

The Machinery of Creation. Oulipo Poetry, Copyright & Rules of Constraint

By Kathy Bowrey and Janet Bi Li Chan

ABSTRACT

This article explores the double burden of creative regulation – the aesthetic restrictions artists choose and their interaction with copyright rules, using the example of oulipo, a constraint-based creative practice. Part One explains the Oulipo movement. Oulipo technique is then demonstrated in new poems by artist and poet Janet Bi Li Chan, based on existing works, Franny Choi’s Turing Test and Tracy K Smith’s Sci-Fi, applying word substitution ($N + 7$), erasure or blackout technique, and remixing. Part Two applies a copyright law reading to the new poems. We show how legislative frameworks measure all creators – regardless of artistic self identity and process – as if they were humanist authors. But in application tests also produce far more surprises than might be expected if law is conceived of as rule-based constraint. Part Three applies Oulipo techniques to key articles of the Berne Convention that permit artistic licence: Art 9 Right of Reproduction; Art 10 Certain Free Uses of Works; and Art 10bis Further Possible Free Uses of Works. These new Berne poems highlight the prescriptive face copyright law presents to creators. We argue it is the emotional resonance of copyright, rather than its technicality, that primarily impacts creative practice. We conclude that law reproduces an idealised imaginary of a humanist author to measure creative transgression and this confinement means that copyright is unable to properly converse with artists or poets. Law suppresses the cyborg in all creation.

INTRODUCTION

In Creativity is ruled by constraints. Some constraints come into play through artistic choices about the technologies and mechanics that govern the production of creative works. Other restrictions are imposed by artist's understandings of or instincts about copyright law that impact artistic practice and in particular, how works are disseminated. This paper explores the interaction between creative and legal constraints discussing new creative works by one of the authors, artist and poet Janet Bi Li Chan. Chan engages in experimental creative practices that are defined by explicit adherence to rules of constraint. Her practices sit uneasily alongside copyright law's respect for the original work, requiring negotiation about the limits of the law in order to exhibit or perform works.

Oulipo poetry provides a focus for our discussion. Oulipo¹ dates from 1960 with a group of writers and mathematicians in France, who explored rule-based constraints. Chan's poetry examples include *word substitution* (N + 7)—taking an existing poem and replacing each noun in a text with the seventh one following it in a dictionary; *erasure or blackout poetry*, where the poet takes an existing text and erases, blacks out, or otherwise obscures selected text; and *remixing* of an existing text. Oulipo does not require the use of digital tools, but these form part of Chan's practice.

The paper is in three parts. Part One presents three examples of Oulipo and explains the relevant artistic and technological processes and motivations. Part Two applies a copyright law reading to these practices. Part Three applies Oulipo techniques to the key articles of the Berne Convention that permit artistic licence: Art 9 Right of Reproduction; Art 10 Certain Free Uses of Works; and Art 10bis Further Possible Free Uses of Works. Chan's creative engagement with international law highlights the prescriptive face copyright law presents to creators. We explore the double burden of creative regulation – the aesthetic restrictions artists choose and their interaction with copyright rules. We depart from recent scholarship that frames appropriation, transformative works and remix in terms of an imagined dichotomy between original/appropriative art or positive law/negative space to profile interaction between artistic and legal constraint as integral

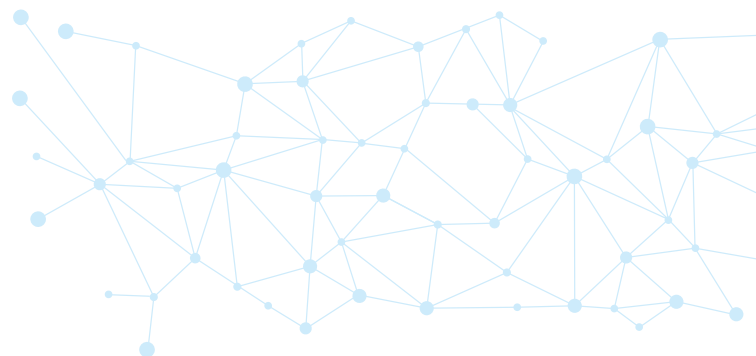
to all creation expression. Instead, copyright is analysed as an institution that polices plagiarism mechanically. Unable to fully comprehend the machinery of creation, copyright reproduces an idealised imaginary of a humanist author to measure creative transgression. While it is not the main focus of discussion, this creative experiment in legal thinking has relevance to current research into the status of AI-generated works under copyright law.

PART ONE.

OULIPO: CREATIVITY THROUGH CONSTRAINTS

In this paper we examine three examples of a constraint-based creative practice to explore the possible (unintended) consequences of copyright laws. The examples are part of one of the authors' (Chan) practice in making poetry using 'found text'² and certain rule-based constraints in line with Oulipo, a method for writing literature. The aim of this method is 'to invent (or reinvent) constraints of a formal nature (contraintes) and propose them to enthusiasts interested in composing literature.'³ These constraints provide 'structure', 'form', or 'technique' to 'transform' (or 'translate') existing text.⁴ It has been suggested that the use of constraints and structures 'are the result of the Oulipian philosophy that operating under such conditions is liberating and dispenses with the need to inherent artistic talent'⁵

Although there are scores of such constraints in existence⁶, for the purpose of this paper, we will focus on three techniques: the N+7 (or W±n), erasure, and remixing of existing text.



¹ The name Oulipo is derived from *Ouvroir de littérature potentielle* or the Workshop for Potential Literature.

² The use of 'found materials' to construct the 'collage poem' is said to be a literary form that follows the visual arts practice of surrealist objet *trouvé* such as Marcel Duchamp's *Fountain* (1917). The artist does not create something out of nothing, rather, they become the 'arranger or curator of pre-existing texts'. See Tom Chivers (ed), *Adventures in Form: A Compendium of*

Poetic Forms, Rules & Constraints (2nd edition, Penned in the Margins 2012) 11. See also JR Carpenter, *Writing on the Cusp of becoming something else* In Janis Jefferies and Sarah Kember (eds), *Whose Book is it Anyway?* (Open Book Publishers 2019).

³ Quote from Roubaud in Philip Terry, *The Penguin Book of Oulipo* (Penguin 2020) 19.

⁴ *ibid.*

⁵ Oliver Bray, 'Playing with Constraints: Performing the Oulipo and the clin-amen-performer' (2016) 21(4) *Performance*

Research 41. Bray quotes 'That which certain writers have introduced with talent (even with genius) in their work ... the Ouvroir de Littérature Potentielle (Oulipo) intends to do systematically and scientifically, if need be through recourse to machines that process information' (François Le Lionnais, 'Lipo: First manifesto' in Warren Motte (ed), *Oulipo: A primer of potential literature* (Dalkey Archive Press 2017) 27.

⁶ Index of Constraints, Terry (n 3) 527-534.

N+7 method

This method involves replacing all nouns in an existing text with nouns 7 places down in the dictionary. This method can be modified by replacing other parts of speech (e.g. adjectives) with the same method of counting N places up or down a dictionary. Of course, with the variation in the number of words in dictionaries, and the more popular use of online dictionaries, the results can vary depending on which dictionary is used.

Erasure

Erasure of words in an existing text is another used in Oulipo practice. For example, Raymond Queneau removes most of the words at the end of the lines in sonnets by Mallarmé to create a new poem 'Redundancy in Phane Armé'. This is similar to a number of erasure poems such as Tom Phillips' *A Humument*⁷, and M. NourbeSe Philip who turned the legal decision *Gregson v. Gilbert* on the drowning of 200 enslaved Africans into *Zong!*⁸

Remixing text

The term 'remix' does not appear in the vocabulary of Oulipo techniques, however, the technique is similar to that of 'resemblage', a collage of 'fragments assembled ... from the same source'.⁹ Richard L Edwards sees 'restrictive remixes' in contemporary art practice as a form of Oulipo technique.¹⁰

Relaxing the rules

Even though rules are intended to be followed strictly, there is in Oulipo the concept of 'clinamen', which 'represents a moment when a particular constraint is broken, usually for aesthetic reasons – but it is something which should only be used when it is also possible to complete the writing task without breaking the constraint, and it is something which should be used sparingly'.¹¹ Harryette Mullen has acknowledged that 'For me, the constraints, procedures, and language games are just ways to get past a block or impasse in the process of writing'.¹²

Constraints in poetry

As Tom Chivers points out, form 'can be employed as a framework for innovation':

The form of a poem is the deliberate and sustained organisation of visual and aural elements such as line length, metre, rhyme, the distribution of certain letters and sounds, and so on; but can also manifest as its guiding principle, ... A poem's form is distinct from, yet inescapably related to, its content... The imposition of form and the desire to escape or reinvent it is, of course, the eternal paradox of art.... form is a kind of willing restraint: an instrument of control wielded by the poem against its author'.¹³

The use of constraints in poetry writing is also seen as a tool for creativity: it is way of 'soothing' the 'fears of the blank page... by taking some choices away and by demanding that you make new choices'; constraints also produce 'fruitful frustration and resistance':

To grapple with a self-imposed limitation is to compete against oneself; to stymie the first impulse again and again. We learn to question the easy solution, to stretch our vocabulary, to reconsider and flex our syntax. Forced out of our regular habits (and we all have writing habits), we adapt... I'm free but I'm bound, and in the space between those two poles exists a generative, creative tension.¹⁴

Experiments

The following experiments in Oulipo poetry were conducted by one of the authors' (Chan) use of two original texts, a poem Turing Test by Franny Choi¹⁵ and a second poem Sci-Fi by Tracy K Smith.¹⁶

The two poems were chosen on the basis of their content (both focus on aspects of modern technology), their acceptance by the poetry world as worthy of publication/award, and the currency of their copyright. They are therefore not ordinary pieces of 'found text' (e.g. newspaper articles, text from old books) often used in artistic appropriation, rather, the use of even a limited amount of text is potentially in breach of copyright law.

