

TRANSFORMATIVE USE EXCEPTION

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CONTENTS PAGE:

- λ **INTRODUCTION** (PAGE 3)

- λ **CHAPTER ONE: THE LEGAL DEVELOPMENT AND IMPORTANCE OF THE CONCEPT: TRANSFORMATIVE USE** (PAGE 6)
 - λ **A. User-Generated Content (‘UGC’) and Its Importance** (PAGE 6)
 - λ **A. (I) What is UGC?** (PAGE 7)
 - λ **A. (II) What is Mash-up Music?** (PAGE 8)
 - λ **B. Why is it Currently Illegal?** (PAGE 10)
 - λ **C. The Concept of Transformative Use** (PAGE 12)
 - λ **C. (I) (a) Origins and Development of Transformative Use** (PAGE 12)
 - λ **C. (I) (b) The Blur and the Err of the Parody Exception** (PAGE 14)
 - λ **C. (II) Deciding Whether a Work Conveys New Meaning** (PAGE 18)
 - λ **D. Warning against Allowing ‘Weak’ Transformation** (PAGE 22)

- λ **CHAPTER TWO: HOW SHOULD THE COMMERCIAL NATURE OF A TRANSFORMATIVE WORK AFFECT ITS ABILITY TO BE DEEMED FAIR DEALING?** (PAGE 25)
 - λ **A. Difficulty in Defining “Non-Commercial”** (PAGE 25)
 - λ **B. Does the Transformative Work Diminish the Market Value of the Original?** (PAGE 28)
 - λ **B. (I) US Jurisprudence and Scholarly Discussion Of Market Value Analysis** (PAGE 28)
 - λ **B. (II) The Public Benefit of Such Uses Versus The Copyright Owner’s Loss** (PAGE 29)
 - λ **B. (II) (a) Benefits of Online UGC** (PAGE 29)
 - λ **B. (II) (b) Benefits of Bringing UGC to Live Audiences** (PAGE 31)
 - λ **B. (III) General Benefit of Artistic Expression** (PAGE 33)
 - λ **C. Using Practices to Fill the Current Gaps in Our Copyright Legal System** (PAGE 35)
 - λ **D. Drawing The Line Between Practices and Infringement** (PAGE 40)

- λ **CHAPTER THREE: AN EXCEPTION ALLOWING TRANSFORMATIVE USE WOULD NOT UNDERMINE MORAL RIGHTS IN ANY SIGNIFICANT MANNER** (PAGE 43)
 - λ **A. Most Transformative Works Unlikely to Infringe Moral Rights** (PAGE 43)
 - λ **A. (I) *Perez v Fernandez*** (PAGE 45)
 - λ **B. Expanding Fair Dealing Defence Would Not Preclude Moral Rights Claims** (PAGE 47)

- λ **PROPOSED DRAFTING FOR THE PROVISION** (PAGE 49)

- λ **CONCLUSION** (PAGE 50)

INTRODUCTION

Remix Culture is an artistic phenomenon that has arisen out of an increase in user-generated content. It is distinguished by its transformative use of popular music.

Remix Culture challenges the principles of copyright law. It embraces two positions, one more radical than the other. The first position argues that everything is a remix because all original material builds on and is influenced by previous material.¹ It advocates the abolition of copyright laws. The second view is more nuanced and argues that Remix Culture should be tolerated and accommodated by a change in the current state of copyright laws.² It supports the expansion of the defences available for copyright infringement. This paper focuses on the latter position, providing an Australian perspective on why and how Remix Culture could be accommodated within the existing copyright framework by an expansion of the fair dealing defence.

This paper proposes the inclusion of the concept of transformative use in the fair dealing defence. This concept recognises the inherently derivative nature of art and is based on the notion of the transformed work being changed, adapted and modified to the extent that it should no longer owe a legal debt to the original work.

Although the Australian fair dealing provisions allow the unauthorised use of copyrighted material for the purposes of research or study, criticism or review, parody or satire, reporting news or professional advice by a lawyer, patent attorney or trade

¹ Ferguson, Kirby. "Everything's A Remix". Everything Is A Remix Part 1, available at

² Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, Penguin Press (2008).

marks attorney,³ Australian law is yet to recognise express protection for unauthorised works that are transformative in nature. In light of recent calls to formally adopt the concept as a part of fair dealing, this paper assumes a timely relevance.⁴

Chapter one clarifies what transformative use could mean in the context of music and Remix Culture. Although the concept of transformative use emerged in the United States ('US'), Chapter One reveals how it was narrowed and confused to require criticism after *Campbell v Acuff-Rose Music Inc*,⁵ a vastly publicised parody case. The Court held that the parody was sufficiently transformative so as to constitute fair use. Parodies were then mistakenly equated to transformative use in the US, and both terms were understood interchangeably. This interdependence effectively precluded the development of a satisfactory defence to protect transformative works.

Transformative use is still not expressly protected in US or Australian legislation, despite its obvious importance in US jurisprudence. This paper will draw on the US jurisprudence surrounding the concept of transformative use, in order to clarify its meaning and its potential applicability in the Australian fair dealing defence.

In light of the recent calls for the inclusion of non-commercial transformative use within Australia's fair dealing provisions, Chapter Two scrutinises why such an exception should not be confined to non-commercial use. Defining non-commercial use in a digital environment that monetises social relations, friendships and social

³ Australian Copyright Council, *Fair Dealing: Information Sheet G079v06* (2012), available at www.copyright.org.au/find-an-answer/browse-by-a-z (last visited 4 November 2012); *Copyright Act 1968* (Cth) part IV.

⁴ Transformative use, ALRC, available at <http://www.alrc.gov.au/publications/issues-paper/transformative-use> (last visited 28 October, 2012) [hereinafter 'ALRC']; Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011) [hereinafter 'Expert Group'].

⁵ (1994) 510 US 569, 579 [hereinafter '*Campbell*'].

interactions presents issues.⁶ Further, many transformative uses that have a commercial edge may be beneficial to society. As a result, it is not necessary or advisable to confine such an exception to any strict definition of non-commercial use, thereby granting courts the freedom to decide when a transformative work is so commercial that it would only be fair for it to constitute copyright infringement.

Some might argue that an exception for transformative use conflicts with authors' moral rights. Indeed on face value, Australia's moral rights laws seem to provide authors with protection against the very act of modification of their work. However, a deeper analysis demonstrates that modification only infringes moral rights where it is prejudicial to the author's reputation or honour. Chapter Three clarifies why the transformative uses discussed in this paper are unlikely to prejudice an author's honour or reputation. Further, including transformative use as a purpose for which dealing with copyrighted works might be deemed fair, would not preclude a moral rights claim where transformative use of an artist's work conflicts with such rights.

This paper aims to act as a catalyst for scholarly participation and legal reform in this area, by introducing a compelling argument for the recognition of transformative uses and by showing cogent justification for legalising Remix Culture.

⁶ ALRC, 130; Expert Group, 2.

CHAPTER ONE

THE LEGAL DEVELOPMENT AND IMPORTANCE OF THE CONCEPT:

TRANSFORMATIVE USE

A. User-Generated Content ('UGC') and Its Importance

A transformative use exception is well overdue. In light of the rise of UGC and its acceptance in society, an exception for transformative use should apply to legitimise most of these practices, which are seemly unstoppable, even for powerful labels. Such practices are merely the result of evolution. First, the rapid evolution of technology has provided our society with software that encourages the production of UGC. For example, the webcam made it significantly easier for users to make and upload videos without using a device other than their computer. Further, Ableton Live and Garage Band have allowed millions to create and mix music, while Imovie and other video editing programs have allowed amateurs to create ostensibly professional footage. Second, the rapid evolution of the internet has provided users with platforms on which they can publish their material to share and discuss with the world. Most notably, YouTube allows 800 million unique users to publish and share their content online.⁷ Further, Sound Cloud, more recently, has given fifteen million users a platform on which they can share their music, whether they are original tracks or secondary works that have been mixed using the widely available software above.⁸

⁷ YouTube Statistics, available at http://www.youtube.com/t/press_statistics (last visited 30 October 2012).

⁸ Mike Reid, SoundCloud quietly floats past 15 million users; preparation underway for Next SoundCloud redesign, Music News, Industry, Tiny Mix Tapes, statistics released on May 14, 2012 available at <http://www.tinymixtapes.com/news/soundcloud-quietly-floats-past-15-million-users-preparation-underway-next-soundcloud-redesign> (last visited 30 October 2012).

As such, this technological evolution has enabled and encouraged UGC's existence, giving users new and meaningful ways to create and communicate. The issue is that, all too often, their creations and such communication unlawfully use copyrighted material. The existing copyright regime naively turns a blind eye to the rise of UGC and the fact that many of these commonly engaged in practices are, strictly speaking, likely to infringe copyright laws. Allowing transformative use will further strengthen the legal position of UGC, by inverting the presumption, so that most of these practices will become unlikely to constitute copyright infringement. After expressly allowing for transformative use in the fair dealing defence, eventually, when faced with a UGC case, courts will have a better opportunity to more justly balance the copyright holders' financial interests with everyone else's creative interests.

A. (I) What is UGC?

UGC possesses a handful of commonly agreed upon characteristics,⁹ as discussed by the Organisation for Economic Co-operation and Development.¹⁰ First, UGC is usually public media and therefore accessible via the internet. Second, the content is somewhat creative. This means users "add their own value to the work."¹¹ Finally, the content is generally "created outside of professional routines and practices."¹² In this context, the professional nature of the work merely depends on whether the user

⁹ Jordan Sundell, *Tempting the Sword of Damocles: Reimagining the Copyright/ DMCA Framework in a UGC World*, 12 Minn. J.L. Sci. & Tech. 335 (2011), 338 [hereinafter 'Sundell'].

¹⁰ Organisation for Economic Co-operation and Development, *Participative Web: User Created Content 8* (Working Party on the Information Economy, Report No. DSTI/IC-CP/IE(2006)7/FINAL), available at www.oecd.org/dataoecd/57/14/38393115.pdf (last visited 20 October 2012) [herein after 'OECD'].

