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## **Reformulating the ‘fair dealing’ defence in copyright law to accommodate transformative musical works and maximise creativity in Australia**

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**Abstract:** This paper aims to examine the effectiveness of Australian copyright law in fostering the development of music works that derive from digital sampling or remixing – known throughout the paper as ‘transformative musical works’. The paper will begin with scene-setting – providing an insight into the world of digital musical sampling and the production of transformative work. Having set the scene, this paper will analyse various theoretical justifications underpinning copyright law, and use them to determine the effectiveness of Australian copyright law. Ultimately, this paper aims to provide an observation of the current law from a utilitarian standpoint, and propose possible reforms that adhere to the established principles, derived from the study of legal theory. In brief, the paper aims to assess how effectively Australian copyright law fosters and develops musical creativity, in light of the increasing incidence of transformative musical works and how the law can be modified to improve its effectiveness.

**Keywords:** transformative musical works; digital music sampling; copyright law; digital technology; remixing; musician; music licensing; legal theory; utilitarian; intellectual property law; Australia.

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## **1 Copyright law and remix culture – an introduction**

### *1.1 Introduction*

Acclaimed composer Ryuichi Sakamoto believes that copyright law has become antiquated in the information age.<sup>1</sup> He argues that in the “last 100 years, only a few organisations have dominated the music world and ripped off both fans and creators”.<sup>2</sup> Such sentiments are in line with the observation that society is shifting away from passive involvement in culture toward a more active, participation oriented scheme.<sup>3</sup>

Developments in digital technology have enabled virtually any person to ‘mix and mash’ copyrighted work with little difficulty.<sup>4</sup> We now inhabit a ‘remix culture’, a culture which is dominated by amateur creators – creators who are no longer willing to be merely passive receptors of content. Instead, they are demanding a much broader right, a right to sample and remix material – to take on the role of producers – to cut, paste, sample or jam with content, in order to produce something which is distinctive of their own social and creative innovation.<sup>5</sup> The production of music in particular has been greatly affected by this generational shift. Through digital music sampling a new generation of musicians have taken portions of existing musical expressions and created new expressions that embody elements of the original work, but are original in their own right.<sup>6</sup>

The very advent of digital sampling and remixing, known here as ‘transformative musical works’, has challenged the existing framework of copyright law.<sup>7</sup> Copyright exists to protect literary, artistic, dramatic or musical forms of expression, by providing creators with an intangible property right over the work.<sup>8</sup> Copyright protection provides the holder of a copyright with limited monopoly rights, which exist as an incentive for creators of copyrightable works, such as musical works, to continue investing time and energy into creating works that have great social utility.<sup>9</sup> However, the issue of striking a balance between the need to protect artists from audio piracy and the goal of fostering the ability of transformative musicians to draw upon existing media has led to a great deal of controversy within the music industry.<sup>10</sup> In light of this increasing tension, this paper hopes to analyse various theoretical justifications underpinning copyright law, and utilise those justifications to analyse the effectiveness of Australian copyright law. Ultimately, this paper aims to provide an observation of the current law in light of transformative music works and propose possible reforms to ensure alignment with the chosen theoretical doctrine. Prior to analysing Australian copyright law, it seems necessary to provide an insight into the growing world of digital musical sampling and the production of transformative musical works.

## *1.2 Music sampling and the creation of ‘transformative musical works’*

Digital sampling is a process by which sounds are converted into binary units readable by a computer.<sup>11</sup> A digital converter measures the tone and intensity of a sound and assigns its corresponding voltage.<sup>12</sup> The digital code is then stored in a computer memory bank and can be retrieved and manipulated electronically.<sup>13</sup> Sampling has become very common in modern popular music, particularly in the genres of rap, hip-hop, electronic dance music and rock.<sup>14</sup> As Vaidyanathan observes, since the 1980s, all a young musician needed was “a stack of vinyl albums, a \$2000 sampler, a microphone, a tape deck, and she could make fresh and powerful music”.<sup>15</sup> Music critic, John Leland wrote in *Spin Magazine*: “digital sampling...has made everybody into a potential musician, bridged the gap between performer and audience”.<sup>16</sup>

Although the examination of the impact of copyright law on music sampling is a relatively modern one, the notion of sampling is not a novel practice. Its origins can be traced back to the reggae musicians in the 1960s and the emerging hip-hop culture in the 1970s forged by popular African-American artists like AfrikaBambaataa.<sup>17</sup> In 1988 the band *Public Enemy* released the album ‘It Takes a Nation of Millions to Hold Us’, which brought to mainstream attention the compositional practice of using samples of other people’s recordings to create a new musical work.<sup>18</sup> By the early 1990s the practice of digital music sampling expanded exponentially, in fact George Clinton’s 1970s music

was sampled by over 120 artists in over 180 songs during this period.<sup>19</sup> Vanilla Ice's 1990s single 'Ice Ice Baby' and MC Hammer's "You Can't Touch This" are considered two of the best-selling rap hits in the world, and both these songs heavily sampled Queen's 1982 hit 'Under Pressure'.<sup>20</sup> As rap producer Daddy-O says, sampling "is something you put together out of bits and pieces other people have done. Once you have the complete product, you have a completely different picture".<sup>21</sup>

Although modern technology is making it even easier for lay people to utilise their surroundings in a creative way, the application of modern copyright law is arguably not conducive to the practice of creating transformative musical works. There appears to be little scope for sampling music without the permission of the copyright owner or under fair dealing doctrines. Therefore a sampling musician must often obtain a licence from the copyright holders or risk facing legal action.<sup>22</sup> Additionally, the system of music licensing has developed in an ad hoc and commercialised way, favouring the monopoly of corporations and large record companies, and discouraging independent musicians who cannot afford to pay the high licensing fees.<sup>23</sup> Although copyright law has been described as 'the engine of free-expression,' which aims to foster flourishing creativity, twentieth century lawmakers have tended to view creative activities as private, atomised pursuits.<sup>24</sup> In applying copyright law, courts have failed to understand that no matter how novel an expression, it was ultimately inspired by a creative work that exists already – "nothing in this world is truly original".<sup>25</sup>

