach of their brand to a new market.

The music industry would likely also benefit as indigenous mash-ups move into more established marketplaces in cities and at universities.⁶¹ As Santos points out, the markets for tecnobrega and kwaito are expanding geographically into more upwardly mobile population sectors.⁶² Much of this is being driven by the inclusion of content that appeals to more mainstream markets, including chart-topping hits by industry talent. If copyright stakeholders encouraged use of their content, they could speed up this market migration. Underground artists would also benefit from this more upwardly mobile exposure⁶³—which the industry could dangle as an additional incentive for getting a DJ to sign a deal. The migration of underground music to mainstream markets with higher disposable income is, of course, not an unheard of phenomenon. One need only look at the exponential growth of hip-hop from its origins as community dance music in the Bronx to see how new music forms can use mash-ups to expand into mainstream markets.⁶⁴

The other principal benefit to the music industry is the potential to build new talent. By allowing access to content, copyright stakeholders can help turn an underground artist into a bankable media asset. Allowing use of hit recordings may be a creative boon for mash-up artists. Stakeholders could make additional recordings available that talent may not have had access to. Better quality recordings may also make a creative difference for indigenous artists whose access may be limited to a bootleg, a sound-a-like cover, or a fragmented sample. Given the creative benefits that the music

59. *Chinese residents annual disposable income*, STARMASS DREAM CO., http://www.starmass.com/china_review/living_index/chinese_disposable_income.htm (last visited Jan. 9, 2013).

60. OECD Development Center et al., *AFRICAN ECONOMIC OUTLOOK* 105-18 (2007), available at <http://www.oecd.org/countries/angola/38561655.pdf>.

61. See Santos, *supra* note 19.

62. *Id.*

63. See generally Krauskopf, *supra* note 27, at 62-66.

64. *Hip Hop*, WIKIPEDIA, http://en.wikipedia.org/wiki/Hip_hop (last updated Mar. 12, 2013).

industry can provide, indigenous mash-up artists actually want to sign on with the companies that are helping them increase visibility.

But perhaps even more valuable to the mash-up artist is the promotional and distribution expertise that the established industry players could bring to the benefit of an emerging underground artist. While the music industry always has the option to pump money into the promotion of content that tests well across different markets, the initial promotional steps for an indigenous mash-up artist can be much more modest. A stakeholder can simply allow the mash-up unrestricted access to “produsage” sites such as YouTube or Facebook.⁶⁵ Instead of threatening websites with take-down letters, the music industry can nurture an emerging artist by permitting the streaming of the mash-up. Companies would not only be able to help the artist build a fan base; they could even monitor and assess the success of the artist in different market sectors. The Holy Grail for both artist and copyright stakeholders would be the mash-up that goes viral either in a particular market or, better yet, globally. A legal collaboration would also allow mash-up talent to participate in a revenue sharing deal negotiated between stakeholders and a “produsage” site. Stakeholder and artist would have access to revenue that would not have been available absent collaboration.

Mash-up artists could also benefit from “piggybacking” onto the shoulders of established members of the music industry’s talent pool.⁶⁶ If a big media company encourages its star performers to seek out and promote underground mash-up creators, it can greatly increase the profile of the emerging artist. Collaboration with a superstar performer could fast-track a little-known DJ into new markets, much as, in a different genre, Paul Simon famously did with Ladysmith Black Mombazo on his *Graceland* album.⁶⁷ Piggybacking already has a rich tradition in hip hop culture in the United States, as star performers like Dr. Dre, Ludacris and Eminem double as impresarios that “discover” and promote new talent.⁶⁸ It has also become more visible in South Africa, where established kwaito stars are known to visit different field parties with an eye to promoting promising underground talent.⁶⁹ Artists such as Zuluboy, Pitch Black Afro, and Pro Kid, known well

65. SONVILLA-WEISS, *supra* note 7, at 19.

66. Marlon Bishop, *Please Explain: What is Bubbling?*, MTV IGGY (June 1, 2012), <http://www.mtviggy.com/articles/please-explain-what-is-bubbling/>.

67. Cross-cultural piggybacking must be done carefully. When *Graceland* was released, Simon was widely criticized for cultural appropriation of indigenous South African music. See Robin Denselow, *Paul Simon's Graceland: The Acclaim and the Outrage*, THE GUARDIAN (Apr. 19, 2012), <http://www.guardian.co.uk/music/2012/apr/19/paul-simon-graceland-acclaim-outrage>.

68. See Greg, *Any Given Sunday: Underground Hip Hop in South Africa*, WORLD HIP HOP MARKET (Feb. 21, 2008), <http://worldhiphopmarket.com/?p=73>; see also Elliot Van Buskirk, *Rapper Ludacris Seeks New Musical Talent via Web or Cellphone*, WIRED (June 17, 2008), http://www.wired.com/listening_post/2008/06/rapper-ludacris/.