¹¹ *Ibid.*

¹² *Ibid.*

intends to profit. The OECD states that this means that the user may hope their work will lead to financial rewards down the track but generally their motivation to make the work is primarily drawn from their desire to communicate or connect with others, for the sake of expression or to gain fame.¹³ This definition seems to encompass most music mash-ups (songs combining two or more pre-existing recordings),¹⁴ video mash-ups (videos combining two or more pre-existing sets of footage), digital collages (artistic works combining two or more visual artworks with music in the background) and fan fiction (literary works incorporating a character, setting or plot from a pre-existing work)¹⁵ created and published online. This paper will predominately focus on mash-up music, and occasionally refer to video mash-ups.

A. (II) What is Mash-up Music?

Mash-up music emerged as a new genre of music in the nineties.¹⁶ Despite its modernity, it is based on a longstanding musical technique called sampling, which has existed since the sixties.¹⁷ Sampling is the act of digitally taking a portion of one sound recording and reusing it in a different piece of music. Mash-up artists often engage in what is commonly referred to as ‘high-mass sampling’. This is the act of

¹³ Ibid.

¹⁴ Graham Reynolds, “*A Stroke of Genius or Copyright Infringement? Mashups and Copyright in Canada*”, (2009) 6:3 SCRIPTed 534.

¹⁵ Graham Reynolds, “*The Impact of Canadian Copyright Laws on the Voices of Marginalised Groups: Towards a Right to Rewrite*”, (2010) Alabama Law Review.

¹⁶ ECC=- The Virtual Gunderphone, available at <http://evolution-control.com/sounds/gunderphonic/> (last visited 4 November 2012).

¹⁷ James Tenney, Collage #1 (“Blue Suede”), composed in 1961, © New World Records; Collage#1 (“Blue Suede”)- James Tenney: Details, Parts/ Movements and Recordings: AllMusic available at <http://www.allmusic.com/composition/collage-1--quot-blue-suede-quot--mc0002499059> (last visited 30 October 2012); James Tenny, Collage No. 2, Viet Flakes, 1967, © Musicworks; Collage No. 2, Viet Flakes (1967)- James Tenney: Songs, Reviews, Credits, Awards: AllMusic, available at <http://www.allmusic.com/album/collage-no-2-viet-flakes-1967-mw0001882341> (last visited 30 October 2012); James Tenney Works, Collage #2 (“Viet-Flakes”) (1966) recorded on magnetic tape for the film *Viet-Flakes* by Carolee Schneemann, available at <http://www.plainsound.org/JTwork.html> (last visited 30 October 2012).

taking different songs (averaging from four to twenty five samples)¹⁸ and mixing them together to form one single track. Mash-up music is commonly made exclusively using samples of other artists' music. Thus, many argue that mash-up music does not have an original aspect in itself. This paper negates that contention.

Mash-up music is a skilled art, which necessarily produces an original composition of the individual sampled components. It involves the skill of the artist to overlay selected lyrics and beats. As explained by DJ Earworm, "there are rules with music."¹⁹ Choosing appropriate songs requires a very good understanding of the original songs' lyrics, beats, tempo, melody, pitch, key and meaning. Without such knowledge a mash-up may sound off pitch, out of timing or simply out of tune.

Therefore, a successful mash-up will generally have been created based on carefully measured but creative decisions in what to sample, how much to sample and when and how to sample each individual part. Even where an artist has randomly mashed up different works, for example where there is no underlying theme that the artist wishes to convey, these decisions must still be made. Thus, the mash-up is, in itself, unique due to the artist's skill in transforming the originals through sampling.

Further, mash-up music grants the listener an exclusive and unique experience of "discovering unlikely artistic complementarities and revisiting their musical

¹⁸ Together As On- A DJ Earworm Mashup- You Tube, available at https://www.youtube.com/watch?v=aKoBye__Txw (last visited 25 October 2012) [hereinafter 'Together']; Party, Ben. Mashup Roundup: DJ Earworm Combines 25 Biggest Songs of the Year. Mother Jones published 3 January 2008, available at <http://www.motherjones.com/riff/2008/01/mashup-roundup-dj-earworm-combines-25-biggest-songs-year> (last visited 30 October 2012).

¹⁹ DJ Earworm Backstage Interview At Capital FM's Summertime Ball 2012- YouTube (June 9, 2012) available at http://www.youtube.com/watch?feature=player_embedded&v=h2jWpG2va8A (last visited 30 October 2012) [hereinafter 'backstage interview'], 1:55.

memories in mutated forms.”²⁰ Since music is a rich emotional stimulus that provokes memories,²¹ the *mash-up music experience* is particularly special. With each song, people associate particular emotions from a particular time.²² Mash-ups therefore mash up the listener’s associated memories and emotions. For example, mashing up familiar dance beats with melancholic melodies and overlaying them with utterly contrasting lyrics creates an intense experience for the listener if they are familiar with the sampled content. However, this ability to emotionally engage with the mash-up will vary depending on how familiar a listener is with the respective samples.

Popular modern mash-up artists include DJ Danger Mouse, famous for “The Grey Album,”²³ Girl Talk for his high-mass commercial sampling,²⁴ DJ Earworm for mashing up pop music to underlying themes²⁵ and Super Mash Bros, referred to as Girl Talk’s hot cousin.²⁶ This paper will occasionally refer to these artists’ mash-up music and experiences in the music industry to illustrate and justify its arguments.

B. Why is it Currently Illegal?

Despite the particularly unique nature of the composition of mash-ups and their effect on the listener, most mash-ups are currently illegal in Australia because mash-up

²⁰ Steve Collins, “Amen to that: Sampling and Adapting the Past.” *Media/ Culture Journal* 10(2) (May 2007), available at <http://journal.media-culture.org.au/0705/09-collins.php> (last visited 30 October 2012) [hereinafter ‘Collins’].

²¹ Kansas State University (2009, January 23). Popular Songs Can Cue Specific Memories, Psychology Research Shows. *ScienceDaily*. Available at <http://www.sciencedaily.com/releases/2009/01/090121174126.htm> (last visited 20 October 2012).

²² Ibid.

²³ DJ Danger Mouse’s “The Grey Album” mashed up the Beatles’ 1968 “White Album” © Apple, with Jay Z’s 2003 “Black Album” © Rock-A-Fella, Def Jam.

²⁴ Girl Talk’s 2006 “Night Ripper” © Illegal Art, mashed up 167 artists in total: see Collins, 13.

²⁵ DJ Earworm- Music Mashups, available at <http://dyearworm.com/> (last visited 30 October 2012).

²⁶ Super Mash Bros- Music, available at <http://supermashbros.com/music.html> (last visited 30 October 2012); Super Mash Bros- It sound’s like Girtalk’s hot cousin- The Student Room, available at <http://www.thestudentroom.co.uk/showthread.php?t=759952> (last visited 5 November 2012).

artists do not obtain permission to use copyrighted works (referred to as clearing samples). Artists do not clear samples because expected revenue of their mash-ups is far below the expected costs of clearing.²⁷ As artists often do not expect any revenue at all, they do not expect to be sued over their work. Even artists like, Girl Talk, who sell their mash-ups, have never been sued for copyright infringement. Although Girl Talk argues that his use is fair under the American Copyright Act,²⁸ his position is controversial.²⁹ For the purposes of this paper, I will go no further than stating that his argument in the US is uncertain, at best.³⁰ Nevertheless, in Australia, it is reasonably clear that Girl Talk and most other mash-up artists' unauthorised use of original work could not fall within any of the restricted purposes for which such dealing with copyrighted works may be deemed fair.³¹ Although, albeit extremely rarely, mash-ups might be created for the purpose of parody or satire and perhaps even criticism.³² Only, these transformative uses will be allowed under the current fair dealing defence.

²⁷ Josh Norek, *You Can't Sing Without the Bling: The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA Ent. L. Rev. 83, 90 (2004) [hereinafter Norek].

²⁸ *Copyright Act of 1976* (US), s107 [hereinafter 'US'].

²⁹ *Good Copy Bad Copy*, A documentary about the current state of copyright and culture, directed by Andreas Johnsen, Ralf Christensen and Henrik Moltke, edited by Adam Neilsen (2007) A Rosforth Production; *Good Copy, Bad Copy*, available at <http://www.youtube.com/watch?v=Ez1rYIVoges> (last visited 30 October 2012); *RiP!: A Remix Manifesto*, directed and edited by Brett Gaylor (2008) produced by Daniel Cross, Mila Aung Thwin, Ravidia Din, Sally Bochner (of the NFB); *RIP: A Remix Manifesto (part 1)*- YouTube, available at <http://www.youtube.com/watch?v=zdwN6rRU0Xk> (last visited 30 October 2012).

³⁰ Robert Levine, *Steal This Hook? Girl Talk Flouts Copyright Law*, N.Y. TIMES (6 August 2008), available at http://www.nytimes.com/2008/08/07/arts/music/07girl.html?pagewanted=all&_r=0 (last visited 30 October 2012); Thomas W. Joo, *Remix Without Romance*, 44 Connecticut Law Review 415 (2011), 443; Rob Walker, *Mash-Up Model*, N.Y. TIMES (20 July 2008), <http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?partner=rssnyt&emc=rss> (last visited 30 October 2012); Shervin Rezaie, *Play Your Part: Girl Talk's Indefinite Role in the Digital Sampling Saga*, 26 Touro Law Review 175 (2010).

³¹ *Copyright Act of 1968* (Cth), Division 3, particularly s40-42 [hereinafter 'Cth'].

³² *Ibid.*

C. The Concept of Transformative Use

This part of Chapter One will firstly shed light on the US jurisprudence and scholarly discussion surrounding the transformative use concept, in order to justify an Australian promulgation of the concept within the fair dealing defence. It will, secondly, clarify the concept's potential applicability to UGC, particularly focusing on mash-up music.