Although copyright law exists to encourage creativity, the current state of the law tends to discourage the creativity of sampling artists. The existing system, which will be examined in this paper, has arguably been developed in response to economic pressure from large companies. This is evidenced by the legislative reforms that extended the period of copyright to the life of the author plus 70 years instead of 50 years.<sup>26</sup> Such an extension of the copyright period arguably does not do much in the way of promoting creativity in society – rather it aims to commodify copyright for the benefit of large corporations, at the expense of the independent musician.<sup>27</sup>

### *1.3 Outline of thesis*

The fundamental aim of this paper is to examine the effectiveness of Australian copyright law in fostering the development of 'transformative musical works'. The paper also aims to examine to the extent to which existing copyright law allows for musicians to draw upon their cultural environment without disincentivising existing copyright holders.

Prior to examining the effectiveness, there must be identifiable indicia for determining what constitutes 'effective' copyright law. Section 2 of this thesis is dedicated to analysing various theoretical frameworks supporting copyright law. This analysis aims to present the utilitarian 'net social welfare' philosophical justification as the most adequate framework for the subsequent examination of the effectiveness of copyright in like of transformative musical works. Utilitarian theory seeks to strike an optimal balance between copyright's function as an exclusive right aiming to stimulate creativity and the widespread public enjoyment and utilisation of those creations.<sup>28</sup>

The third part of this paper will examine the Australian judicial application of the *Copyright Act 1968*.<sup>29</sup> The particular focus of this section will be the 'substantial part' requirement for infringement and the various 'fair dealing' defences to copyright infringement.<sup>30</sup> The Australian 'fair dealing' defences to copyright infringement will be compared with the broader American 'fair use' defences.<sup>31</sup>

The final section of this paper will evaluate the effectiveness of the Australian Copyright law and its impact on transformative musical works. The utilitarian theoretical justifications, established in Section 2 of this paper, will be utilised as a ‘yardstick’ for this evaluation. This section of the paper will also present specific reform suggestions in order for Australian Copyright Law to better accommodate transformative uses of musical works, in light of the theoretical standard. The primary reform will relate to the broadening of Australian ‘fair dealing’ defence to resemble the open-ended ‘fair use’ defence utilised by the USA.<sup>32</sup> The proposed open-ended ‘fair dealing’ defence to infringement will not be bound by the American experience of ‘fair use’, which has increasingly been applied strictly by American Courts.

## 2 Theoretical framework

A thorough understanding of the theoretical justifications for copyright law is a necessary precursor to any effective evaluation into the effectiveness of any state’s copyright law. Theoretical justifications provide a means by which to gauge the effectiveness and compatibility of a given set of rules.<sup>33</sup> The theoretical literature on intellectual property is markedly limited when compared to the literature of its tangible cousin, real property.<sup>34</sup> Nevertheless, given modern society’s increasing proliferation of intellectual property rights, including copyright, it becomes important to search for theoretical foundations to solve any practical questions that may arise regarding the regulation of copyright law, as opposed to solving them ad hoc.<sup>35</sup> There are numerous identifiable theoretical approaches to copyright law. These approaches are worth further analysis in order to determine which framework will provide the underlying indicia with which to approach this paper’s proposed research question.

Natural rights theory, derived from the writings of John Locke, is one of the leading philosophies justifying copyright law.<sup>36</sup> Locke’s theories from his *Second Treatise of Government* largely deals with tangible property, however his writings have been appropriated to form a wider philosophical agenda that encompasses notions of ‘nature’, ‘labour’ and ‘community’.<sup>37</sup> Locke’s general proposition is that a person who labours upon resources that are either un-owned or ‘held in common’ has a natural property right to the fruits of his or her efforts.<sup>38</sup>

The Lockean moral argument for strong individual property rights encompasses a person’s labour, both mental and physical, as their most fundamental property.<sup>39</sup> It focuses the proposition that a natural right arises where a person’s *labour* contributes significantly to a finished product’s value.<sup>40</sup> Therefore, this element of ‘labour’ puts a distinction between an appropriated good and the natural common, which is the entire world of unappropriated materials.<sup>41</sup> The labour that a person exercises over the natural common, according to Locke, should be rewarded in the form of property rights.<sup>42</sup> Locke states: “He who removes out of the State that Nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property”.<sup>43</sup>

However, historically copyright was not implemented for the sole reason of recognising an author’s moral right to ‘reap the fruit of his labours,’ rather copyright was implemented to encourage inventive thinking to benefit society at large.<sup>44</sup> It is often said that an author of a copyrighted work should only receive the value of his work to society.<sup>45</sup> However, a purely Lockean understanding of copyright law would bestow

unlimited rights upon an author as long as they have expended 'labour' – these unlimited rights are often higher than their social worth and also eliminate the social benefits which may arise through the appropriation of the original copyrighted work. In other words, Lockean theory supports the strict enforcement of any copyright regardless of net social benefit. This will lead to a reduction in a given society's creative output – the one thing copyright is supposed to foster.<sup>46</sup> These points are reiterated by critics of the Lockean intellectual property theories. David McGowan raises the concept of fair use to argue that Lockean theory justifies granting authors the right to exclude others from their works, thereby excluding others from what we consider a 'fair use' in a non-legal sense.<sup>47</sup> Thus, according to McGowan, pure Lockean theory has the effect of welcoming welfare losses.<sup>48</sup>

Despite the common misunderstanding that Locke's theory perpetuates private rights to intellectual property, it must be understood that Locke recognises a dual concern for private rights of the individual and the public rights in a natural common of resources.<sup>49</sup> Locke recognises that the laws of the civil society are structured in a way that recognises public good over an individual's right to maintain a domain over labour-invested property.<sup>50</sup> However it can be argued that the increasing monopolistic and proprietarian application of copyright law fails to observe the 'public good' exceptions that even Locke had identified as necessary elements of governing any form of property, whether tangible or intangible.

