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Leaving the Best of Artists and Authors Helpless, Lin Manuel-Miranda's *Hamilton* Illustrates How the Fair Use Test Is Too Gray

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INTRODUCTION

Fair use has permeated our legal system since the nineteenth century.[1] Congress codified the judge-created doctrine in the 1976 Copyright Act.[2] Fair use focuses on fostering creativity and expression.[3] However, "[f]or all its acknowledged importance, . . ., the fair use doctrine is difficult – some say impossible – to define."[4] Fair use is determined through the application of a four factor test that courts apply in a copyright infringement case where fair use has been asserted as a defense.[5] *Warner Bros. Entm't, Inc. v. RDR Books*[6] and *Campbell v. Acuff-Rose Music*[7] illustrate how uncertain the fair use test is, as the cases have opposite holdings, where one court found fair use and the other did not.

A copyright owner has the right to license their copyright protected work.[8] An artist essentially has two options when using copyright protected works: to license or not. Fair use can protect an artist or author in a copyright infringement suit where they did not license the copyright protected work.[9] However, the fair use test is too gray to allow an artist or author to know when they will find a safe harbor in fair use.

This paper discusses fair use and the utilitarian theory. The utilitarian question in copyright is "what is a fair return for authors? And when does control over subsequent use harm creativity, technological progress, or freedom of expression?"[10] Providing a fair return for authors, while promoting creativity is embedded in the issue of whether an artist will be protected under fair use, or if there is a need to license the copied work.

In the first act of Lin Manuel Miranda's *Hamilton the Musical* (*Hamilton*), *Aaron Burr*, originally portrayed by Leslie Odom Jr., sings "Wait for It."[11] *Aaron Burr* sings, "I am inimitable I am an original."[12]

1. *U.S. Copyright Office Fair Use Index*, copyright.gov, https://www.copyright.gov/fls/fl102.html (last updated Dec. 2016).
2. *Id.*
3. *More Information on Fair Use*, copyright.gov, https://www.copyright.gov/fair-use/more-info.html (last updated Oct. 2020).
4. Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1371 (2011) (referencing Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433 (2008)).
5. *More Information on Fair Use*, *supra* note 3.
6. *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (holding that RDR Books' infringement was not fair use).
7. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that 2 Live Crew's parody was fair use).
8. 17 U.S.C. § 106(3) (2018).
9. *More Information on Fair Use*, *supra* note 3.
10. *Id.*
11. Leslie Odom Jr., *Wait for It*, *in HAMILTON THE MUSICAL* (2015).
12. *Id.*

Inimitable is an adjective used to describe a unique, uncopiable thing.[13] Miranda specifically chose the word "inimitable,"[14] yet he chose to license the works he drew his inspiration from. His choice to license leads to a few questions: Was Miranda's work really original? Was the music in *Hamilton* transformative enough that Miranda could have chosen not to license the musical compositions and lyrics he sampled? Would he have been protected under the fair use doctrine?

This paper explores whether the fair use doctrine is too gray, and if there is a need for a better test to allow an artist or author to determine whether their work is transformative enough to permit the unlicensed use of copyright protected work.

I. FAIR USE OVERVIEW

A. The Fair Use Factors

Fair use is a legal doctrine that permits "the unlicensed use of copyright-protected works in certain circumstances."[15] To determine if the unlicensed use of a copyright protected work is permissible under the fair use doctrine, a court will consider four factors:[16]

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (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.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[17]

13. *Inimitable*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/inimitable (last visited Oct. 4, 2020).

14. *Id.*

15. *More Information on Fair Use*, *supra* note 3.

16. *Id.*

17. 17 U.S.C. § 107 (2018); *see also* 17 U.S.C. § 106 (2018) ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted

Fair use is an affirmative defense a defendant may assert in a copyright infringement claim.[18] A fair use claim before the court is determined on a "case-by-case basis"[19] and the outcome is dependent upon "fact-specific inquiry."[20] Due to each claim being fact-specific, "there is no formula to ensure that a predetermined percentage or amount of a work—or specific number of words, lines, pages, copies—may be used without permission."[21]

When the Copyright Act of 1976 was drafted, the fair use doctrine was explicitly noted to serve "only as a guideline."[22] The drafters were broad in the explanation of fair use, leaving the discretion to the courts in how to apply the doctrine.[23] The broadness of the doctrine would lead one to believe that the four factors are of equal weight, however, in application, the focus of courts' decisions are centered around the first and the fourth factor.[24]

"One of the factors weighing in favor of finding fair use is when the use of the original material is 'transformative.'"[25] Transformative use changes the copyrighted work to the extent that the use will no longer be deemed infringement.[26] However, "what exactly is transformative use, and when does it apply?"[27] While the word *transformative* is not included in

work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.").