C. (I) (a) Origins and Development of Transformative Use

Transformative use emerged from the US law concerning the doctrine of fair use. Importantly, fair use should be understood as 'integral' to copyright law rather than merely a tolerated departure from copyright monopoly.³³ The beauty of the US fair use regime is that the courts can decide cases relying heavily on factors and can allow certain uses for purposes not expressly provided for. Fair use is embodied in section 107 of the US *Copyright Act of 1976*.³⁴ It provides that copyright is not infringed by the fair use of copyright material, determined by considering the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality used and the effect of the use upon the potential market or on the value of the copyrighted work.³⁵ The section lists purposes such as criticism, news reporting and scholarship but the provision is open-ended.³⁶ Thus, the listed purposes are only examples of the uses that are presumably fair. This is very different to the Australian

³³ Pierre N. Leval, *Toward a Fair Use Standard*, 103 *Harvard Law Review* 1105 (1990), 1110 [hereinafter 'Leval'].

³⁴ Ben Mee, "*Laughing Matters: Parody and Satire in Australian Copyright Law*" [2010] *Journal of Law, Information and Science* 4, 4.3 [hereinafter 'Mee'].

³⁵ US, s107.

³⁶ *Ibid.*

provision, which only provides protection for certain purposes (outlined in the introduction).³⁷ The US model advantageously removes the need for the legislature to contemplate novel purposes for which use may be fair. The US regime therefore also avoids the unfairness to a defendant of an *ad hoc* review.³⁸ Critics of the US regime, nevertheless, argue that its flexibility allows for excessive judicial discretion.³⁹ However, at least the US regime does not bar many uses at the outset.⁴⁰

Under US law, the transformative nature of an alleged infringing work is a key factor in determining whether the alleged infringer's use is fair. The more transformative the character of the new work, the less will be the significance of other factors, such as a commercial purpose, which may weigh against a finding of fair use.⁴¹

The ascendancy of the role of transformativeness in the fair use inquiry is accredited to Judge Pierre Leval's influential 1990 article in the Harvard Law Review, where he stated that the use must be productive and employ the material in a different manner. He confirmed that the transformative work would need to do more than merely "supersede the objects" of the original work.⁴² Further, Leval stated that the secondary use would add value to the original if the original material were used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings. He concluded that this was the very type of activity that the fair use doctrine intended on protecting for the enrichment of society.⁴³ This

³⁷ Cth, s40-42.

³⁸ Mee, 4.3.

³⁹ Mee, Table 2.

⁴⁰ Ibid.

⁴¹ *Campbell v Acuff-Rose Music*, 510 U.S. 569 (1994), 580-581 [hereinafter '*Campbell*'].

⁴² Mary W. S. Wong, "Transformative" User-Generated Content In Copyright Law: Infringing Derivative Works Or Fair Use? 11 *Vanderbilt Journal of Entertainment & Technology Law*, Vanderbilt University Law School 1075 (2009) [hereinafter 'Wong'], 1106; Leval, 1116.

⁴³ Leval, 1111 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (Story J)).

necessarily involves scrutinising whether the defendant’s variations, revisions, editing, additions, and changes are legally justifiable invasions of the plaintiff’s exclusive intellectual property rights.⁴⁴ As such, the focus is on justification for the transformation and not on the transformation itself.⁴⁵

If Australia allowed transformative use as a purpose for which dealing may be fair, the purposive inquiry should focus on the actual transformation, not its justification.⁴⁶ This would involve an examination of what the plaintiff’s work has become due to the defendant’s additions and changes. This would better focus the purposive part of the fair dealing inquiry on the transformation, allowing for discussion of justification within the factor analysis.

C. (I) (b) The Blur and the Err of the Parody Exception

Australia erred in promulgating the parody exception⁴⁷ instead of expressly promulgating a transformative use exception. This part of Chapter One will analyse the US jurisprudence’s progressive obsession with attaching the meaning of transformative use to the meaning of parody and its critical nature. This has blurred the vital transformative character analysis, which justified parody in the first place.

After *Campbell*, US jurisprudence began to blur the concept of transformative use with its understanding of parody. In *Campbell*, a unanimous Supreme Court reversed the Sixth Circuit ruling that 2 Live Crew’s rap parody of “Oh, Pretty Woman” was

⁴⁴ Wong, 1108.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Cth, s41A, taking into account amendments up to Act No. 158 of 2006 [hereinafter ‘2006 amendment’].

not a fair use of the plaintiff's copyrighted work.⁴⁸ The Court qualified parody works as constituting fair use under section 107 on the basis that parody "can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one, [and therefore] has an obvious claim to transformative value."⁴⁹

The Court distinguished the critical nature of satire with that of parody, clarifying that parody is an imitation that targets the underlying work, while satire is an imitation that targets some other aspect of society.⁵⁰ However, in a footnote it acknowledged that "where there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market, the small extent to which it borrows from the original, or other factors, taking parodic aim at the original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, *as may satire with lesser justification for the borrowing than would otherwise be required.*"⁵¹

Since *Campbell*, US jurisprudence has lost sight of this broader understanding of transformative use. Unlike the US, Australia expressly extends its fair dealing provisions to cover uses for the purposes of creating a parody as well as a satire.⁵² This paper explores the US false dichotomy between parody and satire in order to undermine the presumption that the unauthorised transformative use of copyrighted work requires criticism of the underlying work. This part of Chapter One addresses a recent case below to demonstrate how the interdependence of the meaning of parody

⁴⁸ Tyler T. Ochoa, *Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody*, Journal, Copyright Society of the U.S.A (1997-1998), 580 [hereinafter 'Ochoa'].

⁴⁹ *Campbell*, 579.

⁵⁰ Ochoa, 557, n.51.

⁵¹ *Id.*, 580, n.14; Ochoa, 581-582.

⁵² Cth, s41A.

and the transformative use concept has unjustly and unfoundedly narrowed the transformative use concept's applicability. This misguided presumption will be uncovered in order to ultimately justify a broader transformative use exception.

Recently, Photographer Patrick Cariou sued artist Richard Prince for appropriating images of Rastafarians from Cariou's book and using them in Prince's collage art.⁵³ A Manhattan district court ordered that the use was unlawful and issued an injunction granting seizure and potential destruction of Prince's collage art. The Andy Warhol Foundation for the Visual Arts filed an Amicus Brief urging the Second Circuit to reverse that decision.⁵⁴ This brief highlighted the Court's misconception over the meaning of 'transformative use,'⁵⁵ arguing that the Court erred in holding that "Prince's [p]aintings are transformative only to the extent they comment on" Cariou's photographs.⁵⁶ The brief argues that such a statement is erroneous and contrary to the principles outlined in *Campbell*.⁵⁷ The brief further argues that such an interpretation narrows the fair use analysis in ways that undermine its First Amendment function.⁵⁸

Although *Campbell* involved a parody, it did not suggest that transformativeness is limited to works that comment directly on the original work.⁵⁹ The case clarified that parody had a good claim to transformative use because it provided "social benefit," as

⁵³ *Patrick Cariou v. Richard Prince, Gagosian Gallery, Inc., Lawrence Gagosian*, US Court of Appeals for the Second Circuit (on Appeal from the United States District Court for the Southern District of New York, 11-1197-CV [hereinafter '*Prince*']; Brief of Amicus Curiae the Andy Warhol Foundation for the Visual Arts, Inc. in Support of Defendants-Appellants and Urging Reversal, [hereinafter 'Amicus'].

⁵⁴ *Id.*, 26.

⁵⁵ *Ibid.*

⁵⁶ *Prince*, 349.

⁵⁷ *Amicus*, 26.

⁵⁸ *Ibid.*

⁵⁹ *Amicus*, 27.

explained above.⁶⁰ However, as the amicus brief states, there are many different ways of transforming a work that provides substantial social benefit, other than by criticising it.⁶¹ Further, there are also other ways that might “add value to the original.”⁶² For example, a secondary work may convey “new expression, meaning, or message” through overlaying the original works in a creative and skilled manner, such as in an art collage (such as that of Prince) or a music mash-up.⁶³ In fact, the Second Circuit has previously expressly “disagree[d]” with the suggestion that “comment or criticism” is necessary to show transformative use.⁶⁴ *Graham* involved the reproduction of several reduced sized Grateful Dead posters and concert tickets in a 480-page biography of the Grateful Dead. Their use was deemed transformative because the copyrighted images were “displayed to commemorate historic events, arranged in a creative fashion, and displayed in [a] significantly reduced form.”⁶⁵

This provides a strong basis upon which mash-up music may be found transformative. As described above, samples are generally overlayed and transformed in a creative manner to “commemorate”⁶⁶ the sampled artists. Although mash-up music does not usually criticise the underlying work, it can provide audiences with a new expression of the underlying work, which ultimately conveys a new message or meaning.⁶⁷

⁶⁰ *Ibid*; *Campbell*, 579.

⁶¹ *Amicus*, 27.

⁶² *Campbell*, 579.

⁶³ *Ibid*.

⁶⁴ *Amicus*, 27; *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2006) [hereinafter ‘*Graham*’].

⁶⁵ *Graham*, 609.

⁶⁶ *Ibid*.

⁶⁷ *Campbell*, 579.

C. (II) Deciding Whether a Work Conveys New Meaning

It is likely that an Australian court would rely on US jurisprudence, at least initially, to guide the application of any transformative use defence. Therefore, an Australian court will be likely to examine whether the secondary work conveys new meaning.

This inquiry is somewhat inherently subjective and may depend on an individual's interpretation of the work. Further, their interpretation of the work may depend on their respective artistic ability to engage with the art, which may be affected by their knowledge of the underlying works. This part of Chapter One shows how mash-ups can convey new meaning, and therefore be covered by an Australian transformative use exception. Further, this paper proposes that in determining whether a secondary work produces "new meaning," Australian courts should consider artistic open-ended interpretations because the work in question is artistic and artistic works often suggest multiple meanings to different audiences.