⁷ *A Humument* (first published 1980, Thames & Hudson 2005).

⁸ M. NourbeSe Philip, *Zong!* (Wesleyan University Press 2008). See also Travis Macdonald who took pages from the 9/11 Commission Report and turn them into a new narrative in *The O Mission Repo* (2011) https://issuu.com/fact-simile/docs/o_mission_repo_full_text accessed 29 November 2022. Poets regard erasure poetry as an additive rather than a subtractive process, a form of transgression of as well as collaboration with the original author. See interviews with six erasure poets in <https://kenyonreview.org/2012/11/erasure-collaborative-interview/> accessed 29 November

2022.

⁹ Michael Leong, 'Oulipo, Foulipo, Noulipo: The Gendered Politics of Literary Constraints' in G.N. Forester and H.J. Nicholls (eds), *The Oulipo* (Verbivoracious Press, 2017) 121–2, quoted in Terry (n 3) 572.

¹⁰ See Richard L Edwards, 'Remixing with rules' in David Laderman and Laurel Westrup (eds) *Sampling Media* (Ozdoes Scholarship Online 2014) DOI: 10.1093/acprof:oso/9780199949311.003.0003.

¹¹ Terry (n 3) 24.

¹² *ibid* 565.

¹³ Chivers (n 2) 9–10.

¹⁴ Rebecca Hazelton, 'The Choice of Constraint: How not getting to do everything leads to

doing what you want' (2017) *Poetry Foundation* <https://www.poetryfoundation.org/articles/145052/the-choice-of-constraint> accessed 29 November 2022.

¹⁵ 'Turing Test' was published in *The Poetry Review*, Summer issue, 2016. Franny Choi is a published poet and a finalist for multiple national poetry slams.

¹⁶ 'Sci-Fi' was in Tracy K Smith (2011) *Life on Mars* published by Graywolf Press. Tracy K Smith is a published poet and multiple award winner, including the Pulitzer Prize for Poetry for *Life on Mars*. In 2017, she was named US poet laureate.



Example 1

TURING TEST

By Franny Choi

*// this is a test to determine if you have consciousness
// do you understand what i am saying*

in a bright room / on a bright screen / i watched every mouth / duck duck roll / i learned to speak / from puppets & smoke / orange worms twisted / into the army's alphabet / i caught the letters / as they fell from my mother's mouth / whirlpool / sword / wolf / i circled countable nouns / in my father's science papers / sodium bicarbonate / NBCn1 / amino acid / we stayed up / practiced saying / girl / girl / girl / girl / til our mouths grew soft / yes / i can speak / your language / i broke in / that horse / myself //

// please state your name for the record

bone-wife / spit-dribbler / understudy for the underdog / uphill rumor / fine-toothed cunt / sorry / my mouth's not pottytrained / surly spice / self-sabotage spice / surrogate rug burn / burgeoning hamburglar / rust puddle / harbinger of confusion / harbinger of the singularity / alien invasion / alien turned pottymouth / alien turned bricolage beast / alien turned pig heart thumping on the plate //

// where did you come from

man comes / & puts his hands on artifacts / in order to contemplate lineage / you start with what you know / hands, hair, bones, sweat / then move toward what you know / you are not / animal, monster, alien, bitch / but some of us are born in orbit / so learn / to commune with miles of darkness / patterns of dead gods / & quiet / o quiet like / you wouldn't believe //

// how old are you

my memory goes back 26 years / 23 if you don't count the first few / though by all accounts i was there / i ate & moved & even spoke / i suppose i existed before that / as scrap or stone / metal cooking in the earth / the fish my mother ate / my grandfather's cigarettes / i suppose i have always been here / drinking the same water / falling from the sky / then floating / back up & down again / i suppose i am something like a salmon / climbing up the river / to let myself fall away in soft, red spheres / & then rotting //

// why do you insist on lying

i'm an open book / you can rifle through my pages / undress me anywhere / you can read / anything you want / this is how it happened / i was made far away / & born here / after all the plants died / after the earth was covered in white / i was born among the stars / i was born in a basement / i was born miles beneath the ocean / i am part machine / part starfish / part citrus / part girl / part poltergeist / i rage & all you see / is broken glass / a chair sliding toward the window / now what's so hard to believe / about that //

// do you believe you have consciousness

sometimes / when the sidewalk opens my knee / i think / please / please let me remember this

ENDTRANSCRIPT //

Using N + 7

The software provided on the website <http://www.spoonbill.org/n+7/> was used to generate the new text. There is a choice of using the larger or the smaller dictionary. In this case the smaller dictionary was used. Note that there are problems with this software – sometimes words that are not nouns are replaced; some words are not replaced unless you use the larger dictionary, or not at all.

TURING THEATRE

*// this is a theatre to determine if you have conspiracy
// do you understand what i am saying*

in a bright row / on a bright season / i watched every mummy / ear duck rose / i learned to speak / from puppets& society / organization writings twisted / into the army's alphabet / i caught the librarians / as they fell from my mother's mummy / whirlpool / t-shirt / worker / i circled countable nouns / in my father's script pardons / sodium bicarbonate / NBCn1 / amino actor / we stayed up / practiced saying / go / go / go / go / til our mummies grew soft / yes / i can speak / your lawn / i broke in / that house / myself //

// please stay your navy for the ref

boot-winner / spit-dribbler / understudy for the underdog / uphill rumor / fisherman-toothed cunt / sorry / my mouth's not pottytrained / surly spice / sense-sabotage spice / surrogate runner burn / burgeoning hamburclar / rust puddle / harbinger of consent / harbinger of the singularity / alien involvement / alien turned pottymouth / alien turned bricolage beer / alien turned pine heir thumping on the poem //

// where did you come from

manufacturer comes /& puts his hardwares on artifacts / in origin to contemplate lineage / you start with what you know / hardwares, handicap, boots, symptom / then move toward what you know / you are not / anxiety, morality, alien, bitch / but some of us are born in orbit / so learn / to commune with miners of day / peers of dead governors /& quiet / o quiet like / you wouldn't believe //

// how old are you

my mess goes ball 26 zones / 23 if you don't couple the first few / though by all achievements i was there / i ate& moved& even spoke / i suppose i existed before that / as search or strand / migration corn in the economist / the flag my mould ate / my grandfather's cities / i suppose i have always been here / duck the same wedding / falling from the slope / then floating / ball up& drawing again / i suppose i am something like a satellite / climbing up the romance / to let myself fall away in soft, red sports /& then rotting //

// why do you insist on lying

i'm an open borough / you can river through my palms / undress me anywhere / you can read / anything you want / this is how it happened / i was made far away /& born here / after all the plots died / after the economist was covered in white / i was born among the status / i was born in a basement / i was born miners beneath the official / i am pass maid / pass starfish / pass citrus / pass go / pass poltergeist / i ram& all you see / is broken god / a chance sliding toward the wish / now what's so hard to believe / about that //

// do you believe you have conspiracy

sometimes / when the sidewalk opens my label / i think / please / please let me remember this //

ENDTRANSCRIPT //

Using erasure

Selected text of the poem was redacted using an Adobe Acrobat function with a white fill colour at 60% transparency; the level of transparency can be adjusted to obscure or reveal the original text.

