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Okay, Circuits, Now Let's Get in Formation: A Call to Reform the Copyright Fair Use Doctrine
April Campos*

I. Introduction

Regardless of whether an artist is already a superstar or aspiring to be, the questions surrounding the lawfulness of sampling other artists' creations are equally vast and complex.¹ Artists we listen to every day are too often embroiled in lawsuits regarding music sampling. One such artist, Beyoncé Knowles-Carter, is currently involved in a lawsuit with the estate of Anthony Barre.² The estate accuses Beyoncé of sampling audio³ from two YouTube videos created and posted by the late New Orleans rapper and comedian, Messy Mya,⁴ without the consent of his estate.⁵ Beyoncé alleges the samples of Messy Mya's clips constitute fair use and the dispute is currently pending before the United States District Court for the Eastern District of Louisiana. These disputes, and countless others like them⁶ illustrate a problem with copyright law and

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¹ The legality of music sampling has, for some time, depended on what jurisdiction the sampling took place in, and has been guided by inconsistently applied doctrines of fair use, de minimis, and copyright infringement. Ryan Lloyd, *Unauthorized Digital Sampling in the Changing Music Landscape*, 22 J. INTELL. PROP. L. 143, 155–62 (2014). For purposes of this Comment, music sampling will be analyzed in the context of the fair use doctrine.

² Anthony Barre was an American rapper and YouTube personality better known by his stage name, "Messy Mya." Peter A. Berry, *Beyoncé's Use of Rapper Messy Mya's Voice in Her Song "Formation" is Justified, Lawyers Say*, XXL MAG (Sept. 22, 2017), <http://www.xxlmag.com/news/2017/09/beyonce-messy-mya-formation-justified-lawsuit/>.

³ Music sampling is the use of small portions of existing sound records to create new audio. Bruce J. McGiverin, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1724 (1987).

⁴ See *supra* note 2.

⁵ See *infra* Part III.C.

⁶ An early example of music sampling was the Sugarhill Gang's "Rapper's Delight," which sampled "Good Times" by the band Chic. Steven Daly, *Hip-Hop Happens*, VANITY FAIR, (Nov. 2005), <https://www.vanityfair.com/culture/2005/11/hiphop200511>. Nile Rodgers and Bernard Edwards, who wrote "Good Times," threatened to sue the Sugarhill Gang, and the parties eventually reached a settlement whereby Rodgers and Edwards were credited as co-writers. *Id.* Shawn Corey Carter, husband of Beyoncé Knowles-Carter and a well-known rapper professionally known as Jay-Z, has been sued numerous times over unauthorized music sampling. See, e.g., C. Vernon Coleman II, *Beyoncé and Jay Z Win "Drunk in Love" Sampling Lawsuit*, XXL MAG (Dec. 19, 2015), <http://www.xxlmag.com/news/2015/12/beyonce-and-jay-z-win-drunk-in-love-sampling-lawsuit/>; Daniel Nussbaum, *Music Lawsuit Frenzy: Jay-Z Latest to Settle Copyright Claim, Awards 50% Royalties to Swiss Musician*, BREITBART (Mar. 13, 2015), <http://www.breitbart.com/big-hollywood/2015/03/13/music-lawsuit-frenzy-jay-z-latest-to-settle-copyright-claim-awards-50-royalties-to-swiss-musician/>; Barbara Ross, *Jay Z, Kanye West Stole 'Made in America' Song: Law Suit*, DAILYNEWS (Sept. 4, 2014), <http://www.nydailynews.com/entertainment/gossip/jay-z-kanye-west-stole-made-america-song-lawsuit-article-1.1928591>; Andrew Flanagan, *Jay Z Sued By Litigious Label TufAmerica*

specifically, the fair use doctrine⁷ today. Inconsistent applications of the fair use doctrine have wide-ranging implications: artists are stifled by legal complexities and courts lack clear directives from either the Supreme Court or the legislature. Coupled with the boom of streaming and social media platforms, these inconsistencies have opened the door for ever-increasing amounts of litigation in this area of the law.⁸ The fair use doctrine is intended to balance the interests of copyright holders with the public interest by allowing certain limited uses that would otherwise be considered infringement. By offering protection to a secondary user from being liable to the copyright holder, the fair use doctrine is supposed to serve the public interest by promoting creativity. The secondary user is often the “little guy” or the “amateur/aspiring artist” while the copyright holder is most often known as the “celebrity,” the “record label,” or the “entertainment conglomerate.” By allowing the “big guy” to exploit fair use at the expense of the “little guy,” the legal framework has strayed away from the original purposes of fair use by effectively silencing the creativity the fair use doctrine is meant to protect.

This Comment will briefly provide background on and describe developments in the fair use doctrine that led to the current circuit split, address why the current standards of fair use are outdated, and explain the need for legislative or Supreme Court clarification on the proper weight to be attributed to each of the four factors of the fair use doctrine. Part II of this Comment will briefly review the evolution of the doctrine of fair use: its origins from a judicially created

over Infringement on ‘Run This Town’, BILLBOARDBIZ (Nov. 11, 2013), <https://www.billboard.com/biz/articles/news/legal-and-management/5785840/jay-z-sued-by-litigious-label-tufamerica-over>; Paul Cantor, *Notorious B.I.G., Jay-Z Plagued with Similar Music Sample Issues As Game in the Past*, MTV NEWS (Feb. 11, 2011), <http://www.mtv.com/news/2494916/notorious-big-jay-z-plagued-with-similar-music-sample-issues-as-game-in-the-past/>.

⁷ See *infra* Part II.

⁸ See Robert M. Vrana, *The Remix Artist’s Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music*, 68 WASH. & LEE L. REV. 811, 812 (2011) (noting that the uncertain law has a “chilling effect” on artists); Lloyd, *supra* note 1, at 163 (arguing that inconsistent judgments have had a “negative effect on both the sampling artists and the rightsholders.”).

exception recognized at common law to a codified infringement defense. Part II will also examine the circuit split between the Second and Seventh Circuits in weighing the importance of each of the four fair use factors. Part III of this Comment will discuss the difficulty in conforming current standards to address copyright issues with user-generated content on social media platforms. Finally, Part IV will discuss why there is an urgent need for clarification on the proper fair use standard and the remedies available to tackle the situation.

II. Copyright Law, the History of the Fair Use Doctrine, and the Circuit Split

A. The Origins of the Copyright Fair Use Doctrine

Copyright law derives its authority from Article I, Section Eight of the United States Constitution, which provides, in relevant part: “The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings”⁹ The original and continuing purpose of the copyright is “to stimulate activity and progress in the arts for the intellectual enrichment of the public.”¹⁰ A perspective promulgated by legal scholars and jurists is that American copyright law is grounded in utilitarianism.¹¹ According to the utilitarian theory, copyright law gives exclusive rights to authors for a limited amount of time as an incentive to create works for the benefit of society as a whole.¹² Without guaranteed rights in their creative production, authors faced with the problem of free riders would not be able to profit from their own creations.¹³ The Copyright Act,¹⁴ however,

⁹ U.S. CONST. art. I, § 8.