In citing DJ Earworm's 'United State of Pop 2009,' it has been suggested that video mash-ups change the meaning of the underlying works, whereas music mash-ups do not.⁶⁸ If that particular video mash-up were considered to be transformative then it logically follows that the audio mash-up would be too. This is because the video is merely a visual replication of the audio changes made. Each video clip mashed into that video mash-up is of a song sampled in the audio mash-up. It was only in June 2012, upon the release of DJ Earworm's third summer mash-up 'Fly' that he first

⁶⁸ * JD Candidate, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society By Storm*, Hofstra Law Review, Volume. 39:405 (2011), 425, n.101 [hereinafter 'Review']; DJ Earworm- United State of Pop 2009 (Blame It on the Pop)- Mashup of Top 25 Billboard Hits published on 27 December 2009, <http://www.youtube.com/watch?v=iNzrwh2Z2hQ> (last visited 30 October 2012) [hereinafter 'Blame it on the Pop'].

included extra footage from video clips of songs that he did not sample.⁶⁹ Even in reference to “Fly,” DJ Earworm stated that, “the music leads the videos.”⁷⁰

It has also been suggested that DJ Earworm’s themed mash-ups, such as ‘Together As One,’⁷¹ are not transformative because they merely reiterate the common meaning underlying the chosen songs.⁷² This part demonstrates how, for example, his mash-up ‘Together As One,’ combines U2’s ‘One,’ the Beatles’ ‘Come Together,’ Mariah Carey’s ‘We Belong Together’ and Diana Ross and The Supremes’ ‘Someday We’ll Be Together’ to craft a message that is developed, new and distinct from the sampled songs’ individual meanings.

Contrary to any face value presumption, each original song sampled in ‘Together As One’ contains a unique meaning and message. The Beatles’ ‘Come Together’ was written about their band coming together, U2’s ‘One’ is about the interdependency of lovers despite the hurt, Mariah’s ‘We Belong Together’ is a melancholic plead to get back with her love and Diana Ross and The Supremes’ ‘Someday We’ll Be Together’ is a hopeful desire to rekindle with a past love. This mash-up allows the Beatles’ jestful verses to playfully interact with U2 and Mariah’s heartfelt and somewhat mournful verses and with the hope of Diana Ross and the Supremes, conveying a message of love, hope and unity.

⁶⁹ DJ Earworm- Fly (Capital FM Summertime Ball Mashup) (2012), available at http://www.youtube.com/watch?feature=player_embedded&v=SH0IYcwkU50#! (last visited 31 October 2012) [hereinafter ‘Fly’].

⁷⁰ Backstage Interview, 1:40.

⁷¹ Together.

⁷² Review, 425.

DJ Earworm incorporated different verses from the Beatles' 'Come Together' and altered each verse to finish each with the same ending, "He say one and one and one is three" "one thing I can tell you is you got to be free."⁷³ In the original song, each verse is about a particular band member. For example "he say one and one and one is three" was in the last verse that referred to Paul and his constantly changing desire to move to a solo career.⁷⁴ Paul attempted to convince the others that if he left the band to start a solo career, they would still remain three and could carry on as the Beatles.⁷⁵ The lyrics "one thing I can tell you is you got to be free" were sampled from the end of the second verse, which referred to George and the Indian Maharishi Mahesh Yogi teachings that he often promoted to his fellow band mates.⁷⁶ Nevertheless, removed from its era, these references may be lost on most modern audiences. Placed within the context of love and coming together, the altered phrase "one and one and one is three, one thing I can tell you is you got to be free,"⁷⁷ suggests an entirely new provocative and *avant guard* meaning. DJ Earworm accentuates this by following it up with U2's lyrics "one love, one life, when it's one need in the night."

Further, DJ Earworm incorporates Diana Ross and the Supremes with Mariah to provide two voices for the girl U2 is singing about. In the original, U2 struggles with the pain of a past love that is coming back to him. For example he sings, "have you come here for forgiveness? Have you come to raise the dead?" referring to the love that has died or his soul that has died of the pain after she left. Interestingly, both Mariah Carey and Diana Ross and the Supremes' songs discuss the regret subsequent

⁷³ The Beatles, 'Come Together,' © 1969 EMI Studios, London, Apple [hereinafter 'Beatles'].

⁷⁴ Come Together Lyrics Meaning- Beatles Song Meanings, available at <http://www.lyricinterpretations.com/Beatles/Come-Together> (last visited 25 October 2012).

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Beatles.

to leaving a love that they thought they could do without. For example, Diana Ross admits she made “a big mistake, honey, [she] said goodbye”⁷⁸ and Mariah similarly, albeit over thirty years later, sings “I didn’t mean it when I said I didn’t love you so, I should have held on tight, I never should have let you go.”⁷⁹ Underneath U2’s lyrics “It’s too late tonight to drag the past out into the light,” DJ Earworm carefully places Mariah singing, “we belong together” and Diana Ross singing, “we’ll be together.” Both of these voices represent U2’s girl and her current will to reunite.

At the end of the original U2 song, although “[they] hurt each other, then [they] do it again,” it seems to be a song about giving in and accepting the pain, visible when U2 follows with “you got to do what you should, one life with each other, sisters, brothers.” This introduces a double meaning. Not only has U2 visibly wrestled with romantic love, he then emphasises the overall importance to love. DJ Earworm incorporates both of these lines in his mash-up followed by a repetition of the Beatles’ line referred to above to promote unity, free love and understanding. A YouTube user provided her own interpretation of DJ Earworm’s mash-up in a comment that was liked by 108 other users, “The ending is mashed up so much to make a point.

Throughout the whole song all 4 refrains were calling out to be together as one. The ending is the fulfilment of the split messages. I love that DJ Earworm’s mash-ups strive to be songs of their own with messages and meanings of their own rather than just a conglomeration of songs that sound interesting together.”⁸⁰ Although, this paper’s interpretation or the above user’s interpretation may not be the intended

⁷⁸ Diana Ross and The Supremes, ‘Someday We’ll Be Together,’ © 1971 Motown Records.

⁷⁹ Mariah Carey, ‘We Belong Together,’ © 2005, The Island Def Jam Music Group and Mariah Carey.

⁸⁰ Submitted on You Tube one year ago by profnicolehancock in reply to Loren Hanson (top comment) available at https://www.youtube.com/watch?v=aKoBye__Txw (last visited 26 October 2012).

meaning by DJ Earworm, this should be irrelevant in a Courtroom, so long as they are reasonable. After all, one of art's glories is its ability to be interpreted differently.

Further, it is frequently impossible to identify a single message conveyed by a work, and the sentiments it expresses may be different from those of its creator.⁸¹ Therefore, an artist cannot be expected to explain the intended meaning of their work, as the Warhol Foundation acknowledged in their amicus brief, in relation to Prince's failure to explain a polished meaning of his art in his testimony. Any artistic interpretation reasonably conceivable from the material in question should be a valid interpretation.

Thus, if courts must examine whether a secondary work conveys "new meaning," then they should determine this on a broader artistic interpretative examination of the work in question, as demonstrated above. With an artistically inclined interpretation, mash-ups are more likely to convey new meaning and therefore be transformative.

D. Warning against Allowing 'Weak' Transformation

Nevertheless, this paper acknowledges Judge Kennedy's warning in *Campbell*, over allowing weak transformation.⁸² He was against creative appropriation due to the concern that allowing such uses would weaken copyright protection and creators' financial incentive to create. However, creators' financial rewards have not visibly been adversely affected by the increase in UGC. In 2009, UGC creators increased

⁸¹ Amicus, 32-33, see *Pleasant Grove City v Summum*, 555 U.S. 460, 476 (2009) and *Hurley v Irish-Am. Gay Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

⁸² *Campbell*, 526-527.

from 82.5 million in 2008 to 88.8 million people.⁸³ Those creating videos rose from 15.4 million in 2008 to 18.1 million people in 2009.⁸⁴ Many music mash-ups also fall into the category of ‘video UGC’ because users upload their mash-ups to YouTube. Alongside these figures of increased UGC creators, the value of wholesale sales of sound recordings and music videos in 2009 in Australia totalled \$446.1, up \$20.5 million (five percent) on the \$425.6 million in 2008.⁸⁵ These statistics prove that music revenues have actually increased alongside UGC practices. Further, the outstanding amount of UGC creators shows how widespread this practice of transforming copyrighted work and publishing it online has become.

However, in his Harvard article while discussing the use of quotations in biographies, even Judge Leval recognised that if too much emphasis were placed on the actual transformation (the amount the defendant changes the original), courts would risk over-protecting borrowing practices.⁸⁶ Judge Leval also expressed the indeterminacy of assessing when a work “add[s] value” to another⁸⁷ by pointing out that someone who adapts another person’s work clearly adds value to the universe of expressive works. However, this market is generally reserved to the copyright owner because they have the exclusive right to make derivatives or to license others to use their work. Judge Leval therefore cautioned that the mere fact that an artist has added new value and new expression to a work does not render their borrowing transformative. Judge

⁸³ Emarketer, January 2009, 82 Million User-Generated Content Creators and Counting, available at <http://mashable.com/2009/02/19/user-generated-content-growth/> (last visited 24 October 2012).

⁸⁴ Ibid.

⁸⁵ ARIA statistics, 4172.0- Arts and Culture in Australia: A Statistical Overview, 2010, available at <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/75085D3CE774F2A0CA2577C00013BA64?opendocument> (last visited 24 October 2012).

⁸⁶ Leval, 1112, n.17; Diane Leenheer Zimmerman, *The More Things Change the Less They Seem “Transformed”: Some Reflections on Fair Use*, Journal, Copyright Society of the U.S.A (1998-1999), 261 [hereinafter ‘Zimmerman’].

⁸⁷ Zimmerman, 261.

Leval ultimately suggested that each individual instance of quotation should be examined independently to decide whether it is justified.⁸⁸

Although this paper acknowledges Judge Leval's caution against over-protecting transformed works, adding value to another work should be a valid justification in itself for which UGC users may use copyrighted work. A judge should be required to inspect the secondary work and the prominent changes made therein, however judges should not be required to inspect each instance of 'quotation' (or sample) *independently*. Given the amount of samples in mash-ups, this would be a great burden and would encourage judges to detach samples from the secondary work, restricting them from examining the secondary work in its entirety and from understanding its new meaning.

