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The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
SYDNEY NSW 2001

Dear Sir or Madam

**RE: Copyright Exceptions Review**

I thank the ALRC for the opportunity to make a submission to the copyright exceptions review issues paper.

In this submission I address only Questions 15 – 18 of the issues paper.

**Executive summary**

Australia should introduce a transformative use exception. Transformative use is an important part of the copyright balance: it provides a mechanism through which to balance the rights of past authors against the interests of future authors. In the interests of promoting creativity and innovation, the impact of copyright law on the ability of Australians to create new works should be minimised. The scope of a transformative use exception should be based primarily on demonstrable harm to the direct licensing interests of copyright owners – the core of copyright. Importantly, however, there are unresolved questions about fairness that need to be more clearly addressed before the appropriate scope of a transformative use exception can be determined.

This submission does not directly address the desirability of introducing a broader fair use right. It is likely that an open ended fair use exception is required to provide a more adequate balance between copyright owners and non-transformative users of copyright. If a broad fair use style exception is introduced, it would likely be desirable to include transformative uses within that exception. This submission, however, takes the more limited position that regardless of whether a fair use exception is introduced, an exception that permits unlicensed transformative uses is required in Australian copyright law.

Yours sincerely

Nicolas Suzor  
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## The values of copyright and the role of exceptions

Because copyright is structured as a set of strong exclusive rights tempered by limited exceptions, the exceptions to copyright are a fundamental part of the 'copyright balance'. Judge Pierre Leval, writing extrajudicially of the US fair use doctrine, argued that

Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.<sup>1</sup>

Similarly, in *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Canadian Supreme Court recently explained that although fair dealing procedurally operates as an exception, it

is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.<sup>2</sup>

The exceptions to the exclusivity that copyright provides shape the boundaries of the public domain<sup>3</sup> – the set of relationships with culture that are outside of the control of copyright owners. Speaking of the US fair use doctrine, Madison argues that “[f]air use marks the precious and elusive line between the future and the present, and between the good of the many and the good of the one, that exists for reasons of justice, fairness, utility, or otherwise.”<sup>4</sup>

## Transformative use

Transformative use maps a balance between static and dynamic functions of copyright. Copyright provides a mechanism for the coordination of costly cultural production. But since expression is also an input in cultural production, the greater the strength of copyright, the greater a barrier it imposes on future production. Other facets of copyright law also map onto this tension – particularly duration, scope, and the idea / expression dichotomy – but it is transformative use that frames it most closely.

Transformative use is a balance between past and future creators. From an economic perspective, copyright's exclusive rights are only justifiable to the extent that the costs imposed on future users do not outweigh their benefits. The question about whether to allow transformative use is essentially a question about the extent to which we, as a society, believe that existing expression is an essential input into the creative process.

Framed as a utilitarian question, this is primarily an empirical economic enquiry. On one side of the balance is the harm that transformative uses impose on copyright owners. Most transformative uses cause little harm to the incentives of copyright owners to invest in the production of copyright material. By definition, transformative uses are not substitutes for the original work, and therefore cannot directly harm the market for the original. There may be some exceptions where copyright owners rely on the prospect of licensing transformative works (like film synchronisation rights for music, for example), but for these to have any effect on incentives, they must be reasonably foreseeable.<sup>5</sup> This is an as-yet unresolved question; the ALRC should investigate the extent of harm that transformative uses impose on the incentives of authors and producers of copyright material.

The other side of the balance is the harm to future authors. If copyright expression is an essential input to future creativity, then restricting transformative uses which cause little harm is counterproductive to the explicit goal of encouraging innovation. This question of whether copyright poses a barrier to creativity is a familiar and deeply contested question in copyright theory. The

1 Pierre N Leval, “Toward a Fair Use Standard” (1989) 103 *Harvard Law Review* 1105, 1110.

2 *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004) 1 S.C.R 339, [48].

3 Graham Greenleaf & Catherine Bond, “‘Public rights’ in copyright: What makes up Australia’s public domain?” [forthcoming] *Australian Intellectual Property Journal*.

4 Michael J Madison, “Rewriting Fair Use and the Future of Copyright Reform” (2005) 23 *Cardozo Arts & Ent. LJ* 391, 392.

