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Remedying Unfair Fair Use Judgments in the Music Industry: A Call for Greater Consistency in the Application of the Four Factors and Transformation Determinations in Copyright Legislation

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"to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (U.S. Const. Art. 1, Sec 8. C. 8)

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Chapter 1: Origin of the Patent and Copyright Clause

1 Introduction

History regards the Enlightenment as a time that saw the dissemination and growth of new knowledge. This era ushered in music, artwork, technology, and an abundance of creations and innovations that inspired future generations of creators and artists. The Enlightenment originated in Europe during the 17th and 18th centuries, but its effects are felt across the whole globe and the works created have continued to evolve since then. Importantly, the Enlightenment resulted from a diverse body of creators and artists in various places, not from a group of sovereign individuals. (Conrad, 2012, pg. 4). Individual recognition of creators was considered more important than acknowledging the contribution the creators made to the development of new technology and innovative thinking.

Many people can relate to the inherent value of creating a piece of artwork, writing a well-developed piece of literature, visualizing a concept that would solve a problem, or even working on a project that produces a positive change for humanity. People take pride in their hard work and achievements, but it is unfortunate if their work is considered a group effort based on their profession or trade. This often resulted before the Enlightenment and the need for change arose to acknowledge, protect, and encourage the work of individuals.

This change began during the Enlightenment when trades, skills, artwork, and authorship were reconsidered to be the gifts and talents of individuals rather than passed down via guilds.[1] Individuals started to claim their work as their own as evidenced by artists signing their names

[1] Guilds are an association of craftsmen and merchants whose purpose is to promote the economic interests of their members as well as to provide protection and mutual assistance. Throughout Europe between the eleventh and sixteenth centuries, guilds served both as social and business organizations supported by the government because of the aid they produced (Britannica, 2021).

on their artwork and people began paying more money for certain “masters” to create works of art or literature (Sinnreich, 2019, pg. 29). Thus, a need arose to create further protection of individuals' work and creations.

2 Development of The Patent and Copyright Clause of the United States Constitution

The need for patents, copyrights, and trademarks was first realized in Europe during the 1500s.[2] Specifically, Italy was the first society to grant patents to inventors to stimulate and encourage the development of new technologies and products. In particular, Italy passed a statute that outlined which elements were required to secure a patent, including 1) the requirement for originality, 2) a mandated test for utility, and 3) a fine imposed when there was an infringement. These elements would eventually be adopted by many other countries and included in their respective patent laws (Bria, 2008).

England also recognized the need for the protection of inventions and ideas through patents, copyrights, and trademarks. The government adopted the Statute of Monopolies in 1623, which worked to address several basic patent issues relevant in England (Miller, 1990, pg. 7). At the time of this statute, guilds controlled the market and areas of commerce such as leatherworking, glassmaking, and manufactured goods. The statute helped to regulate commerce while encouraging the introduction of new technologies and inventions to the market. In other words, the origin of patent, copyright, and trademark stemmed from an increased need for technology to stimulate commerce and could also be seen in the newly established colonies.

[2] While this was before the Enlightenment, it was this period in the 17th and 18th century that spurred the need for further protections granted by patents and copyright.

The origin of the need for copyright can be seen in England through the need to protect and control the monopolies in the publishing industry. More specifically, there was a need for copyright to protect and control the content of new works. Authors were often not allowed to share in the commercial reward of their works; thus, in 1710 Parliament enacted the Statute of Anne. This statute gave authors the sole right to publish their works for 14 years after the date of the first publication. As with an infringement on patents, there was a tax imposed if anyone were to infringe upon the copyright held by the initial author (Miller, 1990, pg. 7). The legislature also identified trademarks as another aspect needing protection and regulation. The idea of trademark originates from the medieval period when craftsmen would affix their goods with the mark of their guild to identify the craftsmen and their goods.[3]

By the time the American Revolution occurred, all the colonies had been granting patents. Individuals could apply to the colonial government for "exclusive rights" to sell a specific good or service. South Carolina[4] had the most patents registered among all the colonies, which helped them increase the production of goods (Bria, 2008). Patents were often granted by those who had a role in the legislative or judicial part of each colony. Thus, when the Constitutional Convention convened in 1787, the need for the protection of patents was a priority for the Founding Fathers.

Indeed, before the Constitutional Convention, colonists valued the idea of copyright laws and regulations. The first printing press came to Massachusetts in 1639, and consequently, there were two bills passed which gave authors copyright protection. However, these bills were the

[3] This thought developed into the philosophy behind the current trademark statute, the Lanham Act of 1946. The Act provides a federally registered mark owner with protection against the use of similar marks which might be mistaken for theirs. Thus, eliminating the confusion about the origin of a good or product being sold or produced (Miller, 1990, pg. 179).

[4] Massachusetts and Rhode Island also granted a significant number of patents during this time to various inventors, authors, and innovators (Miller, 1990, pg. 7).

only ones known to have existed in the colonies before the Revolution even though at the time there was a great appreciation for further protections. (Bria, 2008). Without protection for their work, authors had difficulty creating a market and receiving compensation for their work, creating a need for change.

The Founding Fathers saw the need for including a clause related to patent, copyright, and trademark as part of the Constitution. The language of this clause was borrowed from states' constitutions and was not debated in the convention but was passed unanimously, which means the Framers of the Constitution recognized how detrimental it would be to inventors, thinkers, innovators, and authors if excluded.

As a result, Congress was given certain powers within the Constitution in Article 1, Section 8. In particular, Clause 8, empowers Congress to foster and cultivate the creativity and innovation of United States citizens through the Patent and Copyright Clause. The intention of Congress is “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (U.S. Const. Art. 1, Sec 8. C. 8). This clause benefits not only inventors and authors but other creative endeavors as well.

Two laws regulate and protect patents and copyright. The first law, regarding patents, was effective April 10, 1790, and granted the patent owners the sole and exclusive right to sell their invention for a 14-year term. Once this term expired the inventions would become public domain. The second bill, regarding copyright, was effective May 31, 1790, and granted authors the authority to secure copies of maps, charts, and books for 14 years. Over the past 200 years,

these bills have been amended to extend the term for patents to 20 years as well as expand the types of material that can be copyrighted as well as extend the term for 70 years. (Bria, 2008).

2.1 Commentary on Clause

James Madison, one of the Founding Fathers, comments on the importance of the Patent and Copyright Clause in *Federalist 43*. He wrote this to share his ideas on the miscellaneous powers of Congress provided by the Constitution in Article 1, Section 8. Madison devoted only a single paragraph to his thoughts on this clause where he justified how it would provide a national, uniform standard in terms of patents and copyrights. He also finds merit in the protection itself: it provides security for the public good because it allows for the creation and innovation that would benefit society.

James Madison also wrote to the Virginia House of Delegates an Act Securing Copyright for Authors, to emphasize that any author of a book or pamphlet that was composed but not published should have the exclusive right of printing or reprinting their original work for the public to view. Madison argued this exclusive right should be for a term of twenty-one years from the first year of publication. If any other author were to reprint the original work of the initial author without written consent, the second author would have to forfeit any profit made from the sale to the original author. Madison argued this is the just way of handling any forgery and necessary to protect the original work (Madison, n.d.).

