**Copyright and the Fair Use Defense:**

**The Transformation of Transformative Works and the Digital Age**

**by Natasha LaChac**

**Communication Law, Spring 2021 - Professor Watson**

**Introduction**

In 2009, the Associated Press sued artist Shepard Fairey for copyright infringement. Fairey had taken a photograph shot by an Associated Press reporter and edited it into the now-iconic Obama “Hope” poster.[[1]](#footnote-1) The Associated Press held that the power violated copyright and that the work could not be transformative if it was essentially a “form of computerized paint by the numbers;”[[2]](#footnote-2) Fairey maintained that he had transformed the original photograph and was protected by fair use. After two years, the Associated Press and Fairey settled the lawsuit, in a move that experts claimed, “was the right move for both sides.”[[3]](#footnote-3) The lawsuit, had it not been settled, would have set new precedent for copyright law and the fair use doctrine. Fair use is a contentious and subjective issue and precedents in this area of law are influential, and in an age of digital media the law gets more complicated. In the changing landscape, it often seems safer to settle than risk setting new precedent that will influence what a transformative work is for decades, as seen in the Hope poster case. There is a reluctance on the side of companies and digital creators to resolve these issues in court, as the consequences of those decisions may create limitations for the innovations of digital technologies.

The purpose of this paper is to examine copyright law and the applications of the fair use defense. This study will examine typical fair use defense as well as their applications for digital media and will discuss the implications for the future evolution of the fair use defense. The first section of the paper is the Literature Review, and it will examine what scholars consider to be applicable uses of the fair use doctrine and what qualifies as a derivative work. This section will examine historical and current United States copyright legislation. It will explore judicial decisions which set the precedent for what is considered fair use. This section will also define transformative use and discuss the cases which shaped this definition. It will discuss the expansion of the fair use doctrine and the changing landscape of fair use in a digital age. It will speak to the evolution of precedent to manage emerging technologies well as the limitations of the transformative use defense. Lastly, this section will discuss new copyright regulations and the implications these limits have for consumers and creators. It will explore the protections for digital creators and the Digital Millennium Copyright Act. It will examine the limitations of this legislation to protect content creators and service providers.

**Literature Review**

Copyright is a form of intellectual property protected by law. It protects novels, movies, books, songs, software, and other original works. Copyright does not protect facts or ideas, merely the expression of ideas. U.S. copyright law began in the Constitution. It is written in Article 1, Section 8, which gives Congress the power “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.”[[4]](#footnote-4) Copyright was elaborated upon with the Copyright Act of 1790, which was the first copyright law and was amended multiple times to specify the types of works that were covered under copyright.[[5]](#footnote-5) The Copyright Act of 1909 was the next major piece of copyright legislation. Amendments to this act included protections for motion pictures and sound recordings.[[6]](#footnote-6) The last major revision of federal copyright law was the Copyright Act of 1976, which expanded federal protection to published and unpublished works.[[7]](#footnote-7)

The Copyright Act of 1976 includes provisions for works protected by the fair use doctrine, as well as a definition for derivative works. Section 103 says that the copyright for “derivative work extends only to the material contributed by the author of such work,”[[8]](#footnote-8) and that work is treated as independent of the original work. Section 107 defines fair use as four exceptions to using a copyrighted work that would not be copyright infringement. Fair use protects copyrighted works reproduced “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”[[9]](#footnote-9) The courts use a four-part test to determine what is protected under fair use.

1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.[[10]](#footnote-10)

The four-part test is the basis for the doctrine of transformative works. A transformative work is a work that falls under fair use because it is transformative enough from the original that it stands on its own. Attorney Richard Stim wrote that the doctrine of transformative works was established in the 1994 Supreme Court case *Campbell v. Acuff-Rose Music, Inc*. The band 2 Live Crew borrowed the opening words from the song “Pretty Woman.”[[11]](#footnote-11) The music and rest of the song was distinct. The Supreme Court unanimously ruled that 2 Live Crew’s use of the line “Oh, pretty woman, walking down the street” was fair use. The Court emphasized that the most important aspect of the four-part test is that the purpose and character of the use was transformative.[[12]](#footnote-12) In the case of *Campbell*, the work was transformative because the line was a parody of the original song. Justice Souter delivered the opinion.