5 See Shyamkrishna Balganesh, “Foreseeability and Copyright Incentives” (2008) 122 *Harvard Law Review* 1569.

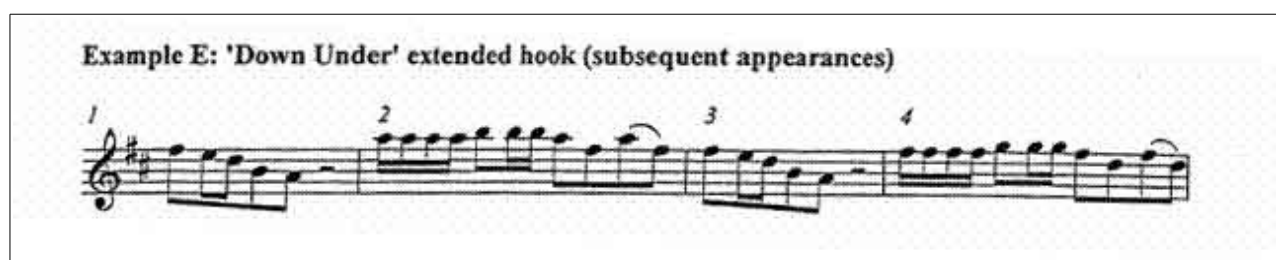
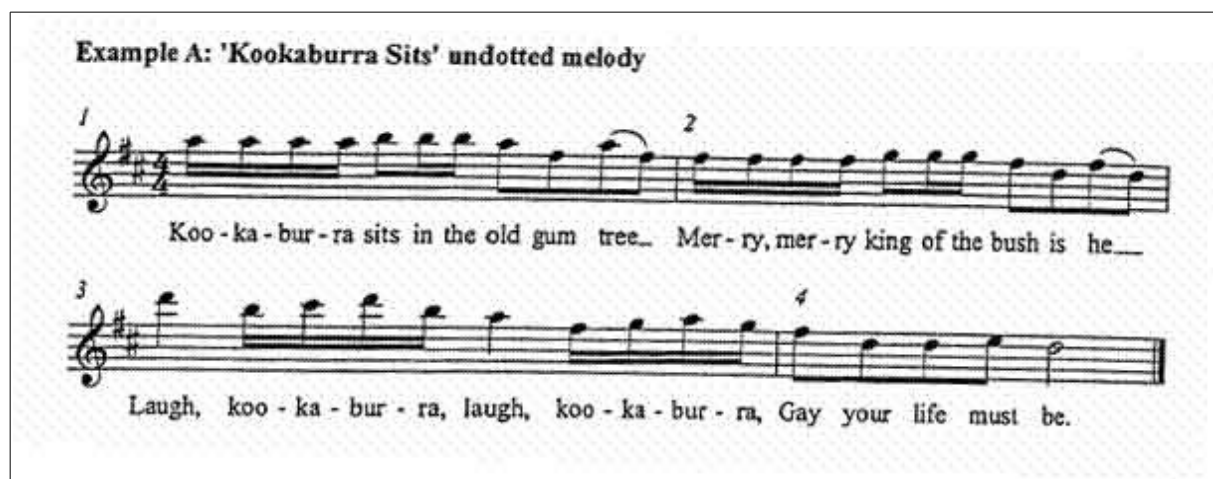
traditional, romantic vision of the creative process emphasises originality in expression and the importance of authorial control over deeply personal works.<sup>6</sup> On this view, copyright poses little threat to the artistic process, because originality, not copying, is integral to creativity. If this is true, the idea / expression dichotomy provides sufficient room for future authors to express themselves, and no further exception for transformative use is required.

In the last two decades, the validity of this romantic vision of authorship has been widely challenged. A number of scholars have powerfully argued that rich access to expression is important because it is a predicate for creative play: borrowing, learning, and imitating are fundamental components of the creative process.<sup>7</sup> 'Progress' occurs when users grow and when they share their own creative play with society.<sup>8</sup> The familiar emphasis on romantic creativity preferences 'original' expression and undervalues the harm caused by exclusive restrictions on use of expression.<sup>9</sup> As countless theorists have noted, creativity does not occur in a vacuum. The romantic myth of the author as a solitary genius creating wholly original work largely emerged from, and was popularized for, political purposes.<sup>10</sup> In practice, creativity is much more collaborative, iterative, and improvisational.<sup>11</sup> This is not something limited to modern appropriation art, remix, and sampling; even the highest examples of classical (romantic) authorship are fundamentally based on borrowing.<sup>12</sup> Creative expression has always been a social practice, firmly embedded within the author's cultural context.<sup>13</sup> It is always, to some extent, the re-expression of existing cultural works.<sup>14</sup> Learning and imitating past expression is