Judge Leval's caution against appropriative art was prevalent in *Prince* where the Court, quoting *Rogers v Koons*,⁸⁹ warned that "if an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use... there would be no practicable boundary to the fair use defense."⁹⁰ Nevertheless, the Court in *Prince* too radically restricted the defence by limiting transformative use to works that obviously commented on the original.⁹¹ This may enhance judicial certainty, because of the longstanding and established jurisprudence on parody, but it does not enable a true inquiry into the actual transformation of the secondary work.

⁸⁸ Ibid.

⁸⁹ 960 F.2d, 310.

⁹⁰ *Prince*, 348.

⁹¹ Ibid, citing *Blanch*, 610-611.

CHAPTER TWO

HOW SHOULD THE COMMERCIAL NATURE OF A TRANSFORMATIVE WORK AFFECT ITS ABILITY TO BE DEEMED FAIR DEALING?

Chapter two illustrates why restricting transformative works to non-commercial uses is unproductive and unhelpful due to the increasingly blurry line between commercial and non-commercial work. Further, it would be unnecessary if a court could consider the commercial nature of the work within a factor analysis.⁹² For example, if the provision allowing dealing for the purpose of transformative use were promulgated in a similar manner as the provision allowing fair dealing for research or study, then courts would have to, among other factors, examine the effect of the dealing upon the potential market for, or value of, the work or adaptation.⁹³ This analysis would necessarily involve an inspection of the commercial nature of the dealing, which is important because transformative uses may not be fair if they harm the market for the original work or the potential market for derivative works, as will be explained later in this part.

A. Difficulty in Defining “Non-Commercial”

Creative Commons’ (CC) struggle with construing a clear definition of “commercial purpose,” that the public collectively understands and agrees upon, illustrates this difficulty. CC is an international non-profit organisation that provides free licences and tools that copyright owners can use to allow others to share, reuse and remix their

⁹² Cth, eg s40(2)(d).

⁹³ Ibid.

material, legally.⁹⁴ CC allows users to specify whether they wish to allow reuse of their work for all purposes or only for non-commercial purposes. CC defines “commercial purpose” as “primarily intended for or directed toward commercial advantage or private monetary compensation.”⁹⁵

Aiming to better understand what the public defined as ‘non-commercial,’ CC conducted a study. In part, it explored what creators perceived as non-commercial.⁹⁶ This paper explores their findings regarding the uncertainties of such a definition, which proves the unhelpfulness of restricting a defence to non-commercial uses.

The research revealed variations of understanding even among creators in communities that share certain contexts, norms or general values. For example, within “the arts community” there are different perceptions of non-commercial use due to newer platforms for distribution and revenue generation, such as YouTube. Generally, most mash-up artists upload their music to YouTube or Sound Cloud. Websites like YouTube, in particular, blur the line between non-commercial and commercial work due to the option to monetise videos. This option allows YouTube members to derive, albeit minimal, profit from the advertisements that YouTube places on members’ videos. This option is now available for any YouTube member publishing content. Many mash-up artists, like other YouTube users, have opted in. Despite each interviewed group’s inability to articulate a single common definition, everyone agreed that the difference between commercial and non-commercial was important.

⁹⁴ About, Creative Commons Australia, available at <http://creativecommons.org.au/about> (last visited 5 November 2012).

⁹⁵ Free Music Archive, available at <http://freemusicarchive.org/faq> (last visited 21 October 2012).

⁹⁶ Id, 29.

Many of the creators interviewed aligned non-commercial work with fair use and mistakenly believed that if the use were non-commercial then it would be fair.⁹⁷ This misconception is illustrated in an interview of US mash-up band ‘Super Mash Bros.’⁹⁸ Band member Ethan Dawes states, in an interview with the Cornell Daily Sun, that he sees their work as legal. He suggested that it would be illegal if they were profiting directly by distributing their mash-ups but they are only profiting from their live performances. This demonstrates two points. Firstly, Super Mash Bros (like many different creators) have their own definition for non-commercial use and, secondly, they mistakenly believe that because their exploitation of the original artist’s work fits their definition, it is strictly legal. Nevertheless, even creating work that indirectly generates profit may be considered commercial, in some contexts.

Visibly, non-commercial use is very difficult to define and may vary depending on the context of the use. It is not feasible to exclude all commercial transformative works from the proposed fair dealing defence because of this uncertainty and it is also unproductive to do so. Much transformative work that is also productive has a commercial edge to it, due to the increasing commercialisation of culture. Thus, courts should consider the commercial nature of a secondary work as a part of the factor analysis, perhaps in deciding whether the transformative use of the original diminishes the market value of the original, as this paper discusses directly below.

⁹⁷ Id, 30.

⁹⁸ Peter Jacobs, *The Sun Interviews: Super Mash Bros*, The Cornell Daily Sun, available at <http://cornellsun.com/node/43093> (last visited 22 October 2012).

B. Does the Transformative Work Diminish the Market Value of the Original?

This part of the Chapter will firstly provide an overview of the US jurisprudence surrounding this inquiry and secondly show how UGC, particularly mash-up music would not adversely affect the original work's market, but rather, could benefit it.

B. (I) US Jurisprudence and Scholarly Discussion Of Market Value Analysis

In *Campbell*, the Supreme Court emphasised that even transformative uses may not be fair if they encroached on the original work's market or harmed the potential market for other derivatives of the original work.⁹⁹ Hence, despite holding that 2 Live Crew's version of "Oh Pretty Woman" was a parody due to the transformative character of the work, the Supreme Court remanded to the Sixth Circuit to determine whether the amount copied was so substantial that it diminished the prospects of a rap version derivative or the value of the owner's right to licence such works.¹⁰⁰

Professor Gordon proposed that fair use be reserved for circumstances in which there was a true market failure.¹⁰¹ Such circumstances would involve a socially desirable product that was possible by a transfer of rights for which the copyright owner either could not (or was unwilling to) grant.¹⁰² For example, if transaction costs in reaching an agreement to transfer rights exceeded the profits that the copyright owner could

⁹⁹ Jane C. Ginsburg, *Authors and Users in Copyright*, Journal, Copyright Society of the U.S.A (1997-1998), 14 [hereinafter 'Ginsburg']; *Campbell*, 592.

¹⁰⁰ Ginsburg, 14-15.

¹⁰¹ Zimmerman, 265; Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 Columbia Law Review 1600 (1982), 1601 [hereinafter 'Gordon'].

¹⁰² *Ibid.*

anticipate earning from the transaction, then a market might fail to form.¹⁰³ In the context of music, a copyright owner may not choose to create a mash-up of their work because, although this is within their exclusive rights, transaction costs in clearing other sampled artists might exceed the profit of the mash-up itself.

Professor Gordon stated that a court should consider fair use as a solution to such market failure problems if they were conceived as intractable and if the public benefit of such work outweighed the harm done to the copyright system of incentives.¹⁰⁴

B. (II) The Public Benefit of Such Uses Versus The Copyright Owner's Loss

Courts should therefore analyse this factor (the effect of the use upon the potential market for, or upon the value of, the copyrighted work)¹⁰⁵ by “balancing the benefit [that] the public will derive if the use is permitted” against “the personal gain the copyright owner will receive if the use is denied.”¹⁰⁶ The benefits of UGC published online and performed live will be explored separately below.

B. (II) (a) Benefits of Online UGC

This part of Chapter Two uses various examples to firstly illustrate how UGC, such as mash-up music, can promote the copyright owner's work and secondly how it allows copyright owners to source out talented individuals.¹⁰⁷

¹⁰³ Gordon, 1628-1629.

¹⁰⁴ Ibid.

¹⁰⁵ US, s107(4).

¹⁰⁶ *Graham*, 613; *Wright v. Warner Books, Inc.*, 953 F.2d 731, Second Circuit (1991), 739.

¹⁰⁷ Lee, 1487.

Firstly, NBC recognised the promotional benefit of users posting copyrighted material on YouTube when someone uploaded a copy of the famous Saturday Night Live clip “Lazy Sunday.”¹⁰⁸ NBC’s hilarious rap parody about the Chronicles of Narnia became a massive hit on YouTube, drawing five million views.¹⁰⁹ YouTube CEO Chad Hurley called NBC asking if they had uploaded the content. NBC eventually asked YouTube to remove the clip because they had not uploaded it.¹¹⁰ Later, NBC realised that their increased popularity was attributable to the illegally uploaded video of the skit. From then on, NBC’s chief marketing officer, John Miller, openly admitted to wanting “to fully embrace the viral activity that YouTube embraces.”¹¹¹

Further, many argue that allowing mash-up artists to use original work increases that work’s value by giving it more exposure, which attracts new audiences who would not have found or listened to the original but for the mash-up¹¹² and that this benefit could, in turn, offset any detriment the copyright owner incurs from lost control.¹¹³ For example, David Bowie has created a mash-up contest challenging individuals to mash up his work for the chance to win an Audi TT coupe.¹¹⁴ Coincidentally (or not), in 1990, Vanilla Ice scandalously sampled Queen and David Bowie’s “Under Pressure” without consent or a licence in his smash hit ‘Ice Ice Baby,’¹¹⁵ which resulted in an

¹⁰⁸ Id, n.108.

¹⁰⁹ Ibid.

¹¹⁰ The Charlie Rose Show: A Conversation with the Founders of YouTube (PBS television broadcast Aug. 11, 2006), available at <http://www.charlierose.com/shows/2006/08/11/3/a-conversation-with-the-founders-of-youtube> (last visited 29 October 2012).

¹¹¹ Lee, 1487, n.115.

¹¹² Jessica Litman, *Creative Reading*, 70 *Law & Contemporary Problems*, 175, 175-176 (2007).

¹¹³ Warren B. Chik, *Paying it Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content Under Copyright Law*, 11 *John Marshall Review of Intellectual Property Law* 240, 268.

¹¹⁴ Edward Lee, *Warming Up To User-Generated Content*, 2008 *University of Illinois Law Review* 1459 (2008), 1518 [hereinafter ‘Lee’]; BowieNet available at <http://www.davidbowie.com/neverFollow/> (last visited 1 November 2012).