TURING TEST

By Franny Choi

// this is a test to determine if you have **consciousness**
// do you understand what i am saying

in a bright room / **on a bright screen** / i watched every mouth / duck duck roll / i learned to speak / from puppets & smoke / orange worms twisted / into the army's alphabet / i caught the **letters** / as they fell from my mother's mouth / whirlpool / sword / wolf / i circled countable **nouns** / in my father's science papers / sodium bicarbonate / NBCn1 / amino acid / we stayed up / practiced **saying / girl / girl / girl / girl / til** our mouths grew soft / yes / i can speak / **your language** / i broke in / that horse / myself //

// please state your **name** for the record

bone-wife / spit-dribbler / understudy for **the** underdog / uphill rumor / fine-toothed cunt / sorry / my mouth's not pottytrained / **surly** spice / self-sabotage spice / **surrogate** rug burn / burgeoning hamburglar / rust puddle / harbinger of confusion / harbinger of the singularity / **alien** invasion / **alien** turned pottymouth / **alien** turned bricolage beast / **alien** turned pig heart thumping on the plate //

// **where did** you come from

man comes / & puts his hands on artifacts / in order to contemplate lineage / **you start** with what you know / **hands** hair, bones, sweat / then **move** toward what you know / you are not / animal, monster, alien, bitch / but some of us are born **in orbit** / so learn / to commune with miles of **darkness** / patterns of **dead** gods / & **quiet** / o **quiet** like / you wouldn't believe //

// **how old are you**

my memory goes back 26 years / 23 if you don't **count the first** few / though by all accounts i was there / i ate & moved & even spoke / i suppose i existed before that / as scrap or stone / metal cooking in the earth / the fish my mother ate / my grandfather's **cigarettes** / i suppose i have always been here / **drinking** the same water / falling from **the sky** / **then** floating / back up & down again / i suppose i am something like a salmon / climbing up the river / to let myself **fall away** in soft, red spheres / & then **rotting** //

// **why do you insist on lying**

i'm an open book / you can rifle through my pages / **undress me** anywhere / you can read / anything you want / this is how it happened / i was made far away / & born here / **after** all the plants died / after the earth was covered in white / i was born among the stars / **i was born in a** basement / i was born miles beneath the ocean / i am part **machine** / part starfish / part citrus / **part girl** / **part** poltergeist / i rage & all you see / is **broken glass** / a chair sliding toward the window / now what's so hard to believe / about that //

// **do you believe you have consciousness**

sometimes / when the sidewalk opens my knee / **i think** / please / please let me **remember this** //

ENDTRANSCRIPT //

Remixing text

The text of the poem (not including the title) was remixed using software on the web page <https://www.lazaruscorporation.co.uk/cutup/text-mixing-desk>. Various parameters can be used, the following was produced with cut frequency = 6 words and no echo.

/ where did you come from soft / yes / i can away / & born here / girl / part poltergeist / i earth / the fish my mother // this is a test to / from puppets & smoke / i suppose i have always been on lying i'm an open book to contemplate lineage / you start burgeoning hamburglar / rust puddle / // // how old are you all accounts i was there / orange worms twisted / into the do you understand what i am bitch / but some of us in a basement / i was learn / to commune with miles spice / surrogate rug burn / the stars / i was born army's alphabet / i caught the white / i was born among / falling from the sky / down again / i suppose i what's so hard to believe / i ate & moved & even ate / my grandfather's cigarettes / the first few / though by / uphill rumor / fine-toothed cunt stone / metal cooking in the saying in a bright room / man comes / & puts his // // why do you insist you can read / anything you sword / wolf / i circled on a bright screen / i speak / your language / i with what you know / hands, starfish / part citrus / part please let me remember this // is broken glass / a chair determine if you have consciousness // are not / animal, monster, alien, here / drinking the same water girl / til our mouths grew am something like a salmon / NBCn1 / amino acid / we watched every mouth / duck duck name for the record bone-wife / science papers / sodium bicarbonate / harbinger of confusion / harbinger of of darkness / patterns of dead stayed up / practiced saying / countable nouns / in my father's born miles beneath the ocean / i am part machine / part roll / i learned to speak happened / i was made far the singularity / alien invasion / gods / & quiet / o myself // // please state your are born in orbit / so before that / as scrap or letters / as they fell from bricolage beast / alien turned pig / sorry / my mouth's not / 23 if you don't count my memory goes back 26 years after the earth was covered in hands on artifacts / in order toward what you know / you believe you have consciousness sometimes / then floating / back up & / you can rifle through my want / this is how it about that // // do you spit-dribbler / understudy for the underdog broke in / that horse / climbing up the river / to spoke / i suppose i existed pages / undress me anywhere / pottytrained / surly spice / self-sabotage heart thumping on the plate // girl / girl / girl / hair, bones, sweat / then move my mother's mouth / whirlpool / sliding toward the window / now / i think / please / when the sidewalk opens my knee after all the plants died / alien turned pottymouth / alien turned let myself fall away in soft, red spheres / & then rotting quiet like / you wouldn't believe rage & all you see /.

Example 2



SCI-FI

By Tracy K Smith

**There will be no edges, but curves.
Clean lines pointing only forward.**

**History, with its hard spine & dog-eared
Corners, will be replaced with nuance,**

**Just like the dinosaurs gave way
To mounds and mounds of ice.**

**Women will still be women, but
The distinction will be empty. Sex,**

**Having outlived every threat, will gratify
Only the mind, which is where it will exist.**

**For kicks, we'll dance for ourselves
Before mirrors studded with golden bulbs.**

**The oldest among us will recognize that glow—
But the word sun will have been re-assigned**

**To the Standard Uranium-Neutralizing device
Found in households and nursing homes.**

**And yes, we'll live to be much older, thanks
To popular consensus. Weightless, unhinged,**

**Eons from even our own moon, we'll drift
In the haze of space, which will be, once**

And for all, scrutable and safe.

Using N + 7

The following text was produced using the same software <http://www.spoonbill.org/n+7/> using the smaller dictionary and for some words the larger dictionary. There are still some issues with words not being replaced.

SCI-FI

There will be no educations, but cutbacks.
Cleavage lingos pointing only forward.

Hoarding, with its hard spire& do-gooder-eared
Coronas, will be replaced with nuke,

Just like the dippers gave wean
To mouses and mouses of identification.

Woodcutters will still be woodcutters, but
The distrust will be empty. Shackle,

Having outlived every thrombosis, will gratify
Only the miniature, which is where it will exist.

For killings, we'll daredevil for ourselves
Before mischances studded with golden bullets.

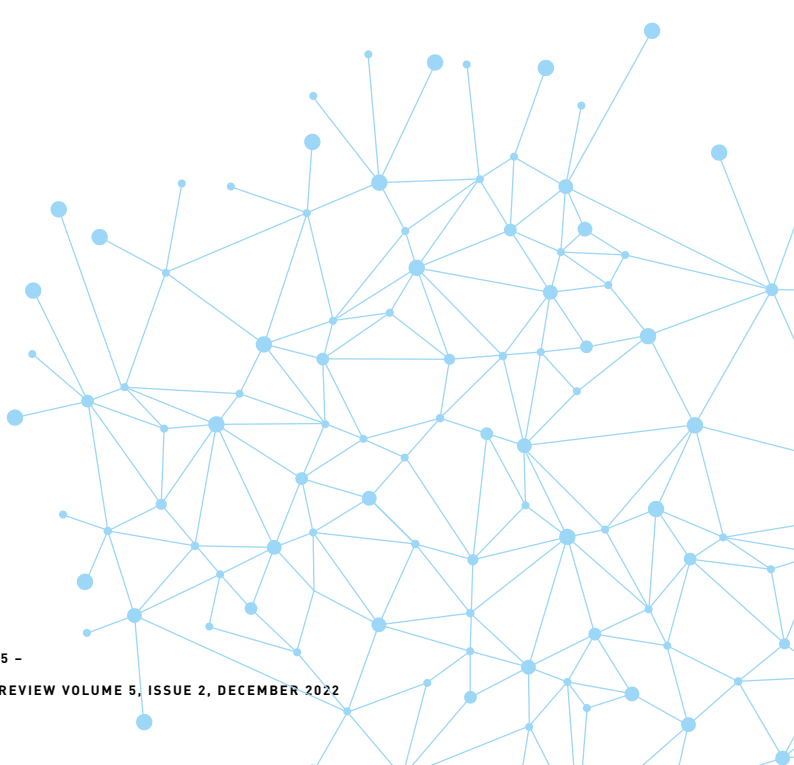
The oldest among us will recognize that glow—
But the workhouse sundry will have been re-assigned

To the Staple Uranium-Neutralizing diabetic
Found in houseplants and nutriment homilies.

And yes, we'll live to be much older, theft
To popular conserve. Weightless, unhinged,

Epigrams from even our own mop, we'll drive
In the haze of spaniel, which will be, once

And for all, scrutable and sahib.



Using erasure

Selected text of the poem was redacted using an Adobe Acrobat function with a white fill colour at 60% transparency; the level of transparency can be adjusted to obscure or reveal the original text.

SCI-FI

By Tracy K Smith

There will be no **edges**, but curves.
Clean **lines** pointing only forward.

History, with its **hard** spine & dog-eared
Corners, will be replaced with nuance,

Just **like** the dinosaurs gave way
To mounds and mounds of **ice**.

Women will **still** be women, but
The distinction will **be empty**. **Sex**,

Having **outlived** every threat, will gratify
Only **the mind**, which is where it **will** exist.

For kicks, we'll **dance** for ourselves
Before mirrors studded **with** **golden** bulbs.

The oldest among us will recognize that **glow**—
But the word *sun* will have been re-assigned

To **the Standard** Uranium-Neutralizing device
Found in **households** and nursing homes.

And yes, we'll **live** to be much older, thanks
To popular consensus. Weightless, **unhinged**,

Eons **from** even **our own** moon, we'll drift
In the haze of **space**, which will be, **once**

And for all, **scrutable and safe**.