- 6 See Martha Woodmansee, "On the Author Effect: Recovering Collectivity" (1991) 10 *Cardozo Arts & Entertainment Law Journal* 279; Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of Authorship" (1991) 1991 *Duke Law Journal* 455.
- 7 See Nicolas Suzor, "Access, progress, and fairness : rethinking exclusivity in copyright" [in press] *Vanderbilt Journal of Entertainment and Technology Law*.
- 8 Julie E Cohen, "Creativity and Culture in Copyright Theory" (2007) 40 *UC Davis Law Review* 1151, 1191 ("Within the realm of creative practice, the play of culture is the to-and- fro in flows of artistic and cultural goods and in cultural practices of representation. Play in this sense is an essential enabling condition of cultural progress."); Mihály Csíkszentmihályi, *Creativity: flow and the psychology of discovery and invention* (1997) 6–7.
- 9 Jessica Silbey, "The Mythical Beginnings of Intellectual Property" (2007) 15 *George Mason Law Review* 319, 350 (arguing that "much copyright doctrine remains preoccupied with valuing certain works of authorship more strongly than others").
- 10 B. Kaplan, *An unhurried view of copyright* (1967) 23–25; Lyman Ray Patterson & Stanley F. Birch, *A unified theory of copyright* (2009) 27–33; James Boyle, *Shamans, software, and spleens: law and the construction of the information society* (1996); Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, appropriation, and the Law* (1998); Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of Authorship" (1991) 1991 *Duke Law Journal* 455, 458–9; Peter Jaszi, "On the Author Effect: Contemporary Copyright and Collective Creativity" (1991) 10 *Cardozo Arts & Entertainment Law Journal* 293, 296–7; Martha Woodmansee, "On the Author Effect: Recovering Collectivity" (1991) 10 *Cardozo Arts & Entertainment Law Journal* 279, 287–9.
- 11 James Boyle, *The public domain: enclosing the commons of the mind* (2008) Ch 6; Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, appropriation, and the Law* (1998) 248–257; Lawrence Lessig, *The future of ideas: the fate of the commons in a connected world* (2002) 105; Peter Jaszi, "On the Author Effect: Contemporary Copyright and Collective Creativity" (1991) 10 *Cardozo Arts & Entertainment Law Journal* 293, 304; O. B Arewa, "The Freedom to Copy: Copyright, Creation, and Context" (2007) 41 *U.C. Davis Law Review* 477, 494 (arguing that views of creativity in copyright doctrine are often at odds with "the reality of borrowing and copying in the creation of new works"); Rebecca Tushnet, "Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It." (2004) 114(3) *Yale law journal* 535–592, 552 ("Many of the ways in which people use copyrighted works creatively involve both copying and reworking. As Picasso (or someone else) said, 'Good artists borrow; great artists steal.'" (citations removed).
- 12 Jack Stiller, *Multiple authorship and the myth of solitary genius* (1991); O. B Arewa, "From JC Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context" (2006) 84(2) *North Carolina Law Review* 547, 599–605 (describing pervasive borrowing by masters in the classical music canon); Michael J Madison, "Beyond Creativity: Copyright as Knowledge Law" (2010) 12 *Vand. J. Ent. & Tech. L.* 817, 837–8 (describing borrowing as intrinsic to the learning, practicing, and the creative process of Vincent van Gogh); Tyrone M Carlin, "The Rise (and Fall) of Implied Duties of Good Faith in Contractual Performance in Australia" (2002) 25 *University of New South Wales Law Journal* 99, 106 ("In the early twentieth century, the incorporation of existing source material directly into works of art became commonplace. ... In literature the same basic technique underlies some of the most important works of Modernism ...").
- 13 Julie E Cohen, "Creativity and Culture in Copyright Theory" (2007) 40 *UC Davis Law Review* 1151, 1189.
- 14 Ibid 1176–7; Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of Authorship" (1991) 1991 *Duke Law Journal* 455, 459–463; Jessica Litman, "Public Domain, The" (1990) 39 *Emory Law Journal* 965, 966–7.