¹¹⁵ Ibid; Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court’s Attempt to Afford “Sound” Copyright Protection to Sound Recordings*, 31

out of court settlement.¹¹⁶ Bowie's recent encouragement for others to sample his work illustrates a turn of thought and a release of control over his works in return for free publicity and increased popularity. Perhaps Bowie appreciated the publicity and fame that Vanilla Ice's 'Ice Ice Baby' brought him years earlier, and understood first hand that there is much to gain from allowing others to sample his work.¹¹⁷

Secondly, YouTube UGC creators are often talented and the talent they convey in their infringing videos may be appealing to the copyright owner. It is in this way that talent may be sourced from infringing UGC. For example, Nick Hayley made an unauthorised mash-up video of an iPod commercial, synchronized it with a copyrighted song and posted it on You Tube.¹¹⁸ Although Haley was only a teenage student, once Apple saw the mash-up they hired Haley to produce Apple's new television commercial.¹¹⁹

B. (II) (b) Benefits of Bringing UGC to Live Audiences

This part explores the public benefit of taking UGC away from its natural online habitat to the hearts of live audiences. Sometimes, mash-up artists develop a large fan group of their own and perform their popular mash-ups to large crowds at their own shows. Sometimes DJs also take the opportunity to play their own mash-ups at clubs without being caught. Live performances of copyrighted work take UGC from the

Columbian Journal of Law & the Arts 355 (2008), n.172; Mary B. Percifull, *Digital Sampling: Creative or Just Plain "CHEEZ-OID?"* 42 Case Western Reserve University 1263 (1992), 1266.

¹¹⁶ Famous Copyright Infringement Plagiarism cases in Music, available at <http://www.fairwagelawyers.com/most-famous-music-copyright-infringement.html> (last visited 1 November 2012).

¹¹⁷ Vanilla Ice, 'Ice Ice Baby,' © 1990 SBK Records.

¹¹⁸ Lee, 1484.

¹¹⁹ Lee, 1486.

Internet onto stages or clubs. The key difference is that mash-up artists' audiences become a live audience, who pay entry fees. This part of the paper will firstly discuss the performance of unauthorised mash-ups in live shows and secondly, in clubs.

First, for mash-up artists selling out their own shows, the public benefit is that their audiences are able to enjoy seeing them live. However, the copyright owners are not earning any profit from these shows. Is this a loss? They would only be able to earn money from the shows if the samples were cleared. However, samples cannot be cleared because transaction costs far outweigh the mash-up artists' revenue. Thus, copyright owners are not losing out because those works would never have been created if not free of any license from the copyright owner. In addition, mash-up shows could still be viewed as promoting the fame of the original artist, as above.

Second, for DJs that perform their own mash-ups in clubs without the club finding out, the public benefit is that the partygoers at the club can hear a local fresh interpretation of many individual originals, mashed up into one track. A DJ's job in a club is to play music for the crowd. Collective licensing agencies such as APRA already cover the reproduction of other artists' music within clubs. The most obvious question that any layperson will ask is: what difference does it make for DJs to play mash-ups as opposed to the original song if the venue's licence already covers the playing of other artists' work? This suggests that the public does not understand how copyright owners could incur an economic loss from such activity. This, in turn, implies that the public does not recognise or value the owner's exclusive right to license for such purposes.

B. (III) General Benefit of Artistic Expression

There is no evidence that labels have lost any sales due to the massive outpour of creative UGC such as mash-ups, or that the value of the sampled artists' work has diminished in any way. The real impact of mash-up artists' unauthorised dealing has been to provoke social commentary over new interpretations of the underlying work.

The Amicus argues that the public benefits from permitting uses like Prince's transformed collage art because the public "has a strong and substantial interest in encouraging the production of expressive works of art, and in receiving the benefits of artistic expression."¹²⁰ This is as applicable to musical mash-ups as it is to collage art.

However, this paper notes that, imbedded within the Amicus' public benefit argument, is America's first amendment considerations of protecting the freedom of speech.

Importantly, in Australia, there is no general protection over speech and a distinction is drawn between political and other forms of speech.¹²¹ Before the introduction of the parody purpose exception,¹²² this distinction barred artists from engaging in any creative transformation works that did not involve political criticism.¹²³ Despite this recent improvement,¹²⁴ the artistic freedom of transformative communication remains more unprotected than ever in this technologically advanced modern society.

Australia must better "balanc[e] the public interest in free communication against the competing public interest which the restriction is designed to serve."¹²⁵ This balance

¹²⁰ Amicus, 34; *Salinger v Colting*, 607 F.3d 68, 82 (2010).

¹²¹ *Theophanus v Herald And Weekly Times Ltd* (1994) 182 CLR 104.

¹²² 2006 amendment.

¹²³ *Id.*, 122.

¹²⁴ 2006 amendment.

¹²⁵ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 136, 143.

has traditionally been skewed in favour of property rights. This paper argues that artistic expression is just as important to a democratic society as is political communication. Without freedom, art cannot flourish. Mash-ups and other UGC should be viewed as essential pieces of a modern dialogue on pop culture. UGC importantly allows users to share their interpretations of original works with the public in a creative and participatory manner through the creation of secondary works.

As argued in the Amicus, a court cannot assume that harm to all derivative markets is protectable, as it did in *Prince*.¹²⁶ Although, the Supreme Court recognised in *Campbell* that there is “no protectable derivative market for criticism,”¹²⁷ criticism is not necessarily the only non-protected derivative market. The Amicus stated that, in *Campbell*, the market for criticism was not reserved to copyright owners because they would be unlikely to refrain from censoring the expression in this market.¹²⁸ The market for transformative uses should also not be reserved to copyright owners.¹²⁹ Reserving the market for transformative uses to the copyright owners, similarly as reserving it to them for criticism, allows them to prevent the expressive use of their original work in new works of art that “they happen not to like.”¹³⁰

Further, banning this form of creative and original artistic expression, would mean artists wishing to work in the medium of collage would need to consult a lawyer, and commence agreements and negotiations in an effort to obtain a license, that the copyright owner might not grant.¹³¹ This is the same for artists in the medium of

¹²⁶ Amicus, 36.

¹²⁷ Ibid; *Campbell*, 592.

¹²⁸ Ibid.

¹²⁹ Amicus, 37; *Graham*, 615.

¹³⁰ Amicus, 37.

¹³¹ Ibid.

mash-up music. While commercially successful artists might be able to bear sampling costs (since they usually only sample one song in any given track), mash-up artists (sampling up to 25 songs in any one track) cannot possibly afford this. The total magnitude of these costs that creative users, like mash-up artists, would have to incur outweighs any small market loss, if any, that the original artist might incur.¹³²

C. Using Practices to Fill the Current Gaps in Our Copyright Legal System

Drawing on the US jurisprudence surrounding the concept of transformative use, this paper has tried to clarify a definition for ‘transformative use’ that is feasible for the Australian fair dealing defence. Nevertheless, given the inherently broad nature of the concept, any definition of transformative use will remain stigmatised with uncertainty. This part of Chapter Two illustrates the reasons why it may be extremely helpful to fill these uncertainties in the law with certain existing widespread informal practices.

Often when discussing copyright law, legal scholars fail to explore issues from a more practical or realistic standpoint because the formal “black letter law” blinds them. Controversies over abstract and inherently uncertain legal principles such as transformative use and fair use are too often discussed without any recognition or weight placed on informal practices and how they may help to resolve the debate.¹³³

Given these uncertain legal principles, few people actually understand copyright law. In the US, a Clinton administration “White Paper” on Intellectual Property and National Information Infrastructure examined copyright law in the internet age and

¹³² Ibid.

¹³³ Lee, 1473.

came to this conclusion, which was reconfirmed by a study on UG(video)C by Professors Aufderheide and Jaszi.¹³⁴ They found that seventy-six percent of their creator interviewees grasped that fair use allowed them to use copyrighted materials, but none could correctly describe what types of uses were fair.¹³⁵ If Australia broadened its fair dealing laws to allow transformative uses then, although it would not ban novel productive uses at the outset, novel arguably transformative uses' legitimacy will become more uncertain. Thus, if Australia promulgated the proposed provision, it should rely on widespread practices to guide the law in achieving a practicable definition for transformative novel uses.

The *Sony* case is a good demonstration of how practice has been acknowledged and adopted despite uncertainties in the law. After almost eight years before the Courts,¹³⁶ the practice of American viewers recording television shows became widespread, alongside dramatically increased sales in VCRs.¹³⁷ Further, the public became increasingly concerned with the government's meddling with ordinary practices. As such, the Supreme Court noted, in its decision to allow VCR recording, that "one may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible."¹³⁸

¹³⁴ Lee, 1481; Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 204 (1995); Pat Aufderheide & Peter Jaszi, *The Good, the Bad, and the Confusing: User-Generated Video Creators on Copyright 2* (2007).

¹³⁵ Lee, 1481.

¹³⁶ *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 432 (C.D. Cal. 1979); *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981); *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) [hereinafter '*Sony*'].

¹³⁷ Lee, 1484; James Lardner, *Fast Forward: Hollywood, the Japanese, and the Onslaught of the VCR* 163-67, 197 (1987).

¹³⁸ Lee, 1484; *Sony*, 456.

Similarly, the amount of creators involved in producing UGC has expanded enormously. In fact, UGC is beginning to venture from the internet to live audiences, even in formal arenas, as highlighted below.