William Blackstone, an English jurist, judge, and Tory politician during the eighteenth century, discussed his thoughts on Section 8, Clause 8. Blackstone was a firm believer no subsequent author can convey the same idea as the original sentiment shared by one author. In other words, if a man were to write anything on paper or paint on canvas, the thoughts conveyed

should remain under the jurisdiction of the original owner to do what he wants with them. However, if an author's original work is used without his knowledge or consent, then it detracts from the original thoughts and ideas expressed. Thus, the want for the protection of original ideas or works is needed (Blackstone).

3 Intellectual Property - What is Property

To better understand the Patent and Copyright Clause, it is important to define property. In his essay *Property*, James Madison defines it as “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual” (Madison, 1792). Therefore, property is what a man can attach value to and claim as his own. Every man has the right to own property, and the government is obligated to protect this right. However, Madison argues, the government should use the protection with caution, otherwise, it might overstep by taking away the freedoms of citizens as outlined in the Constitutions. If this were to happen then individuals would not be able to fully enjoy their freedoms of conscience, or the ability to follow one’s own beliefs of religion and morality, which Madison argues is the most important property of all.

To further understand the nature of property, one can look to philosophers like John Locke and Georg W.F. Hegel. In his State of Nature, Locke equates property to self-preservation. Essentially, our property is what we value because it provides us with the means to survive. The labor we put into the property gives it value because a person can acquire property rights only after mixing their labor with resources held in common if, after the acquisition of it, "there is enough and as good left in common for others” (Locke, 1965, pg. 290). In other words, Locke’s concept of property is important because it argues that when an inventor or author labors over

their invention or work, they own it so long as it does not hinder others from similarly exercising their own right to self-preservation.

Hegel further provides context about the concept of private property rights. In his work, *Philosophy of Right*, Hegel states that the ability to create or "direct his will upon any object" allows for the object to become the person who is directing their will upon the object. (Hegel, 2000, pg. 57). Hegel embraces the idea that individuals' freedom to create and invent will make the object one's individual property. Thus, property rights are essential to basic human satisfaction. By allowing people to invent, innovate, and create, they are being true to themselves and to what defines them as humans. Without being able to own something in a tangible sense there is no means by which one can survive or be satisfied. While the idea of physical or tangible property may have changed over time, it has roughly remained true to its original principles and what was proposed by different philosophers.

3.1 Intellectual Property - What is Intellectual Property?

Intellectual property law consists of a set of basic legal rights established in legislation and judicial decisions and is used by a range of creators internationally and within multiple different professions (Sinnreich, 2019, pg. 3). It protects any product of the human intellect including thoughts or concepts that must be tangible in the sense they can be written down or recorded. Moreover, intellectual property law, which protects intellectual works, can be defined as a collection of laws and doctrines that govern the use of ideas and concepts. Patents, copyright, and trademark laws work to protect the intellectual property rights of individuals.

One can connect Locke's thoughts on tangible property to intellectual property. Locke justified what property was in the state of nature. In other words, mixing labor with what nature

gave us is what gave us our right to a particular item of property. This can be translated to the idea that intellectual property can be made tangible which would require labor to make it so. Therefore, mixing labor with one's thoughts or ideas provides the justification that intellectual property, much like Locke's physical property, must be protected since we no longer exist in the state of nature and therefore cannot fully protect our property without some sort of government assurance.

3.2 Problems with Intellectual Property Rights

One of the main concerns with intellectual property rights is the connection between protecting property rights and the need for "fair use" of the property. There is a significant relationship between fair use and intellectual property since fair use works to prevent infringements of intellectual property. When someone utilizes fair use, they are protected from legal prosecution. However, it can be challenging and hard to define what constitutes fair use. As a result, if a person does not fully appreciate the fair use standards within intellectual property rights laws for copyrighted works, they risk adverse legal action.

Chapter 2: Analysis of *Baker v. Seldon*

1 Background on Case

Baker v. Selden (1879) was one of the most important Supreme Court cases pertaining to Copyright. Charles Selden gained copyright in 1859 for a book he wrote called Selden's Condensed Ledger, which outlined an innovative method of bookkeeping. The books were only approximately 650 words long and featured roughly 20 pages of mostly bookkeeping forms. Selden went on to publish six books in total, but none of them were commercially successful. Baker later published a book in 1867 describing a comparable technique and Baker, unlike Selden, was quite successful, selling his book in more than 40 counties in less than five years. Elizabeth Selden, Selden's widow, sued Baker for infringement of Selden's copyright in 1872 (Samuelson, 2005, pgs. 1-6). This case was not initially tried with witnesses in court. Instead, some transcripts were given to the trial judge for him to read and rule on. These transcripts held the testimony of four witnesses all saying Baker's book was no different from anything Selden had written, thus suggesting Baker may have violated copyright. To understand the significance of the testimony, it is important to understand the actions taken on Selden's part.

In Selden's book, he used an introductory essay aimed at explaining his system of bookkeeping[5] and was followed by forms to put the system into use. Selden arranged the

[5]The primary innovation in this system was the use of "condensed" entries to consolidate all transactions into a single ledger. Transactions in various accounts had to be recorded twice under the existing double entry method: first in a journal dedicated to a specific account, and then chronologically in a general ledger common to all accounts. Selden's novel ledger layout allowed him to capture all relevant data in a single "condensed" diary. This simple enhancement had the potential to make accounting operations far more efficient. All information was more easily available with the condensed ledger, and balances and reports could be generated considerably faster. As a result, work, time, and money were saved, as well as the detection of errors and fraud was made easier (Bracha, 2008).

columns and headings so the entire process of a day, week, or month was on a single paper or two pages facing each other. Baker, however, started to sell similar forms with columns and headings arranged differently but achieved the same result as Selden's forms. This leads to the argument that Baker was intentionally selling and receiving compensation for work he had taken from Selden.