a vital part of the creative process which requires not that works be wholly original, but that they be sufficiently 'appropriate' to be understandable within a particular cultural context.<sup>15</sup> Increased access and lower barriers to producing and distributing expression are likely to promote a more decentralized, diverse culture.<sup>16</sup>

If copyright policy is designed to promote innovation and creativity, then these less romantic notions of creativity should lead us to support greater tolerance for unlicensed transformative uses. Two recent examples highlight this point. The first is *Larrikin v EMI*, where a substantial part of the Marion Sinclair's folk song 'Kookaburra sits in the old gum tree' was found to have been reproduced in Men at Work's anthem 'Down Under'.<sup>17</sup>



The second is *The Panel*, which ultimately found that Network Ten's show 'The Panel' had reproduced a substantial part of several clips taken from Channel Nine's television broadcasts.<sup>18</sup>

Both of these examples are recent instances of transformative reuses of copyright material in commercial contexts. Both add significant value to the Australian economy and Australian society. Neither impose substantial harm to the incentives of copyright owners. Unless there is some other relevant factor, the guiding principles enunciated in the issues paper suggest that both of these should be permitted. At best, requiring these uses to be licensed would needlessly transfer wealth from the innovative user to the originator, imposing a barrier on creative reuse. At worst, high transaction costs, cumulative licensing requirements, and strategic behaviour make licensing prohibitive, resulting in the underproduction of valuable works.<sup>19</sup>

- 15 J. C Fromer, "A Psychology of Intellectual Property" (2010) 104(4) *Northwestern University Law Review* ("artists, scientists, and engineers typically—although not always—need to spend substantial amounts of time learning that which came before them to be able to create in their particular domain."); Mihály Csíkszentmihályi, *Creativity: flow and the psychology of discovery and invention* (1997) 28–30 (defining creativity as being dependent on acceptance within a domain).
- 16 Jessica Litman, "Sharing and Stealing" (2004) 27 *Hastings Communications and Entertainment Law Journal* (Comm/Ent) 1, 26.
- 17 *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* [2011] FCAFC 47.
- 18 *TCN Channel Nine Pty Limited v Network Ten Pty Limited (No 2)* [2005] FCAFC 53.
- 19 For example, P. Aufderheide & P. Jaszi, *Reclaiming fair use: How to put balance back in copyright* (2011) show that requirements to licence the use of footage stifles creative practice in documentary filmmaking.



## The amount taken

In *The Panel*, a key factor in the copyright analysis was the extent of the material copied. This factor provides little guidance to the transformative use analysis. Consider, for example, Duchamp's satirical take on Da Vinci's *Mona Lisa*. If the *Mona Lisa* were still under copyright in 1919, few today would argue that Duchamp should have had to seek a licence. The benefit of hindsight allows us to see that Duchamp's contribution to the evolution of art depended on his ability to take the whole of Da Vinci's painting. From this example, it seems reasonable to conclude that the amount taken cannot be an appropriate guide to whether a transformative use should be permitted or not.



Leonardo Da Vinci, *Mona Lisa* (ca 1503-06)



Marcel Duchamp, *L.H.O.O.Q.* (1919)

## Substitutability: the core of a transformative use exception

The importance of promoting innovation and creative use of copyright material suggests that unlicensed transformative use should be permitted in clear, strong terms. In terms of balancing the interests of future authors against those of past authors, the most logical limitation to a transformative use exception is the line of actual harm to the licensing market of the original author. The clearest indicator of actual harm is direct substitution where, in the words of Justice Story, the new work acts “to supersede the use of the original work”.<sup>20</sup> While the exact contours of a transformative use right are highly contested, drawing a distinction between using a work to create a new work and copying to directly compete with the original is a logical place to start.<sup>21</sup> It might accordingly be possible to presume that transformative uses do not generally cause harm, and the utilitarian balance accordingly supports a general presumption that transformative uses do not infringe. Where a copyright owner alleges that she has suffered harm due to a transformative use, it likely makes sense to require the owner to show actual harm or a likelihood of actual harm – at the very least, this will

<sup>20</sup> *Folsom v Marsh*, 9 F. Cas 342 (C.C.D. Mass. 1841).