¹⁰ Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1129 (1990).

¹¹ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

¹² See *Harper & Row, Publishers Inc. v. Nation Enter’s*, 471 U.S. 549, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies economic incentive to create and disseminate ideas.”).

¹³ Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 620 (2015).

¹⁴ 17 U.S.C. §§ 1–8, 10–12 (2012).

does require boundaries on the rights provided to authors.¹⁵ In order to balance the interests of promoting the public welfare without diminishing the incentive to create,¹⁶ copyright law permits limited use of copyrighted materials without having to first acquire permission from the copyright holder by defining the use as a permissible “fair use.”¹⁷

Fair use provides for the legal, unlicensed citation or incorporation of copyrighted material in another author’s works under a four-factor test.¹⁸ The fair use doctrine is intended to balance the interests of copyright holders with the public interest in the wider distribution and use of creative works by allowing certain limited uses that might otherwise be considered infringement.¹⁹ Fair use has been recognized in common law since the Statute of Anne of 1709²⁰ and originated as part of a judicially created common law exception.²¹ In *Flosom v. Marsh*,²² Justice Joseph Story set forth the factors in the fair use analysis²³ and these four factors were codified by Congress under the Copyright Act of 1976.²⁴ The non-exclusive list of factors to be considered in the fair use analysis, as codified by Congress, are: “(1) the nature and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;”²⁵ “(2) the

¹⁵ Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 997 (1997).

¹⁶ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good . . . the Copyright Act must be construed in light of this basic purpose.”).

¹⁷ 17 U.S.C. §107 (2012).

¹⁸ *Id.*

¹⁹ Leval, *supra* note 10, at 1109–10.

²⁰ *See, e.g., Gyles v. Wilcox*, 26 Eng. Rep. 489 (Ch. 1740) (recognizing that “fair abridgement” does not infringe on an author’s rights).

²¹ *Id.*

²² 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

²³ “The question of piracy, often depends upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercise the same common diligence in the selection and arrangement of the materials.” *Id.*

²⁴ § 107.

²⁵ *Id.* In analyzing the purpose and character of the work, courts consider the transformative nature of the work and ask “whether the new work merely ‘supersedes the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

nature of the copyrighted work;”²⁶ “(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;”²⁷ “and (4) the effect of the use upon the potential market for or value of the copyrighted work.”²⁸

Section 107 of the Copyright Act specifically enumerates fair use as a limitation on the exclusive right enjoyed by authors.²⁹ It provides: “[n]otwithstanding the provisions of §§ 106 and 106A [granting certain rights to authors], the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright.”³⁰ When Congress codified the fair use doctrine, it did not define fair use but instead provided a non-exhaustive list of illustrative uses—such as criticism, scholarship, and news reporting—that may qualify as fair use.³¹ The Supreme Court had traditionally characterized fair use as an affirmative defense, but in *Lenz v. Universal Music Corp.*, the United States Court of Appeals for the Ninth Circuit concluded that fair use was not merely a defense to an infringement claim, but was an expressly authorized right, and an exception to the exclusive rights granted to the author of a creative work by copyright law.³²

The first factor (purpose and character of the use) focuses on the intended aim of the use and courts typically favor non-commercial uses such as educational or newsreporting use, over commercial uses.³³ The first factor considers whether the use is “transformative,” focusing on

²⁶ § 107. Works that are more factual in nature or employ common images are less likely to receive the same amount of protections as creative, individual works. See *Campbell*, 510 U.S. at 579.

²⁷ § 107. This factor must be analyzed in terms of the “quantitative and qualitative aspect of the portion of the copyrighted material taken.” See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

²⁸ § 107. Although not dispositive, the final factor has been heralded by some courts as “the single most important element of fair use.” See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 476 (1984)).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994).

³² 801 F.3d 1126, 1138 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 2263 (2017). “Fair use is therefore distinct from affirmative defenses where a use infringes a copyright, but there is no liability due to a valid excuse, e.g., misuse of a copyright.” *Id.*

³³ *Campbell*, 510 U.S. at 578.

“whether the new work merely ‘supersedes the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”³⁴ A use may be considered transformative if it is made for a sufficiently distinct purpose or function—such as a search engine³⁵ or a parody.³⁶

The second factor (the nature of the work) relates to the type of copyrighted work at issue.³⁷ This factor analyzes the connection of the original work to the goals of copyright law.³⁸ Unpublished works are afforded broader copyright protection and the availability of the fair use defense is narrower.³⁹ Creative works such as paintings or musical compositions enjoy a greater copyright protection than is afforded to informational works, such as a newspaper article.⁴⁰ The second fair use factor weighs against the secondary user if the original copyrighted work is unpublished and/or creative in nature.⁴¹

The third factor (the amount and substantiality of the portion used) is analyzed in terms of the “quantitative and qualitative aspects of the portion of the copyrighted material taken.”⁴² The qualitative aspect of the third factor focuses on the “substantiality” of what has been copied.⁴³ A secondary work may be considered an unfair use if it copies the “heart of the work,” even if only a small amount of the original was actually copied.⁴⁴ The “heart” of the work refers to the main source of the work’s economic value.⁴⁵ The third factor stands for the proposition that all other

³⁴ *Id.* at 579 (citing *Flosom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841)).

³⁵ *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007).

³⁶ *Campbell*, 510 U.S. at 583.

³⁷ *Id.*

³⁸ *Id.* at 579. An example is the promotion of artistic expression. *Id.*

³⁹ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 551 (1985).

⁴⁰ *See, e.g., Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1993).

⁴¹ *Id.*

⁴² *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

⁴³ *Harper & Row*, 471 U.S. at 564–66.

⁴⁴ *Id.*

⁴⁵ *Id.* In *Harper & Row*, the court held that even though the number of words copied from President Ford’s memoir was “insubstantial,” the third factor favored the original copyright holder because the small part that was copied was the primary subject that readers would be interested in: why President Ford pardoned Richard Nixon. *Id.*

factors being equal, a use is more likely to be fair if it copies only a small amount from the original work and what was copied is not the “heart” of the work.⁴⁶

The final factor (market effect) considers the effect that a secondary work has on the market for the original work.⁴⁷ The fourth factor has been proclaimed as the “undoubtedly the single most important element of fair use.”⁴⁸ The Supreme Court, however, limited this emphasis on the fourth factor in *Campbell v. Acuff-Rose, Inc.*, by stating that the fair use test should “not be simplified with bright-line rules[,] . . . the four statutory factors [should not] be treated in isolation[, and] . . . all [four factors] are to be explored and the results weighed together.”⁴⁹ The Supreme Court held that the market effect should be given less weight when the use is transformative.⁵⁰ The Court reasoned that if a secondary work was sufficiently transformative, there would be a lesser likelihood that the work would replace the market for the original.⁵¹ In certain situations—for example where the original copyright holder is an aspiring artist and the secondary user is an established artist—the market factor should, in fact, weigh heavily in a fair use decision.