2 Ruling of the Court

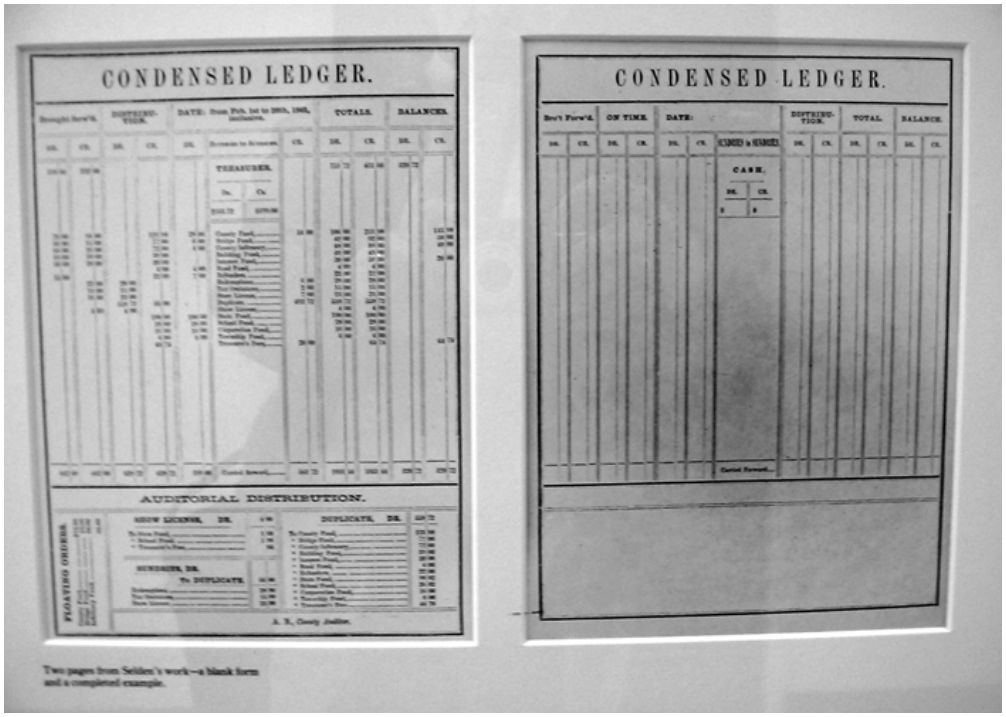
Baker appealed a decision from the Southern District of Ohio which held he had infringed upon the copyrighted work of Selden. The Supreme Court held Baker did not violate the copyright Selden had obtained for his book, work, and forms because it was not a lawful subject of copyright. Justice Bradley, who delivered the opinion of the Court, held a book explaining a system or art may be protected by copyright only if the book contains the author's unique explanation of the system or form and not if it is incidental to other persons' use of the system:

> There is no doubt that a work on the subject of book-keeping, though only explanatory of well-known systems, may be the subject of a copyright; but, then, it is claimed only as a book. Such a book may be explanatory either of old systems, or of an entirely new system; and, considered as a book, as the work of an author, conveying information on the subject of book-keeping, and containing detailed explanations of the art, it may be a very valuable acquisition to the practical knowledge of the community. But there is a clear distinction between the book, as such, and the art which it is intended to illustrate. The mere statement of the proposition is so evident, that it hardly requires any argument to support it. The same distinction may be predicated on every other art as well as that of book-keeping (*Baker v. Seldon*, 1880).

While the author's original writing was a valid subject of copyright, it held some similarities to practical knowledge explained by writing and would thus be considered community property.[6]

[6]Assets that enter into marriage during the marriage through any sources other than inheritance or gift are referred to as community property (Community Property, 2022). The primary reason why community property is relevant in this case is because Seldon's wife was the one who brought suit against Baker after the death of her late husband so she could recover monetary value from her husband's work.

Thus, this would not be allowed to be the subject of copyright if it is not completely original to the author. Using a range of sciences and practical arts, the Court explored the idea of using similar forms to achieve the same result without using the same format or process. In other words, the author's copyright protection extends only to the description of the art or system, not to any forms or materials incidentally used in the explanation. It would be like granting patent-like protection without requiring a showing of novelty to find copyright protection against the use of the system itself or the forms required for it. Originality is what generates copyright, not novelty,[7] and protecting the explanation and not the use of a system is what it preserves. Thus, the decision was reversed and remanded.



Type of ledger used and created by Seldon for bookkeeping records (Selden Ledger)

[7] The terms "novelty" and "originality" are frequently interchanged. They are, nevertheless, dissimilar. Novelty denotes newness in an objective sense, whereas originality denotes a creator's own work in synthesizing a concept rather than learning it from someone else (Pranjalina, 2022). Therefore, when used in the context of copyright, it is clear that for one's work to be registered in copyright it is necessary for it to be original to the creator's own work.

3 Analysis of Case

The ruling of *Baker v. Selden* introduced a new viewpoint on how to analyze copyright claims. It directed courts to consider whether the defendant copied the author's description, explanation, illustration, or depiction of any useful art or ideas. If there were no copyright on the book or idea, it can be copied by anyone even if it is competing with the original work. Furthermore, the principles, techniques, and materials necessary to implement the art (e.g., blank forms demonstrating the use of the system) can likewise be used and copied by second comers without fear of infringement (Samuelson, 2005, pg. 20).

According to the Supreme Court, three key examples of when it might be necessary to create work similar to copyrighted material include medicine, drawing,[8] and mathematical sciences. An author's writing a book on medicine does not give her the right to make and sell the medicine(s) described in her book--that would be patent infringement. Secondly, perspective illustrations in a book cannot be copyrighted. Additionally, if an author copyrighted a mathematical concept, it would not give him exclusive rights to the concept's methods or explaining diagrams. However, this does not mean every work an author produces cannot be protected in some sense. It more so depends on if another author can contribute original work that does not interfere with those three examples or similar examples.

[8] "The fact the art is described in the book by illustrations of lines and figures which are reproduced in practice in the application of the art, makes no difference. Those illustrations are the mere language employed by the author to convey his ideas more clearly. Had he used words of description instead of diagrams (which merely stand in the place of words), there could not be the slightest doubt that others, applying the art to practical use, might lawfully draw the lines and diagrams which were in the author's mind, and which he thus described by words in his book" (*Baker v. Seldon*, 2022).

4 Analysis of Precedent Set

Baker v. Selden is one of the few copyright decisions to remain influential in the copyright literature and case law. Many subsequent courts and commentators have referred to Baker for guidance regarding limiting principles of copyright law. Its principal holding—copyright does not protect systems described in copyrighted works—is now codified in Section 102(b) of the Copyright Act. Furthermore, there are three more codified emanations of Baker: the useful article limitation[9] on the copyrightability of pictorial, sculptural, and graphic works; the rule that copyright protection for drawings of useful articles does not extend to the useful articles depicted in the drawings; the rule is that blank forms are uncopyrightable (Samuelson, 2005, pgs. 24-25).

The public would lose access to the advancement of the concept or thinking if copyright were to grant the author of a book the exclusive ownership of the art described inside the work. However, it is also important to note it would still work to "...promote the progress of sciences and useful arts…" (U.S. Const. Art. 1, Sec 8. C. 8) in a manner allowing for other authors and individuals to flourish as well. In other words, creators are able to enter into the same market without retribution from original creators if the secondary work is similar to the original work.

[9] Original, creative expression fixed in a tangible medium, such as sculptures, paintings, and musical recordings, is protected under US copyright law. However, copyright protection frequently does not extend to the design of utilitarian goods such as furniture or clothing. Copyright protects useful articles only to the extent that they contain artistic qualities that are distinct from their utilitarian aspects. However, it is easier to state than to apply the notion, and courts have established a few criteria throughout time to assess which, if any, components of a helpful piece are protected by copyright. Manufacturers have faced uncertainty as a result of the lack of a single, uniform framework, which has resulted in extensive and costly litigation (*Baker v. Seldon*, 2022).