<sup>21</sup> See Lyman Ray Patterson & Stanley F. Birch, *A unified theory of copyright* (2009) 288 (drawing a distinction between the use of the work and the use of the copyright).

generate better information about what types of acts cause harm in copyright.<sup>22</sup>

## The importance of fairness

Utilitarian balancing suggests that some form of an exception for transformative uses is necessary. How exactly its scope should be delineated, however, is an unresolved question. In part, this is an empirical question about the extent of harm imposed on copyright owners and the burden imposed on future authors. In part, however, it is also a question about fairness. Copyright, in addition to its instrumental economic goal of promoting growth and innovation, must also treat people fairly.<sup>23</sup> It seems relatively uncontroversial to say that in some cases, economic efficiency must give way to our sense of fairness in copyright. Unfortunately, the normative disagreements around fairness are not well articulated or understood. In particular, there is little consensus about the extent to which fairness requires transformative users of copyright material to apportion some of the benefits of their use to the original authors.

### Fairness in remuneration

While it seems clear that past authors should not be able to prevent future authors from creating new works, there is little agreement as to whether past authors should be entitled to a portion of the profits. In the *Larrikin* case, there may be some consensus that Sinclair's estate should have no legal right to prevent *Men at Work* from building on her iconic tune. Whether Sinclair's estate is entitled to a share of profits, however, is more contested. If fair reward in copyright is really about incentives, then *Men at Work*'s use of Sinclair's tune could not have been foreseen and therefore could not cause harm.<sup>24</sup> On the other hand, if fairness requires a rigorous accounting of all contributions, a compulsory licence might be more appropriate than a free use exemption. There is no clear answer to this question, but Gordon's point is clearly relevant:

“Culture is interdependence, and requiring each act of deliberate dependency to render an accounting would destroy the synergy on which cultural life rests. Even if the accounting were done painlessly – by a magic computer that somehow could costlessly determine who contributed what and could prepare a continuously up-to-date, self-executing list of debits and credits – part of our self-concept as a people depends upon our having a common heritage. Parceling out that heritage to only those willing and able to pay destroys part of its value.”<sup>25</sup>

It might be tempting to limit a transformative exception to the easy case of non-commercial transformative use. This would, however, be a mistake. To the extent that copyright is designed to allow creators to derive a living from their work, it should not prejudice future creators by requiring commercial transformative uses to be licensed. From a utilitarian perspective, there is no reason to suggest that society would be better off by requiring *Network Ten* to licence all the clips it used to produce *The Panel*. Doing so would not increase *Channel Nine*'s incentives to broadcast television programs, and would only decrease *Network Ten*'s incentives. It is important to note at the outset that there is no strict dichotomy between amateur and professional creators; creative practice is much more fluid.<sup>26</sup> An excellent example is the 2003 film by Jonathan Caouette, *Tarnation*. The film was initially made for a budget of just over \$200, and went on to win the Best Documentary Award from the National Society of Film Critics, the Independent Spirits, the Gotham Awards, and the L.A. and London International Film Festivals. The final cost of clearing the rights to the music that forms an

22 Christopher Sprigman, “Copyright and the Rule of Reason” (2009) 7 *Journal on Telecommunications & High Technology Law* 317, 323.

23 Jessica Litman, “Sharing and Stealing” (2004) 27 *Hastings Communications and Entertainment Law Journal (Comm/Ent)* 1, 31–32.

24 Shyamkrishna Balganesh, “Foreseeability and Copyright Incentives” (2008) 122 *Harvard Law Review* 1569.

25 Wendy J. Gordon, “On owning information: Intellectual property and the restitutionary impulse” (1992) 78(1) *Virginia Law Review* 149, 168.

26 See J. E. Burgess & J. B. Green, “The Entrepreneurial Vlogger – Participatory Culture Beyond the Professional-Amateur Divide” in Patrick Vonderau & Pelle Snickars (eds) *The YouTube Reader* (2009) 89, 90 (arguing, in the context of user-generated content on YouTube, that it is “clear that amateur and professional media content, identities and motivations are not so easily separated.”); William W. III Fisher, “The Implications for Law of User Innovation” (2010) 94(5) *Minnesota Law Review*, 1434–5.

integral part of the film, however, was over \$400,000.<sup>27</sup> In this instance, Caouette was able to raise the funds and negotiate the licences; many more filmmakers are never able to, which means many films are never able to be commercially distributed.<sup>28</sup>

There is major theoretical uncertainty on this point. Whether future authors owe a financial debt to those authors to whom they owe an artistic debt again depends on our understanding of the process of authorship. Until we resolve this uncertainty, we will struggle to define the appropriate contours of a transformative use exception.