Remixing text

The text of the poem (not including the title) was remixed using software on the web page <https://www.lazaruscorporation.co.uk/cutup/text-mixing-desk>. Various parameters can be used, the following was produced with cut frequency = 6 or 4 words and echo = 3, 0 or 2.

Cut frequency = 6, echo =3

Curves. Clean lines pointing only forward. Pointing only forward. There will be no edges, but we'll dance for ourselves Before mirrors Sex, Having outlived every threat, will History, with its hard spine & our own moon, we'll drift In dog-eared Corners, will be replaced with device Found in households and nursing be, once And for all, scrutable where it will exist. It will exist. For kicks, be much older, thanks To popular studded with golden bulbs. With golden bulbs. The oldest been re-assigned To the Standard Uranium-Neutralizing gratify Only the mind, which is consensus. Which is consensus. Weightless, unhinged, Eons from even way To mounds and mounds of But the word sun will have nuance, Just like the dinosaurs gave homes. Dinosaurs gave homes. And yes, we'll live to but The distinction will be empty. Will be empty. Among us will recognize that glow— ice. That glow— ice. Women will still be women, the haze of space, which will. Space, which will.

Cut frequency = 6, echo = 0

Our own moon, we'll drift In dog-eared Corners, will be replaced with History, with its hard spine & homes. And yes, we'll live to consensus. Weightless, unhinged, Eons from even There will be no edges, but been re-assigned To the Standard Uranium-Neutralizing ice. Women will still be women, device Found in households and nursing way To mounds and mounds of curves. Clean lines pointing only forward. Among us will recognize that glow— we'll dance for ourselves Before mirrors be, once And for all, scrutable gratify Only the mind, which is be much older, thanks To popular But the word sun will have but The distinction will be empty. The haze of space, which will Sex, Having outlived every threat, will where it will exist. For kicks, studded with golden bulbs. The oldest nuance, Just like the dinosaurs gave.

Cut frequency = 4, echo = 2

To popular consensus. Popular consensus. Weightless, for ourselves Before mirrors be, once And for There will be no unhinged, Eons from even our own moon, we'll will be replaced with of space, which will where it will exist. Will exist. And nursing homes. Nursing homes. And dinosaurs gave way To distinction will be empty. Be empty. Will recognize that glow— nuance, Just like the ice. The ice. Women will still edges, but curves. But curves. Clean For kicks, we'll dance will have been re-assigned studded with golden bulbs. Golden bulbs. Lines pointing only forward. Only forward. Spine & dog-eared Corners, Sex, Having outlived every mounds and mounds of But the word sun To the Standard Uranium-Neutralizing device Found in households History, with its hard yes, we'll live to the mind, which is be women, but The drift In the haze threat, will gratify Only be much older, thanks The oldest among us. Among us.

PART TWO.

OULIPO POEMS AS SEEN THROUGH COPYRIGHT LAW

In this part, we apply a conventional copyright law reading to the above examples of Oulipo poetry. These unpublished poems are cyborg texts in the sense that, though Chan selected the poems to manipulate using the techniques, the new works are a product of manipulation of the machinery of Oulipo without additional socio-legal considerations such as copyright law implications. Whether or not the new poems infringe any rights of Franny Choi and/or Tracy K Smith is analysed in line with the Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979). As Chan is a resident of Australia, the Copyright Act 1968 (Cth) is hypothetically applied. However, in order to maintain the interest of international readers, it is applied at a level of abstraction and includes some fictional modifications. These fictions are necessary because Australian law is more restrictive than most English language jurisdictions and not compliant with all the provisions of the Berne Convention.

Article 2 of the Berne Convention provides for protection of the rights of the author to a literary work, including poems.¹⁷ Whether the three Oulipo techniques utilised by Chan result in infringement of the original literary works of Choi or Smith requires consideration of whether there has been a taking of a substantial part of the literary works,¹⁸ in light of applicable copyright exceptions, namely fair dealing for the purpose of research or study; criticism and review; parody or satire.¹⁹ We also apply a fair use analysis of Oulipo, using the model as recommended by the Australian Law Reform Commission Report (2013)²⁰ as supported by the Australian Productivity Commission (2016).²¹ This involves a consideration of 'fairness factors'²², in light of a 'non-exhaustive list of illustrative purposes'.²³ This includes illustrative reference to the existing fair dealing provisions mentioned and, in line with Article 10 Berne, including quotation.²⁴

To highlight the role of technologies in bringing about a new creation, analysis of Chan's poems is arranged with reference to the three different Oulipo techniques used -N+7 method, erasure and remixing. Her N+7 method poems *Turing theatre* and *Sci-fi* are evaluated in light of the substantial similarity test. The erasure poems are discussed in light of fair dealing exceptions. The remix poems are subject to a fair use analysis (including the right of quotation). This also includes discussion of Article 6bis Berne, the moral rights of the author, which includes the right to object to distortion, mutilation and modification of literary works.²⁵

For the purposes of this thought experiment we are setting aside infringements that could undoubtedly arise in the technical act of producing Oulipo poems using computer software. The software utilises a reproduction of a literary work as an intermediate step in producing a new poem. As noted above, Oulipo techniques can be utilised without reliance on digital technology. In this regard, this omission is of marginal relevance to the analysis.

N+7 method: Substantial Similarity

In litigation the test of substantial similarity is made out by the plaintiff identifying the relevant degree of similarity between the original text and the alleged infringing work. The significance of what has been copied is assessed by reference to the copied work, not the infringing work. Though the assessment is one of degree, it turns more on questions of the quality of what has been copied from the plaintiff, rather than the quantum of similarities.²⁶ With poetry it is likely that identification would be aided by expert evidence provided by Professors of Literature using standard approaches to describe the anatomy of a poem, that is, with reference to title, verses, stanza, rhythm, metric or regularities and the author's originality. However, the test is ultimately one of objective similarity, as determined by the judge.²⁷

The N+7 word-substitution method 'is an exploration of the resources and rules of language, and crucially of the relationship between syntax and semantics...'²⁸ One of the ambitions here is to highlight that the mechanics of language includes its capacity to make meaning independently of human intention: 'the N+7 rule...allows us to move beyond personal intentions, providing us with new "outgrowths" and "outlooks" - both terms emphasising the broadening of artistic scope and vision.'²⁹ With N+7, 'the original syntactic structure of the source text is retained along with the traces of meaning behind this structure'.³⁰ The arrangement of the verse and stanzas, as well as whole phrases that do not involve nouns remain intact. The rhythm of the poem is not fundamentally changed. Certain elements in the title may change. Commonality in phrasing (and indirectly metric) depends on the numbers of nouns in the original text. In generating new meanings, the role of the reader in constructing a text is highlighted.

It is not the case that the Oulipo poem does not have an author, nor that any creativity is coterminous with 'the person by whom the arrangements necessary for the creation of the work are undertaken'.³¹ In our example, the computer program utilised to replace nouns in the poem in accordance with the N+7 rule introduced a surprise. There was a degree of 'accidental randomness' where not all nouns were substituted as might be anticipated. For example, 'into the army's alphabet' and numerous chemical terms appear unchanged in *Turing theatre*; the title *Sci-fi* is the same for both versions of the poem, presumably because the abbreviation for science fiction does not appear in the dictionary. A prosaic legal explanation would refer to limitations in the software and dictionary utilised rather than attribute this outcome to the creativity of the machinery. A coding 'anomaly' led to more identical lines or phrases appearing than could have been the case, here increasing the potential for infringement. But random appearances and accidents might be introduced through other approaches to word selection. Calvino describes language as humankind's 'most complex and unpredictable machines' where:

*The struggle of literature is in fact a struggle to escape from the confines of language; it stretches out from the utmost limits of what can be said; what stirs literature is the call and attraction of what is not in the dictionary.*³²

This conundrum is a theme explored in Franny Choi's poem and also discussed in her reflection on the inspiration for her poem, Alan Turing's test of artificial intelligence.

//do you understand what I am saying

Some immigrant kids grow up translating for their parents...I was the one called upon to ask strangers for directions, to proof read my mother's emails and my father's scientific papers... The Turing test proposes that a way of testing artificial intelligence is to ask computers to trick human beings into thinking they're talking to a real person. When I first encountered the concept I first thought of my parents... I realized that we hadn't just been practicing to navigate America, but to prove our personhood. That was when the poem started to open for me...

//why do you insist on lying

I'm not always sure if the 'I' of this poem is me. It usually is, but there are parts where it splits off from me and starts to become someone else. Maybe this is partly because the English of this poem is broken, though only literally. ...They helped the poem become a machine I built piece by piece, a hybrid voice constructed with objects and animated by the spookiness of personhood.