Chapter 3: Analysis of *Campbell v. Acuff-Rose Music*

1 Background on Case

Campbell v. Acuff-Rose Music (1994) was a major Supreme Court copyright case because it expressed how courts could more consistently rule on whether the subsequent use was a fair use.[10] Acuff-Rose Music, Inc. sued the rap group, 2 Live Crew members, and their record label, alleging that their song "Pretty Woman" violated the copyright of Acuff-Rose's in the rock ballad "Oh, Pretty Woman" by Roy Orbison. This case examined Section 107 of the Copyright Act of 1976, which considers whether the quantity and value of the materials utilized are reasonable in relation and proportion to the original work. The amount of permissible copying varies depending on the user's intent and nature of the use. 2 Live Crew was originally asked not to release their parody but did so without the permission of Acuff-Rose Music Inc.

2 Ruling of the Court

The Supreme Court held that 2 Live Crew's commercial parody may be a fair use within Section 107 of the Copyright Act of 1976. Justice Souter, who delivered the opinion of the court, stated that the Supreme Court decided that the commercial aspect of a parody is simply one factor to be considered in a fair use investigation, and the nature of the parody was not sufficiently considered when determining the extent of copying from the original work. As there was no such evidentiary presumption available to address either the character and purpose of the usage or the market injury, the Court determined that the Court of Appeals erred in applying the

[10] Fair use is any copying of copyrighted material done for a limited and transformative purpose, such as to remark on, critique, or parody a copyrighted work, in its broadest definition. Without the authorization of the copyright owner, such uses are permissible. To put it another way, fair use is a defense against a copyright infringement lawsuit. Fair use is a judge-created doctrine dating back to the nineteenth century and codified in the 1976 Copyright Act (Stim, 2013).

assumption that the commercial nature of the parody rendered it presumptively unfair. Considering the parodic purpose of the use, Justice Souter said that the appellate court "erred in holding that 2 Live Crew had necessarily copied excessively from the Orbison original, considering the parodic purpose of the use" (*Campbell v. Acuff-Rose Music, 1994)*.

To further explain the decision of the Supreme Court, Justice Souter gave specific reasoning for the decision. The common-law history of fair use adjudication is preserved by Section 107, which states that "the fair use of a copyrighted work ... for purposes such as criticism [or] comment ... is not an infringement …" (*Campbell v. Acuff-Rose Music, 1994)* and calls for case-by-case consideration rather than strict guidelines. In view of the goal of copyright, which is to advance science and the arts, the following four legislative considerations were examined and compared. These four factors are (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and sustainability of the portion taken from copyrighted work, and (4) the effect the use has on the potential market (Stim, 2013). It was decided that the purpose and character of the work were criticism in the form of parody. Furthermore, there was not enough of the original work in the secondary work to be considered a sustainable amount. With respect to the effect on the potential market, the Court did not find a severe threat to the original work and therefore, the application of these factors ruled in favor of Campbell.

3 Analysis of Case

This case is important because it emphasizes and further defines the four factors that identify what is considered fair use. It also identified a new concept of "transformativeness"[11]

[11] Transformativeness is "the dominant test of fair use and in the observation that a finding of transformation in a copyright fair use claim virtually assures a finding that the use is fair" (Beard, 2016, 10).

which considers subsequent users of original works who don't replace the work's original usage but instead add something new with a different purpose or character. This is in addition to the four factors that had been identified in Section 107 of the Copyright Act of 1976. However, it was not fully understood how to apply the factors in a way that would provide a more consistent ruling in cases. This case ultimately helped to narrow in focus what fair use to be considered.

One main problem of this case is that the use of transformation could be widely misunderstood. Fair use cases have increasingly made use of the Supreme Court's acceptance of and emphasis on "transformative use." The requirement that a "fair use" work must provide commentary on the underlying work has also been broadened by several courts. However, a backlash against the crucial role "transformative" use—which isn't defined in Section 107—is playing in fair use analysis—began to emerge.

4 Analysis of Precedent Set

The 20th-century case of *Campbell v. Acuff-Rose Music, Inc.* is considered a landmark Supreme Court case. This case established that fair use can still apply to a secondary work even if profits are generated from it; this is just one aspect of a fair use analysis. In other words, a parody's commercial purpose does not automatically make it a presumptively unfair use of copyrighted material. Instead, it is the same classification as a criticism or academic review. Furthermore, it reevaluated what parody means within fair use. The nature of parody, or other forms of “copying” that are considered fair use must be viewed as such and there cannot be a miscommunication between these classifications and the four factors. This case demonstrated how a court can use the four factors to best identify if a secondary use falls within the right of fair use from the original work or if it hinders the original work.

Chapter 4: Analysis of *Google v. Oracle*

1 Background on Case

The Supreme Court's more recent decision in *Google LLC v. Oracle America Inc.* (2021) is a significant copyright case because of further consideration of fair use. After integrating copyrighted content into the research process for data gathering and analysis, Google's usage of the Java APIs was legal and allowed researchers to collect and analyze data even more effectively, accelerating the innovation process. Google LLC was the Appellant and used similar code from Java Programming in its Android products. Oracle America, Inc. was the Appellee in this case which is a computing platform based on the popular Java programming language, Java SE.

In 2005, Google acquired Android and attempted to create a new mobile software platform. Google copied roughly 11,500 lines of Java SE code into its new Android platform to enable Java programmers to work with it. The copied lines are part of an application programming interface (API). In program code, APIs allow programmers to call upon prewritten computing tasks. It was Google's vision to create an Android platform that was free and open so that software developers could use the tools there for free. With the help of its Android platform, Google expected an ever-growing number of developers to create Android-based applications, thereby increasing the appeal of Android-based smartphones. In turn, more people would buy and use these devices. At that time, using Java software was common among different software developers and it was considered a common language. Using the Java language on that platform, developers could write programs that would run on any desktop or laptop computer, regardless of the hardware. Google and Oracle had discussed the possibility of Google leasing the entire Java

platform for its smartphone technology. However, this was never accomplished and instead, Google proceeded to have roughly 100 engineers continue to use the code to better develop their Android software.

Oracle sued Google for copyright infringement but the federal district court held that APIs are not subject to copyright since they would prohibit and hinder useful innovation and collaboration which is contrary to the intention and aim of copyright. According to the U.S. Court of Appeals for the Federal Circuit, the Java APIs are copyrightable, however, the court left open the possibility of a fair use defense. The U.S. Supreme Court originally denied Google's petition for certiorari but ultimately ruled on the case.

2 Ruling of the Court

The Supreme Court held, in a 6-2 vote, that the use of the Java SE's software by Google is fair and does not constitute a copyright infringement. Justice Stephen Breyer wrote the majority opinion for the court. According to copyright law, Google's limited copying of the Java SE Application Programming Interface constituted fair use of the Java SE:

> The doctrine of "fair use" is flexible and takes account of changes in technology. Computer programs differ to some extent from many other copyrightable works because computer programs always serve a functional purpose. Because of these differences, fair use has an important role to play for computer programs by providing a context-based check that keeps the copyright monopoly afforded to computer programs within its lawful bounds (*Google LLC v. Oracle America, Inc, 2020).*

By keeping in mind that the Constitution indicated that copyright aims to promote the progress of science and useful arts by granting creators exclusive copyright, the Court was able to resolve the case and assume that the software code is subject to copyright protection and fair use.