Example E: 'Down Under' extended hook (subsequent appearances)



Men at Work's use of *Kookaburra* was clearly commercial, but it was also highly expressive.

### The role of moral rights in preventing unfair uses

Another aspect of fairness that weighs on the desirability of allowing unlicensed transformative uses is the potential for harm to authorship interests. In the main part, these are likely adequately dealt with by Australia's moral rights regime, but some modifications may be necessary if a transformative use exception were to be introduced.

### Integrity and non-commercial harms of commercial uses

Some commercial uses may be considered unfair even though they do not directly cause harm. In France, Luc Besson was able to enjoin Vodafone's advertising campaigns that featured a similar character to 'Leeloo' from his film *The Fifth Element* (played by Milla Jovovich in both instances).<sup>29</sup> The use likely posed little direct harm to the value of the copyright in the film. Besson successfully argued, however, that it caused harm to his artistic integrity, and was therefore prohibited under France's moral rights regime.<sup>30</sup>

27 Greg Kilday, "Documentary makers rally for fair use" Reuters (11 November 2005) available at [www.documaniafilms.com/page8/files/page8\\_1.pdf](http://www.documaniafilms.com/page8/files/page8_1.pdf).

28 See P. Aufderheide & P. Jaszi, *Untold stories: Creative consequences of the rights clearance culture for documentary filmmakers* (2004).

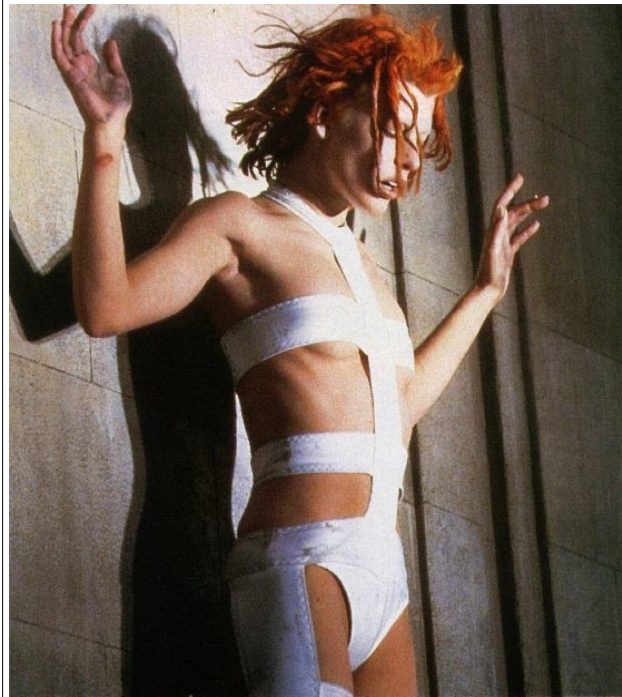
29 *Sté Gaumont and Luc Besson v Sté Publicis Conseil and Sté Française du Radiotéléphone*, Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., Sep. 8 2004.

30 See Elizabeth Adeney, "Of personalities and personae: a French victory for film producers and authors" (2005) 16(2) *Australian Intellectual Property Journal* 109, 118 ("The character had been denatured in its spirit by its use in the commercial environment of Vodafone Live advertising.").





*Jovovich in Vodafone Advertisement*



*Jovovich in Besson's Fifth Element*

Another example is Virgin Mobile's use of a Flickr picture for its Australian advertising campaign. Justin Wong posted a photo of his friend, Alison Chang, on Flickr under a permissive Creative Commons licence.<sup>31</sup> Virgin then turned the photo into a parody of Chang for its advertising campaign. While the use was apparently licensed, it raises important questions for a potential transformative use exception.



*Justin Wong's original photo of Alison Chang posted to Flickr.*



*Virgin Mobile's advertising campaign.*

31 E. F. Carroll & J. M. Coates, "The school girl, the Virgin and the billboard" [2009] *Knowledge Policy for the 21st Century*.



Both Vodafone and Virgin's campaigns were transformative, in that they did not 'supersede the objects' of the original work. Both, however, raise potential conflicts that are important to our sense of fairness. There is a legitimate argument that the unwanted commercial exploitation of a personal copyright work could impose harm on the author. Under Australian moral rights law, it is unclear whether authors would have the ability to object to such uses. It may be that the moral right of integrity would extend to protect authors from this type of harm, but if not, an expansion of the right of integrity may be necessary to compensate for a new transformative use exception.