…the enquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is “transformative,” altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[[13]](#footnote-13)

The determination of transformative works in *Campbell* became a roadmap for cases to follow. To understand how the fair use qualifications are interpreted, it is important to study the language used in *Cariou v. Prince*. Photographer Patrick Cariou published the book “Yes Rasta” in 2000. Richard Prince, a celebrity appropriation artist, incorporated thirty-five of those photographs in a series of collages titled Canal Zone.[[14]](#footnote-14) Prince’s collages were displayed in the Gagosian Gallery in New York in 2008. Prior to the gallery, an owner contacted Cariou to inquire about displaying his work, but canceled their collaboration after mistakenly assuming that Cariou was working with Prince. Following this, Cariou sued Prince for copyright infringement.[[15]](#footnote-15)

Prince was found liable for copyright infringement in the Southern District of New York. According to a publication in the Harvard Law Review, the district court said that Prince’s work was not transformative because it did not comment upon the original photographs.[[16]](#footnote-16) The court also found that Prince’s collage undermined Cariou’s ability to market his original work, and therefore it was copyright infringement.[[17]](#footnote-17)

The Second Circuit Court reversed the decision of the lower court. It concluded that Prince’s works were transformative because of how they would “appear[] to the reasonable observer.”[[18]](#footnote-18) Prince himself testified during his deposition that he did not intend to comment upon Cariou’s original work and create new meaning. The Second Circuit, however, did not take that to discredit his claim to fair use; Judge Parker said that “the law does not require that a secondary use comment on the original artist or work.”[[19]](#footnote-19) As explained by copyright lawyer Melissa Eckhause, *Cariou* expanded the definition of a transformative work as it was interpreted in *Campbell*. In *Campbell*, a transformative work was a form of parody, but *Cariou* instead defined a transformative work as something that “generally must alter the original with ‘new expression, meaning, or message.’”[[20]](#footnote-20) The Harvard Law Review expands that decision in *Cariou* was also important because it did not require the transformative work to comment upon the original.[[21]](#footnote-21) The Second Circuit had determined in cases before *Cariou* that transformative works did not necessarily have to be parodies, but the decision in *Cariou* further widened the scope.[[22]](#footnote-22)

As digital technologies evolve, so must the copyright precedent to encompass them. *Sony Corp. v. Universal City Studios, Inc.* was a critical copyright case which expanded on fair use for digital mediums and emphasized the rights of private consumers. Sony was the manufacturer of the Betamax VTR, which allowed consumers to tape and replay broadcast television.[[23]](#footnote-23) In 1976, Universal City Studios sued Sony in California District Court over the Betamax, alleging that “home recording of television constitutes copyright infringement, and that Sony was directly, contributorily, or vicariously liable for the infringement.”[[24]](#footnote-24) The court ruled in favor of the defendants. As written by the Virginia Law Review, it found that home recording specifically for noncommercial home use was exempt from infringement by the Copyright Act of 1976, and because it the enforcement of noncommercial home recordings would beget privacy issues.[[25]](#footnote-25) The court also ruled against Universal City Studio’s allegation that Sony sold the Betamax knowing that their consumers may take part in an infringing activity. It found that the probability of economic harm to the plaintiffs was speculative and concluded that Universal City Studios could not prove market losses.[[26]](#footnote-26) Additionally, the court held that the plaintiffs would “deprive Sony of financial reward for years of investment and improvement of this technology,”[[27]](#footnote-27) a judgement which the Virginia Law Review held protected digital innovations.[[28]](#footnote-28)

The Ninth Circuit Court reversed the decision of the lower court, reported on by Touro Law Review, finding that Sony was liable for contributory infringement.[[29]](#footnote-29) Sony appealed to the Supreme Court, which reversed the ruling of the Ninth Circuit in 1984. The Supreme Court upheld the opinion of the district court. It agreed that the fair use doctrine protected VTR technology because it was capable of noncommercial home use. Importantly, as noted by legislative attorney Robin Jeweler, the court said that the sale of the Betamax was protected, because the Copyright Act of 1976 did not “encompass control over an article of commerce that is not the object of copyright protection.”[[30]](#footnote-30) The court also found that the Betamax did not financially impair the plaintiff’s copyrighted works.[[31]](#footnote-31)