B. Transformation vs. Market Effect: The Circuit Split Regarding the Four Fair Use Factors

The circuit split discussed in this Comment focuses on the difference in methodologies employed by the regional circuit courts with respect to the four fair use factors—particularly, the Second Circuit’s emphasis on the degree to which an allegedly infringing work is transformative and the more economic-focused approach employed by the Seventh Circuit. In 1984, the Supreme Court decided *Sony Corp. of America v. Universal City Studios, Inc.*, and acknowledged that “[t]he doctrine of fair use has been called, with some justification, ‘the most troublesome in the whole

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 566.

⁴⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994).

⁵⁰ *Id.*

⁵¹ *Id.* at 591.

law of copyright.”⁵² The root of the problem with fair use is that Congress did not “provide definitive rules when it codified the fair use doctrine in the 1976 [Copyright] Act; it simply incorporated a list of factors ‘to be considered.’”⁵³ This has caused problems with consistency in the application of the fair use principles and a divided court system. In *Harper & Row Publishers v. Nation Enterprises*, the Supreme Court proclaimed the fourth factor as “undoubtedly the most important element of fair use.”⁵⁴ This proclamation installed the inquiry into market harm as the predominant issue in any fair use analysis and essentially made it highly unlikely that any use that was commercial in nature would qualify as fair use.⁵⁵ But following the seminal article by Judge Pierre N. Leval⁵⁶ and the Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.*,⁵⁷ a new strain of fair use jurisprudence emerged in the early 1990s. Judge Leval’s article was published following a period of inconsistent decisions among the courts and a period of reversals that had a significant impact on fair use jurisprudence in the 1980s.⁵⁸ Judge Leval’s article maintains that copyright jurisprudence serves a utilitarian purpose⁵⁹ and suggests that the judiciary should look to the main purpose of fair use, which is to ensure that copyright protections do not become so expansive as to throttle innovation.⁶⁰ In his article, Judge Leval argued that the key determination in a fair use analysis must be whether, and to what extent, the alleged infringing use is

⁵² *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 475 (1984) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939)); *see also* *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980); *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir 1977), *cert. denied*, 434 U.S. 1013 (1978).

⁵³ *Sony Corp. of Am.*, 464 U.S. at 476.

⁵⁴ *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985)

⁵⁵ Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 722 (2011).

⁵⁶ *See* Leval, *supra* note 10, at 1111.

⁵⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁵⁸ *See, e.g.*, *Universal City Studios, Inc. v. Sony Corp of Am.*, 480 F.Supp. 429 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984); *see also* *Harper & Row Publishers, Inc. v. Nation Enterprises*, 557 F. Supp. 1067 (S.D.N.Y. 1983), *modified*, 723 F.2d. 195 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985).

⁵⁹ *See* Leval, *supra* note 10, at 1118.

⁶⁰ *Id.* at 1109.

transformative.⁶¹ He went on to further explain that the use “must be productive and must employ the quoted matter in a different manner or for a different purpose from the original”⁶² and pronounced that if the secondary work added “value” to the original work then it encompassed the very type of activity fair use was meant to protect.⁶³ Judge Leval essentially asserts that the soul of the fair use analysis is the first factor.⁶⁴

In *Campbell*, the Supreme Court relaxed the traditional fair use standard by adopting much of the philosophy in Judge Leval’s article, in particular his definition of the first factor of the fair use analysis.⁶⁵ *Campbell* addressed a parody of Roy Orbison’s “Oh, Pretty Woman” by the rap group 2 Live Crew.⁶⁶ The Supreme Court held that the inquiry for the first factor of the fair use analysis turns on whether, and to what extent, the alleged infringing use is transformative.⁶⁷ The Supreme Court further explained that “the more transformative the new work, the less significant the other factors will be, like commercialism, that may weigh against a finding of fair use.”⁶⁸ It is important to note that, in *Campbell*, the Supreme Court reaffirmed its position that the fair use factors are analyzed under fact-sensitive inquiries and *should be considered together without any bright line rules*.⁶⁹ Following *Campbell*, the circuit courts widely adopted the transformative use inquiry, with the Second Circuit being particularly vocal in its support of the transformative use inquiry and instrumental in expanding fair use by using a liberal “transformation” test.⁷⁰

⁶¹ *Id.* at 1111.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 1116.

⁶⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994).

⁶⁶ *Id.* at 572.

⁶⁷ *Id.* at 569.

⁶⁸ *Id.* Importantly, the Supreme Court also corrected its previous statement in *Sony Corp. of America v. Universal City Studios, Inc.* that commercial uses are presumptively unfair. *Id.* at 594.

⁶⁹ *Id.* at 577 (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985)) (emphasis added).

⁷⁰ *See, e.g., Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).

The Second Circuit transformation standard, as defined in *Cariou v. Prince*,⁷¹ set a liberal precedent for what the Second Circuit would consider “transformative.” In *Cariou*, the Second Circuit was tasked with examining whether Richard Prince’s “Canal Zone Series” sufficiently transformed Patrick Cariou’s photographs in such a way as to constitute a fair use by Prince.⁷² Cariou’s original works were photographs of Rastafarians in natural scenic setting, taken for the purpose of being featured in the book *Yes Rasta*.⁷³ Prince used Cariou’s photographs featured in this book and superimposed them with images and colored, oval-shaped blotches of color on top of the original work.⁷⁴ Prince juxtaposed the scenic images with images of musical instruments with the goal of creating dystopian scenery through the photo series.⁷⁵ Some of the works were in fact more transformed than others, but the majority consisted of Prince using Cariou’s entire photograph and adding a handful of elements.⁷⁶ The Second Circuit held that an unauthorized work’s transformative nature does not depend on whether it “comments” on the original work, but rather whether it has altered the original work with a “new expression, meaning, or message.”⁷⁷ This decision signified an important shift in fair use jurisprudence because the “comment upon” requirement had previously been an important consideration for determining the nature of unauthorized derivative works.⁷⁸ Additionally, this decision was noteworthy due to the Second Circuit’s deliberate decision to ignore the negative financial impact that Prince’s exhibit had on Cariou’s ability to display his own works for monetary gain.⁷⁹ The Second Circuit considered the

⁷¹ *Id.*

⁷² *Id.* at 698.

⁷³ *Id.* at 699.

⁷⁴ *Id.* at 701.

⁷⁵ *Id.* at 705.