The Court considered the four statutory factors in evaluating whether a secondary use is fair. First, the Court determined that Google's use of the Java APIs is transformative.[12] Google only copied what was necessary to allow programmers to work in different computing environments and altered what they did use to make their programming different. However, they used the same programming language that is found in JAVA API. Second, the Court found the lines that were copied were bound with uncopyrightable ideas[13] indicating the likelihood of this application of fair use undercutting the general copyright protection that Congress provided for computer programs. Third, Google copied only .4% of the entire API which demonstrates that it was fair use because it was not a significant use of the original work. Fair usage does not have an absolute restriction for the amount of work that can be copied and it is entirely dependent on the conditions, therefore, the use of .4% falls into the category of fair use in this circumstance. Lastly, the Supreme Court decided that Google's new smartphone platform is not a substitute for Java SE in the market. Considering all four factors, Google's limited copying was fair use.

2.1 Concurring and Dissenting Opinions

The dissenting opinion, written by Justice Clarence Thomas and joined by Justice Samuel Alito, asserts the Court should have addressed whether Oracle's code is copyrightable. Justice Thomas would have ruled that Google's use of that copyrighted code was unfair. By copying Oracle's code, Google "erased 97.5% of the value of Oracle's partnership with Amazon, made

[12] When implementing the fair use doctrine, one of the most significant considerations to consider is whether the alleged infringer's use of the copyrighted work was transformative. This indicates that the new work has significantly altered the copyrighted original's appearance or nature (Stim, 2013)

[13] When it comes to derivative works, the line between an uncopyrightable idea and an infringing derivative can be blurry. Where the line is drawn is frequently ambiguous, and it is normally resolved case by case. However, in this case the uncopyrightable ideas would be considered ideas that are original to the thinker and creator and are unable to be changed in any way without infringing upon their copyright.

tens of billions of dollars, and established its position as the owner of the largest mobile operating system in the world." (*Google LLC* v. *Oracle America, Inc, 2020*).

3 Analysis of Case

There are four provisions of the current Copyright Act that are significant in this case. First, a definitional provision sets forth three basic conditions for obtaining copyright. There must be a "wor[k] of authorship," that work must be "original," and the work must be "fixed in any tangible medium of expression." (Menell, 2021) Second, the statute lists certain kinds of works that copyright can protect. They include "literary," "musical," "dramatic," "motion pictur[e]," "architectural," and certain other works. (Menell, 2021). Third, the statute limits what kinds of works can be copyrighted, including those that might otherwise be covered by the definitional provisions. This measure, for example, prohibits copyright protection for ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries. Fourth, Congress and the courts have limited the scope of copyright protection, even for works that are entitled to one. Copyright laws, for instance, limit an author's rights in performing and displaying his or her work in addition to performing sound recordings. As a result, a copyright holder cannot prevent another person from making a "fair use" of copyrighted work.

4 Analysis of Precedent

By exercising its constitutional power to enact copyright laws, Congress, prompted by this case, is weighing the advantages and disadvantages and determining the more specific nature of the copyright infringement tax or fine, including its boundaries and conditions, as well as exceptions and exemptions. This battle over copyrightable software material has been ongoing for over four decades and therefore, is something that needs to be addressed by Congress. The

Google v. Oracle case progresses towards establishing functional specifications of computer software that can be reimplemented without violating copyright law.

The Supreme Court presented an authoritative opinion in this case, stating that software functional specifications are either uncopyrightable or their use in other products will be deemed fair use. In assessing the fair use of software and other functional works, the first fair use factor - the nature of the work - is crucial. Additionally, it expands the considerations applicable to software and other functional works by assessing the fourth fair use factor — the "effect" of the copying in the "market for or value of the copyrighted work" — to include public benefits of the copying in appropriate cases.

Chapter 5: Copyright in the Music Industry

1 Introduction

The scope of what is covered under copyright continues to evolve. Various controversies arise concerning legislative changes and how they relate to professions and businesses. Copyright protects all original works of authorship, including poetry, novels, stories, movies, songs, computer software, and architecture. As a result, it protects three elements: originality, creativity, and fixation. In other words, it must be the original work of the author, must have a certain level of creativity,[14] and must be written fixedly to qualify for Copyright. These three elements are very important to the progress and creation of different forms of art and have been for a while. Different art formats have been granted protection including paintings, sculptures, drawings, photography, and music. While these formats are each important in their way, this chapter will focus on the effects that copyright legislation has had on the music industry.

To understand the importance of the music industry and how it has been encompassed in copyright legislation, it is necessary to identify how “useful art” is defined as used in the Constitution. According to Madison, in 1787, the term “useful arts” was meant to convey works that are helpful and valuable in supporting progress for the advancement of society (Walterscheid, 1994, 52). Therefore, to advance the course or procession of trades such as art, writing, and inventing was to promote the progress of useful arts. While in 1787 useful art was considered to be helpful or valuable, it has since changed as the years have evolved. This change can be seen in previous Supreme Court cases, as discussed later in this chapter, and with the advancement of technology and what is considered to be valuable in today’s world.

[14] The work must have "at least a modicum" of creativity and be the author's own invention. The criterion for a "modicum of creativity" establishes a low bar for copyrightability (Walterscheid, 1994, 52).

In addition, to further understand how music can be considered a “useful art,” it is important to look at what art means. Art has often been considered a process or activity or an overall product. Some thinkers have similar themes of what art means. For example, Dr. Samuel Johnson, an English writer who made lasting contributions as a poet, playwright, essayist, moralist, critic, biographer, editor, and lexicographer and is also considered the father of the English Dictionary, once said that “art is the power of doing things which are not taught by nature” (Ruckstuhl, 1916, 1). John Stuart Mill similarly said that “art is but the employment of the powers of nature for an end” (Ruckstuhl, 1916, 1). In addition to these two thinkers, Samuel Coleridge, who was a British Poet, said that “art is not a thing; it is a way” (Ruckstuhl, 1916, 1). Art is any activity that can be summarized as a highly diverse range of human activities involving the production of visual or auditory that showcase an author's imagination or technical skills and that are intended for aesthetic or emotional appeal (Ruckstuhl, 1916, 1). Thus, this encompasses poems, statues, paintings, and music, among others.

There is a tendency to treat music as an object, having a moment of creation, a uniformity of characteristics across time and place, and the ability to be used and influenced (Roy, 2010, 1 - 2). In other words, music can be used for a variety of different things and it has further cemented its place among other forms of art that are considered useful, especially with the use of technology. For example, studies show that music therapy is an effective treatment for various health conditions and mental disorders. Music therapy was first used in the United States in 1945 to help military service personnel who were recovering in hospital settings (Music Therapy, n.d.). However, military service members and veterans, people with Autism Spectrum Disorder (ASD), individuals with Alzheimer’s disease, and people in correctional settings such as those in mental health facilities, halfway houses, or group homes have been known to use musical

therapy. Furthermore, victims of trauma and crisis, those with mental health disorders, substance abusers, and those who are physically ill with chronic pain, diabetes, cardiac conditions, cancer, and headaches have used musical therapy as a form of treatment (Music Therapy, n.d.). From these groups of people who use musical therapy as a form of treatment for what may afflict them, their social, cognitive, spiritual, physical, and emotional well-being and skills tend to be benefitted. The use of music in therapy is one of the ways that indicate that music is both helpful and valuable as well as creates an emotional response, therefore, tying it not only to a form of art but that of useful art.