### Attribution and other etiquette norms

It seems increasingly clear that a key component of fairness involves following established norms of etiquette, and attribution is one of the key social norms in creative communities today. Tushnet argues that for many creators and many fan communities,

Creators are paid not in cash, but in credit. The value of their works comes from circulation, dissemination, motion: credit benefits the creator only when some third party sees the new use. Moreover, a credit-based transaction necessarily implies a continuing relationship between the parties. Credit is part of a conversation. It looks back to the past, when an obligation was created, and forward to the future, when it will be fulfilled by an audience's recognition of the first creator's contributions.<sup>32</sup>

While transformative uses may impose little financial harm, a failure to attribute can cause serious harm. The recent suit in the US between Shepard Fairey and the Associated Press neatly illustrates this point. Fairey used Manny Garcia's photo of Barack Obama as the basis for the iconic *Hope* poster that played a large role in the 2008 presidential campaign. Fairey's highly transformative poster is clearly an important cultural work, and just as clearly, is unlikely to pose any significant harm to Garcia or the Associated Press. What grates most about this case, however, is the dishonesty with which Fairey dealt with the source work. Fairey refused to provide attribution and apparently destroyed evidence that the Garcia photo was the source for the *Hope* poster. It seems likely that fairness of attribution – and other applicable social norms – should play an important role in the determination of the scope of a transformative use exception although again it may be already appropriately dealt with through Australia's moral rights regime.



Mannie Garcia (2006)



Shepard Fairey, *Hope* (2008)

32 Rebecca Tushnet, "Payment in Credit: Copyright Law and Subcultural Creativity" (2007) 70 *Law and Contemporary Problems* 135, 153.

## Conclusion

A transformative use exception is necessary to help achieve an appropriate balance in Australian copyright law. The most appropriate starting point for a definition of transformative use is based on actual harm to the value of the copyright material. Where there is no or little harm to past authors, copyright law should not impose costs on future authors who would reuse that material. The primary indication of likely harm is substitutability – a use is transformative where it is not substitutable for the original work. This should form the core basis of a transformative use exception. In utilitarian terms, the commercial nature of the use and the amount of the original taken do not provide useful guides to evaluating whether a transformative use should be allowed.

Because copyright must also be fair, careful attention needs to be paid to the non-economic harms that might accompany some transformative uses. The most important point to make is that there has been little attention paid to the normative question of whether each commercial creative use of copyright material should trigger a duty to account to the original author. What fairness means, in this context, is uncertain. More work is required to understand whether copyright should impose a restitutionary obligation on commercial transformative users or whether the returns provided by copyright should be limited to licence fees that are direct and foreseeable. The importance of encouraging innovation and a creative culture weigh heavily in favour of not requiring a rigorous accounting, but more investigation is needed to determine whether the norms of fairness require otherwise.

If a transformative use exception is to be introduced, particular care must also be taken to ensure that the moral rights of authors are sufficiently respected. In many cases, the moral rights of integrity and attribution will likely provide adequate protection for authors. Whether any modification of the moral rights is required to ensure that transformative uses are fair, however, has not yet been closely examined.

*Question 15. Should the use of copyright materials in transformative uses be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?*

A broad exception for transformative use should be introduced. The exception should clearly permit uses which are not substitutes for (or do not directly compete with) the copyright material.

*Question 16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?*

Any use of a publicly available work in the creation of a new work should be considered transformative, on the condition that it does not substitute for (or directly compete with) the original work.

*Question 17. Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?*

A transformative use exception should not be limited only to non-commercial use. Unlike the approach taken to drafting s 200AB, Australia should assert that transformative uses are special cases which do not unreasonably prejudice the legitimate interests of copyright owners. The limitation should apply only to uses which do not conflict with normal exploitation of the copyright material, in the sense that they do not directly compete with that material.

*Question 18. The Copyright Act 1968 (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?*

It is unclear, on current evidence, whether the moral rights provide adequate protection in the face of a potential transformative use exception. More investigation is required to determine whether the scope of moral rights should be adjusted (enlarged or reduced) in response to the introduction of a user's right of transformative use.