⁷⁶ *Cariou*, 714 F.3d at 705.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* The district court case went into great detail regarding the market effect of Prince’s work on Cariou. *Cariou v. Prince*, 784 F.Supp. 2d 337, 344 (S.D.N.Y. 2011). The gallery that showed Prince’s “Canal Zone Series,” ending up selling eight of the thirty pieces of art in the “Canal Zone Series” for approximately 10 million dollars, of which Prince

market factor to be unimportant because of the transformative nature of Prince’s work.⁸⁰ The Second Circuit’s decision in *Cariou*, served to further broaden⁸¹ the scope of the *Campbell* decision, not only because it mitigated the importance of the fourth statutory factor of fair use, but also because it lowered the threshold for transformation by not requiring the unauthorized work to comment on the original work.⁸²

In *Kienitz v. Sconnie Nation*, the Seventh Circuit criticized the Second Circuit’s emphasis on transformativeness in the *Cariou v. Prince* decision.⁸³ Rejecting the transformative use paradigm, the Seventh Circuit suggested that the *fourth* factor was the most important of the four statutory fair use factors.⁸⁴ In *Kienitz*, the Seventh Circuit was tasked with determining whether fair use existed where a copyrighted photograph of the mayor of a town in Wisconsin was turned lime green, used to make t-shirts and tank tops emblazoned with the words “Sorry for Partying,” and sold by Sconnie Nation on clothing for a marginal profit.⁸⁵ The United States District Court for the Western District of Wisconsin held that three of the four fair use factors weighed in favor of Sconnie Nation.⁸⁶ The district court noted that the crux of the first inquiry turned on whether the new work “supersedes the original work, or instead adds something new with a further purpose

received approximately 6 million dollars. *Id.* This is particularly relevant because, at about the same time, another New York City art gallery had been planning to display Cariou’s photographs as featured in *Yes Rasta*. *Id.* Once the gallery owner found out about the showing of Prince’s work at the other gallery, she cancelled Cariou’s show because it had “been done already.” *Id.* Cariou planned on selling copies of his books and prints of his photographs ranging from \$3,000 to \$20,000 at this gallery showing. *Id.*

⁸⁰ *Cariou*, 714 F.3d at 709–10.

⁸¹ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006). The Second Circuit considered whether chronological assemblage of reduced-format posters in a biography of the Grateful Dead titled *Illustrated Trip* constituted fair use. *Id.* at 606. The Second Circuit held that each poster differed from its original expressive purpose due to the bibliographic nature of the book, and accordingly was transformative. *Id.* at 609. This case broadened *Campbell* by holding that even when a secondary user takes an entire work, the use can still be considered transformative, so long as the use does not supersede the original work. *Id.*

⁸² *Cariou*, 714 F.3d at 705.

⁸³ 766 F.3d 756 (7th Cir. 2014).

⁸⁴ *Id.* at 758 (emphasis added).

⁸⁵ *Id.* at 757.

⁸⁶ *Kienitz v. Sconnie Nation LLC*, 965 F. Supp. 2d 1042, 1055 (W.D. Wis. 2013) (finding that the purpose and character of the use, the amount and substantiality of the portion taken, and the effect of the use on the potential market weighed in favor of Sconnie Nation).

or of a different character.”⁸⁷ The court also commented, with regards to the market effect factor, that seeing Kienitz’s image next to the Scennie Nation shirts, it was evident that the shirts “were not a substitute for and did not reduce the demand for Kienitz’s photographic portrait”⁸⁸ The district court supported its rationale by citing the Supreme Court’s decision in *Campbell*.⁸⁹ The Seventh Circuit affirmed the district court’s decision finding that Scennie Nation’s use of the image constituted fair use but used a different reasoning.⁹⁰ In so holding, the Seventh Circuit held that transformative use was not a statutory factor and that it would be better to stick to the four statutory factors set forth in section 107.⁹¹ The Seventh Circuit went on to further maintain that the fourth factor, market effect, should be the most important when analyzing fair use.⁹² The Seventh Circuit’s position following *Kienitz* seemingly rejects the fair use jurisprudence that developed following Judge Leval’s article and the Supreme Court decision in *Campbell*. Although the Seventh Circuit’s criticisms were levied specifically towards the Second Circuit and towards *Cariou*, the language and analysis is dismissive of transformative use as a whole. The clash highlighted by *Kienitz* and *Cariou* centers on the difference in the approaches employed by the regional circuits regarding the four statutory fair use factors—principally the approach taken by the Second Circuit that focuses on the degree to which a secondary work is “transformative,” and the market-centered approach adopted by the Seventh Circuit.

III. Current Copyright Standards Have Been Unable to Adapt and Cope with the Rapid Rise of the Internet and Social Media

⁸⁷ *Id.* at 1049.

⁸⁸ *Id.* at 1054.

⁸⁹ *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994)).

⁹⁰ *Kienitz*, 766 F.3d at 760.

⁹¹ *Id.* at 758.

⁹² *Id.*

In an age where emerging artists are increasingly flocking to social media platforms to exhibit their work, it has become increasingly difficult for the law, as it currently stands, to provide adequate protections for this subset of artists.

A. The Fundamentals of Copyright Protection

The 1976 Copyright Act defines copyrightable material as “original works of authorship fixed in any tangible medium of expression.”⁹³ “Works of authorship” are further defined to include a list of eight non-exhaustive categories.⁹⁴ Courts look to whether a work is both “original and “fixed,” rather than focusing on whether a work falls into one of the listed categories of Section 102.⁹⁵ “Originality,” however, is defined nowhere in the copyright statute or in the Constitution even though it is a defining element of copyright law.⁹⁶ As a result, interpretation of the notion of originality has developed over time.⁹⁷ The threshold of creativity necessary to receive copyright privileges is extremely low and protection applies broadly.⁹⁸ Courts throughout the United States have hesitated to unambiguously delineate the boundaries of the creativity and originality necessary for copyright protection.⁹⁹ In *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court famously stated that “[i]t would be a dangerous undertaking for persons trained only to the

⁹³ 17 U.S.C. § 102 (2012).

⁹⁴ *Id.* The list includes: “literary works; musical works, including any accompanying works; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; sound records; and architectural works.” *Id.*

⁹⁵ *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 48 (D. Mass. 1997) (“[T]he designation ‘works of authorship’ is not meant to be limited to traditional works of authorship such as novels or plays. Rather, Congress used this phrase to extend copyright to new methods of expression as they evolve.”).

⁹⁶ *See* 17 U.S.C. § 101 (2018).

⁹⁷ For example, at one point in time it was argued that photographs did not have the requisite originality for copyright protection because they “simply captured a current reality.” *See Burrow-Giles Lithographing Co v. Sarony*, 111 U.S. 53, 57–58 (1884) (holding that photographs could be considered “writings” and photographers were “authors” for purposes of the statute).

⁹⁸ *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding that the alphabetization of listings in a telephone directory did not meet the requisite originality standard required to receive copyright protection). There the Court stated that “originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.” *Id.* at 345.

⁹⁹ *See Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”¹⁰⁰ Given the subjective nature of deciding whether a work is “creative enough,” courts have been consistent in liberally applying the standard of creativity and originality.¹⁰¹ The Supreme Court, in defining “creativity,” stated that a work must be an “independent creation” that demonstrates a “modicum of creativity.”¹⁰² Thus, the Court provided a broad definition to respect the subjective nature of creativity.