18. *Limitations to a Copyright Owner's Rights*, COPYRIGHT ALLIANCE, https://copyrightalliance.org/ca_faq_post/what-is-fair-use/ (last visited Nov. 22, 2020); *Affirmative Defense*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/affirmative_defense (last visited Nov. 22, 2020) ("This is a defense in which the defendant introduces evidence, which, if found to be credible, will negate criminal liability or civil liability, even if it is proven that the defendant committed the alleged acts.").

19. *More Information on Fair Use*, *supra* note 3.

20. *Id.*

21. *Id.*

22. Richard Stim, *Fair Use: The Four Factors Courts Consider in a Copyright Infringement Case*, NOLO, https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html (last visited Oct. 18, 2020) [hereinafter *Fair Use: The Four Factors Courts Consider*].

23. *Id.*

24. *Id.* "The U.S. Supreme Court has noted that *transformative* uses of copyrighted work can deeply affect the analysis of the first factor." *Id.* (internal quotations omitted) (emphasis added). Additionally, "courts often focus on the impact of the use on the potential market for the original, under the fourth factor, as a proxy for the harm done by the infringement." *Id.*

25. Richard Stim, *Fair Use: What is Transformative?*, NOLO, https://www.nolo.com/legal-encyclopedia/fair-use-what-transformative.html (last visited Oct. 18, 2020).

26. *Id.*

27. *Id.*

the definition of fair use, "transformative use has become the touchstone of almost every copyright case involving fair use in the last couple decades."[28] Below are two significant copyright cases that illustrate how the court applied the four-factor test to determine if the infringement would be protected under fair use. The *Warner Brothers* case and the *Acuff-Rose* case are useful to compare because the holdings are opposite, which highlights that the fair use test is too gray.

1. Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008)

When RDR Books published a Harry Potter Lexicon, Warner Brothers Entertainment Inc. and J.K. Rowling filed a copyright infringement suit.[29] The defendants asserted having a safe harbor in the fair use doctrine.[30] The District Court evaluated the four fair use factors as "'an open-ended and context-sensitive inquiry.'"[31] The Court believed, in accordance with the U.S. Supreme Court, that the "most critical . . . inquiry under the first fair-use factor is 'whether and to what extent the new work is transformative.'"[32]

The Court found that the Lexicon served a different function than the original use,[33] and that "the Lexicon's use [was] transformative and [did] not supplant the objects of the Harry Potter works."[34] However, the Lexicon's overall transformativeness was lessened by its "use of the original Harry Potter works . . . not [being] consistently transformative."[35] Thus, the Lexicon failed to "'minimize the expressive value'"[36] of the original work.[37] The Lexicon also copied distinctive language directly from the book, which harmed RDR Books' fair use argument.[38]

28. Mark Meyer, *Copyright: How did transformative use become fair use?*, MARK MEYER PHOTOGRAPHER, https://www.photo-mark.com/notes/how-did-transformative-use-become-fair/ (last visited Oct. 4, 2020).

29. *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 520 (S.D.N.Y. 2008).

30. *Id.* at 539.

31. *Id.* at 540 (quoting Blanch v. Koons, 467 F.3d 244, 250 (2d Cir. 2006)).

32. *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)) (internal emphasis omitted). "Courts have found a transformative purpose where the defendant combines copyrighted expression with original expression to produce a new creative work and where the defendant uses a copyrighted work in a different context to serve a different function than the original use." *Id*. at 541.

33. *Id.*

34. *Id.*

35. *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 544 (S.D.N.Y. 2008).

36. *Id. (citation omitted)*

37. *Id.*

38. *Id.* (noting that using distinctive language is unfavorable when analyzing the third factor–amount and substantiality).