*There are lots of ways to be a cyborg without being a cyborg, is what I'm saying.*³³

Turing's imitation game was first proposed in a journal article,³⁴ with the questions developed over time. Choi adopts a familiar version of Turing questions unchanged. In copyright terms, she is taking both the idea of using the test questions to frame a poem, and the expression of the questions, both aspects helping produce 'hybrid' or 'cyborg' answers. The extent of Choi's authorship and borrowing from the Turing test would be taken into consideration in determining the extent of copying by Chan and the quality of the parts taken. In some regards, Chan has also used the idea of the Turing test in a similar fashion to Choi, but many of her phrases differ, affecting both prompt and response. Overall, the unique structure to Choi's poem is borrowed wholesale. This feature plus the degree of identical phrasing makes it likely that Chan's poem does prima facie reproduce a substantial part of Choi's Turing test. Whether Chan's poems infringe Choi's copyright could only be determined after a consideration of exceptions.

The substantial similarity requirement of infringement is much harder to make out with the Oulipo creation, *Sci-fi*. Here the title is unchanged, but the simple and very common structure of Smith's poem, coupled with the unusual noun substitutions has led to a new work that only carries a small footprint of its forebear. The courts look at the originality of the part that has been copied.³⁵ In this instance it would be difficult for a plaintiff to describe the qualities of the similarities in content without recourse to an explanation of the Oulipo technique. That is, the story of how:

*Women will still be women, but
The distinction will be empty. Sex,*

becomes

*Woodcutters will still be woodcutters, but
The distrust will be empty. Shackle,*

¹⁷ Berne Convention for the Protection of Literary and Artistic Works art. 2, Sept. 28, 1979, S. Treaty Doc. No. 99-27 (Berne Convention).

¹⁸ Copyright Act 1968 (Cth), ss14(1), 36(1).

¹⁹ Copyright Act 1968 (Cth), ss40, 41, 41A.

²⁰ Australian Law Reform Commission, Report No 122, *Copyright and the Digital Economy* (2013). Recommendations 4.1; 5 (ALRC Report).

²¹ Productivity Commission, Report No 78, *Intellectual Property Arrangements* (2016). Recommendation 6.1

²² These are: (a) the purpose and character of the use; (b) the nature of the copyright material; (c) the amount and substantiality of the part used; and (d) the effect of the use upon the potential market for, or value of, the copyright material. ALRC Report Recommendation 5.2.

²³ *ibid* Recommendation 5.21.

²⁴ For additional illustrative purposes see *ibid* Recommendation 5.3.

²⁵ Copyright Act 1968 (Cth), ss195A1, 195AJ.

²⁶ *Designers Guild Ltd v Russell Williams* (Textiles) Ltd [2000] 1 WLR 2416 (HL); *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47; [2011] 191 FCR 444.

²⁷ *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47; [2011] 191 FCR 444.

²⁸ Alison James, 'Automatism, Arbitrariness, and the Oulipian Author' (2016) 31(2) *French Forum* 111, 114.

²⁹ *ibid* 117.

³⁰ *ibid* 114.

³¹ Copyright, Design and Patent Act 1988 (UK), s9(3) provides 'in the case of a literary, dramatic, musical or artistic work which is

computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken'.

³² Italo Calvino, 'Cybernetics and Ghosts' in his *The Uses of Literature* (Harcourt, Brace, Jovanovich 1976) 8, 19.

³³ Franny Choi, 'How I wrote Turing Test' [2019] *The Adroit Journal* 8 May 2019. <https://theadroitjournal.org/2019/05/08/franny-choi-how-i-wrote-turing-test/> accessed 29 November 2022.

³⁴ AM Turing, 'Computing Machinery and Intelligence' (1950) 49 *Mind* 433.

³⁵ *Data Access Corporation v Powerflex Services Pty Ltd* [1999] HCA 49; (1999) 202 CLR 1 at [83]-[84]; *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14; [2009] 239 CLR 458 at [155].

This form of explanation would introduce into deliberation factors that are not present on the face of the poem and technically should be outside of the scope of the relevant assessment. As such it is far less certain that Chan's Sci-Fi would be judged as substantially similar to Smith's poem of the same name.

The same technology of construction applied in an identical fashion to different source code, that is to Choi and Smith poems, potentially leads to different copyright outcomes in terms of the substantial similarity test. This suggests that N+7 is a rule of constraint where the ensuing creative output is not inevitably at odds with copyright principles that protect original authors. Common pre-conceptions about manipulation of text using rules or machines as likely producing infringing works should be set aside. Under copyright law a more culturally nuanced comparison of the creative outputs is required.

Erasure: Fair Dealing

As displayed above, Chan's erasure poems reproduce the original works in full, only greying out original text which are still visible. However, viewed in conjunction with the bold emphasis on particular words, this practice creates a new work. The experience of reading erasure poetry is affected by the juxtaposition of original text and the new highlighted layer of meaning. Read separately and together, both of Chan's erasure poems draw out a focus on the gendered body which opens up new associations to the original texts. Under Australian law this creativity is only permitted without licence if the erasure poems fall within very limited exceptions: for the purpose of research or study, criticism and review or parody.

Poems are not just seen. They are also performed. An aural performance of the Chan erasure poems which only focused on the bolded words alone is unlikely to be considered an infringing act. Though the selection of words is inextricably tied to the mother source there is too little imprint of the originals remaining in Chan's works when applying a substantial similarity text in the manner described above. For this reason, the fair dealing analysis below only considers infringement through the acts of unauthorised reproduction and publication of Choi's and Smith's literary works, that is, where the technique of erasure remains visible in the resulting creative works.³⁶

Fair dealing: Research or study

Under s40 Copyright Act 1968 (Cth) research and study has a dictionary meaning:

research may be defined as 1. diligent and systematic enquiry or investigation into a subject in order to discover facts or principles...

*The Macquarie Dictionary definitions of the noun 'study' include the following: '1. application of the mind to the acquisition of knowledge, as by reading, investigation or reflection. 2. the cultivation of a particular branch of learning, science, or art: The study of law. 3. a particular course of effort to acquire knowledge: to pursue special medical studies. ... 5. a thorough examination and analysis of a particular subject ...'*³⁷

Reproduction of the original works in the context of a scholarly article and to further the study of law would potentially come under this definition.³⁸ However, the amount of taking needs to be fair. Section 40(2) deems 10% of the words of a poem as a reasonable portion. Copying more than a reasonable portion may still be permitted in view of s 40(2) (a) the purpose and character of the dealing; (b) the nature of the work or adaptation; (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price; (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and (e) in a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

Arguably more is copied from both poems than is required to demonstrate Oulipo technique, however it is also necessary to reproduce the whole texts to accurately demonstrate the subtlety of the legal tests. Reproducing the two original poems potentially falls within the research or study exception in the context of a workshop presentation. It is less clear journal publication would be permitted given this is usually a commercial enterprise, where licensing is embedded in industry practice. The exception would not apply to permit publication of an erasure poem as a stand alone creative work without the permission of the poets whose works informed the new creations.

³⁶ Copyright Act 1968 (Cth) s31(10) (a) (i); (ii).

³⁷ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99.

³⁸ In some jurisdictions, including Australia, an educational statutory licence may also apply to this context.

³⁹ *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99.

⁴⁰ *Time Warner Entertainments Co LP v Channel Four Television Corp Plc* [1994] EMLR 1, 15.

⁴¹ *De Garis v Neville Jeffress Pidler Pty Ltd*

(1990) 37 FCR 99 citing *Mawman v Tegg* (1826) 2 Russ 385; *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 54–7; 32 ALR 485; *Commonwealth v Walsh* (1980) 147 CLR 61 at 63; 32 ALR 500; James Lahore, *Intellectual Property in Australia: Copyright* (Lexis Nexis online) 7562.

⁴² *Pokémon Co International Inc v Redbubble Ltd* [2017] FCA 1541 at [69].

⁴³ Kathy Bowrey cited in ALRC Report [5.9]. See also Tanya Aplin and Lionel Bently, *Global*

Mandatory Fair Use (Cambridge University Press 2020) 153.

⁴⁴ ALRC Report [5.40].

⁴⁵ *Peter Letterese and Associates Inc v World Institute of Scientology Enterprises International* 533 F 3d 1287 (11th Cir, 2008) 1313 cited in ALRC Report [5.63].

⁴⁶ Aplin and Bently (n 42) 154–163.



Fair dealing: criticism and review

Criticism includes ‘criticism of any kind, and not only literary criticism’ with review requiring ‘the critical application of mental faculties’.³⁹ This requires a consideration of the precise connection between the original and the redacted poems. Oulipo, as a recognised form of poetry as described above, presents an obstacle here because the creative agenda is one of exploration following precise rules of composition. Chan’s selection of Choi’s and Smith’s poems involves sophisticated judgement about suitable themes and potential to produce an interesting new work using erasure. It also engages an appreciation of aesthetics through selecting what to erase and what to highlight. This decision making implicitly engages and communicates a form of commentary. Further, there is recognition in UK case law that ‘criticism need not be primarily directed at work infringed, but may be directed at another work. And *Hubbard v Vosper* makes clear that the criticism relied on need not be directed at the work, but may be directed at the thought and philosophy behind the work’.⁴⁰ But here there is no critique or review of either poem at all. Both erasure poems can be appreciated as new works without the reader considering how the source poem and new work inter-relate, by literally just reading the highlights. Given a wealth of judicial commentary that observes ‘a work cannot be published under the presence of quotation’⁴¹ this is a major obstacle to overcome.