B. Copyright in User-Generated Content Posted to Social Media Platforms

At least some social media posts would in fact meet the base requirement of originality; the more creative the posted content, the stronger the copyright protection is likely to be.¹⁰³ The content that users post can typically be split into two classifications: user-generated content and user-found content.¹⁰⁴ The difference lies in the origination of the content—a user’s own creative works are user-generated but information a user reposts or forwards on to others that was found elsewhere is user-found content.¹⁰⁵ User-generated content can consist of text, images, or videos that social media users independently create and post to the Internet.¹⁰⁶ A range of user-generated content can be found in almost every corner of the Internet, including on blogs, Twitter, YouTube, Facebook, Instagram, and even the Wikipedia.¹⁰⁷ This content forms part of an emerging network of self-expression and self-promotion that has become a hallmark foundation of online social

¹⁰⁰ 188 U.S. at 251.

¹⁰¹ See *Feist Publications*, 499 U.S. at 345.

¹⁰² *Id.*

¹⁰³ See *Reader’s Digest Ass’n v. Conservative Digest, Inc.*, 821 F.2d 800, 806 (D.C. Cir. 1987) (defining “originality” to mean only that “the work is independently created rather than copied from other works”) (citations omitted).

¹⁰⁴ Craig C. Carpenter, *Copyright Infringement and the Second Generation of Social Media: Why Pinterest Users Should Be Protected from Copyright Infringement by the Fair Use Defense*, 16 NO. 7 J. INTERNET L. 1, 10 (2013).

¹⁰⁵ *Id.*

¹⁰⁶ *Williams Elecs., Inc. v. Artic Int’l Inc.*, 685 F.2d 870, 874 (3d Cir. 1982); see also Jessica Gutierrez Alm, “Sharing” Copyrights: The Copyright Implications of User Content in Social Media, 35 HAMLIN J. PUB. L. & POL’Y 104, 111 (2014) (“A court would likely find social media content to be fixed in tangible form. Therefore, for those works that also meet the originality requirement, this renders at least some user-generated content copyrightable material.”).

¹⁰⁷ See Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863 (2008).

culture. This content, however, also raises a bevy of issues regarding creativity, collective authorship, ownership, and misappropriation of previously copyrighted works.¹⁰⁸ In recent years, social networking platforms have entrenched themselves into popular culture, bringing with them a multitude of copyright complications.¹⁰⁹ These platforms have changed the face of the Internet in many ways, including bringing a broader visibility to the creative self-expression of the average person.

Once a work has been deemed creative enough, in order to receive protection, the work must be fixed in a tangible medium of expression.¹¹⁰ User-generated digital content is “fixed” when it exists for “more than a transitory period” of time.¹¹¹ The inquiry into whether a work is fixed for more than a “transitory duration” is a fact-sensitive analysis.¹¹² For the most part, content posted to social media and social networking sites is not automatically erased.¹¹³ It remains stored, detectable, and searchable. Thus, a court would likely find social media content to be fixed in tangible form. Consequently, for authors whose works also meet the originality requirement, their user-generated content would constitute copyrightable material.

Once creativity, originality, and fixation have been established, the creator of the work is granted six exclusive copyright ownership rights.¹¹⁴ The six rights are the right to reproduce, prepare derivative works, distribute copies, perform audiovisual works publicly, perform sound recordings publicly, and display publicly.¹¹⁵ When the act of fixation occurs on a social media

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 17 U.S.C. § 102 (2012).

¹¹¹ 17 U.S.C. § 101 (2012). The Copyright Act defines “fixed” as an expression in which a work may be “perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.*

¹¹² *See, e.g.,* Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d Cir. 2008); MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993).

¹¹³ Zach Whittaker, *Facebook Does Not Erase User-Deleted Content*, ZDNET (Apr. 28, 2010), <https://www.zdnet.com/article/facebook-does-not-erase-user-deleted-content/>.

¹¹⁴ 17 U.S.C. §106 (2012).

¹¹⁵ *Id.*

platform, however, an author may find that his or her rights have been automatically altered by the hosting website's Terms of Use. Social media platforms function as a means to distribute user content to other users, therefore as a means of avoiding infringing on users' copyrights, these websites require users to license away the rights to the content they post.¹¹⁶ This is typically accomplished when the user presses the "agree" button at the bottom of a webpage that is jam-packed with dense text.¹¹⁷ The Terms of Use of social media giants such as Facebook, Twitter, YouTube, and Instagram each state that the user retains the rights to any user-generated content.¹¹⁸ Each platform, however, then requires the user to agree to an overly expansive non-exclusive license. Facebook, for example, states that the user grants a "non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any [intellectual property] content that you post on or in connection with Facebook."¹¹⁹ YouTube and Twitter take it even further and state that the license grants the company specific rights.¹²⁰ YouTube's license, for example, permits it to "reproduce, distribute, prepare derivative works of, display, and perform" user content.¹²¹ This

¹¹⁶ David Berreby, *Click to Agree with What? No One Reads Terms of Service, Studies Confirm*, THE GUARDIAN (Mar. 3, 2017), <https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print>.

¹¹⁷ These types of "contracts," referred to as "click-wrap agreements," have typically been upheld by the courts because the act of clicking "agree" denotes that the user is aware of the terms and is assenting to those terms. Kevin W. Grieson, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R.5TH 309, 317 n.1 (2003). A click-wrap agreement is one that "appears when a user first installs computer software obtained from an online source or attempts to conduct an Internet transaction involving the agreement, and purports to condition further access to the software or transaction on the user's consent to certain conditions there specified; the user 'consents' to these conditions by 'clicking' on a dialog box on the screen, which then proceeds with the remainder of the software installation or Internet transaction." *Id.*

¹¹⁸ See *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Nov. 1, 2017) ("You own all of the content and information you post on Facebook."); *Terms of Service*, YOUTUBE [hereinafter *YouTube Terms of Service*], <http://www.YouTube.com/t/terms> (last visited Nov. 1, 2017) ("You retain all of your ownership rights in your Content."); *Terms of Service*, TWITTER [hereinafter *Twitter Terms of Service*], <https://twitter.com/tos> (last visited Nov. 2, 2017) ("You retain your rights to any Content you submit, post or display."); *Terms of Use*, INSTAGRAM [hereinafter *Instagram Terms of Service*], <http://instagram.com/about/legal/terms/> (last visited Nov. 2, 2017) ("Instagram does not claim ownership of any Content that you post.").

¹¹⁹ *Statement of Rights and Responsibilities*, *supra* note 118.

¹²⁰ *YouTube Terms of Service*, *supra* note 118; *Twitter Terms of Service*, *supra* note 118.

¹²¹ *YouTube Terms of Service*, *supra* note 118.

language closely parallels the statutory grant of rights¹²² and grants licenses to YouTube of all six of the copyright owner's exclusive rights through the Copyright Act as well as the right to sublicense all six rights.¹²³ These licenses are non-exclusive, and therefore do not transfer ownership,¹²⁴ however, the licenses are so comprehensive that they allow these websites to do virtually everything with user-generated content, which should make courts question what, if any, rights do these users have in the face of such allowances.