The Court was concerned with the secondary author capturing significant revenue from copying the original work.[39] The Court held that RDR Books failed to prove their copying was protected under fair use; thus, it permanently enjoined the Lexicon's publication and awarded the plaintiffs statutory damages.[40]

2. Campbell v. Acuff- Rose Music, 510 U.S. 569 (1994)

"When it comes to copyright cases involving fair use, all roads lead to *Campbell v. Acuff-Rose*."[41] The Acuff-Rose case underscores the value and need of fair use, which is that "some opportunity for fair use of copyrighted materials [is] necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts . . . .'"[42]

In *Campbell v. Acuff-Music Inc.*, the Court resolved whether "2 Live Crew's commercial parody of Roy Orbison's song, 'Oh, Pretty Woman,' [was] a fair use."[43] 2 Live Crew sought permission from Acuff-Rose Music to use "Oh, Pretty Woman," and expressed their willingness to give appropriate credit and license the work.[44] Acuff-Rose refused to license the work for 2 Live Crew's parody.[45] 2 Live Crew went on to release a collection of songs called "As Clean As They Wanna Be," which included "Pretty Woman."[46] The albums and CDs credited Orbison, Dees and Acuff-Rose as the authors and publisher, respectively, of "Pretty Woman."[47] "Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skyywalker Records, for copyright infringement."[48]

An analysis of the first fair use factor allows a court to determine, according to Justice Story, if the new work "supersede[s] the objects"[49] of the original work, or if the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message."[50] This analysis allows courts to evaluate to what

39. *Id.* at 545.
40. *Id.* at 554.
41. Meyer, *supra* note 28 (emphasis added).
42. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (quoting U.S. CONST. art. I, § 8, cl. 8).
43. *Id.* at 571–72.
44. *Id.* at 572.
45. *Id.* at 573.
46. *Id.*
47. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 573 (1994).
48. *Id.*
49. *Id.* at 579 (citing Folsom v. Marsh, 9 F. Cas. 342, 348 (Mass. Dist. Ct. 1841)).
50. *Id.*

extent the new work is "'transformative.'"[51] While a work need not be transformative to find fair use, the more transformative the work is, the less significant the other factors will become, thus making the court more likely to find in favor of fair use.[52] Ultimately, the Supreme Court found that the Court of Appeals placed too great an emphasis on the parody's commercial value, and the consideration provided to the nature of the copied work was not sufficient. The Supreme Court reversed the decision and found that the parody was protected under fair use.[53]

3. Analysis of Cases

The shortcomings of the fair use test are highlighted by the paradoxical holdings in the above cases. In *Warner Bros. Entm't, Inc. v. RDR Books*, the Court's finding regarding the third factor—how to analyze distinctive language —was conclusory. The Court did not provide how much distinct language copied would be too much, or how to concretely define what is considered distinctive. Additionally, while the Court acknowledged that "most critical to the inquiry under the first fair-use factor is 'whether and to what extent the new work is transformative,'"[54] it failed to define transformativeness. The Court said that a work achieves its "transformative purpose both where the defendant combines copyrighted expression with original expression to produce a new creative work."[55] The Court found that the Lexicon served a different function than the original use of the Harry Potter novels.[56] Logically then, RDR Books should have been protected under fair use. However, the Court did not find fair use. Where the reasoning and outcome were antithetical, this single case can serve as a paradigm of the problematic nature of the fair use test. If the Court could not conclude with certainty that the work was transformative enough, then how can an artist or author be expected to reasonably know if their work is transformative enough to find fair use?

In *Campbell v. Acuff-Rose Music*, while the Court provided a solid foundation of how to apply the four-factor test, it failed to provide a concrete way to measure the factors. The case asserts that the absence of transformativeness is not dispositive of finding fair use, but that the

51. *Id.* (quoting Pierre N. Leval, *Commentary: Toward a Fair Use* Standard, 103 HARV. L. REV. 1105, 1111 (1990)).

52. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 573 (1994).

53. *Id.* at 569.

54. Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 540 (S.D.N.Y. 2008) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

55. *Id.* at 541.

56. *Id.*

presence of transformativeness makes the importance of the four factors decrease.[57] Here, the Court placed considerable importance on transformativeness, yet failed to include how to define transformativeness. Where the Court failed to provide a definition for transformativeness, artists and authors are left in the gray area of the fair use test. Thus, artists and authors can only engage in murky speculation when attempting to determine if their work is transformative enough to permit the unlicensed use of copyright protected work.

Moreover, there was a sharp difference in the value the *Acuff-Rose* Court placed on the fourth factor compared to the *Warner Brothers* Court. In the *Acuff-Rose* case, the Supreme Court held that the appellate court was overly concerned with the financial value of the parody.[58] The Court in the *Warner Brothers* case was concerned with the revenue the secondary author would gain from the copied work.[59] This disparate value the courts placed on the fourth fair use factor highlights how gray the fair use analysis is and why a better test is needed.