Another lesser known, arguably more continental, theory supporting copyright law is derived from the writings of Kant and Hegel.<sup>51</sup> Known by many as the 'personality theory', it is based on a notion that authorship is supreme.<sup>52</sup> Personality theorists offer the principled argument that intellectual property rights, such as copyright, must be recognised by a state, regardless of its efficiency considerations.<sup>53</sup> Hegel argues that private property rights are "crucial to the satisfaction of some fundamental human needs".<sup>54</sup> Intellectual property rights are thus justified as a means of shielding the appropriation and modification of artefacts through which authors and artists have expressed their 'wills'.<sup>55</sup> This theory seems to vary from the aforementioned natural law theory and the foregoing discussion on utilitarian theories, which only recognises property insofar as it furthers society utility.

The theory that perhaps encapsulates the historical development of intellectual property is utilitarianism. It must be noted that for the purposes of this paper, a utilitarian theory of intellectual property will be applied to evaluate the effectiveness of Australian copyright law in light of increasing transformative uses of existing copyrighted musical works. William Landes and Richard Posner attempt to demonstrate the utilitarian justifications for copyright law, arguing that intellectual products are easily replicated and that enjoyment of them by one individual does not prevent enjoyment of them by other persons.<sup>56</sup> Simply put, without exclusive rights, creative artists will be undercut by copyists who bear only 'low costs of production'.<sup>57</sup> This utilitarian approach advises that the guideline or the 'lawmakers' beacon' when shaping property rights should be the maximisation of *net social welfare*.<sup>58</sup> Therefore, a utilitarian would require lawmakers strike an optimal balance between the power of exclusive rights to encourage the creation of inventions and the partially offsetting tendency of said rights curtailing the widespread public enjoyment of those creations.<sup>59</sup>

The philosophy of utilitarian intellectual property has been propelled by many significant economists and philosophers, including Adam Smith, John Stuart Mill, Jeremy Bentham and Karl Marx.<sup>60</sup> Adam Smith, while generally critical of monopoly powers as detrimental to the operation of his famous ‘invisible hand’, still justified the need for limited monopolies to promote innovation and commerce requiring substantial upfront investments and risk.<sup>61</sup> Similarly John Stuart Mill concurred that patent monopolies were justified arguing that the temporary ‘exclusive privilege’ ensured that the reward to the inventor or creator was proportional to the usefulness of their intangible creation.<sup>62</sup> This line of thinking is evident in the first copyright statute, the *Act of Anne*, enacted in 1709 to ‘encourage learning’.<sup>63</sup> This statute influenced the formulation of modern copyright law in many nations around the world and is considered a “watershed event in Anglo-American copyright history”,<sup>64</sup> – it is frequently invoked by modern judges and academics as “embodying the utilitarian underpinnings of copyright law”.<sup>65</sup>

Stadler describes American copyright law as a ‘distinctly utilitarian construct’ that aimed to promote the progress of science in society as whole.<sup>66</sup> Early American congress granted authors the exclusive rights to their creations for 28 years, as any more exclusivity was seen as burden to society.<sup>67</sup> The advancement of learning was seen as the primary goal of copyright, with the reward to the author being secondary.<sup>68</sup> This is reflective in early British and Australian legislation as well.<sup>69</sup> However, with the emergence of individual rights, copyright law has undergone a transformation, markedly different from its initial utilitarian beginnings. Copyright, as this paper will demonstrate, has expanded to give extensive exclusive rights to holders of copyright, perhaps at the expense of the public enjoyment of the creations.

The exclusive rights that are granted to copyright holders are justified as incentives to creativity.<sup>70</sup> Therefore, logically any breach of said copyright effectively diminishes the incentive for musicians to continue making music. But what if a breach of copyright did not significantly impact on a musician’s creative incentive? If, despite the transformative uses of copyrighted works, copyright holders still retain a significant profit as well as the incentive to create, then arguably a system of copyright law that hampers transformative uses places an unnecessary economic burden on society. Such a burden would displace the utilitarian notion of striking an optimal balance between copyright’s function as exclusive rights aiming to stimulate creativity as well as the widespread public enjoyment and utilisation of those creations.<sup>71</sup> This paper aims to demonstrate that current Australian copyright law tips the balance in favour of the copyright holder, which effectively burdens society at large, giving legs to the saying: “All are equal, but some are more equal than others”.<sup>72</sup>

The aforementioned discussion of various theoretical rationalisations of copyright law demonstrates the varying perspectives this area of law generates. As can be concluded from the analysis, there is no particular theory that stands out as more acceptable than the others. However, to evaluate the effectiveness of any given set of laws, one must establish a standard. Philosophical frameworks provide an effective means of facilitating the analysis of a set of laws and can catalyse useful conversations among the various people and institutions responsible for the shaping of the law.<sup>73</sup> As this paper aims to analyse the effectiveness of current Australian copyright law in light of the increasing trend towards ‘musical transformations’, the utilitarian theoretical framework is best suited. The ‘net social welfare’ argument contained in utilitarian theory is in line with the historical understanding of copyright as an incentive to promote creativity, not increasing individual monopolies. A utilitarian understanding of copyright is conducive to analysing

the effectiveness of Australian copyright law in light of increasing incidences of music sampling and remixing by musical appropriators.