2 Music Industry

Like other types and forms of art, the music industry has seen a process of evolution and change. This evolution was especially seen with the shift to digital technology and how more people had access to music and the ease with which musicians could use technology to produce more songs. However, this evolution is roughly 150 years old. In the sixteenth century, standardized music notation[15] became commonplace over greater geographical distances, turning music from a service into a good. Until the Renaissance, much of the music around the world was improvised and loosely interpreted. Often, melodies and lyrics were composed based on a theme and that theme was passed down orally. In the mid-19th century, the printing press changed all that, producing volumes of sheet music for the middle class. This began the sheet music industry, but live musicians were still needed to produce the experience (Garland, 2003, 3). By the 1920s and 1930s, the record industry combined rapidly evolving mass-production techniques with new information technologies — especially radio. The convergence of these

[15] Standardized musical notation is the evolution and understanding of a standard system in which to score music. This made it easier for music to be played across the world by many people (Garland, 2003, 3).

trends allowed sharp, technologically savvy, business-minded individuals to develop a music industry that exploded in popularity. At the same time, the fundamental business model for musicians had not changed in 10,000 years, and musicians were not prepared to enter into negotiations over the value of their work. Entrepreneurs began negotiating contracts on international distribution, copyrights, and exclusivity with people who knew how to sing, dance, and entertain (Garland, 2003, 3).

2.1 Key Music Industry Concepts Relevant to Copyright

The music industry, like many industries, fields, and domains, has jargon that is well known inside of it but is not immediately understood by those outside of it. Terms such as sampling and interpolation fall into this category which is why it is imperative to understand their significance before one can better understand their impact on the music industry and copyright.

In the music industry, there have been instances where individual artists are working to build their music presence by sampling or interpolating other works. Sampling is more common in the music industry and it is where one digitally records a sound in the most technical definition (Sa'id, 2015, 84). Sampling is, however, the process of extracting fragments of pre-recorded music from old recordings (usually vinyl records) to make original music. A musician or artist working within a specific tradition or medium must decide whether to adhere to or scale the fundamental techniques and philosophies of that tradition or medium. When they use sampling, they are using it as a special form of derivative art. In other words, sampling allows artists to be inspired to produce new music while paying tribute to other artists' work. A lot of artists view sampling as a sound collage in which they can draw from different "sound

sources" (Sa'id, 2015, 89). The fact that it is a real-time mix of all one's musical knowledge and understanding is why it is considered a respected way to make music, despite some critics' cynicism about it. Interpolation, on the other hand, is utilizing a melody, or parts of a melody, from a song that has already been recorded, but re-recording the melody rather than sampling it. Replay and interpolation are used interchangeably, and both refer to re-performing the music (Berklee Online, n.d.).

3 Legislation in the Music Industry

A mandated update of the copyright law, the Music Modernization Act of 2018 (MMA), makes statutory licensing easier for music providers while making it fairer for creators. There are three main titles included in this act, the musical works modernization act, the classics protection and access act, and the allocation for music producers act. The U.S. Copyright Office assigned the Mechanical Licensing Collective, Inc. (MLC) responsibilities under Title I of the MMA for collecting and disbursing mechanical royalty payments. A new rule applied to songwriters and publishers beginning January 1, 2021, who are now required to register with The MLC's online claiming portal to receive payments under the new blanket license. In addition to developing a policy study, conducting outreach activities, and publishing educational materials, the Office has also conducted several modifications and developed many rulemakings to implement these provisions (Copyright).

3.1 Other Relevant Cases

To understand the importance of how the music industry has been affected by copyright legislation and how artists are provided some protection, there are a variety of different cases regarding the music industry and copyright. One notable case regarding the music industry and

copyright protection and infringement was between The Verve and the Rolling Stones. Originally, The Verve had licensed the use of five notes from the Rolling Stones' song "The Last Time" in exchange for 50% of the royalties. The Rolling Stones sued The Verve for their song "Bittersweet Symphony," which contained a sample from "The Last Time." The Stones claimed that they used more of the sample than they were supposed to and the court ruled in their favor. Consequently, The Verve lost all royalties and publishing rights and a lawsuit was later filed for mechanical rights as well. Until May of 2019, The Verve had to surrender all their rights to "Bittersweet Symphony" to the Rolling Stones (Tsioulcas, 2019).

It is also important to note that there are current cases that are taking place regarding the music industry and copyright. The most recent case involves Beyonce and her new album, *Renaissance*, and lesser-known recording artist Kelis. Beyonce, according to Kelis, never informed the Kellis that she was sampling Kelis' hit song "Milkshake" in her newest album. This occurred in August of 2022 and as of right now, Beyonce has pulled the song from all streaming services to avoid legal repercussions (Roundtree, 2022). Interpolation, a key part of the music industry and as seen within this case, falls into the fair use aspect of copyright, however, there are certain situations in which it is unclear how far is "too far" for using the same melody or parts of the same melody from older songs in new songs.

Chapter 6: How Copyright Legislation Can Be Improved

1 What Works in Copyright Legislation

Without copyright legislation, musicians and composers would not earn a livable wage from their works which would provide little to no incentive to create more works, thus hindering the progress of useful arts. There are also benefits of being able to use copyright to protect one's work because with legal evidence of ownership, if someone were to take one's work there will be less of a chance of misrepresentation of the original owner due to the registration from the published copyright (Stapleton, 2022). Copyright holders are also permitted to enforce the rights over their works only if it is registered with the U.S. Copyright Office. No lawsuit can be brought by a copyright holder without registration (Stapleton, 2022). Therefore, these benefits of copyright and the legislation that promotes the protection of copyright are beneficial[16] to preserve the original work and dissuade others from committing copyright infringement. Thus, this saves a lot of time and money in the long run.

2 Problems Identified

To better understand how copyright affects the music industry, it is important to note the obstacles caused by challenges related to copyright in the industry. Owners of copyright enjoy a bundle of exclusive rights that cannot be exercised by anyone else, and the use of their work without permission may constitute an infringement. Nevertheless, copyright does not afford a

[16] Libertarians disagree with this assessment because they view copyright as a further restriction for innovation. Stephan Kinsella, a notable Libertarian and Intellectual Property Right Scholar, discusses that copyright strives to restrict an owner of physical property—limited resources—from using his property as he sees appropriate. For instance, if one were to discover a technique to use his property, he would not be able to use it if there was any chance that his technique overlapped with a copyrighted technique (Kinsella, 2008, 56). This is significant to Libertarians because it detracts from a sense of autonomy that they believe everyone is entitled to.