II. LICENSING OVERVIEW

Copyright owners are entitled to certain exclusive rights to their works.[60] One such right granted to copyright owners, "subject to 17 U.S.C.S §§ 107–122,"[61] is the right "to distribute copies or phonorecords of the copyrights work . . . by sale or other transfer of ownership, or by rental, lease, or lending."[62] An author's ability to license or assign their copyright allows for the potential of economic or other benefits.[63] To gain a benefit, the copyright holder can either license or assign their copyright protected work.[64] The choice to license or assign the copyright is dependent on the type of ownership the copyright owner wishes to retain.[65]

A copyright owner can license their protected work as they choose.[66] Obtaining a license, or permission, has been boiled down to a basic five-

57. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
58. *Id.* at 569.
59. *Warner Bros. Entm't, Inc.*, 575 F. Supp. 2d at 545.
60. 17 U.S.C. § 106.
61. 17 U.S.C. § 106.
62. 17 U.S.C. § 106(3).
63. Copyright Licensing, JUSTIA, https://www.justia.com/intellectual-property/copyright/copyright-licensing/ (last updated June 2019).
64. *Id.*
65. *Id.* With licensing, the owner retains rights to their work, whereas with assigning the owner loses control over their work. *Id.*
66. 17 U.S.C. § 106.

step process.[67] The process is to "(1) determine if permission is needed; (2) identify the owner; (3) identify the rights needed; (4) contact the owner and negotiate whether payment is required; and (5) get your permission agreement in writing."[68] Licensing fees can vary based on what is being sampled, like sound recordings or compositions.[69] Fair use allows a new author or artist to sidestep the traditional copyright structure by using copyright protected work without permission or licensing.[70]

The difficulty with obtaining permission, as related to the topic of this paper, is determining what use of a work will be considered transformative enough that permission would not be needed.

III. *HAMILTON THE MUSICAL*: WAS LICENSING NECESSARY OR WOULD FAIR USE BE ENOUGH?

Hamilton the Musical is the hip-hop musical that took Broadway by storm.[71] Lin-Manuel Miranda wrote and starred in the award-winning show, which depicted the life of founding father Alexander Hamilton.[72] Miranda largely based the musical off the biography *Hamilton*, written by Ron Chernow.[73] In his lyrics and musical compositions, Miranda referenced works of artists across all genres, and most prominently hip-hop.[74] Notable references Miranda made included some to The Notorious B.I.G., Mobb Deep, DMX, Rogers and Hammerstein's *South Pacific,* Eminem, and Jason Robert Browne's *The Last Five Years*, to name a few.[75]

Though Lin-Manuel Miranda drew inspiration from, referenced and incorporated similar lyrics and musical compositions from music giants, he has not faced copyright infringement litigation.[76] In fact, "not only are none

67. *The Basics of Getting Permission*, STAN. U. LIBR., https://fairuse.stanford.edu/overview/introduction/getting-permission/ (last visited Dec. 1, 2020).

68. *Id.*

69. *Id.*

70. *More Information on Fair Use*, *supra* note 3.

71. Laura Ware, *Hamilton Musical*, STAGE AGENT, https://stageagent.com/shows/musical/4417/hamilton (last visited Oct. 22, 2020).

72. *Id.*

73. *Id.*

74. Larry Iser, *'Hamilton' and Copyright: Lin-Manuel Miranda had his Eyes on Music History*, FORBES (June 16, 2016, 9:00 AM), https://www.forbes.com/sites/legalentertainment/2016/06/16/hamilton-and-copyright-lin-manuel-miranda-had-his-eyes-on-music-history/#49d4199b50f8 [hereinafter *'Hamilton' and Copyright*].

75. *See id*; *see also* Heran Mamo, *Lin-Manuel Miranda Explains How 'Hamilton' Serves as a 'Love Letter to Hip-Hop' That He Grew Up On*, BILLBOARD (July 7, 2020), https://www.billboard.com/articles/columns/hip-hop/9414834/lin-manuel-miranda-apple-music-interview.

