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Is it possible to make a black and white case out of the grey album?

dr john

It might have been more fitting had Mickey Mouse and not DJ Danger Mouse produced 'The Grey Album' – the fusion of vocals from Jay-Z's Black Album with samplers of the Beatle's White Album (see issue 83, 26 February 2004).

It was hailed by many in the press that websites offered downloads of the album as some kind of expression of a co-ordinated protest against international copyright law. This episode gave rise to a sense of outrage that a record company should seek to bring a 'cease and desist' order against some one simply having some fun using its recordings without permission and that at the very least a licence should simply have been automatically issued allowing for this new work – good or bad – to be created.

It's a view that bears as much reality to the real world as Mickey does to your average field mouse.

There appears to be a body of opinion that holds the view that simply because new digital technology affords endless opportunities to create new works out of existing works that copyright law should automatically accommodate such possibilities. Indeed not only should there be an accommodation by the original creator or owner, but there should be an absolute right to the new creator to do so.

That popular view appears to hold good where the original owner is perceived as the fat cat and the new creator is regarded as the dormouse. It's pure Tom and Jerry. No doubt however that view would sway and change were the original owner the door mouse and the new owner the fatcat. Shades of grey.

Copyright law, however, is even handed on the subject. For copying to constitute an infringement it must be 'substantial' (Section 16(3) Copyright, Designs and Patents Act 1988). Substantiality is based on the quality of the work copied – and if it is an essential part of a work (ie incorporating a substantial amount of the original skill and labour) then it may in fact not be a very large part of it. It's a qualitative test not a quantitative one. The

law is black and white on the subject. So is the Grey Album.

The issues and arguments which the Grey Album give rise to are a microcosm of all those issues which the digital transmission of music have been raising over the past few years. It is based on the fallacy that copyright ownership limits potential creativity and freedom of expression. In reality it is because copyright law has existed and been complied with that creativity has exploded in those countries which have over the years protected its artists and creative businesses.

There may be cases where a new piece of work which samples another work would otherwise be of artistic interest but is effectively stopped as a result of copyright laws. But the law cannot be expected to differentiate between a talented Danger Mouse playing around with a Beatles track to Mickey Mouse having a go. It has to be a black and white case. That's all folks...

Any views expressed are personal opinions of John Benedict who appears courtesy of Benedicts, Denton Wilde Sapte and AIM.