### **3 The current state of copyright law in Australia**

In order to analyse effectiveness of copyright in light of transformative uses of music, one must first have an adequate understanding of the law, in order to identify any limitations. Copyright protection in Australia is provided by the *Copyright Act 1968*.<sup>74</sup> This is a piece of federal legislation that superseded the 1911 Act, which was modelled closely on English Law.<sup>75</sup> Under the *Copyright Act* a single composition of recorded music may give rise to a number of different types of copyright.<sup>76</sup> Copyright protects the form of expression of ideas, but not the ideas themselves.<sup>77</sup> There are generally three copyrights in a musical recording. Firstly the copyright in the musical work itself, which includes the notation and composition of notes.<sup>78</sup> Secondly, if there are lyrics in a given musical work, then copyright subsists separately for those lyrics as a literary work.<sup>79</sup> Thirdly, there exists copyright in the sound recording of a given musical work.<sup>80</sup>

Copyright provides an owner with a 'bundle of rights', which gives the copyright holder the exclusive entitlement to: reproduce, publish, publically communicate (often via performance) and make adaptations of a given 'work'.<sup>81</sup> Copyright infringement in the musical work will occur where a sampler does any of the acts within the copyright owner's exclusive rights.<sup>82</sup> An infringing act need not be done in relation to the whole of the work; rather a 'substantial part' of the work will suffice.<sup>83</sup> This means that if an individual copies, without permission, a 'substantial part' of a musical work, lyric or sound recording which is copyrighted, an infringement exists.<sup>84</sup>

The definition of 'substantial part' is a question that generates significant debate within the legal community.<sup>85</sup> As the phrase 'substantial part' is not defined in the *Copyright Act* it is therefore a matter for judicial interpretation – the courts have historically placed an emphasis on qualitative rather than quantitative considerations when assessing infringement of copyright.<sup>86</sup>

#### *3.1 Substantial part*

Often transformative users, sampling existing musical works, will not take the whole of the copyright work, but just a small portion. Whether this is considered an infringement of copyright will depend on whether that portion is considered a 'substantial part'.<sup>87</sup>

In a single musical work, copyright may subsist in a number of ways within the one musical work – this includes the notation and score, the lyrics or words, the sound recording, the arrangement and the performance of a given musical work.<sup>88</sup> Australian courts approach the question of 'substantiality' as a matter of fact and degree.<sup>89</sup> In *Hawkes and Son (London) v Paramount Film Service Ltd* [1934] the use of half a minute of a four-minute song was held to infringe copyright given that the limited section constituted the principal part of the song.<sup>90</sup> In some long works, the quoting of a small passage may be regarded as substantial if it is an important and essential part of the work.<sup>91</sup> This is further reiterated in *Gold Peg International Pty Ltd v Kovan Engineering*, where Crennan, J. noted that "taking quite small portions" may amount to a 'substantial part'.<sup>92</sup> Although this case is not directly related to musical works, it is representative of

the strict application of the substantiality doctrine by Australian courts considering matters of infringement.

Although it is fair to say courts have historically interpreted the substantiality doctrine rather narrowly, it is still essential to understand that the concept of substantiality is still not easy to define, and subtle factors can influence the judgment of the courts.<sup>93</sup> This subtlety is notable in *Joy Music v Sunday Pictorial Newspapers (Joy Music)*, a case displaying an early understanding of ‘transformative uses’.<sup>94</sup> This case related to a literary parody of the popular song entitled ‘Rock-a-Billy’ by Guy Mitchell. In his judgement, McNair J held that a literary parody of the lyrics in ‘Rock-a-Billy’ did not amount to a reproduction of a substantial part of the lyrics; rather the parody was produced by ‘sufficiently independent work’.<sup>95</sup> The parody was accordingly not a reproduction of the song, but a new original work derived from the song.

Although *Joy Music* was concerned primarily with parody, it is not necessarily limited to parodies in application. Suzor believes that the principle to be drawn from *Joy Music* is that when significant new effort and originality is put into reproduction of a copyright work, such that it becomes an original expression in its own right, it will not amount to an infringement.<sup>96</sup> Unfortunately, the decision in *Joy Music* was not remembered judicially for its defence of ‘transformative uses’, rather for its advocacy of parody, evident in the later legislative amendments to allow the use of a copyrighted work for parodying purposes.<sup>97</sup> Australian courts have since taken a rather austere approach to interpreting ‘substantial part’ as evidenced by the recent controversial Federal Court decision in *Larrikin Music v EMI (Larrikin)*.<sup>98</sup>

### 3.2 *The Kookaburra laughed all the way to the bank – the Larrikin Music case*

The copyright infringement action brought by Larrikin Music Publishing Pty Ltd (Larrikin) against EMI Songs Australia Pty and the members of the famous Australian band ‘Men at Work’ attracted a great deal of public interest, especially in light of the unfortunate passing of Greg Ham, the flautist who’s flute riff was the main focus of this case.<sup>99</sup>

On appeal, the central question for the full court was whether there was a substantial degree of copying between the flute riff in Men at Work’s famous ‘Down Under’ and the first two bars of the iconic Australian folksong ‘Kookaburra sits in the old gum tree’ written by the late Marion Sinclair.<sup>100</sup> The copyright for this tune is owned by Larrikin Music Publishing, as a result of an assignment in Sinclair’s estate in 1988.