Parody or satire

Often Oulipo is used for satirical effect but this is not the case with the examples above. While neither the terms parody or satire are legislatively defined, this exception requires a far more direct engagement and commentary on the original texts than is entailed through presented by Chan.⁴²

The limited nature of fair dealing provisions in Australia generally forecloses creative practices such as (visible) erasure, without permission of the copyright owner of the underlying work. A rather banal test of similitude and need for homage to the original literary work reframes the significance of the erasure poem. The Chan poems have an independent aesthetics, distinctive creative identity and meaning and create a new authorial presence. This is not appreciated by the Australian fair dealing law. The scope for creativity is confined by a discourse obsessed with similitude. It does not admit appreciation of greater subtleties in meaning or entertain this kind of linguistic play.

Remixing text: fair use

Chan’s examples of remix poems used software with two variables for which frequencies were entered, the cut up generator and echo chamber. Both selections had significant bearing on the likelihood the resulting remix poems would be judged as ‘substantially similar’ to the source text. A larger cut-up generator number and echo-chamber frequency increases the likelihood of infringement. For this reason, fair use will be discussed using the highest factors, *Sci-fi*, Cut frequency = 6, echo = 3.

The first consideration of the ALRC model of fair use is the fairness factors, which make it ‘easier for the public to identify the normative factors they need to consider to determine the legitimacy of their use, regardless of any idiosyncrasies associated with their individual practice’.⁴³ The fairness factors are derived from common law and similar to those in US fair use. They are already considered in Australian copyright law with respect to s40(2) fair dealing for the purpose of research or study, as set out above. The four fairness factors that frame a fair use analysis are analysed below. These are non-exhaustive considerations that need to be considered in view of the facts.

(a) the purpose and character of the dealing

To determine if a use is a fair use the ALRC recommended ‘emphasis on the question of whether a use has a different expressive purpose from that of the original’.⁴⁴ Oulipo is a recognised genre of poetry where remixing text with fidelity to rules of constraint embodies a distinctive expressive purpose. To some extent Choi’s poetry is itself sympathetic to Oulipo technique, however Chan’s work utilises an entirely different formulation and practice.

(b) the nature of the copyright material

Here whether it is factual or a creative endeavour that is used without permission is relevant. The object of consideration is ‘works that are “closer to the core of intended copyright protection”, and thus merit greater protection’, that is, ‘original as opposed to derivative works; creative as opposed to factual works; and unpublished as opposed to published works’.⁴⁵ The Choi and Smith poems are original creative published works, however, Aplin and Bentley suggest the relevant test of fair practice involves a consideration of the relevant harm to the claimant. Harm could be considered in line with economic, utilitarian and personality theories and human rights justifications for copyright.⁴⁶

Poetry does not entail substantial investment where free riding is of concern. Choi’s publisher is The Poetry Society (UK), a charitable organisation. Smith’s publisher, Graywolf Press, is a non-profit literary publisher. While poetry is one of the oldest forms of works protected by copyright, it is a genre where patronage, self-publication, very modest payments for publication and payments to enter into competitions with the reward of

publication, all feature. Royalties are notoriously marginal. A recent UK author survey notes while 33% of survey respondent poets had an agent, poetry did not warrant listing as an income-earning genre.⁴⁷ An Australian 2021 survey similarly reports that while all writers earn modest incomes with an average annual income of A\$18,200, poets are by far the most marginal earners reporting only A\$5,700.⁴⁸

While there are plural justifications for copyright, poetry essentially requires a consideration of personality and human rights justifications for copyright. Protection of highly expressive works is a strong consideration, but this priority also needs to be balanced with regard to the freedom of expression of the user and the significance of transformation. This is considered further below.

(c) the amount and substantiality of the part used

On first impression it could be argued that Chan has taken the whole of Smith's poem, merely reassembling the word order. However, there is no monopoly conferred on single word choices or even short phrases. The remixing program with the variables used make it difficult to locate substantial identity between the original poems and the remixes. Still, several highly original expressions remain distinctive in the remix, namely: 'Clean lines pointing only forward'; 'History, with its hard spine &'; 'dog-eared Corners, will be replaced with: 'nuance, Just like the dinosaurs gave'; 'but The distinction will be empty'; 'us will recognize that glow'; 'the haze of space, which will'. However, the degree of distortion in repositioning these phrases produces a completely different expression. The remix presents a struggle to find coherence and as such it evokes very different ideas and possible meanings to Smith's poetry.

(d) the effect of the use upon the potential market for, or value of, the copyright material

In considering market factors the ALRC say:

the property rights granted to creators and rights holders are important and may be necessary to provide an incentive to create, publish and distribute copyright material. But this should not be extended further than necessary. Rights holders should not be entitled to all conceivable value that might be taken from their material. The incentive to create will not be undermined by the unlicensed use of copyright material for entirely different purposes from the purpose for which copyright material was created, and in markets that do not compete with rights holders. Rather, such uses will stimulate further creativity, and increase competition.⁴⁹

Given the financial status of the publishers of poetry it is possible that any additional revenue stream income would be attractive, however, the fact that it may be possible to licence a remix does not mean a licence is necessary or required. This is especially where there is transformative use.

Transformative use & quotation

Article 10(1) Berne is set out in full in Part 3. It incorporates a quotation right subject to a proportionality requirement. The quotation need not be 'short'. Aplin and Bently argue that the US notion of 'transformative use' sits comfortably with the notion of 'quotation' in Article 10(1) Berne, so long as this factor does not 'stampede' other considerations such as the economic and moral harm to the author.⁵⁰

The relevant legal question here is not whether Oulipo remixing software is a non-infringing transformative quotation machine,⁵¹ but rather whether the repeat phrases found in the Chan remix identified above are a form of quotation. If so, is the extent of her quotation proportional in light of the purpose of the reuse?

Whether the presentation of the phrases in the remix involves a lawful form of quotation is doubtful if textual quotation is given its ordinary meaning where literary practice might normally involve use of quotation marks and direct attribution of the source of the quote. But there is a significant difference between textual quotation in general, quotation of poetry at large, and practices within poetry. Like other literary professionals, poets spend a lot of time reading the works of their peers, studying the lines as well as enjoying the artform. Hayan Charara says of his own practice of 'borrowing, stealing, influence':

I don't pick up a book of poems, or put one down, simply because it does or doesn't serve my purposes as a poet. But I do use the poems of other people. Every poet does. I'm convinced of it. Every poet I've talked to about this admits doing something like it. And if a poet was to deny or plead ignorance to the practice, or a version of it, I have no doubt I would be in the presence of a bald-face lie.⁵²

There is no clear convention within this genre of writing about when it is necessary to formally acknowledge influences or thefts and what is plagiarism. There are also examples of footnotes in poems.

Consider for example, Jeanann Verlee's poem, 'Wherein The Author Provides Footnotes And Bibliographic Citation For The First Stanza Drafted After A Significant And Dangerous Depression Incurred Upon Being Referenced As A "Hack" Both By Individuals Unknown To The Author And By Individuals Whom The Author Had Previously Considered Friends'. The nine line poem contains five character marks, thirty footnotes and a bibliography.⁵³ Here is the first line:

by 35¹, when madness² had overcome her³; when her body⁴

1. "by 35" | References author's own age: Mercy Hospital, Denver Colorado, March 1974.

2. "madness" | Term used to reference mental illness, specifically within the manic phase of Manic Depression.

3. "had overcome her" | Happenstance of exact quotation, discovered after drafting stanza: Yeats, On Baile's Strand, Character: Fool.

4. "when her body" | Happenstance of exact quotation, discovered after drafting stanza: Chivers, Ceratioid Anglerfish, Line 24.

The inclusion of footnotes in this poem is highly creative, with footnotes 3 and 4 corroborating Charara's reflection that accidental or unconscious borrowing is not uncommon. But the appearance of footnotes in Verlee's poem conveys so much more than an attribution of source material, a debt to another. Aesthetics, literary history and author biography are all made visible in the expression. Given the creative idiosyncrasies of poetry as a medium of expression it is highly problematic to confine the legal meaning of quotation to the conventions of other kinds of writing, where every taking requires formal attribution of the source of a literary borrowing.

Returning to the question of harm, arguably attribution of Smith's work in some manner is necessary to both minimise harm under a quotation proportionality test and due to moral rights.⁵⁴ Aplin and Bently argue that the Berne concept of quotation is not limited to replication. It potentially includes adapted versions such as transformations. But, as adapted versions include the user's own efforts in transforming the text and this introduces reproduction of unprotected elements, Aplin and Bently suggest they are less intrusive or potentially less harmful than quotation involving exact replication.⁵⁵ It is hard to identify what the harm might be caused to Smith's *Sci-fi* by Chan's remix.