The doctrine of the Betamax case is an important one because, as noted by the Touro Law Review, it protected the rights of companies to innovate new technologies and the rights private consumers to create content.[[32]](#footnote-32) This decision has since been revisited in the context of new digital technologies. The protections in *Sony* have not applied in subsequent cases where the technologies were shown to have substantial infringing uses. *A&M Records, Inc. v. Napster, Inc.* is one such case, as discussed by a Washington University case study. Napster was a peer-to-peer network, which is a network that can transfer data directly between individual computers without using a server.[[33]](#footnote-33) A&M Records sued Napster for copyright infringement because the network allowed users to distribute their music for free. The Ninth Circuit Court ruled that Napster was liable for copyright infringement. It found that the recordings being distributed were not fair use because they copied the entirety of the original music.[[34]](#footnote-34) The court also found that Napster caused substantial financial harm by reducing CD sales among college students, affecting the market for the copyrighted work.[[35]](#footnote-35) Unlike in *Sony*, where it was found that the technology was capable of non-infringing home use, the court ruled that Napster was too vast and anonymous a service to be considered personal use.[[36]](#footnote-36) Additionally, the court found that Napster was liable for contributory infringement because they had knowledge of widespread copyright infringement but did nothing to curb it. Napster was not eligible for protection because it made no effort to issue takedown notices or remove infringing content.[[37]](#footnote-37)

*Sony* was again revisited in *MGM Studios, Inc. v. Grokster, Ltd.* in 2005. Grokster was sued for copyright infringement, like in *Napster*, for the use of peer-to-peer file sharing networks. The lower courts ruled in favor of Grokster, citing the precedent of the Betamax case which protected the technology if it was “capable of substantial non-infringing uses.”[[38]](#footnote-38) The Supreme Court ruled against Grokster. The court ruled that the case was different from *Sony* because the technology was not only capable of sustaining non-infringing uses, but a primary function was to do so. Grokster could not prove that the primary use of the peer-to-peer technology was for non-infringing use. Like in *Napster*, the court also found that the peer-to-peer technology enabled infringement on a broad scale and presented market effects for MGM Studios.[[39]](#footnote-39)

Peer-to-peer networks and the subsequent lawsuits are indicative of how copyright lawsuits have become different in a digital landscape. By their nature, peer-to-peer networks allow users to directly connect with one another and evade a content controller.[[40]](#footnote-40) Jessica Reyman, professor and digital ethics and copyright author, acknowledges how evolving technologies complicate copyright law. She writes that “the balance formulated by copyright law between authors’ rights and users’ rights is throw off kilter: the very structure of the balance no longer works the way it did in a pre-digital culture.”[[41]](#footnote-41)

The decisions in *Napster* and *Grokster* set the precedent for a changing digital landscape. Reyman notes the battle in *Grokster* between copyright and digital technologies, and that court ruling in these cases must strike a balance between competing interests.[[42]](#footnote-42) Justice Souter, in the opinion for *Grokster*, acknowledges this tension.

He identifies the two values as 1) the value in the creation of intellectual property, made possible by the enforcement of copyright protection, and 2) the value in innovative communication technology development, enabled by limiting the incidence of liability for copyright infringement. The goal of the ruling, then, becomes one of “balance,” or finding a fair state of copyright law that protects the interests of two types of innovation: artistic and intellectual creation and technology development.[[43]](#footnote-43)

Copyright decisions in a digital age have lasting implications for the balance of creator and consumer rights. This is evident in the justice’s split decision in *Grokster*. Though the court was unanimous, Reyman underscores that there were two concurring opinions which argued for a revision of the *Sony* decision. Justice Ginsburg, joined by Justices Kennedy and Rehnquist, wrote that the decision indicated a need to revisit the Betamax doctrine given that the technology was based in infringing uses.[[44]](#footnote-44) Justice Breyer, concurring with Justices Stevens and O’Connor, conversely argued that “a strong demonstrated need for modifying *Sony* has not yet been shown.”[[45]](#footnote-45) He held that the *Sony* precedent was a strong standard for protecting technological innovation while also maintaining copyright.[[46]](#footnote-46) The official opinion of the court as written by Justice Souter, however, does not revisit the *Sony* decision. The court instead introduced the “inducement rule,” which holds a service liable for copyright infringement if the product is designed for infringement or to induce infringement.[[47]](#footnote-47)

