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The case for unfair use

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Last year, amid a membership surge that looked set to finally see the organisation given major party status, the UK Green Party was hit by a minor scandal. The novelist Linda Grant had unearthed a long-standing commitment by the party, then enshrined on its website, to reduce UK copyright terms to “a usual maximum of 14 years.” Downcast, [she took her discovery to Twitter](#).

The backlash from artists – a group at the heart of the party’s base – was swift and unrelenting. Grant wrote that the limit would “slash authors’ incomes”; her fellow novelist Stella Duffy [told the Guardian](#) that two of her novels had recently been optioned by HBO, and that “one of them would be just about coming up to the end of copyright term under the 14-year rule,” meaning “the big corporation could take my work without paying me a penny.” By the end of the week, the party announced it would be reviewing its policy, ensuring a long overdue conversation about copyright reform was over before it had even started.

For context, the Greens’ proposed copyright amendment – far from a radical new stance on intellectual property rights – promised a return to the terms of the very first UK copyright law: the 1709 [Statute of Anne](#), which allowed artists 14 years of exclusivity over their work. In 1787, the authors of the United States Constitution arrived at the same number for their own copyright clause. It wasn’t until the 19th century that copyright terms began to rival average life expectancies, normalising the idea that artists should never live to see their work enter the public domain.

This shift was not the result of grassroots activism by the artists themselves, but rather aggressive lobbying by the publishing and entertainment industries. That’s what makes Duffy’s suggestion that HBO would relish the shortening of copyright terms such a farcical distortion of the facts: it’s not major TV networks that are the chief beneficiaries of a vibrant public domain but – wait for it – the public. The ‘Big Six’ media conglomerates would like nothing more than for Duffy to retain control of her books from here to kingdom come, as long as they get to keep Mickey, Bugs et al.

In his video series [Everything Is a Remix](#), filmmaker Kirby Ferguson considers the reasons why artists might conspire with vested corporate interests to limit the cultural commons. He points the finger at loss aversion, the human tendency to perceive losses to a greater degree than gains, arguing that this can explain why even an artist like [Shepard Fairey](#) – whose work begins and ends with the appropriation of existing images and ideas – might assert his moral right to decide how, when and by whom his own work is appropriated (Fairey has both threatened, and been threatened with, copyright lawsuits).

Currently, and perhaps for as long as the Green Party remains at the sidelines of British politics, UK copyright terms are set to 70 years from the death of a work’s author (in the case of cinema, that means a film’s director, screenwriter or composer, whoever dies last).

Under this system, even the earliest films of [Charlie Chaplin](#), produced over a century ago, will be kept out of the public domain until 25 December 2047. Merry Christmas; many of us will be dead by then.

If you doubt for a moment the creatively stifling effect of such laws, consider the case of F.W. Murnau's [Nosferatu](#), an unsanctioned 1922 adaptation of Bram Stoker's 1897 novel *Dracula*. Stoker's widow Florence Balcombe accused the film's producers of copyright infringement, and after a prolonged legal battle, successfully forced them to withdraw the film and burn its negative. The fact that some prints survived, allowing *Nosferatu* to be reassembled decades later, is today considered a miracle of film preservation, even as we continue to uphold the regressive laws that saw the film destroyed in the first place.

Faced with an enfeebled public domain, artists have in recent years rallied around a legal provision that grants them access to culture's bloated private sector. [Fair use](#) (and its UK variant, [fair dealing](#)) allows creators to freely use copyrighted work in the service of various noble pursuits, including but not limited to criticism, parody and pastiche. Fair use has proven especially beneficial to filmmakers, thanks to the [efforts](#) of law firms like California's [Donaldson + Callif](#), and the persuasive precedents set by films like Kirby Dick's anti-censorship polemic [This Film Is Not Yet Rated](#), Sophie Fiennes' pop philosophy essay [The Pervert's Guide to Cinema](#) and Rodney Ascher's mischievous truther doc [Room 237](#).

Of course, rights holders were never going to take this storming of their cultural empire lying down. Following the enactment of the 1998 [Digital Millennium Copyright Act](#), which heightened the penalties for online copyright infringement, media companies began liberally filing takedown notices against works that made use of their content, often without concern for their fair-use credentials. The development of [content identification software](#) automated and accelerated this process, leading to a culture in which work is presumed illegitimate until proven otherwise, and in which there's little incentive for rights holders to exercise restraint as they police the use of their intellectual property online. In 2009, Google reported that [over a third of the copyright notices issued against its users were invalid](#).

In response, artists have sought to codify their understanding of fair use with guidelines and checklists, but these too have had a suffocating effect on innovation. As our sense of what constitutes fair use has hardened, so has our sense of what must therefore be 'unfair' use – in both a legal sense and a moral one. In my own experience, those most effusive in their celebration of fair use are also those quickest to chide other artists for crossing what they see as the bounds of the form.

On the one hand, this can be explained as a benevolent desire to protect fellow artists from inadvertent violations of the law. But it also slows the progress of fair use, by fetishising current best practices as though they were innate moral boundaries and not merely contemporary interpretations subject to continuous change. Just as amendments to copyright are opposed by those who have the most to lose, fair use is portrayed as inflexible by those whose work already fits neatly within its walls.