DJ Earworm's mash-ups, for three consecutive years now, have been played at the Capital FM Summertime Ball.¹³⁹ The Ball takes place each year at the Wembley Stadium in London, with audiences of up to 90,000 people.¹⁴⁰ Each year, DJ Earworm mixes each of the performing artists into his Capital FM Summertime Ball Mash-Up, which is shown as a part of the show, at the beginning and end of it.¹⁴¹ Despite the infringing nature of mash-ups, DJ Earworm's music has received significant radio airplay¹⁴² and his radio hit, 'United State of Pop 2009,' peaked at number fifty on the CHR/ Top 40 charts.¹⁴³ His 2011 Capital FM Summertime Ball Mash-up, 'Like OMG, Baby,' even received two Sony Radio Academy Awards: Gold (Best single promo/ commercial) and Silver (Best promotional/ Ad Campaign).¹⁴⁴ In 2012, the London Organising Committee of the Olympic Games commissioned Earworm to create mash-ups for the 2012 Olympics,¹⁴⁵ which were played at various UK stadiums.¹⁴⁶ As

¹³⁹ DJ Earworm Summertime Ball 2012 Mash-Up- Capital FM, available at <http://www.capitalfm.com/summertime-ball/news/dj-earworm-summertime-ball-2012-mash-up/> (last visited 3 November 2012).

¹⁴⁰ World's Ten Biggest Football Stadiums, Champions League Betting, available at <http://champions-league-betting.com/worlds-biggest-football-stadiums.html> (last visited 3 November 2012); Justin Bieber Thankful for "Crazy" Fan Reaction At The Summertime Ball 2012- Audio- Capital FM, available at <http://www.capitalfm.com/artists/justin-bieber/news/summertime-ball-2012-fan-reaction/> (last visited 3 November 2012).

¹⁴¹ DJ Earworm Summertime Ball 2012 Mash-Up- Capital FM, available at <http://www.capitalfm.com/summertime-ball/news/dj-earworm-summertime-ball-2012-mash-up/> (last visited 3 November 2012).

¹⁴² Radio that plays DJ Earworm- Listen Online, available at <http://tunein.com/radio/DJ-Earworm-m162790/> (last visited 3 November 2012).

¹⁴³ Earworm- About, Facebook, available at <http://www.facebook.com/Earworm?sk=info> (last visited 3 November 2012) [hereinafter 'Earworm Facebook'].

¹⁴⁴ Earworm Facebook; Twitter/ djearworm: Wow, last night I just won... available at <http://twitter.com/djearworm/status/67951612836069376> (last visited 3 November 2012).

¹⁴⁵ Earworm Facebook.

far as his dealings with Capital FM were concerned, DJ Earworm was unaware of any formal licensing agreements and explained that, sometimes in his experience, “when things happen that are of benefit to all parties involved, they are simply allowed to continue.”¹⁴⁷ Regarding the radio airplay, DJ Earworm believed that his mash-ups were legally covered because radio stations “have a blanket license to play all the component parts, and there has been no challenge clearly defining this as a derivative work rather than a medley.”¹⁴⁸ This statement reinforces the common perception that so long as there is a licence to play the components, a mash-up is legal. This, once again, emphasises that, in practice, copyright owners’ exclusive right to license their music for mash-up purposes is ignored or unrecognised by mash-up artists and by the public. Further, labels are not challenging these practices. Rather, as illustrated by Earworm’s success, there appears to be growing encouragement in the music industry.

Another formal context in which mash-ups are played to audiences is in State, National and International cheerleading competitions. Referred to as cheer mash-ups or mixes, such unauthorised uses of music are necessary for cheer squads to perform their routines to. Although cheer mash-ups do not involve as much overlapping of samples as other mash-ups, they still overlay samples with sound effects to which they will perform jumps and stunts. Further, cheer mash-ups often mix up to twenty songs in any individual, two to three minute, track. In fact, cheer mash-ups even adjust the speed of original songs to suit the timing of their routine, generally sampling as little as two counts of a song and as much as twenty-four counts.¹⁴⁹ Often

¹⁴⁶ Ibid.

¹⁴⁷ Personal Communication with DJ Earworm on 2 November 2012.

¹⁴⁸ Ibid.

¹⁴⁹ Peachtree Ridge- 2008- 2nd place- Coed- YouTube, available at http://www.youtube.com/watch?v=Xfk78ZF_Ygc&feature=related (last visited 3 November 2012);

cheer squads contract cheer music companies to make their customised cheer tracks. For example, cheermusic.com has been making cheerleading music since 1991 and even composed the music for the Toros Nationals routine in the famous cheerleading movie, 'Bring It On.'¹⁵⁰ The founder of the company, Mark Bryan, explained that, "with Bring It On, they paid to use the songs in the mixes" however normally "neither [his] company or the client is negotiating anything with any record company. The cheer world is far too small for that."¹⁵¹ He stated that they would have to sell "1000 times more copies of a mix than [they currently] do in order to even approach the record companies."¹⁵² All the company requires is that their clients own a legal copy of the recordings that they want the company to mash-up for their cheer routine.¹⁵³

Routines are performed in front of thousands of spectators. For example, the Australian All Star Cheerleading Federation Nationals, smaller than its US counterpart, still attract audiences of around 1000 people and charge entry fees.¹⁵⁴ The practice of using mash-ups for cheer routines is prevailing and the reproduction thereof does not stop at the venue, because routines are generally also uploaded onto YouTube and international competitions are even aired on television.¹⁵⁵

Colombus High School Cheerleading 08 STATE CHAMPS! YouTube, available at <http://www.youtube.com/watch?v=cXRWQa9tQLw&feature=related> (last visited 3 November 2012).

¹⁵⁰ Bio (Bring It On) Cheerleading Music, available at <http://cheermusic.com/> (last visited 3 November); Bring It On, directed by Peyton Reed and Jim Rowley, produced by Marc Abraham, Thomas Bliss and Jeff Gittle, written by Jessica Bendinger and Stephen White, 2000, © Universal Pictures; Toros in Nationals (Bring it on) YouTube, available at <http://www.youtube.com/watch?v=4q6ibxqwkNI&feature=related> last visited 3 November 2012).

¹⁵¹ Personal communication with Mark Bryan on 25 October 2012.

¹⁵² Ibid.

¹⁵³ Personal communication with Mark Bryan on 3 November 2012.

¹⁵⁴ Australian All Star Cheerleading Federation, Cheer, Stunt and Dance, available at <http://www.aascf.com.au/news> (last visited 3 November 2012).

¹⁵⁵ Universal Cheerleaders Association- Where American Cheers:: HomeESPN Air Dates, available at http://uca.varsity.com/espn_dates.aspx# (last visited 3 November 2012).

Given the uncertainties in any transformative use concept and the consequential difficulty in determining what novel uses could be fair, this paper has explained that it may be helpful to rely on these informal but widespread practices, to realistically clarify what novel uses and dealings should be deemed fair and transformative.

D. Drawing The Line Between Practices and Infringement

This paper has clarified how mash-up works can be deemed sufficiently transformative, while acknowledging the uncertain nature of the concept. It has also demonstrated how mash-ups generally do not risk harming the original work's market and can result from a 'market failure.' Further, it has established the need to fill gaps in formal law with informal widespread practice. However, this paper has not yet outlined the specific transformative uses of content, which may usurp the market of the original or of a potential derivative of the original work. This final part of Chapter Two will, based on the above discussion of the law and policy, clarify the types of uses that should be allowed.

Could individuals publish their mash-ups on their You Tube channel if such mash-ups were not made with a view to profit? Undoubtedly, users should be able to continue publishing their transformed use of copyrighted content on their channel, even if they have opted into the monetisation scheme, as it generally creates little if any profit.

What if that individual is a world-renowned mash-up artist and their mash-ups have been viewed over five million times? The amount of public views or fame of a work should not prevent a mash-up artist's use from being fair. Thus far, internationally

popular mash-up artists like Super Mash Bros, whose You Tube videos have over five million views, have never been sued over one single sample. Perhaps, this in itself illustrates that such use is accepted by copyright owners as common practice and that such practices are in fact reasonable or at least not worth suing over.

What if the artist sold their transformative works online? Girl Talk is one of the few mash-up artists who sell their mash-ups online, albeit for a price determined by the consumer. The fact that the consumer may choose the price they wish to pay shows that Girl Talk may not necessarily have a predominantly commercial purpose.

Regardless, even if he did, given that his works are so transformative, the original market is unlikely to be substituted by them. This could be a key reason for why no copyright owner has sued him yet. Nevertheless, it would depend on a combination of both factors, most importantly whether his work diminishes the original market.

Would such a defence cover amateur or professional artists or both? In this day and age, amateur artists turn into professional artists and then fade again with the seasons. It is almost as impossible to strictly define ‘non-commercial,’ as it is to define ‘professional.’ Generally, professional implies commercial and amateur implies non-commercial, in accordance with CC above. Their status (either commercial or professional) should be irrelevant. How does the promotional value of the work come into play? What if a mash-up artist sells merchandise from their Facebook page in order to promote their music? Many mash-up artists, such as Super Mash Bros sell their own merchandise. Such merchandise represents their public personalities. This should not affect their mash-up music’s entitlement to the defence of fair dealing.

Should cheerleaders remain able to use unauthorised mash-ups for their routines? Yes. Should their routines be televised and published on YouTube? Yes, because such material is sufficiently transformative, as it is productive and its practice is common.

Finally, what if a mash-up or other UGC incorporated a work that had not yet been released to the public? Depending on how commercial the UGC is, it may usurp the market of the original. If a mash-up, sold online, incorporated a substantial portion of a work not yet released to the public, then it is very likely that such transformative use would not be allowed because it could encroach upon the original work's market and copyright owner's ability to be first published. What if the mash-up were released after the original, but not very long after? Again, it depends on the commercial nature of the work and the popular market that it falls into. If the mash-up or secondary work was competing in the same charts and receiving radio airplay then it is likely to usurp the market of the original. The more commercial the mash-up, the more important it is that the mash-up artist samples songs that have already satisfied their consumers' appetite, that is, songs that it will not be competing against for a 'Top 40' spot.

This paper acknowledges that although such informal practices might be widespread, the public may not as collectively agree upon them as they agreed upon VCR recording. Some people may dislike the music and therefore discourage such practices. Further, this disliking portion of the public may argue that mash-ups disgrace the original artist's work, in a way contrary to their person. Some may even suggest that they infringe artists' moral rights. However, this argument misconceives the scope of legal protection actually provided by the Australian moral rights regime, as below.