As Reyman writes, the decision of the court to not revisit *Sony* and instead create a new standard for regulating new technologies is more restrictive. The ruling is stricter than the *Sony* precedent, which accepted technologies like the VCR “as lawful technologies, despite their potential threats to established business models for cultural production.”[[48]](#footnote-48) The *Grokster* decision, by contrast, creates a new limitation for emerging technologies. This may limit the future of digital innovations, as the precedent values analog creativity over digital creativity.[[49]](#footnote-49)

There has been a major update to copyright legislation to protect digital technologies. The Digital Millennium Copyright Act, passed in 1998, exempts online service providers from liability for copyright infringement if they issue “takedown” notices from copyright holders and remove content which possibly infringes on copyright.[[50]](#footnote-50) The DMCA, the Harvard Law Review notes, is useful for protecting transformative works. Without it, servers would limit their user base’s creative capacity to avoid potential lawsuits.[[51]](#footnote-51) The protection of the DMCA allows for more transformative works online. However, the Harvard Law Review also says that while the DMCA encourages digital works by providing liability protections for service providers, it can do little to protect content creators who are vulnerable to takedown notices. [[52]](#footnote-52)

*Lenz v Universal Music Corp.* demonstrates this conflict. In 2006, Stephanie Lenz uploaded a video of her children dancing on YouTube, and in the background of the video the song “Let’s Go Crazy” by Prince was audible.[[53]](#footnote-53) Universal Music Corp. sent a takedown notice to YouTube, which then removed Lenz’s video. Lenz sent a DMCA counter-notification to YouTube, claiming the fair use defense, who subsequently reuploaded the video. Lenz then sued Universal Music Corp. for misrepresentation which violated the DMCA.[[54]](#footnote-54)

The Ninth Circuit Court ruled in Lenz’s favor. The court ruled that Universal Music Corp. did not act in good faith when issuing a takedown notice, and in fact explicitly failed to consider if the video was fair use. However, the court did not find that Universal Music Corp. “knowingly materially misrepresent[ed][]… that material or activity [was] infringing”[[55]](#footnote-55) as required by the DMCA. The Harvard Law Review says that the burden of proof was placed on Lenz, who did not present evidence which showed that Universal Music Corp. issued a takedown notice with the knowledge that the material might have constituted fair use.[[56]](#footnote-56) This implies that the court, though ruling in favor of Lenz, did little to protect the rights of creators or the fair use doctrine. By placing the burden of proof on Lenz, the court encouraged future reckless DMCA takedown notices.[[57]](#footnote-57) The Harvard Law Review says that this weakens the overall purpose of the DMCA, which is supposed to protect fair use. “In order to stem such abuse more effectively, the court should have interpreted the DMCA's ‘knowing’ misrepresentation requirement to include representations recklessly made without sufficient procedures to form a good faith belief about fair use.”[[58]](#footnote-58)

**Conclusion**

Copyright is a crucial and deep-set section of law in the United States. The emergence of new digital technologies complicates copyright law. Though there is clear precedent for the protection of fair and transformative uses of copyrighted works, technologies that sustain infringing and non-infringing uses are increasingly held liable for copyright infringement. This is further complicated by laws meant to protect platforms which inadvertently harm content creators with an excessive issuance of takedown notices. Additionally, the reluctance to assess digital copyright in court and create new precedents creates a murky path for the future of copyright law. As new technologies evolve, so must the law to protect both the rights of copyright holders and the fair use doctrine.