Central to our contemporary understanding of fair use is the concept of transformation, which requires that any use of a copyrighted work effect an identifiable change in that work's meaning. In *This Film Is Not Yet Rated*, [Kirby Dick](#) excerpts an intense but elliptical sex scene from [Boys Don't Cry](#), used in its original context to demonstrate the emotional

bond between two characters. In Dick's film, the scene instead illustrates the bias of the US censor board against non-heteronormative sexual activity. Clearly, his is a transformative use.

Likewise, in *The Pervert's Guide to Cinema*, Sophie Fiennes intercuts Slovenian philosopher Slavoj Žižek with a climactic scene from Francis Ford Coppola's [The Conversation](#), in which Gene Hackman hallucinates a pool of blood rising up from a toilet bowl. In Coppola's film, the scene conveys the descent of Hackman's character into unchecked paranoia. To Žižek, the gory toilet is a clear demonstration of "the blind spot, from which the object looked upon returns the gaze".

A focus on transformation has sharpened countless works of fair use by encouraging artists to consider, and thereby refine, their intentions. It's also homogenised the kinds of work that are considered acceptable – both to artists and audiences. A fair use orthodoxy has built up around the word, and there's perhaps no better way to see it in action than by comparing the various recent appropriations of Stanley Kubrick's [The Shining](#), which – ever since [Gus Van Sant](#) exhausted the fad for remixing Hitchcock's [Psycho](#) by remaking the film [shot-for-shot](#) in 1998 – has become the go-to fair use building block.

One of the most celebrated short films of last year was Nick Denboer and Davy Force's [The Chickening](#), which puts *The Shining* through the digital meat-grinder of *After Effects* in order to transform Kubrick's psychological masterpiece into a surrealist, poultry-themed pop video. In the universe of *The Chickening*, Jack Torrance takes a caretaker job not at the Overlook Hotel but at Charbay's Chicken World Restaurant Resort, his son Danny speaks with a thick Brooklyn accent, and Scatman Crothers plays a green-skinned alien with a purple tongue and a CG eye-patch.

The Chickening

It's a technically flawless but frustratingly hollow bit of absurdist wallpaper, which makes a feature of its own wearying 'randomness'. Nonetheless, its clear-cut 'transformation' of Kubrick's work saw it hailed by critics and audiences alike as a golden example of fair use's potential. If a key question in determining a work's transformativeness is who it submits as its ultimate author, then *The Chickening* offered a reassuring answer: whatever the film is, it's Denboer and Force who are responsible.

By contrast, the anonymously conceived 2011 project [The Shining Forwards and Backwards](#) – in which two copies of the film are projected on top of one another, one playing forwards and the other backwards – puts Kubrick's authorship front and centre, refusing to flaunt (or even identify) its own author. As a result, it was quickly deemed an illicit oddity, filed alongside [Dark Side of the Rainbow](#) (in which [The Wizard of Oz](#) and Pink Floyd's *Dark Side of the Moon* are synchronised in order to reveal their supposed psychic connections) as something to be traded quietly among collectors, or recreated from scratch in students' bedrooms. A recent London screening took place unannounced and after dark, so as not to provoke the wrath of the Kubrick estate.

Then there's *Bigger than The Shining*, the 'secret film' unveiled by S&S columnist [Mark Cousins](#) and his regular collaborator [Timo Langer](#) at this year's Rotterdam Film Festival. Taking two existing films as his raw materials (the identity of one should by now be clear) he cuts between them at leisurely intervals, evoking the experience of flicking between neighbouring satellite movie channels. What emerges is less an authorial statement from

Cousins – his trademark lilting voiceover is conspicuously absent – than a heightened experience of the individual films themselves, and an awareness of their common themes. Transformation be damned.

There's a real value in this approach, but it's not one currently recognised by fair use doctrine, so it can hardly be a coincidence that Bigger than The Shining is the first of Cousins' films to be given 'secret' status (he intends to destroy the film next January on the first anniversary of its premiere, and asks that audience members not reveal its contents between now and then). Like so many other non-transformative provocations – from Richard Prince's reprint of [The Catcher in the Rye](#) to Kristleifur Björnsson's paparazzi blow-up [My Girlfriend Natalie](#) – it seems the film may simply have arrived too soon.

One of the most powerful things any work of art can do is push against external pressures, whether that's by opposing a dominant political structure, defying a censor or simply speaking truth to power. Equally vital, however, and less commonly appreciated, is art that pushes against those subtle pressures that exert themselves from within. (After all, if there's anything to be learned from last year's non-starter of a copyright debate, it's that creative communities are great at propping up bad ideas once they've been thoroughly internalised.) When it comes to fair use, that means remembering that current interpretations of the law are just that – current interpretations – and that some of the most important milestones in fair use filmmaking, from Thom Andersen's [Los Angeles Plays Itself](#) to Christian Marclay's The Clock, were not considered legitimate at the time of their creation. Instead, the limits of fair use were redrawn around them, with a new set of pencil marks on an ever-changing map.