CHAPTER THREE

AN EXCEPTION ALLOWING TRANSFORMATIVE USE WOULD NOT UNDERMINE MORAL RIGHTS IN ANY SIGNIFICANT MANNER

Expanding Australia's fair dealing provisions to allow transformative use would not undermine an artist's moral rights. There are two reasons why the public, engaging in a face value perusal of the moral rights regime, may think that it would. Both reasons are misinformed and thus misconceived, the second even more than the first. The first is that allowing artists to transform other works without it constituting copyright infringement will increase the production of mash-ups, thereby making artists more vulnerable to derogatory treatment of their work. This is a result of the misconception that transformative works infringe moral rights because they modify the sampled work in a way that could be considered derogatory by the author. The second is that broadening the defence would preclude all moral rights claims over transformative works. This view is based on the misconception that fair dealing is a defence available for all infringements under the Copyright Act, including a moral rights infringement.

A. Most Transformative Works are Unlikely to Infringe Moral Rights

This part of the Chapter demonstrates that a transformative use defence is unlikely to prejudice moral rights by clarifying the objective level of prejudice necessary in order to infringe moral rights. Such clarification will demonstrate the unlikelihood of this level of prejudice subsisting in mash-up music. This will, in turn, contradict the commonly perceived view that all mash-ups potentially infringe moral rights.

In the year 2000, Australia responded to its international obligations by enacting comprehensive moral rights legislation.¹⁵⁶ The three moral rights afforded by the legislation include the right to be attributed as the author, the right against false attribution and the right of integrity.¹⁵⁷ This paper will focus on the right of integrity because the burden to attribute the authors is not large and is widely respected by mash-up artists. The right of integrity is the right not to have one's work treated in a derogatory way.¹⁵⁸ "Derogatory treatment" means doing anything in relation to the work that prejudices the creator's honour or reputation.¹⁵⁹ This could include distorting, mutilating or materially altering the work if such alteration could prejudice the creator's honour or reputation.¹⁶⁰ Nevertheless, according to the Australian Copyright Council, simply altering a work in a way the creator is not happy with, will not infringe the creator's moral rights if that treatment does not meet the requisite level of prejudice.¹⁶¹ Therefore, it is unlikely that a sampled artist could argue moral rights infringement merely because he dislikes the mash-up artist's use of his or her work. As such, moral rights are unlikely to apply as broadly to mash-up music as a disliking public would have previously wished, on a face value scant analysis.

This paper considers, below, a case heard earlier this year in the Federal Magistrate's Court. This case further clarifies the type of modification necessary to constitute prejudice to the author's reputation or honour.

¹⁵⁶ Copyright Amendment (Moral Rights) Act 2000 (Austral.).

¹⁵⁷ Australian Copyright Council, *Moral Rights: Information Sheet G043v13* (2012), available at www.copyright.org.au/find-an-answer/browse-by-a-z (last visited 5 October 2012) [hereinafter 'Moral Rights Information Sheet']; Cth, part IV.

¹⁵⁸ Cth, s195AI.

¹⁵⁹ Moral Rights Information Sheet; Cth, s189; Cth, s195AK.

¹⁶⁰ Cth, s195AK(a).

¹⁶¹ Moral Rights Information Sheet.

A. (I) *Perez v Fernandez*¹⁶²

In this case, Federal Magistrate Driver found that Australian DJ and promoter, Mr Fernandez (DJ Suave), infringed Mr Perez's (Pitbull's) moral right of integrity.¹⁶³ DJ Suave altered Pitbull's song, 'Bon Bon', by replacing some of the original words with an audio drop of Mr Perez saying, "Mr 305 and I am putting it down with DJ Suave." Mr Perez originally recorded the statement for Mr Fernandez to use as a promotional tool for Mr Perez's expected tour of 2008. However, Mr Perez never toured Australia that year.

Mr Fernandez's unauthorised use of Mr Perez's work, in conjunction with the audio drop, constituted a modification of the work. Similarly, all mash-up music constitutes a modification of original works. Yet this case shows that modification alone is insufficient to constitute infringement of an artist's moral right of integrity in Australia. Federal Magistrate Driver clarified this through a thorough examination of the prejudicial circumstances surrounding the modification of Mr Perez's work.

The court clarified that an artist need not demonstrate that they suffered any actual damage for the treatment of their work to be deemed derogatory.¹⁶⁴ However, they had to prove a high level of real potential prejudice to the artist's honour or reputation.¹⁶⁵

¹⁶² [2012] FMCA 2 (10 Feb 2012) [hereinafter '*Perez*'].

¹⁶³ Cth, s195AI.

¹⁶⁴ *Perez*, 96.

¹⁶⁵ *Perez*, 88.

Federal Magistrate Driver considered the alteration in the context of Mr Fernandez and Mr Perez's tainted relationship due to the failed tour. He acknowledged that those with better knowledge of the failed tour would understand the audio drop to be belittling of Mr Perez's credibility and reputation.¹⁶⁶ Generally, mash-up artists and the artists they sample have no prior relationship. Mash-up artists generally do not aim to belittle the original artist, but rather intend on commemorating them. On this basis, most mash-ups' sampling of original content can be distinguished from Mr Fernandez's infringing modification of the 'Bon Bon' song.

Further, Federal Magistrate Driver placed heavy weight on the fact that 'Bon Bon' had not been released when Mr Fernandez uploaded his altered version on his website and begun playing it at his own DJ shows.¹⁶⁷ Some unaware listeners might, therefore, have believed the distorted version to be the original song.¹⁶⁸ Mash-up music can also be distinguished from this finding of infringement because mash-up artists usually specifically choose to sample songs that the listener is already familiar with. They are therefore unlikely to sample an unreleased song.

Visibly, this case establishes a high threshold for what may constitute an infringement of moral rights. Accordingly, it appears that most mash-ups would not infringe an original artist's right of integrity unless they featured an unreleased song or otherwise prejudiced the honour or reputation of the artist.¹⁶⁹ Therefore, it is unlikely that expanding the fair dealing defence, to allow transformative works such as mash-ups, would undermine sampled artists' moral rights in any significant way.

¹⁶⁶ Ibid.

¹⁶⁷ *Perez*, 86.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid; Cth, s195AK.

B. Expanding Fair Dealing Defence Would Not Preclude Moral Rights Claims

Allowing transformative uses to fall within the defence of fair dealing would not preclude a moral rights claim because moral rights are subject to their own defence. This means that if an artist feels that a transformative work treats their work in a derogatory manner that prejudices their reputation or honour, they still have a moral rights claim because the moral rights regime, in Australia, is independent of the fair dealing defences, which are available for infringements of economic rights.

A separate defence for moral rights infringement is provided in the Australian Copyright Act, under section 195AS. It provides that a derogatory treatment of an artist's work does not infringe their rights if the prejudicial treatment was "reasonable" in the circumstances.¹⁷⁰

The Act sets out a number of factors to be taken into account in working out whether the work that infringed moral rights was reasonable.¹⁷¹ These factors include: the nature of the work; the purpose, manner and context for which it is used; relevant industry practice; whether the work was created in the course of employment or under a contract of service; and if there are two or more authors, their views about the derogatory treatment. Most relevant for this discussion are the two first factors.

Some may argue that if transformative use were inserted into the copyright act as a purpose for which the dealing may be deemed fair, then a court may consider a mash-up artist's transformative use as a valid purpose for which they may infringe the

¹⁷⁰ Cth, s195AS.

¹⁷¹ Cth, s195AS(2).

original artist's moral rights, according to the purpose factor in section 195AS.¹⁷²

However, it is unlikely that a court would place great weight on a transformative purpose to justify moral rights infringement. It would largely depend on the nature of the mash-up. For example, if the transformative work were made for the purposes of constituting a parody, then it might be reasonable for the artist to treat the work derogatorily. Nevertheless, this inquiry is entirely independent of the fair dealing inquiry. As such, the proposed reform is unlikely to affect an author's moral rights.

The ALRC suggested that, "allowing transformative use may lead to a more frequent assertion of moral rights."¹⁷³ As explained above, UGC such as mash-up music is unlikely to infringe an artist's moral rights so there will not necessarily be an increase in the assertion of moral rights. Even if there were a more frequent assertion of moral rights then that would, if anything, only enrich the lack of jurisprudence in this area.

¹⁷² Ibid.

¹⁷³ ALRC, 130.

PROPOSED DRAFTING FOR THE PROVISION

In light of the law and policy arguments, this paper proposes the following drafting:

COPYRIGHT ACT 1968 - SECT **

Fair dealing for purpose of transformative use

(1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of transformative use does not constitute an infringement of the copyright in the work.

(2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of reproducing the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for the purpose of transformative use include:

- (a) the purpose and character of the dealing;
- (b) the nature of the work or adaptation;
- (c) the effect of the dealing upon the potential market for, or value of, the work or adaptation

CONCLUSION

This paper has explained why it is important to allow the public to use copyrighted works for the purposes of creating transformative works. Chapter One explained what type of uses may fall into UGC and what is meant by mash-up music. It further explored the US jurisprudence surrounding the transformative use concept, in order to show how works, such as mash-up music, could convey new meaning and therefore be categorised as transformative. Chapter One also acknowledged some US scholars' cautions against allowing a broad transformative use exception. Chapter Two explored the uncertainty of any strict non-commercial definition in order to show that it was unproductive to restrict a transformative purpose to non-commercial use. Further, it suggested that the commercial nature of a transformative use could be analysed by a court within the factor analysis (particularly within parts (a), (b) or (c) of the factor analysis described above in the proposed drafting). Chapter Two acknowledged that an investigation into the commercial nature of the secondary work is important because the transformative use of a work will not be fair if it usurps the market of the original. Further, the Chapter explored the public benefit of expression, skill and talent provided by UGC works, including mash-ups. It also showed how such works allow copyright owners to gain publicity and to scout for talent. Chapter Three then explained the high level of prejudice required for moral rights infringement in order to eradicate the misconception that most mash-ups are contrary to artists' moral rights. This paper concluded its discussion with a drafted provision for which transformative uses could be included as a purpose in the fair dealing defence. In ultimate conclusion, Australia should enact the proposed provision.

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