C. Is Fair Use Actually Fair? A Fair Use Analysis for *Estate of Barre v. Carter et al.*

The Second Circuit's holdings reflect the status quo on the application of the fair use doctrine in modern copyright law.¹²⁵ The Second Circuit's stance presently suggests a liberal standard for analyzing whether an alleged use is sufficiently transformed for its use to be considered fair. Under current fair use jurisprudence, assuming the following two threshold issues have been satisfied: that (1) the work is original, fixed, and constitutes expression rather than ideas and (2) a defendant violated an exclusive right, a court will examine the four statutory factors of fair use.¹²⁶ In analyzing the first factor, the purpose and content of the work, courts have held that when the original work is sufficiently "transformed," its use will generally be fair.¹²⁷ The second factor of the fair use analysis examines the connection of the original work to copyright's goals, such as the promotion of artistic expression.¹²⁸ The third factor analyzes the amount and

¹²² 17 U.S.C. § 106 (2012).

¹²³ *YouTube Terms of Service*, *supra* note 118.

¹²⁴ 17 U.S.C. § 101 (2012) (defining a "transfer of copyright ownership" to include exclusive licenses, but not nonexclusive licenses).

¹²⁵ See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 568 (2008); Netanel, *supra* note 55, at 721 ("First, Beebe found that, as measured by case citations, fair use opinions from courts of the Second and Ninth Circuits exerted an overwhelming influence on fair use opinions outside those Circuits, even more than we might expect.")

¹²⁶ See *supra* Part III.A.

¹²⁷ See *supra* Part II.B.

¹²⁸ 17 U.S.C. § 107 (2012).

substantiality of the portion used in relation to the copyrighted work as a whole¹²⁹ and finally, for the fourth factor, the courts must look to the market effect of the alleged infringer's use.¹³⁰

When the Second Circuit's expansive fair use standards are applied to content posted on social media, the results are inadequate copyright protections to the owners of this content. In the lawsuit between the estate of Anthony Barre and defendants Beyoncé Knowles-Carter,¹³¹ Khalif Brown,¹³² Michael Len Williams II,¹³³ Sony Music Entertainment, Parkwood Entertainment and others involved with song "Formation," the estate¹³⁴ alleges that the defendants misappropriated and infringed on the estate's rights under copyright law by featuring the voice of Anthony Barre, better known as Messy Mya, saying three phrases¹³⁵ from his works in the single "Formation," released on February 6, 2016.¹³⁶ The estate asserts it owns a protectable copyright interest in two YouTube videos created by Messy Mya: (1) "Booking the Hoes from New Wildlings;" and (2) "A 27 Piece Huh?"¹³⁷ According to the estate, Messy Mya was a well-known performance comedian and music artist who published over one hundred videos of his performances, garnering over two

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Beyoncé Knowles-Carter is a Grammy award-winning American singer and songwriter. David Renshaw, *Beyoncé is Now The Most-Nominated Woman Artist in Grammy History*, THE FADER (Dec. 6, 2016), <http://www.thefader.com/2016/12/06/beyonce-grammy-history>.

¹³² Khalif Brown is a hip hop recording artist known professionally as "Swae Lee," one-half of the hip hop duo "Rae Sremmurd." Erika Ramirez, *18. Rae Sremmurd: 21 Under 21*, BILLBOARD (Sept. 11, 2014, 12:51PM), <https://www.billboard.com/articles/6251190/rae-sremmurd-21-under-21-2014>

¹³³ Michael Len Williams II is a music producer professionally known as "Mike Will Made It." Andrew Noz, *Beat Construction: Mike Will Made It*, FADER (Apr. 30, 2012), <http://www.thefader.com/2012/04/30/beat-construction-mike-will-made-it/>

¹³⁴ Tragically, 22-year-old Barre was shot and killed on November 14, 2010 in New Orleans, Louisiana. Brendan McCarthy, *Messy Mya, Burgeoning Rapper and YouTube sensation, Identified as 7th Ward Murder Victim*, THE TIMES-PICAYNE (Nov. 15, 2010), http://www.nola.com/crime/index.ssf/2010/11/7th_ward_murder_victim_identif.html. Angel Barre, his sister and sole heir, brought the herein discussed suit on behalf of his estate. Estate of Barré v. Carter, No. 17-1057, 2017 U.S. Dist. LEXIS 116593 (E.D. La. July 25, 2017).

¹³⁵ These three phrases are: "What happened at the New Orleans" from the video "Booking the Hoes from New Wildlings," uploaded to YouTube on August 19, 2010 and "Bitch I'm back, by popular demand," and "Oh yeah baby. I like that" from the video "A 27 Piece Huh?," uploaded to YouTube on September 3, 2010. *Estate of Barré*, 2017 U.S. Dist. LEXIS 116593, at *5.

¹³⁶ *Id.*

¹³⁷ *Id.* at *4.

million views on his YouTube channel.¹³⁸ Messy Mya’s voice, as used in the single “Formation,” also appeared on the album “Lemonade” and during the “Formation World Tour.”¹³⁹ According to the estate, no license or compensation was ever obtained to copy any portion of Messy Mya’s works.¹⁴⁰ In response, the defendants filed a motion to dismiss, arguing the use of the sampling constituted a protected fair use.¹⁴¹ The judge presiding over the case, however, declined to dismiss and the case is presently set to move forward and towards a fair use analysis.¹⁴²

In the case of the estate of Messy Mya, it would likely be easy to establish that the estate holds a valid copyright in Messy Mya’s YouTube videos.¹⁴³ Proceeding to the fair use analysis, the defendants were quick to assert that their use of audio from Barré’s videos constituted “raw material” in the creation of a music video about “black Southern resilience that featured depictions of the history and culture of New Orleans.”¹⁴⁴ They also assert that the YouTube videos comprised only a small component of the Formation music video and the Formation World Tour live performances¹⁴⁵ and that the small portion of the YouTube clips was utilized for an entirely different purpose than the originals.¹⁴⁶ The second factor, the nature of the copyrighted work, is a factor favoring the estate. This factor asks whether the work is a creative work, which receives more protection, or if it more informational and functional in nature, which would afford it less protection.¹⁴⁷ The third factor, amount and substantiality of the portion used,¹⁴⁸ stands to favor the

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at *7.

¹⁴¹ Bill Donahue, *Beyonce Can’t Shake Copyright Suit Over “Formation”*, LAW360 (July 26, 2017, 7:05PM), <https://www.law360.com/articles/948291>.

¹⁴² *Id.*

¹⁴³ *See, e.g.,* Gutierrez Alm, *supra* note 106, at 111 (“A court would likely find social media content (to be fixed in tangible form. Therefore, for those works that also meet the originality requirement, this renders at least some user-generated content copyrightable material.”).