69. *Kwaito*, *supra* note 30.

enough in South Africa to have a record deal, are virtually unknown in the U.S.⁷⁰ A record label with the temerity to sign on one of these local stars would not only get the established star's talent, but it may also lead the music industry to "undiscovered" talent that the local star may be cultivating. Established former underground stars may also be effective mediators, allowing the parties to avoid or resolve creative or business conflicts that might arise between an indigenous creative upstart and an established corporate copyright holder.

III. PRACTICALITIES

Fundamentally, there are two different approaches that stakeholders could use to leverage a profitable collaboration with an underground mash-up artist. The music industry could either actively promote mash-up creativity through a voluntary collective license or they could tacitly allow an infringement, taking action only if the mash-up artists becomes too successful to remain "under the radar." For a number of reasons, including some raised in the previous section of this article, a proactive approach is better than what would essentially be a "wait-and-see" approach. By collectively licensing their content to indigenous mash-up artists, the music industry can participate in the nurture of new artists almost from the beginning. And because it is a voluntary collective license, stakeholders can always opt out if they would prefer to wait until an artist establishes a market foothold, or if they prefer litigation. Still, stakeholders who opt out may find themselves at a competitive disadvantage with those who opt in. If the collective license covers only some music, it may be that mash-up artists will migrate to the music they can use legally, especially if there is a lot of "legal" music to choose from. An industry player who participates would generate goodwill and an opportunity to promote its catalog; a nonparticipating player not only loses a promotional opportunity, but may also even be seen as a threat or a bully if litigation becomes the only option.

For stakeholders willing to offer a collective license, they would be free to set certain conditions, encourage certain uses, or establish licensee eligibility criteria. By limiting a collective license to uses in mash-ups, stakeholders might be able to steer artists away from less transformative covers, which could be seen as a competitive threat to the industry's existing market. If, for example, a music industry company wants to make a free or low cost license available to a sound system or an artist based on income, or structure a fee as a percentage of sales, that might be possible. And while it may be true that some underground artists might see no reason to accept a conditional license—free or otherwise—when they can simply continue to infringe with effective impunity, the incentive to work with stakeholders looking to mainstream underground talent may be enough to

70. Greg, *supra* note 68.

get them onboard. If the goal of most underground artists is to become mainstream, then the ability to use recordings legally would be an opportunity not to pass on. Continued infringement means not fully emerging from the underground. That may be acceptable for some militant DJs, but not for most artists. Moreover, as a general matter, there is a good chance that artists of good will, if offered a simple, practical alternative to infringement, will accept a licensing regime. Just ask all the former peer-to-peer file-sharers that flocked to iTunes for downloads when it became available.

In a 2008 White Paper, the Electronic Frontier Foundation proposed a voluntary collective license regime as a solution to illegal peer-to-peer file sharing on pirate websites.⁷¹ The proposal would be to have internet service providers or universities bundle a collective licensing fee into the cost of service to customers.⁷² Using the blanket license for broadcast as a model, the paper argues enormous benefits to copyright stakeholders, creative upstarts, and the file sharers themselves.⁷³ File sharers and emerging artists would have access to as much music as they want, and the copyright stakeholders in the music industry would pool a windfall of royalties, where none existed before.⁷⁴ While the industry may still be holding out hope that it can turn a profit from legal file sharing,⁷⁵ a similar, if somewhat more modest, collective licensing regime could be of great benefit in an indigenous mash-up context. In its simplest form, the collective license could be tacked on to the cost of admission to a sound system venue or applied to a CD distributor—given the growing numbers of consumers, pennies on the dollar could mean significant royalties to stakeholders.

Moreover, some of the drawbacks of the EFF file-sharing proposal are not applicable to indigenous mash-up culture. For one thing, collectively licensing mash-up culture is not about surrendering control of a consumer market that was once firmly in the grasp of the music industry. The music industry has never controlled this market sector, so a voluntary collective license could be viewed as a way to expand into new markets, not cannibalize an existing one. And while it is true that mash-up artists also infringe, the underlying activity is also different. Mash-up artists, unlike file sharers, are not choosing infringement as an easy, “free” alternative to purchasing recordings. These are grassroots, expressive movements that

71. Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELECTRONIC FRONTIER FOUNDATION (Apr. 30, 2008), available at <https://www.eff.org/pages/better-way-forward-voluntary-collective-licensing-music-file-sharing>.

72. *Id.*

73. *See id.*

74. *See id.*

75. *See id.*

developed in good faith.⁷⁶ File sharers, on the other hand, do what they do for the sole purpose of evading royalty payments.⁷⁷

The music industry could adopt this type of approach without worrying about whether they are rewarding egregious infringers or abandoning their efforts to build online music selling. Nor would a collective license to mash-up culture be at the expense of consumers who are not part of the movement. One of the frequent criticisms of collective licensing is that it forces consumers to pay a fee whether or not they use the copyrighted content. By limiting the license to grassroots mash-up participants, no one can claim that non-infringers are effectively subsidizing sound systems. Such a limitation could mean less money to the music industry, but it is better than the alternative, which is no money or costly overseas litigation.