monopoly on its use. As a result, artists within the music industry should be able to engage in sampling and interpolation without unreasonable constraints on their creativity when drawing from original work[17]. However, there is often conflict over how a secondary work can use original work for inspiration which constitutes the idea of 'fair use' or 'fair dealing' within the copyright legislation. (Frith, 2004, 90). Based on this notion, limited use may be fair in the sense that the amount of copyright work reproduced or the purpose of reproduction is proportional to the work. It also allows for the secondary use of copyrighted material for works that offer criticism, comments, news reporting, or research (Frith, 2004, 90). While this may be ambiguous, it is ultimately decided on a case-by-case basis what is considered fair for the amount of reproduction that is present in new work.[18]

As described above, in copyright law dealing with fair use, there are four different factors that measure if a work infringes on copyright and exceeds fair use which include: the purpose and character of the use, the nature of the copyrighted work, the amount and sustainability of the portion taken from copyrighted work,[19] and the effect the use has on the potential market (Stim, 2013). Unfortunately, federal court intervention is the only option to finally determine whether a certain usage qualifies as fair use. The two problems that I have identified with the Copyright clause, and more specifically the application of fair use, is that there is a lack of a consistent

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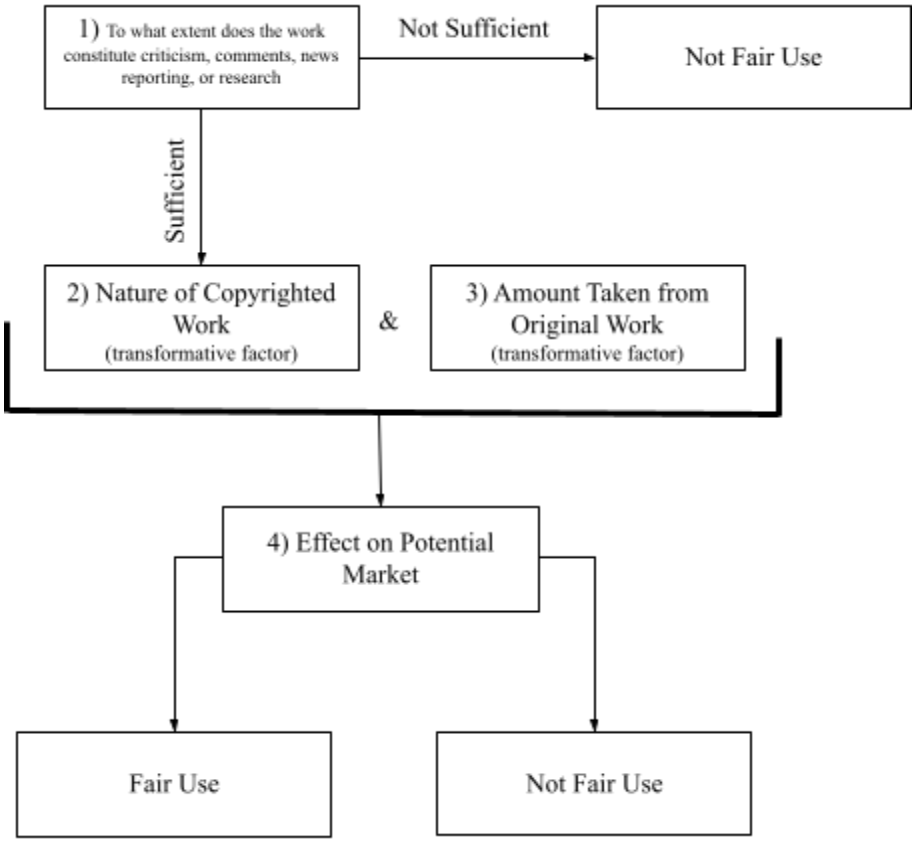
[17] While the music industry has faced a lot of adversity with Copyright Legislation, there are also other industries that could be positively affected by a change in Copyright Law. However, for the purpose of this thesis, I am choosing to focus primarily on the music industry.

[18] For example, Greg Gillis, a DJ, has previously released five albums, each of which includes hundreds of songs and is available for free on his website. Gillis has not obtained a license and pays nothing to the original proprietors of the copyrighted material for each song sample he utilizes on his albums. Gillis' work could be argued as fair use if there was ever a lawsuit because it has a transformative nature, meaning it is utilizing others' contributions in new and different ways and the amount of each music he samples is small to the point of being insignificant (Myers Law Group, 2015).

[19] Judicial decisions have recently increased their focus on the concept of transformation or how much of the work has been given a new expression, meaning, or message in accordance with the second principle (Stim, 2013).

understanding of the cohesive thought process in which to apply the four factors within a case. The second problem is the transformative nature of fair use. In other words, the transformativeness is not easily identifiable which leads to confusion and differences in outcomes. To better understand the problems identified, one can use the following chart to see the correct application of the four factors as well as the models of the figures identifying the boundary of transformation in fair use.



This chart works to clarify the direction and application of the four factors.[20] The first factor, the purpose and character of use, provides a threshold response to determining fair use. If the work does not fulfill public interest activities such as education, research, archiving, news

[20] *Campbell v. Acuff-Rose Music (1994)* worked to set a better foundation in which to apply the four factors but it needs to be more widely used in fair use cases.

reporting, and comment and criticism of existing works that the secondary work can replicate, then further analysis is not required because it cannot be considered fair use and therefore is in violation of copyright. However, for example, if one were to critique an article, then this would fulfill at least one of the objectives and would therefore need further consideration of the other factors of fair use to fully identify if it is within the realm of fair use.

If the secondary work satisfies the threshold factor, then the court decides if the work is sufficiently transformative meaning it does not "usurp the market" (Beard, 2016, 29). The second, third, and fourth factors - or the nature of the copyrighted work, the amount and sustainability of the portion taken from copyrighted work, and the effect the use has on the potential market - play into this consideration of the transformation in the secondary work.

Studies suggest that the identification of this second factor is too narrow, or limited for the extent to which it is understood, which leads to it being often insufficiently considered in judicial rulings. Often, the outcome of this factor's determination is not always directly tied to the court's decision. For example in *Campbell vs. Acuff-Rose Music (1994)*, the Supreme Court stated "[t]his factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." In that decision, the Court determined that "Orbison original's creative expression for public dissemination falls within the core of the copyright's protective purposes," and this fact "is not much help in this case since parodies almost invariably copy publicly known, expressive works." (*Campbell*, 1994). Therefore, a limited understanding of how to apply the second factor regarding transformation, how to apply a threshold of transformation, and how much is too much, limits the ability of courts to give a consistent ruling

on fair use. Therefore, a model suggested by Randolph Beard, George Ford, and Michael Stern[21] in a paper published about 'Fair Use in the Digital Age" identified the best way in which to measure fair use.