¹⁴⁴ *Estate of Barré*, 2017 U.S. Dist. LEXIS 116593, at *12.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at *12–13.

¹⁴⁷ 17 U.S.C. § 107 (2012); *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (2014).

¹⁴⁸ § 107.

defendants due to the significantly small amount of audio that was sampled from Messy Mya’s YouTube videos. The Formation music video used only four seconds of a five minute and fourteen second clip and six seconds of a one minute and fifty-three second clip, while the Formation World Tour live performances used only the former audio clip.¹⁴⁹ Finally, using the Second Circuit’s interpretation of the fourth factor, the focus would be on whether the secondary use “usurps the market of the original work.”¹⁵⁰ As discussed earlier, in *Cariou*, the Second Circuit held that there was no effect on the potential market for the plaintiff’s photographs of Rastafarians as Cariou “ha[d] not actively marketed his work or sold his work for significant sums, and nothing in the record suggest[ed] that anyone [would] not now purchase Cariou’s work.”¹⁵¹ Under the *Cariou* framework,¹⁵² the fourth fair use factor also stands to weigh against the estate. Using the analogous facts of *Cariou*, supporters of the emphasis on “transformativeness” could make a strong argument may be made that the defendant’s use of Messy Mya’s voice was sufficiently transformative. As a result, an analysis of the remaining fair use factors would be moot because, under the standard set by the Second Circuit,¹⁵³ a court is likely to place less of an emphasis on remaining three factors in the fair use test when the court deems the transformative factor satisfied.

When analyzed under the proposed fair use reforms, the defendant’s use of audio from Messy Mya’s YouTube videos would not be considered a protectable fair use. Under the proposed reform¹⁵⁴ of the analysis, which adopts the Seventh Circuit’s emphasis on the market factor,¹⁵⁵ the fourth factor would weigh heavily in favor of the estate and against the defendants. According to the plaintiff, Messy Mya’s estate never received any compensation for the use of his protected

¹⁴⁹ See *Estate of Barre*, 2017 U.S. Dist. LEXIS 116593, at *14.

¹⁵⁰ *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013).

¹⁵¹ *Id.* at 709.

¹⁵² *Id.*

¹⁵³ See *Id.*

¹⁵⁴ See *infra* Part IV.

¹⁵⁵ See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014)

works.¹⁵⁶ The defendant's use of Messy Mya's clips were highly commercialized¹⁵⁷ and parasitic in nature. Removing the enhanced emphasis on transformativeness would allow a court to properly balance factors two through four of the fair use test, all of which favor the estate. Under a reformed fair use analysis, the defendants would not be able to reap the benefits of the fair use defense and deprive the estate of its deserved statutory damages.

IV. Why the Lines of "Fair Use" Need to Be Redrawn

A. The Duty to Reform Fair Use

Historically, innovation has always posed a challenge to copyright law.¹⁵⁸ Inevitably, the legal implications surrounding new technologies are unclear at first, and potentially infringing conduct becomes rampant before the judiciary or the legislature have the opportunity to address it. An early example of this phenomena was the advent of online file sharing in the early 2000s.¹⁵⁹ Illegal Internet file sharing was such an easy way to send and receive content that it became popular among millions of users before copyright holders brought lawsuits in waves against individual

¹⁵⁶ Estate of Barré v. Carter, No. 17-1057, 2017 U.S. Dist. LEXIS 116593, *7 (E.D. La. July 25, 2017).

¹⁵⁷ To illustrate, Beyoncé's "Formation World Tour" sold over 2 million tickets, grossing approximately \$250 million. Ray Waddell, *Beyoncé's Formation Tour Sold Over 2 Million Tickets and Made Over \$250 Million*, BILLBOARD (Oct. 14, 2016), <http://www.billboard.com/articles/business/7541993/beyonce-formation-tour-2-million-tickets-250-million-dollars>. Her visual album "Lemonade," featuring the lead single "Formation," sold more than 2.5 million copies, making it the top-selling album in the world in 2016. Dan Rys, *Beyoncé's 'Lemonade' Highest-Selling Album Globally in 2016; Drake Lands Top Song: IFPI*, BILLBOARD (Apr. 25, 2017), <http://www.billboard.com/articles/columns/hip-hop/7775037/ifpi-beyonce-lemonade-highest-selling-album-2016-drake-song>.

¹⁵⁸ Technological innovations threaten copyright law by revolutionizing the ability to copy and distribute. See, e.g., *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908) (where an assignee of copyrights on music compositions brought suit against player piano sellers); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (where owners of copyrights on motion pictures brought suit against television rebroadcasting company); *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984) (where owners of copyrights on television programs brought suit against manufacturers of videotape recorders). See generally Vincent J. Roccia, *What's Fair is (Not Always) Fair on the Internet*, 29 RUTGERS L.J. 155, 163-64 (1997) (discussing copyright law's response to technologies such as the VCR, photocopier, and tape recorder); *Sony Corp. of Am.*, 464 U.S. at 430-31 ("From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of . . . the printing press that gave rise to the original need for copyright protection." (citations omitted)).

¹⁵⁹ See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios v. Grokster*, 545 U.S. 913 (2005).

users and software providers.¹⁶⁰ As advances in technology continue to give users new ways to produce and consume content, there is an increasingly compelling demand for the reimagining and reinterpretation of what is copyrightable. To that end, and to help enhance the predictability of the fair use analysis in future jurisprudence, it is imperative to have a national standard grounded in Supreme Court precedent. Although the Supreme Court has analyzed the fair use doctrine over the years in other contexts,¹⁶¹ it has not squarely addressed the standard for determining whether an unauthorized use is fair since its 1994 decision in *Campbell v. Acuff-Rose Music Inc.*¹⁶² In light of the conflicting approaches adopted by the regional circuits regarding fair use,¹⁶³ the Supreme Court needs to step in and reconcile the conflicting decisions.

Under current fair use jurisprudence, the market effect (the fourth factor) is not as important as it once was.¹⁶⁴ The fairest application of fair use standards when considering user-generated content, however, call for a heightened focus on the market effect, with some modifications from the current way courts analyze the factors. In applying the fair use analysis to user-generated content, it makes the most sense, in the interests of fairness, to use a test of commercial exploitation when considering the first and fourth factors. In other words, is the purpose of the secondary use simply sharing, free-riding, or is it parasitic? In determining this, courts should consider whether the appropriation is from professional to amateur, peer to peer, or amateur to professional. In cases where the defendant is a professional and the plaintiff an amateur, there must be a higher standard

¹⁶⁰ Mohsen Manesh, *The Immorality of Theft, the Amoralty of Infringement*, 2006 STAN. TECH. L. REV. 5, 34–35 (2006).

¹⁶¹ See, e.g., *Golan v. Holder*, 565 U.S. 302, 328 (2012) (addressing the constitutionality of the section of the Uruguay Round Agreements Act granting copyright protection to certain preexisting works); *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (addressing the constitutionality of the Sonny Bono Copyright Term Extension Act); *Quality King Distributors Inc. v. L’anza Research Int’l Inc.*, 523 U.S. 135, 150–52 (1998) (addressing the application of the first sale doctrine to gray market goods).