The fact that a breakout mash-up artist cannot rely on the law, however, is a good thing. The erosion of legal protection that accompanies fame is a valuable tool in making a collaborative approach work. If they want a chance at stardom, indigenous mash-up artists need to rely on the good will of copyright stakeholders, not the law. Even if a rights limitation applied in a grassroots mash-up context, it would only be matter of time before a mainstreaming mash-up artist would “grow out” of that limitation. Copyright stakeholders need to demonstrate that they are giving indigenous artists something of value—a right to their content and the chance to go mainstream. In return, record companies could negotiate access to sell their catalogue at sound systems, or even possibly access a street vendor CD distribution network. They would also have the chance to negotiate a deal with an emergent underground artist at an early career stage, when companies would be able to secure better terms. The earlier a deal is struck, the sooner earlier record companies can promote the artist on “produsage” sites and in traditional distribution.

Indeed, waiting too long to strike a deal is one of the drawbacks of taking a wait-and-see approach. If a stakeholder decides to take legal action for infringement after an artist becomes too successful to escape notice, the copyright owner may be able to leverage a legal settlement into a deal. But it’s a big “may.” For one thing, owners would again have to deal with an enforcement action that, absent some type of large-scale piracy, is hard to enforce. Winning a case may be a tactical victory legally, but from a business standpoint, what has the copyright stakeholder won? In some cases, the prospect of litigation may be enough to drive an emergent talent back underground. And even if the mash-up artist was willing to negotiate a litigation-coerced deal, is it really worth the negative public relations or the possibility of bad blood between the stakeholder and a “reformed” talent?

To be sure, there will be some who say that the benefits of trying to mainstream indigenous markets and talents are too remote to justify a

76. SONVILLA-WEISS, *supra* note 7, at 20.

77. See von Lohmann, *supra* note 71.

change in the status quo. For a collaborative collective licensing regime to work, an artist needs to want to go mainstream. Guerilla mash-up artists, who, for aesthetic or ideological reasons, would see working with a for-profit copyright stakeholder as a “sell-out,” will not participate no matter what the music industry does. And there could be a backlash even among the majority of artists who would leap at the chance of mainstream success if copyright stakeholders negotiate a license that is viewed as exploitative. As cultural outsiders, the music industry needs to carefully cultivate its collaborative incursion into indigenous mash-up culture. Enlisting established artists to “piggyback” may help ease some of the cross-cultural tensions present between industry and artist.

The music industry must also accept that even if they do everything right, their efforts may not lead to new mainstream talent. Essentially, the music industry is leveraging their copyright interests with an eye to developing markets for new content and new talent. The marketability of the content would necessarily be the driver of success for stakeholders. Content that is easily accessible across cultures—and especially in mature markets such as the U.S.—would provide the biggest return on the industry investment. Content that, for language or cultural reasons, has less transnational market value may be a harder sell for corporate media entities; but even a creative artist who has gone viral regionally or in a niche market may be worthwhile for an industry in search of new revenue.

CONCLUSION

If the recording industry has foresight, it should be bending over backwards to leverage good will in indigenous mash-up culture. While the law will not deem mash-up uses as charitable, the music industry has the discretion to refrain from rights enforcement. Nothing prevents record labels, music publishers, artists, and performance rights organizations from granting a license at little or no cost to a grassroots musical phenomenon in a developing nation. At some point, copyright stakeholders can simply decide to accept an infringing use, either to generate good will, foster creativity, or with an eye to eventually licensing it as it becomes more marketable. In American fan culture, one can witness a rowdy costumed performance of *The Rocky Horror Picture Show*⁷⁸ in the well of a movie theater or a verbatim reenactment of an original *Star Trek* episode in a Seattle park.⁷⁹ Like indigenous mash-up culture, this type of fan creativity is grassroots and participatory. And it is not going away anytime soon.

78. Anthony Blenke, *Don't Dream It, Be It: A Research Study into the Cultural Phenomenon Surrounding the Rocky Horror Picture Show and Its Impact on Society*, in USFSP UNDERGRADUATE RESEARCH SYMPOSIUM (2012) available at http://dspace.nelson.usf.edu/xmlui/bitstream/handle/10806/4857/Anthony_Blenke_Anthropology-1.pdf?sequence=4.

79. “*Star Trek*” in the Park, CBS NEWS (Aug. 12, 2012), available at <http://www.cbsnews.com/video/watch/?id=7417892n>.

Ultimately, this could be a way for copyright owners to address participatory creative culture in a way that does not make them the bad guy. A collaborative, nurturing approach could be broad enough to include fan culture, but it does not have to. Indigenous mash-up forms in the developing world may merit special consideration by the recording industry. Tecnobrega, kuduro, kwaito, and bubbling are exciting, innovative examples of participatory media culture, in a world where there are likely many more forms yet to be discovered. From a creative standpoint, these emerging forms need to be supported. From a business standpoint, these are markets that can be grown and mainstreamed.⁸⁰ The beauty of a collaborative approach is that the stakeholders get a measure of control to decide the conditions and limits. With luck, they may even get new talent, and more revenue.

80. Krauskopf, *supra* note 27, at 8.