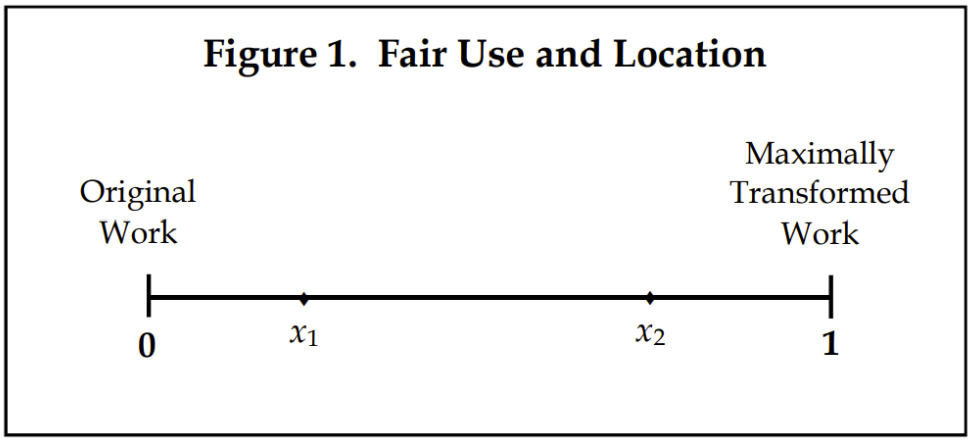
Currently, courts often take the four factors as independent when addressing a fair use argument, evaluating each one separately before deciding which way the whole analysis leans. There is no statutory support for this approach, but it results from court precedent. However, the lack of a solid conceptual foundation makes this method inconsistent. The four elements interact rather than stand-alone and are not weighed equally. Furthermore, as one can see on the chart for factors two and three, a finding of fair use requires the transformation of the original work so that the secondary work does not take away from the original work by any means. However, fair use is not entirely about transformation because the secondary work must create an independent and significant value to the public. For example, if one were to use an original science experiment and draw from the research and findings to create a new project, their project would fall under the category of fair use, however, it would be sufficient in creating new value for the public. As Michael Murray[22] argues, fair use encourages contributions to "public interest activities such as education, research, archiving, news reporting, and comment and criticism of existing works" (Beard, 2016, 28-29). These works promote the transformation of original work into secondary work.

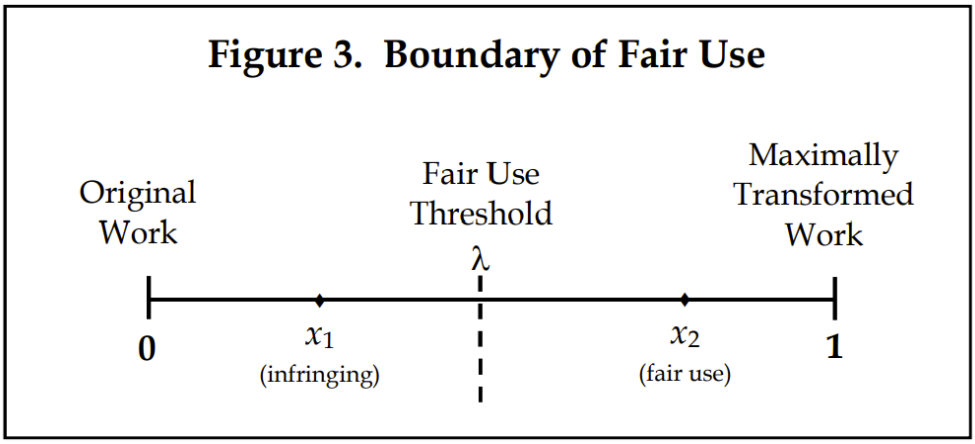
Practically speaking, transformation is what economists refer to as product differentiation. The use of "location" models is common in theoretical investigations of product differentiation. In these models, the location may refer to a specific geographic area, but it can

[21] These three individuals are most recognized for their academic publications about fair use and different applications of fair use in copyright influence the market.
[22] Michael Murray is a notable lawyer who has published on fair use, transformation and its significance.

also be more broadly defined as consumer preferences or brand attributes. Consumers are uniformly distributed in the unit interval [0, 1] as the demand side of the market for the original and any hypothetical secondary works. This is shown in Figure 1. Consumer preferences determine where they will fall on the location model and this model uses distance to measure how far a certain work is from the preferences of customers in a specific location. The danger that a secondary work "supersede[s] the objects" of the original and "serve[s] as a market replacement for it, making it likely that cognizable market injury to the original would occur" (*Campbell, 1994)* is higher if it is located at or close to the origin. Therefore, the more a secondary work is close to zero, the more it resembles violation and the less likely it is that it may be considered fair use.

In this context, fair use policy seeks to define the minimal threshold of "transformativeness" required for a work to be considered fair use as opposed to infringement. This threshold (labeled) in the model, created by Beard, Ford, and Stern, ranges from 0 to 1 in value. As a result, the parameter [0, 1] might be seen as the severity of the legal limits on fair use or the minimal level of transformativeness necessary to be considered fair use. Right-aligned secondary works are considered fair use but left-aligned (or smaller-sized) secondary works are considered to be infringing. These individuals noted that they randomly set fair use at 0.5 in Figure 3. A secondary work at x1 is therefore infringement, whereas a secondary work at x2 is sufficiently transformed to be considered fair use (Beard, 2016, 17-19).





Locations Models used to determine fair use (Beard, 2016, 17, 19)

3 Solutions to the Problems Identified

To fix the two problems identified, the lack of understanding in the application of the four factors and the identifying the transformative boundary in fair use, I propose that Congress revise Section 107 of the Copyright Act of 1976 to help create a more consistent application of the four factors used in determining fair use and the use of transformation. The chart and models can be used to refocus the application of the four factors, particularly the second factor. In the chart, each factor will be given equal weight in the finding of fair use and considered collectively in a

holistic analysis. This allows for a more consistent ruling because of the holistic approach that will be taken when deciding if fair use is a sufficient claim within Copyright cases. As stated above, currently there is little understanding of how to apply the four factors but the layout provided through the chart demonstrates the direction in which to view and make a decision on each factor in a more holistic way. Furthermore, the two models which provide more detail in how to identify the boundary of transformation in fair use can be better applied via factors two and three. Thus, this will solve the problem of when a factor is not being applied to the transformativeness of the secondary work and the threshold is not identifiable, however identifying the boundary that is created within the model will form an identifiable threshold.

4 Conclusion

In this thesis, I have identified weaknesses to the fair use fair use concept in Section 107 in the Copyright Act of 1976. In particular, it is difficult to identify what fair use is in copyright cases because of the ambiguity of the four factors and how they are applied. As a result, inconsistent rulings by judges occur. Therefore, the solution that I propose is to revise the statute to put an appropriate emphasis on the application of all four factors in a cohesive way, specifically the second factor, because the way in which it is viewed now gives it too narrow of a focus, leading to inconsistency in rulings. In other words, there is a lack of understanding on how to apply this factor to each case and how to identify a threshold for transformativeness in fair use. To assist in better understanding what it means for a more consistent ruling on fair use in various cases, the statute should include a mechanism similar to location models to identify where the fair use threshold is and what consequences this threshold will have on the market. There is a shared interest in the copyright in encouraging and fostering innovation, recognizing the rights and interests of creators, promoting a rich and accessible culture, and advancing

technologically and economically. Legislation must be able to grow and adapt to the changes that society may experience to better adhere to the goal of respecting the public interest. This ability to adapt will better help the artists within the music industry because of how often sampling and interpolation occur, it becomes easier for a case of fair use infringement and a potential lack of transformation. Thus, through identifying how to better follow the steps and understand how to apply the four factors within cases, there can be a better protection of artists rights within the industry when they create music and different works.

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