¹⁶² 510 U.S. 569 (1994).

¹⁶³ See *supra* Part II.B.

¹⁶⁴ *Id.*

of what constitutes fair use. Otherwise, young artists and creators of original content posted to social media can have their work illegally sampled for the gain of the professional artist without just compensation. In this analysis, a court’s inquiry would consider the commercialization of the secondary work: distinguishing between the value gained by the secondary user and the value lost by the copyright holder. Use of this test would prevent a professional from exploiting copyright law in a manner that extinguishes the rights of creators of user-generated content, a result that the current system seems to sanction.

The legislative history of the fair use defense demonstrates that fair use is meant to be a flexible analysis because it was Congress’ intent that there be “no disposition to freeze the doctrine in the statute.”¹⁶⁵ Congressional records underscore that “beyond the very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adopt the doctrine to particular situations on a *case-by-case basis*.”¹⁶⁶ One of the implications of the Second Circuit’s decision in *Cariou v. Prince* has been that the transformativeness inquiry has bled into the other three statutory factors.¹⁶⁷ For example, for the fourth statutory factor of section 107, the Second Circuit held that that the correct inquiry is whether the new work completely usurps the market for the original, and that the more transformative the new work, the less likely it will be that it does so.¹⁶⁸ The concept of transformation has crucial ramifications for content posted on social media, as digital works are incredibly easy to manipulate and appropriate.¹⁶⁹ Given the Supreme Court’s denial of the petition for certiorari in *Kienitz*,¹⁷⁰ there is an ever-pressing need to resolve the ongoing conflict in determining how to weigh the first factor

¹⁶⁵ H.R. Rep. No. 94-1476, at 66 (1976).

¹⁶⁶ *Id.* (emphasis added).

¹⁶⁷ 714 F.3d 694, 708–09 (2d Cir. 2013).

¹⁶⁸ *Id.* at 709.

¹⁶⁹ Sheldon W. Halpern, *Copyright Law and the Challenge of Digital Technology*, in *IMAGE ETHICS IN THE DIGITAL AGE* 144–145 (Larry P. Gross, John Stuart Katz & Jay Ruby eds., Univ. of Minn. Press)(2003).

¹⁷⁰ *See Kienitz v. Sconnie Nation, LLC*, 135 S. Ct. 1555 (2015)

emphasizing transformative use against the fourth factor focusing on market effects. In theory, these two factors should be two sides of the same coin because a highly transformative use should not cause market harm.¹⁷¹ Emphasizing different factors, however, can potentially cause the same facts to yield inconsistent results.

B. Addressing Critiques and Potential Counterarguments

Critics of the Seventh Circuit’s emphasis on the market effect factor of the statutory fair use factors argue that the *Kienitz* opinion rejects Supreme Court precedent set by *Campbell v. Acuff-Ross Music, Inc.* by eschewing the first factor in favor of the fourth factor.¹⁷² This critique, however, is unfounded because the Second Circuit’s central argument in *Cariou* is not grounded in Supreme Court precedent; rather it focuses and expands upon one of the many principles delineated by *Campbell*. In *Campbell*, the Supreme Court stated that the fair use analysis is:

*not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The text employs the terms “including” and “such as” in the preamble paragraph to indicate the “illustrative and not limitative” function of the examples given which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.*¹⁷³

Neither the copyright statute, nor the Supreme Court explain which factor is most important in the fair use analysis.¹⁷⁴ Supporters of emphasizing the market effect factor of fair use argue that the transformative test is overly broad,¹⁷⁵ while critics of the market effect argue that the problem with

¹⁷¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

¹⁷² Aaron B. Wicker, *Much Ado About Transformiveness: The Seventh Circuit and Market-Centered Fair Use*, 11 WASH. J.L. TECH. & ARTS 355, 377 (2016); Alexandra Navratil, *Examining the Seventh Circuit’s Repudiation of the Transformative Fair Use Analysis: Kienitz v. Sconnie Nation, LLC.*, 27 DEPAUL J. ART TECH. & INTELL. PROP. L. 73, 86 (2016).

¹⁷³ *Campbell*, 510 U.S. at 577–78 (emphasis added).

¹⁷⁴ See *supra* Part II.

¹⁷⁵ *Kienitz v. Sconnie Nation, LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

the market factor is that it can be construed too broadly.¹⁷⁶ Critics also argue that “by definition every fair use involves the loss of some royalty revenue.”¹⁷⁷ According to critics, if the market factor is given serious deference, this factor would never weigh in favor of the secondary user and classifying it as the single most important element of fair use would make the fair defense defunct;¹⁷⁸ however, the same can be, and has been, said of the first factor.¹⁷⁹ By employing a more market-based analysis, courts would hearken back to the utilitarian nature of copyright jurisprudence: that copyright protection is afforded to encourage and promote the creation of new artistic works. Fair use would still have its place, but with a higher bar set in place. These circular arguments are one of the many reasons the Supreme Court needs to step in and offer guidance on the copyright fair use doctrine once and for all.

V. Conclusion

In light of the significant differences in how the regional circuits approach fair use, it is imperative that the Supreme Court intervene to decide how our judiciary should apply the statutory factors and how the issue of “transformative” use should be evaluated to distinguish non-infringing fair uses from unauthorized infringing works. When it does, it will almost certainly have a profound impact in shaping the future of copyright jurisprudence, as well as steering the actions of artists, social media users, and creators of user-generated content. Young artists of all kinds flock to social media to publicly display their art and hopefully gain attention and fame. User-generated content posted to the Internet and social media platforms receive the most basic, and oftentimes inadequate, copyright protections. Although often dismissed as amateurs, creators of

¹⁷⁶ Navratil, *supra* note 172, at 86.

¹⁷⁷ Leval, *supra* note 10, at 1124.

¹⁷⁸ See Leval, *supra* note 10, at 1124–25.

¹⁷⁹ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 578–79; *Cariou v. Prince*, 714 F.3d 694, 709–10 (2d Cir. 2013); see also Wicker, *supra* note 172, at 367.

user-generated content are indeed copyright owners who should enjoy the full benefits of exclusive statutory rights. Historically, the rights of these users have been left out of consideration and potential violations of their rights overlooked. Under a reformed fair use analysis, these creators of user-generated content will stand a better chance of being afforded the protections they deserve under statutory copyright law. As the law currently stands, the economic burden of serving the public interest in copyrights is forced onto those that are not in the best place to shoulder it. In this way, the burden for public good is placed on “the little guy” which in turn limits his resources, desire, and ability to produce more additional creative works¹⁸⁰ which only serves to undermine the ultimate goal of copyright law.

¹⁸⁰ *See, e.g.,* Authors Guild v. Google, Inc., 804 F.3d 202, 208 (2d Cir. 2015).