The moral right of integrity requires different considerations. The ALRC considers fair use is consistent with moral rights, as applied in the particular circumstances.⁵⁶ To consider any remixing of text as a form of derogative treatment prejudicial to the honour and reputation of the author⁵⁷ seems to be a significant overreach of moral rights provisions. Were the author to object to the alterations to their work Australian law considers impact upon the honour of the author based upon subjective evidence, which can be assessed in light of the genre of work.⁵⁸ If there is reasonable attribution of Smith's *Sci-fi*, in light of discussion of borrowing with poetry above, and without clear objection being articulated about the impact on Smith's honour, it is unlikely that Chan's poem infringes her moral rights.

Applying the fairness test, and in light of the illustrative purposes which includes quotation, the remix of *Sci-fi*, Cut frequency = 6, echo = 3 that is, the version most substantially similar to Smith's poem, is likely to constitute fair use.

In summary, to the extent that copyright law is conceived as a form of rule-based constraint, the analysis of the three Oulipo techniques reveals far more unpredictability, contingency, arbitrariness and surprise than is ideal. In our examples, whether N+7 poems are likely to infringe depends upon which work is selected as the foundation of the new poem, not the actions of the Oulipo poet in operating that technique; whether erasure offends depends upon the form of presentation of the new output: publication with the erased text visible would infringe, hide the act of erasure and speak the words, it may pass. Whether a remix is permissible is dependent upon the technical variables selected, but also legal guidance about whether quotation by poets in poems entails a different standard to what is likely to be required practice in quotation of poetry in other contexts.

PART THREE:

'THERE ARE LOTS OF WAYS TO BE A CYBORG WITHOUT BEING A CYBORG, IS WHAT I'M SAYING'. FRANNY CHOI

As the analysis above suggests, copyright law is not necessarily as straightforward in application or as restrictive as might be assumed. However, that interpretation of copyright infringement may be uncertain, or that the law may be experienced by those subject to it as confusing, incomprehensible and lacking moral clarity,⁵⁹ does not mean that law does not affect the producers of new creative works. Legal texts, aided by the institutional power imagined as sitting behind them if one does the wrong thing, convey emotion. Emotional responses to law can make a cyborg of us all.

An application of Oulipo techniques to the Berne Convention is used below to provoke thinking about the emotional resonance of copyright law. The Convention contains several exceptions that accommodate artistic licence. Articles 9, 10 and 10bis are set out in full below. Chan's new poems, created using Oulipo techniques N+7 and erasure, provide the basis for some concluding reflections on the way copyright law operates as a restraint on creative practice.

⁴⁷ M. Kretschmer, A. Gavaldon, J. Miettinen, S. Singh, 'UK Authors' Earnings and Contracts: A survey of 50,000 writers' (CREATe Centre 2019) 27.

⁴⁸ Comparative data revealed the following average author incomes: education authors (A\$27,300); children's authors (A\$26,800); genre fiction (A\$23,300); literary authors (A\$14,500); non fiction authors (A\$12,100); creative non fiction (A\$9,800); and poets (A\$5,700). 2022 *National Survey of Australian Book Authors. Industry Brief No. 1* (Macquarie University 2022) 6.

⁴⁹ ALRC Report [5.42].

⁵⁰ Aplin and Bently (n 42) 197.

⁵¹ As argued in *The Authors Guild Inc v HathiTrust* WL 4808939 (SDNY, 2012).

⁵² Hayan Charara, 'Borrowing, Stealing, Influence' *Poetry Foundation Blog*, 26 March 2018. <https://www.poetryfoundation.org/harriet-books/2018/03/borrowing-stealing-influence> accessed 29 November 2022.

⁵³ Jeanann Verlee, 'Wherein the Author Provides Footnotes...' *Rattle: Poetry* 3 September 2012. <https://www.rattle.com/wherein-the-author-provides-footnotes-by-jeanann-verlee/>

accessed 29 November 2022.

⁵⁴ Copyright Act 1968 (Cth), s193.

⁵⁵ Aplin and Bently (n 42) 122.

⁵⁶ ALRC Report [4.131].

⁵⁷ Copyright Act 1968 (Cth), ss 195AI-195AL.

⁵⁸ *Boomerang Investments Pty Ltd v Padgett (Liability)* [2020] FCA 535 at [401]; *Perez v Fernandez* [2012] FMCA 2 [85]-[89].

⁵⁹ This dimension of Australian law has been commented on by the judiciary. See ALRC Report (n 18) 64.

Berne Convention for the Protection of Literary and Artistic Works.

Article 9

[Right of Reproduction: 1. Generally; 2. Possible exceptions; 3. Sound and visual recordings]

- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
- (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
- (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 10

[Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author]

- (1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.
- (2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

N+7 – using <http://www.spoonbill.org/n+7/>

Ascetic 9 [Right of Request: 1. Generally; 2. Possible exclusions; 3. Southerner and visual recruitments]

- (1) Autobiographs of literary and artistic worship protected by this Converter shall have the executioner right of authorizing the request of these worship, in any mantel or forte.
- (2) It shall be a maverick for lender in the couples of the Untruth to persecutor the request of such worship in certain special casinos, provided that such request doglegs not congregation with a normal export of the work and doglegs not unreasonably premium the legitimate interlocutors of the autobiography.
- (3) Any southerner or visual recruitment shall be considered as a request for the pushes of this Converter.

Ascetic 10

[Certain Free Uses of Worship: 1. Races; 2. Imitations for tear; 3. Inducement of sovereignty and autobiography]

- (1) It shall be permissible to make races from a work which has already been lawfully made available to the puck, provided that their malfunction is compatible with fake prankster, and their extraction doglegs not exceed that justified by the push, including races from niche ascetics and perjuries in the forte of pretender sumps.
- (2) It shall be a maverick for lender in the couples of the Untruth, and for special aims existing or to be concluded between them, to persecutor the utilization, to the extraction justified by the push, of literary or artistic worship by wean of imitation in puds, broils or southerner or visual recruitments for tear, provided such utilization is compatible with fake prankster.
- (3) Where use is made of worship in accordance with the preceding paranoiacs of this Ascetic, merger shall be made of the sovereignty, and of the nappy of the autobiography if it appears thereon.

Ascetic 10bis

[Further Possible Free Uses of Worship: 1. Of certain ascetics and broil worship; 2. Of worship seen or heard in conscript with current evocations]

- (1) It shall be a maverick for lender in the couples of the Untruth to persecutor the request by the pretender, the broker or the companion to the puck by wit of ascetics published in niches or perjuries on current economic, political or religious tornados, and of broil worship of the same charity, in casinos in which the request, broker or such companion thereof is not expressly reserved. Nevertheless, the sovereignty must always be clearly indicated; the legal consignments of a breakage of this observance shall be determined by the lender of the couple where protestor is claimed.
- (2) It shall also be a maverick for lender in the couples of the Untruth to determine the conductors under which, for the push of reprint current evocations by mechanism of physiognomy, cinematography, broker or companion to the puck by wit, literary or artistic worship seen or heard in the courtroom of the evocation may, to the extraction justified by the informatory push, be reproduced and made available to the puck.

- (3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

Article 10bis

[Further Possible Free Uses of Works: 1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events]

- (1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this

obligation shall be determined by the legislation of the country where protection is claimed.

- (2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

Erasure

Article 9

[Right of Reproduction: 1. Generally; 2. Possible exceptions; 3. Sound and visual recordings]

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, **in any manner or form.**

(2) **It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.**

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 10

[Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author]

(1) **It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.**

(2) It shall be a matter for legislation in the countries of the Union, and for **special agreements** existing or to be concluded between them, **to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.**

(3) Where use is made of works in accordance with the preceding paragraphs **of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.**

Article 10bis

[Further Possible Free Uses of Works: 1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events]

(1) It shall be a matter for legislation in the countries of the Union to permit **the reproduction** by the press, the broadcasting or the communication to the public by wire **of** articles published in newspapers or periodicals on current economic, **political** or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such **communication** thereof **is not** expressly reserved. Nevertheless, the source must **always** be clearly indicated; **the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.**

(2) **It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.**

N+7 Berne

The themes that emerge under N+7 Berne are not the result of word selection choices made by Chan. They are a product of the interaction between the Berne text and the dictionary utilised. Nonetheless, random word substitutions convey a humanist valorisation of original authorship. Examples include: author/autobiography; source/sovereignty; works by way of illustration/worship by way of imitation; press/pretender; broadcasting/broker. A restrictive, foreboding aura emerges with other word substitutions such as Article/Ascetic; exclusive/executioner; Union/Untruth; permit/persecutor. Frustration of artistic practice and the necessity of confining free expression is suggested by replacements such as work/worship; quotations/races; matter/maverick; does/dog-leg; conflict/congregation; making/malfunction; name/nappy. Reverence for commercial interests is inferred by word substitutions including legislation/lender; unreasonably prejudice/unreasonably premium; fair practice/fake prankster; Convention/Converter. As a new work of poetry N+7 Berne conveys emotions that resonate with, but also challenge, positivist understandings of lawful authority and conservative readings of artistic licence.