Given that historically, no case regarding musical copyright infringement had come before an Australian court, Jacobson J referred to the judgement in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* as authority on the understanding that ‘substantial part’ is to be determined by the quality than the quantity of what is copied.<sup>101</sup> Justice Jacobson then undertook a precise step-by-step analysis of the two works to determine whether they were objectively similar, looking at melody, key, tempo and harmony.<sup>102</sup> He also relied on evidence that Colin Hay (the lead singer of ‘Men at Work’) had on occasions sung the verses of ‘Kookaburra sits in the old gumtree’ when performing ‘Down Under’ live, to determine that ‘Down Under’ infringed a significant part of ‘Kookaburra sits in the old gum tree’. Although EMI music criticised the court’s approach as ‘overly mechanistic and fragmented’ application of copyright principles, their argument fell on deaf ears.<sup>103</sup>

Although the *Larrikin* case does not relate to the topic of transformative musical works considered in this paper, it is nevertheless one of the most significant recent

Australian decisions that considers copyright infringement in a musical work. Forrest and Potter believe the decision in *Larrikin* signals increasing intolerance of music borrowing by Australia courts.<sup>104</sup> By applying the same legal tests that are used to determine copyright infringement for other works of authorship, such as literary and dramatic works, courts have a tendency to find copyright infringement in musical works as well.<sup>105</sup> Justice Jagot in *Larrikin* stated that 'it cannot be doubted' that the reproduction of 'Kookaburra' is to be found in 'Down Under'. This is despite the fact, as Vertigan points out, 'Down Under' does not use the lyrics of 'Kookaburra', nor was it detected by fans of both the songs until decades after 'Down Under' was released.<sup>106</sup>

Although *Larrikin* does not consider transformative uses of copyrighted musical works, as is the central focus on this paper, an analysis of *Larrikin* demonstrates the current trend in Australian courts to interpret the substantiality doctrine strictly. The 'substantial part' rule is a universally acknowledged and historically developed rule in copyright law, which aims to protect authors from unfair misappropriation of their works.<sup>107</sup> However, when applied strictly, as in *Larrikin*, the rule has the ability to restrict musical creativity. *Larrikin* sets a precedent that no appropriation of a musical work, no matter now insignificant, is acceptable. Compounding the problem is that Men At Work's use of 'Kookaburra' does not fit within the 'fair dealing' exceptions provided in ss40 to 43 of the *Copyright Act*.<sup>108</sup> This provides a useful segue into analysing the current defences or 'fair use' justifications for using copyrighted musical works in Australia.

### 3.3 Fair dealing

It remains permissible to reproduce substantial parts of copyright works where the use constitutes what is known as 'fair dealing' under the *Copyright Act*.<sup>109</sup> Where a sampling musician's transformative use is considered to have reproduced a 'substantial part' of the original copyrighted work, the next question to consider is whether the musician has an available fair dealing defence.<sup>110</sup> Sections 40 to 43 of the *Copyright Act* deem it possible for an individual to use an appropriate portion of a work for the purposes of: research or private study, criticism or review, reporting the news or for giving professional legal advice.<sup>111</sup> Therefore, in Australia the defence of 'fair dealing' is permitted only in the context of the aforementioned categories. This differs greatly from the broad-based 'fair use' regime operating in the USA.<sup>112</sup>

Apart from fair dealing, other identifiable defences found in the *Copyright Act* include: educational uses,<sup>113</sup> parallel importation of different categories of non-infringing works and subject matter,<sup>114</sup> artistic works,<sup>115</sup> libraries and archives,<sup>116</sup> and computer programs.<sup>117</sup> However these defences do not have a direct relation to transformative musical works, which is the focus of this paper, thus further discussion of these particular defences is unnecessary and beyond the scope of this paper.

In determining whether an alleged infringement is protected by any of the 'fair dealing' defences, an objective reasonable person test is used to determine whether the purpose of the infringement fits into any of the ss40 to 43 'fair dealing' categories.<sup>118</sup> However this test is applied rather arbitrarily and judicial interpretation of 'fair dealing' varies greatly. A particularly influential case relating to the fair dealing defence is *Garis v Neville Jeffress Pidler Pty Ltd*.<sup>119</sup> The Federal court was asked to determine whether a press-clipping service, which monitored newspapers and other media and provided relevant photocopies to its customers, infringed upon the copyright vested in the photocopied artists.<sup>120</sup> Justice Beaumont utilised the *Macquarie Dictionary* meanings of

‘research’, ‘study’, ‘criticism’ and ‘review’ to determine whether the defendant’s infringement could be successfully defended.<sup>121</sup> Given this relatively restrictive interpretation, it was found that the defendant’s infringement could not be successfully defended, as the infringement failed to come within the confines of the dictionary definitions of the various ‘fair dealing’ categories.<sup>122</sup>

However, in *Nine Network Australia v Australian Broadcasting Corporation*, Hill J noted that the application of a defence “is not one...which can be resolved by looking at the dictionary definition of the word”.<sup>123</sup> The case related to an alleged copyright breach by the Australian Broadcasting Corporation (ABC), when footage from the Nine Network’s coverage of the New Year’s celebration in a television show depicting the news in a humorous light. In this instance, the court extended a liberal view, stating that the reporting need not be of the traditional kind.<sup>124</sup> Similarly, *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (The Panel Case)* also determined the validity of ‘fair dealing’ in Network Ten’s use of Channel Nine’s television footage for use on the entertaining news programme *The Panel*.<sup>125</sup> At trial, when considering the utilisation of the fair dealing defence for ‘criticism and review’, Conti J remarked that “criticism and review are words of wide and infinite scope which should be interpreted liberally”.<sup>126</sup> However on appeal to the Full Court, Conti J’s judgment was disregarded and an infringement was found.<sup>127</sup> It was argued by legal scholars that there were significant errors in the Full Court’s judgement and this argument was validated when the High Court overturned the Full Court’s decision on further appeal.<sup>128</sup> Ultimately the High Court rejected the Full Court’s highly literal interpretation of the ‘fair dealing’ provisions and overturned the Federal Court decision.<sup>129</sup> However, beyond confirming that broadcast copyright subsists in discrete television programmes and advertisements, the High Court’s decision does not offer any real comfort to those in broadcasting industries, or any industry affected by copyright. Whether a use of a copyrighted work will amount in a breach of the *Copyright Act* continues to require the subjective determination of whether the excerpt is a ‘substantial part’ and if so, whether it can be successfully defended via the ‘fair dealing’ provisions.<sup>130</sup> The cases analysed thus far provide that the determination of copyright infringement is a rather arbitrary one in Australia.