1. David Cravets, *Associated Press Settles Copyright Lawsuit Against Obama ‘Hope’ Artist*, Wired. (January 12, 2011), at https://www.wired.com/2011/01/hope-image-flap/. [↑](#footnote-ref-1)
2. *Id.* [↑](#footnote-ref-2)
3. *Obama Hope Poster Lawsuit Settlement a Good Deal for Both Sides, Says Kernochan Center Director*, Columbia Law School, at https://www.law.columbia.edu/news/archive/obama-hope-poster-lawsuit-settlement-good-deal-both-sides-says-kernochan-center-director. [↑](#footnote-ref-3)
4. Constitution of the United States, Art. I, Sec. 8. [↑](#footnote-ref-4)
5. Copyright.Gov, https://www.copyright.gov/timeline/. [↑](#footnote-ref-5)
6. *Id.* [↑](#footnote-ref-6)
7. *Id.* [↑](#footnote-ref-7)
8. Pub.L. 94–553. [↑](#footnote-ref-8)
9. *Id.* [↑](#footnote-ref-9)
10. *Id.* [↑](#footnote-ref-10)
11. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994). [↑](#footnote-ref-11)
12. Richard Stim, *Fair Use: What is Transformative?*, Nolo.com, at https://www.nolo.com/legal-encyclopedia/fair-use-what-transformative.html [↑](#footnote-ref-12)
13. *Campbell*, 510 U.S. [↑](#footnote-ref-13)
14. Melissa Eckhause, *Digital Sampling v. Appropriation Art: Why Is One Stealing and the Other Fair Use? A Proposal for a Code of Best Practices in Fair Use for Digital Music Sampling*, 84 Missouri Law Review 371 (2019). [↑](#footnote-ref-14)
15. *Copyright Law – Fair Use – Second Circuit Holds That Appropriation Artwork Need Not Comment on the Original to Be Transformative*, 127 Harvard Law Review 1228 (2014). [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. *Id.* [↑](#footnote-ref-17)
18. Cairou v. Prince, 714 F.3d 694 (2d Cir. 2013). [↑](#footnote-ref-18)
19. *Id.* [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
21. Harvard Law Review 1228, *supra* note 15. [↑](#footnote-ref-21)
22. *Id.* [↑](#footnote-ref-22)
23. Robin Jeweler, “Digital Rights” and Fair Use in Copyright Law, (2003). [↑](#footnote-ref-23)
24. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984). [↑](#footnote-ref-24)
25. *Universal City Studios, Inc. V. Sony Corp.: ‘Fair Use’ Looks Different on Videotape*, 66 Virginia Law Review 1005 (1980). [↑](#footnote-ref-25)
26. *Id.* [↑](#footnote-ref-26)
27. *Sony Corp.,* 464 U.S. [↑](#footnote-ref-27)
28. 66 Virginia Law Review 1005, *supra* note 25. [↑](#footnote-ref-28)
29. *The Copyright Monopoly after Sony Corp. of America V. Universal City Studios, Inc.*, 1 Touro Law Review 151 (1985). [↑](#footnote-ref-29)
30. *Sony Corp.,* 464 U.S. [↑](#footnote-ref-30)
31. Robin Jeweler, *supra* note 23. [↑](#footnote-ref-31)
32. 1 Touro Law Review 151, *supra* note 29. [↑](#footnote-ref-32)
33. *Case Study: A&M Records, Inc. v. Napster, Inc.* Washington university in St. Louis. (August 1, 2013), at https://onlinelaw.wustl.edu/blog/case-study-am-records-inc-v-napster-inc/. [↑](#footnote-ref-33)
34. *Id.* [↑](#footnote-ref-34)
35. Robin Jeweler, *supra* note 23. [↑](#footnote-ref-35)
36. *Id*. [↑](#footnote-ref-36)
37. Washington University in St. Louis, *supra* note 33. [↑](#footnote-ref-37)
38. *Sony Corp.,* 464 U.S. [↑](#footnote-ref-38)
39. *Id.* [↑](#footnote-ref-39)
40. Jessica Reyman, The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture, 95 (2009). [↑](#footnote-ref-40)
41. *Id.* [↑](#footnote-ref-41)
42. *Id.* [↑](#footnote-ref-42)
43. *Id.* [↑](#footnote-ref-43)
44. *Id* at 108. [↑](#footnote-ref-44)
45. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005). [↑](#footnote-ref-45)
46. Jessica Reyman, *supra* note 40. [↑](#footnote-ref-46)
47. *Id* at 110. [↑](#footnote-ref-47)
48. *Id* at 111*.* [↑](#footnote-ref-48)
49. *Id*. [↑](#footnote-ref-49)
50. Pub. L. 105-304. [↑](#footnote-ref-50)
51. *Copyright law – Digital Millennium Copyright Act – Ninth Circuit requires analysis of fair use before issuing of takedown notices*, 129 Harvard Law Review 8 (2016). [↑](#footnote-ref-51)
52. *Id.* [↑](#footnote-ref-52)
53. *Id.* [↑](#footnote-ref-53)
54. *Id.* [↑](#footnote-ref-54)
55. Pub. L. 105-304. [↑](#footnote-ref-55)
56. 129 Harvard Law Review 8, *supra* note 51. [↑](#footnote-ref-56)
57. *Id.* [↑](#footnote-ref-57)
58. *Id.* [↑](#footnote-ref-58)