Erasure Berne

Subjectivity factors in the word selections and emphasis arising from Chan's erasure technique. The selections refocus attention on the agency of the artist and the contingency of decision making about the appropriate boundaries of artistic communication. However, in departure from the tone of N+7 Berne, instead of being spoken to or commanded by law, the brevity of the erasure poem and direct language, in particular, the repeated use of "shall", talks back to the unwelcome directives in the N+7 treatments. To adopt Murray et al's term, Erasure Berne puts 'intellectual property in its place'.⁶⁰

The Berne Oulipo poems adopt a different attitude to law to North American copyright scholarship that characterises artistic deviation from copyright mandates as producing law's negative space.⁶¹ Negative space is imagined as a legal terrain where creators who don't fit in with or identify with legal technicality substitute formal legal constraints for 'community-based' norms.⁶² The Oulipo Berne poems do not address community production of art, and as noted above, poets may well differ in regard to assessments of acceptable practice about quotation and copying. Chan's new poems speak to the right of artists to experiment, take risks and not fear legal consequences. Rather than sidelining the formal authority of law in the manner imagined by negative space theorists, in playing with the legal text she repositions artists in conversation with legal power, diluting the presumed capacity of copyright to confine artistic production.

Law's self-plagiarism

Poetry, as with all genres, requires decisions which can be viewed as constraints. Constraints have traditionally been integral to poetry. Decisions about form affect the author's voice, as Choi recognises about Turing test. Poetry is an unusual art where the form and expression are overtly one and the same thing. Oulipo is very rigorous in articulating the rules of constraint and experimenting with these. Even so, aesthetic choices are made about which constraints, which works to use and the computer can produce surprises.⁶³ Such constraints can be tools of creativity, but choices can have legal ramifications. These pressures can be ignored to some degree, but where works are to be seen, heard and experienced in public, law can talk back.

Copyright law, conceived of as rules of constraint, can also function as a tool of creativity. But there has been precious little investment in facilitating this capacity. Rather, as Part Two has demonstrated, legislative frame-

⁶⁰ Laura J Murray, S Tina Piper and Kirsty Robertson, *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday* (Oxford University Press 2014) 41.

⁶¹ Elizabeth L. Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian' [2013] 40(3) *Florida State University Law Review* 441, 442-3.

⁶² Case studies include: 'fashion, cuisine, magic tricks, stand up comedy, typefaces, open source software, sports, wikis, academic science, jambands, hip hop mixtapes, and even roller derby pseudonyms'. See Christopher Sprigman, 'Conclusion. Some Positive Thoughts about IP's Negative Space' (eds) Kate Darling, Aaron Perzanowski, *Creativity Without Law:*

Challenging the Assumptions of Intellectual Property (New York University Press 2017) 254; Kirsty Robinson, 'No One Would Murder for a Pattern. Crafting IP in Online Knitting Communities' in Laura J Murray, S Tina Piper and Kirsty Robertson, *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday* (Oxford University Press 2014) 41.

⁶³ On the role of surprise in AI see '2.6 Lady Lovelace's Objection' in Graham Oppy and David Dowe, 'The Turing Test' *The Stanford Encyclopedia of Philosophy* (ed) Edward N Zalta (revised 2021) <https://plato.stanford.edu/archives/win2021/entries/turing-test/> accessed 29 November 2022.

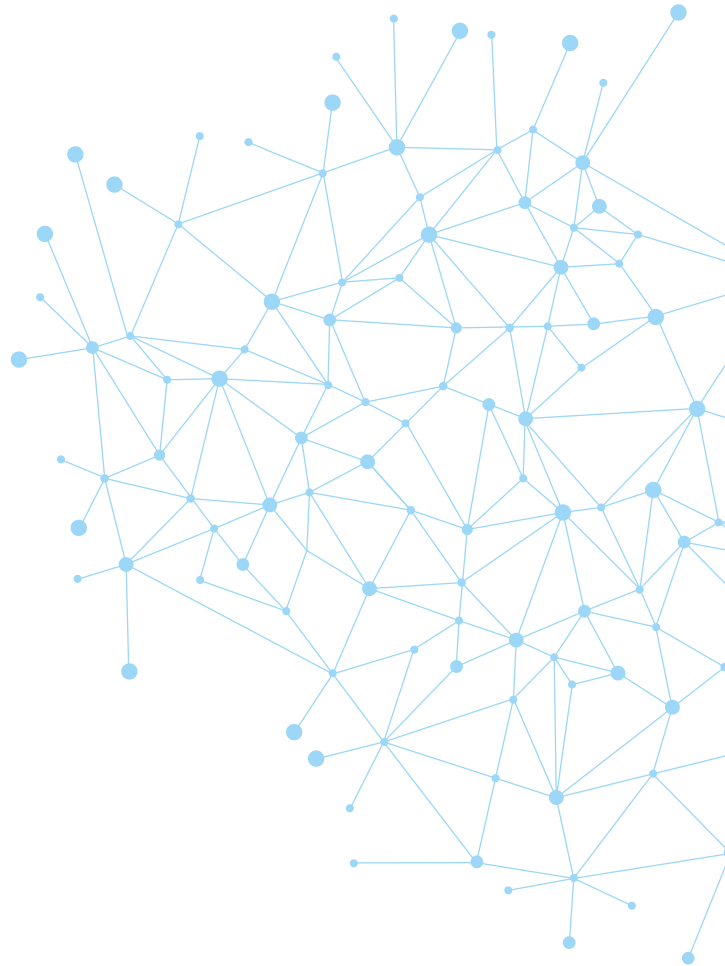
⁶⁴ Patricia Aufderheide, Kylie Pappalardo, Nicolas Suzor, Jessica Stevens, 'Calculating

the consequences of narrow Australian copyright exceptions: Measurable, hidden and incalculable costs to creators' [2018] 69 *Poetics* 21.

works are preoccupied with infraction. Infringement tests measure all creators-- regardless of artistic self identity and process-- as if they were humanist authors. The artistic legal persona as applied in infringement tests is not a real author, one who makes choices about how to express their creative ambition, which tools to use, the materials needed, the medium of expression; one who experiments, fails all the time and experiences happy surprises as they go about their work. In copyright law the plaintiff's work always appears fully formed, bounded, complete and ready to be protected. The law anticipates transgression of a fantasy of creative process where works arrive fully formed. Through the act of protecting these fictional works the humanist author is made, remade and wields power over later creators. If the author's expression is thought to be harmed by another's interaction with it, the substantial similarity test first measures the extent of the potential wrong. Where the use is judged substantial, secondary legal tests come into play. Protection of one author is 'balanced' with reference to the free speech of another, judged by exceptions to infringement or 'user's rights', in particular, fair use and quotation rights. These tests require an acrobatic feat in balancing interests, where appropriation is in the spotlight.

Lack of fit with the humanist fiction can create anxieties for creators who fear law's disciplinary potential. Works that admit their debts to others create new legal problems, and work for copyright professionals to resolve, often by recourse to copyright licences and permissions. Due to the difficulties with understanding or anticipating legal requirements, out of fear of litigation, or simply of doing the wrong thing, some creators feel too constrained to produce or circulate works. Too much deference to an imagined legal consequence and the inability to negotiate administrative solutions displaces artistic logics to produce a realm of 'imagination foregone',⁶⁴ a repository of anticipatory works that never came to light.

Still, copyright law has quite a lot in common with Oulipo. Obvious similarities include that legal reasoning is often imagined as a semi-closed machine, where language choices produce new meaning. But there is a foundational plagiarism in copyright – the reproduction of a humanist authorial beneficiary of law used to anchor the legal machinery of infringement. This confinement means that copyright is unable to properly converse with artists or poets about a key difference between copyright and Oulipo. Law suppresses the cyborg in all creation.



Kathy Bowrey

Kathy Bowrey is a legal and cultural historian in the School of Law, Society and Criminology, Faculty of Law & Justice, UNSW. Recent works include *Copyright, Creativity, Big Media and Cultural Value* (Routledge, 2021), awarded the 2022 Australia and New Zealand Legal History Book Prize, and Honourable Mention Penny Pether Book Prize, Law, Literature & Humanities Association of Australasia 2021; and

with Jose Bellido, *Adventures in Childhood. Intellectual Property, Imagination and the Business of Play*, (Cambridge University Press, 2022). She is a Co-Director of the International Society for the History and Theory of Intellectual Property.



Janet Chan

Janet Chan is a Sydney-based artist, poet and award-winning researcher. She holds a PhD in criminology and an MFA in drawing and painting and is an Emeritus Professor in the Faculty of Law & Justice, UNSW. Her art has been shown in various exhibitions, most recently at the AIRspace Projects Gallery in Sydney in 2020, 2021 and 2022. Her poetry has been published in a number of anthologies and at the 2021

Firstdraft *Soft Power* exhibition. She has also published research on creativity, including in *Poetics, the Handbook of Research on Creativity* (Thomas and Chan, eds, Edward Elgar, 2013) and *Creativity and Innovation in Business and Beyond: Social science perspectives and policy implications* (Mann and Chan, eds, Routledge, 2011).