From the aforementioned judicial analysis, it is possible to conclude that Australian courts have deviated away from the more fundamental understanding of the purpose of copyright law. The WIPO Copyright Treaty is one of the ‘internet treaties’, established to deal with the impact the internet placed on artists of literary and artistic works.<sup>131</sup> It operates as a protocol to the Berne Convention, to which Australia is a signatory.<sup>132</sup> The Preamble addresses that a state’s copyright laws should recognise “the need to maintain a balance between the rights of authors and the larger public interests”.<sup>133</sup> Given the impact of the decision in *Larrikin* it is fair to suggest that fair dealing exceptions should be expanded to strike a better balance between the public benefits gained by transformative appropriations of existing musical works and the commercial reward and recognition given to the original copyright holder.<sup>134</sup> This type of, arguably broad-based, approach to copyright infringement and ‘fair dealing’ is observable in the copyright legislation of the USA.<sup>135</sup> Section 107 of the US Copyright Law provides that “the fair use of a copyrighted work...is not an infringement of copyright”.<sup>136</sup> ‘Fair use’, unlike ‘fair dealing’, is an open ended exception to copyright infringement which is cognisant of social utility certain acts of copyright infringement can reap. ‘Fair use’ is not limited to purposive categories as the ‘fair dealing’ exception is in Australia.<sup>137</sup>

### 3.4 Fair dealing versus fair use

'Fair use' is a distinguishing feature of copyright law in the USA, embodied in Section 107 of the US *Copyright Act 1976*.<sup>138</sup> Whether or not a particular copyright infringement encompasses the 'fair use' doctrine is dependent on the satisfaction of the four subsections of s107.<sup>139</sup> These four factors include:

- 1 the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes
- 2 the nature of the copyrighted work
- 3 the amount and substantiality of the portion use in relation to the copyrighted work as a whole
- 4 the effect of the use upon the potential market for, or value of the copyrighted work.<sup>140</sup>

'Fair use' has been relied on in the USA to permit both what have been referred to as 'transformative' and 'productive' uses of copyright material.<sup>141</sup>

It is a widely held belief that the copyright law in the USA is more conducive to defending copyright infringement than Australian copyright law.<sup>142</sup> The Australian Information Industry's (AIIA) submission to the Attorney General's Department evidences this. The AIIA notes that the US' 'fair use' doctrine is significantly broader in scope than the set of defences available to Australian users under the 'fair dealing' doctrine.<sup>143</sup> However, one should not be fooled into thinking that the fair use doctrine implemented by the USA is the libertarian breakthrough for transformative artists in their battle to seek a truer balance between artistic freedom of expression and a copyright holder's monopoly incentives. The US' 'fair use' doctrine, despite being more liberal than the Australian 'fair dealing' system, still displays an overarching preference for the corporatisation of copyright, as the case law evidences.<sup>144</sup>

In the USA, there has been much debate about whether digital sampling and transformative uses of musical works is protected under the defence of fair use.<sup>145</sup> In 1992 Island Records sued the band 'Negativland' and SST Records Ltd in respect to the unauthorised and unattributed sampling of the famous U2 song "I Still Haven't Found What I'm Looking For".<sup>146</sup> However, as Negativland could not afford to contest the matter in court, they agreed to settle with the record company for half the proceeds of the transformative work, plus \$25,000. After settlement, Negativland argued that the defence of fair use should be liberalised and expanded to allow any partial usage for any reason. They argued that "[Artists] are being guided by new technologies to reacquaint themselves with cultural urges toward a rejuvenated public domain, right here in the twenty-first century".<sup>147</sup> These sentiments were later judicially explored by the Supreme Court of the USA in *Campbell v Acuff-Rose Music Inc*, where Souter J stressed that the fair use doctrine supported the transformative use of copyright material, arguing that the question for a court to consider is "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message".<sup>148</sup>

However, in spite of the decision in *Campbell v Acuff-Rose Music*, the ground-breaking decision in *Bridgeport Music Inc v Dimension Films Inc* has shifted American judicial opinion on transformative appropriation of musical works.<sup>149</sup> The case

considered the use of a sample from the rap song ‘100 Miles and Runnin’ in the sound track of the movie ‘I Got the Hook Up’.<sup>150</sup> The piece of music in contention was a two second, three-note solo guitar piece, which was copied, looped and extended to 16 beats. Despite the size of the alleged infringement, the Federal Court of Appeal found that the part taken was ‘valuable’. The decision by the Federal Court of Appeal overturned the decision of Higgins J of the Middle District Court of Tennessee, where the matter first went to trial. Justice Higgins held the infringement *de minimis non-curatlex*, stating: “a balance must be struck between protecting an artist’s interests and depriving other artists of the building blocks of future works”.<sup>151</sup> He also observed that “since the advent of Western music, musicians have freely borrowed themes and ideas from other musicians”.<sup>152</sup> The overruling of Higgins J’s decision arguably went against the trend outlined that American courts have often allowed very small, *de minimis*, excerpts of songs to be sampled.<sup>153</sup>

In Australia, there have not been many cases that have considered transformative uses of musical works compared to the USA. The most significant decision relating to musical appropriation in Australia is *Univeral Music Australia Pty Ltd v Miyamoto*.<sup>154</sup> This case concerned the unauthorised remixing of entire tracks of existing sound recordings by five Disc Jockeys (DJs). Although the remixing artists argued that they had made the unauthorised remix CD to raise their profiles as musicians, the court disregarded this argument in light of the fact that the DJs had made financial gains from the sale of the remix CD. Justice Wilcox condemned the artists for ‘blatantly disregarding copyright restrictions,’ but did make the comment that, had the DJs infringements of copyright not presented a financial gain, he would have taken a “less serious view of the infringements”.<sup>155</sup> However, Wilcox J’s opinion does nothing to dispel the allegation of infringement against these artists, nor is there an identifiable ‘fair dealing’ justification that encompasses this type of copyright infringement. Indeed the court failed to even contend the argument presented by one of the DJ’s that “bootleg mix tapes had led to the discovery of artists, such as rapper 50 Cent”, and that they were only using the copyrighted musical works to make their own mark in the music industry. These warm sentiments aside, it is no surprise that the Federal Court ruled against the defendants in the *Miyamoto* case, given the DJs in question appropriated full musical works, with no authorisation and little transformation.<sup>156</sup> The issue to be derived from this case, for the purposes of this paper, is what level of infringement will be accepted, if any at all by an Australian Court? Will there be concessions made for artists who have taken great effort to completely transform an existing work into a completely original work?

## 4 Evaluation and reform

### 4.1 *How effective is Australian Copyright Law, in light of a Utilitarian standard?*

Having established a necessary understanding of the primary areas of Australian Copyright law that influences the propagation of ‘transformative musical works’, it is now necessary to compare the legal doctrine to the chosen utilitarian theoretical framework. As mentioned in Section 2 of this paper, the utilitarian framework is primarily concerned with the maximisation of ‘net social welfare’.<sup>157</sup> In copyright terms, this alludes to a maximisation of creative output. Copyright provides creators of musical

works with exclusive rights over their work, so as to not be undercut by copyists who only bear 'low costs of production'.<sup>158</sup> By providing a musician with 'limited monopoly' over their 'creative output', copyright promotes further innovation. However, the copyright provided should not grant the musician with so powerful a monopoly so as to deprive other artists who seek to appropriate the copyrighted musical work to create completely different original works; this would inadvertently reduce the creative output in a given society. On the opposite end of the spectrum, the copyright granted to musicians should not be so mildly enforced that copyists can freely appropriate the entirety of an existing work without being reprimanded – this would be a disincentive for musicians to make music, and therefore reduce the overall creative output in society. Ultimately, the aim for Australian copyright is to promote and maximise creative output and not to protect an individual or their estate's right to monopolise on a copyright for the sake of remuneration. The benefits gained by a copyright should ideally not exceed the incentive it provides. An ideal system of copyright law would foster a balance between copyright holders who need incentives to continue to invest in creative output and appropriating artists who intend to utilise an existing musical work and transform it into something new and original.<sup>159</sup>

One of the primary doctrines of Australian copyright law examined in Section 3 was 'substantial part'. The application of the 'substantial part' doctrine by the court in *Larrikin* provides an example of non-maximisation of creativity.<sup>160</sup> Having assessed the similarity of the two contentious works in *Larrikin*, it is arguable that there may be some notational similarities between the two works. However these similarities are almost undetectable. Even if we concede that the two works are in fact similar, it is reasonable to suggest that Larrikin only pursued action against EMI for a financial benefit, and not because it felt the infringement was a disincentive for further creation. This fact is further reiterated by the fact that Larrikin Music only discovered the 'infringement' accidentally; when a television personality pointed out the similarity between the two works on the television show *Spicks and Specks*. One may perhaps question whether Larrikin would have pursued such action if the flute riff in question was not from a song as commercially successful as 'Down Under'. Vertigan observes that copyright law was devised to create an incentive for creativity and provide economic benefits for those who create works and ultimately benefit society – this is synonymous by the aforementioned utilitarian 'net social welfare' justifications.<sup>161</sup> However, the principles pertaining to copyright law are challenged when a company acquires the copyright of a work, as Larrikin Music did, and utilises this copyright in the hope of achieving a large windfall. The decision in favour of Larrikin arguably goes against the general notion that copyright law exists to benefit society at large and not to provide a singular individual or entity with monopoly rights at the expense of a flourishing creative society.

The second doctrine examined in Section 3 relates to the 'fair dealing' defences to copyright infringement. Despite the sometimes liberal application of the 'fair dealing' defences to infringement by the Australian courts, it is evident from the categorical nature of the provisions that the defences are highly purposive.<sup>162</sup> It is unlikely that a sampling musician would create a transformative use of a copyrighted musical work for reasons of 'reporting the news' or 'research/private study'. Additionally, appropriations of copyrighted musical works by music samplers are often not done for purposes of 'criticism or review', rather they are musical expressions, intended to further contribute to a greater musical society. As people exercise creativity in unexpected ways, it seems reasonable that copyright law should be flexible enough to

restrict uses which would devalue existing copyrighted expressions or produce a disincentive for copyright holders to continue creating, but also allow those transformative uses which do not devalue existing musical works or remove the incentive for the copyright holder to create future works.

It seems that copyright law is perceived by judiciaries to be analogous to real property.<sup>163</sup> However, copyright, like other intellectual property rights, is a man-made legal construct, designed to restrict the flow of expression.<sup>164</sup> Without copyright, once an expression is released, anyone exposed to it is free to use the informative conveyed, build upon the expression and adapt it as their own.<sup>165</sup> It is evident from the examination of case law that the focus of the judiciaries in both Australian and the USA, is not to maximise creativity. Rather copyright is perceived as an individual right, similar to a right in tangible property, to be monopolised to the greatest degree. The *Bridgeport* decision highlights that even a broad 'fair use' doctrine, like that utilised in the USA, minimises creativity if the court interprets the doctrine narrowly. If an open ended defence is adopted in Australia, we need not be bound by the USA's experience and authority; rather any proposed legal reform should aim to ensure the maximisation of creativity. This provides a useful segue to examine possible reforms.

## 4.2 *Reform*

The paper presents the following reform provisions to maximise total creative output. These reform provisions are suggested in light of the discussion on music sampling and transformative musical works, which is the central focus of this paper. As a disclaimer, this paper has not analysed the effect these proposed reforms may have on other copyrightable works, such as artistic or literary works – such analysis is beyond the scope of this paper.

### 4.2.1 *Substantial use*

Although the substantial part doctrine is interpreted strictly by Australian courts, as demonstrated by the *Larrikin* decision, it is a universally acknowledged and historically developed rule in copyright law that aims to protect authors from unfair misappropriation of their works. In the *Panel case*, the full court of the Federal Court analysed the drafting history and parliamentary committee reports that preceded the enactment of the 'substantial use' provision in the *Copyright Act*, and determined that it is a historically practised freestanding requirement of consideration in infringement actions.<sup>166</sup> Furthermore, the former British Empire, whose system of copyright greatly influenced the legislation in Australia, defined copyright as "the sole right to produce or reproduce that work or any substantial part thereof in any material form whatsoever".<sup>167</sup>

One simple reform on the s 14(1) 'substantial part' doctrine, may be to provide a definition of 'substantial part', so that a judiciary determines copyright infringement with greater reference to the interest protected by the copyright, which in the case of musical works is often 'creative integrity'.<sup>168</sup> The definition should enable judiciaries to analyse not just the quantitative or qualitative significance of an infringement, but also the context in which the infringement occurred.

#### 4.2.2 Fair use

On the 18th of February 2005 the Commonwealth Attorney General, Phillip Ruddock announced a review of copyright law to examine whether a fair use exception, similar to one used in the USA, should be added to the Australian *Copyright Act*.<sup>169</sup>

There is no doubt that such a reform would go a long way towards solving the legal issues created by the practices of digital music sampling and the creation of transformative musical works. The current 'fair dealing' provisions do not satisfy the utilitarian standard of copyright: maximising creative output by balancing both the interests of the copyright holder and the appropriating artist. However, Section 3 illustrates the irregularities in the application of the 'fair use' defence by US courts, who by applying the defence strictly, have created a precedent of not recognising 'fair use' in allegedly infringing work not classified as a parody. The decision of the US Federal Court of Appeal in the *Bridgeport Music* case, demonstrates an instance where a court failed to maximise creativity.<sup>170</sup> By ruling in favour of the plaintiff, the court essentially advocated depriving musicians of any access to small samples of copyrighted musicals works, although such infringement would not result in damage to the copyrighted expression, nor provide the copyright holder with a disincentive to continue producing creative output. This paper argues that any reform to the Australian 'fair dealing' provisions need not be limited to simply adopting the US' 'fair use' defence, rather the 'transformative use' theory, noted in the US Supreme Court case *Campbell v Acuff-Rose Music*, should become doctrine.<sup>171</sup>

By adding a provision recognising 'transformative' uses of copyright material, the law would acknowledge the works of musicians who utilise music samples of existing works to create an entirely different and original new musical work.<sup>172</sup> Although courts may need to exercise discretion in determining whether a particular work is indeed a 'transformation' of the original copyrighted work, providing a transformative uses provision reaffirms copyright law's function as promoting a flourishing creative society.

## 5 Conclusions

We often copy or build upon another's words, images or music to convey our own ideas effectively. However, if a copyright holder withholds access to their work or insists upon an exorbitant licensing fee, we are left without a means to express these ideas.<sup>173</sup> Although different views may exist, this paper advocates the view that copyright exists to protect the social right to engage in creativity over an individual right to monopolise a creative work.

As presented in Section 1, modern technology has changed the way individuals engage with creative materials.<sup>174</sup> An ever increasing amount of people are demanding a much broader right to engage with creative material. Technology has only hastened what has been an age old tradition – taking an existing idea and transforming it into something new. Arguably, no artistic work is completely original – in fact all music is inspired by pre-existing musical ideas.<sup>175</sup> Therefore, what makes music sampling any different? So long as the appropriating musician expends some creative skill to transform an existing work into a completely new and original one, there seems to be no obvious harm to promoting the types of 'transformative musical works' described throughout this paper.

Section 2 analyses the theoretical underpinnings and discovers that copyright, like all intellectual property, was never designed to provide an all encompassing monopoly right to holders.<sup>176</sup> Rather, copyright aims to balance the rights between copyright holders and the general public, so as to maximise the creative output in a given society.<sup>177</sup> However, having compared this theoretical understanding to the application of copyright law, explored in Section 3, it can be concluded that the current Australian copyright doctrine does not adequately promote transformative musical works.

The reforms suggested in Section 4 of this paper, cater to a more liberal interpretation of the copyright function. These reforms primarily derive from an evaluation of musical sampling and transformative musical works, as a more generalised examination of copyright law is beyond the ambit of this paper. The reforms do not intend to endanger the rights of existing copyright holders, but hope to encourage more creative and transformative engagement with existing musical works.<sup>178</sup> The proposed recommendations believe transformative musical works can be encouraged without prejudicing an existing copyright holder's right to make a living. Whether Australia will adopt a more relaxed copyright doctrine is difficult to say, given that copyright is a contentious area of law with many stakeholders with varying interests. However, given that the culture of appropriating and engaging directly with existing musical works has only expanded in the last decade, it seems futile for Australian lawmakers to retaliate against the trend. It seems more reasonable for lawmakers to address the inadequacies of the current copyright doctrine and look to promoting a system that benefits the majority of stakeholders and intrinsically promotes creative output.

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