76. *'Hamilton' and Copyright*, *supra* note 74.

of Miranda's sources of inspiration or lyrics suing Miranda, they are lining up to praise him . . . ."[77] Miranda has been free of litigation for infringement for a few reasons.[78] Namely, he cleared his uses with the original artists by giving credit where it was due, asking and receiving permission, and – where necessary – obtaining licensing.[79]

Throughout the entire soundtrack, Miranda included references and samples from hip-hop, rap, R&B and musicals by other artists.[80] For example, Miranda paid homage to The Notorious B.I.G.[81] In "My Shot," at the 40 second mark, *Alexander Hamilton* spells out his name, "A-L, E-X, A-N, D / E-R / we are / meant to be" in a rhythm that mimics The Notorious B.I.G.'s infamous line in "Going Back To Cali," where he raps, "It's the N-O, T-O, R-I, O / U-S / you just / lay down / slow."[82] Also in "My Shot," *Aaron Burr* sings "I'm with you but the situation is fraught / You've got to be carefully taught," which Miranda sampled from *South Pacific*.[83] Another nod Miranda made to The Notorious B.I.G. was in the song "Ten Dual Commandments" which The Notorious B.I.G.'s "Ten Crack Commandments" inspired.[84] Miranda also included the line "Nobody needs to know" from the musical *The Last Five Years*, in his song "Say No to This."[85]

One song in particular includes numerous samples and references to hip-hop and rap giants: "Cabinet Battle #1."[86] Miranda noted that he structured "Cabinet Battle #1" and "Cabinet Battle #2" after the rap battles in the movie *8 Mile*.[87] In "Cabinet Battle #1," the song opens with George Washington moderating a debate between Secretary of State, Thomas Jefferson, and Secretary of the Treasury, Alexander Hamilton, regarding

77. *Id.*

78. *Id.*

79. *Id.* Because Miranda intended to use another's musical composition in a musical, he needed a specific type of license called a Grand Rights license. *Id.*

80. Erin McCarthy, *26 Things You Might Not Have Known About Hamilton*, MENTAL FLOSS, https://www.mentalfloss.com/article/71222/20-things-you-might-not-have-known-about-hamilton (last updated June 15, 2020).

81. *Id.*

82. Minou Clark, *You Probably Missed These Epic Hip-Hop Easter Eggs in 'Hamilton'*, HUFFPOST (Mar. 16, 2016, 1:20 PM), https://www.huffpost.com/entry/my-name-is-alexander hamilton_n_56e6e3eae4b0b25c9182840d?guccounter=1.

83. McCarthy, *supra* note 80.

84. *Id.*

85. *Id.*

86. Clark, *supra* note 82.

87. Forrest Wickman, *All the Hip-Hop References in Hamilton: A Track-by-Track Guide*, BROW BEAT (Sept. 24, 2015, 9:02 AM), http://www.slate.com/blogs/browbeat/2015/09/24/hamilton_s_hip_hop_references_all_the_rap_and_r_b_allusions_in_lin_manuel.html.

State debts.[88] Washington opens the debate by saying "Ladies and gentlemen, you could've been anywhere in the world tonight, but you're here with us in New York City!"[89] In Jay Z's song "Izzo (H.O.V.A.)," around the 15 second mark, Jay Z's introduction was "Ladies and gentlemen / . . . / You could've been anywhere in the world / But you're here with me, ..."[90]

Listeners to "Cabinet Battle #1" theorize that Miranda's nod to Eminem did not just stop at stylizing his rap battles after the rap battles from *8 Mile*, but that Miranda also may have referenced Eminem's song "Renegade."[91] Lastly, in "Cabinet Battle #1," Miranda paid homage to Grandmaster Flash's song "The Message" when *Jefferson* sings to *Hamilton* that he did not have the congressional votes for his financial plan, saying "*ah ha ha ha*," and then sings "Such a blunder/ Sometimes it makes me wonder/ why I even bring the thunder."[92] In "The Message," Grandmaster Flash composed the lines "It's like a jungle/ Sometimes it makes me wonder/ How I keep from going under / *Ah ha ha ha*."[93] Hip-Hop, rap, and other music fans have become so enthralled with *Hamilton* that a track-by-track guide was created to identify all of Miranda's references.[94]

As noted above, Miranda "cleared" his uses of the music that inspired him and that he copied through obtaining rightful permission, paying a licensing fee, or simply attributing proper credit.[95] However, could Lin-Manuel Miranda have opted not to clear his work and found protection under fair use? In a Forbes article, Attorney Larry Iser argued that Miranda did not need clearance for his works.[96] Iser noted that the courts have placed the most emphasis on the first fair use factor, scrutinizing whether the new work is "transformative."[97] Iser found that in a Second Circuit

88. Clark, *supra* note 82.

89. *Id.*

90. *Izzo (H.O.V.A.)*, Genius, https://genius.com/Jay-z-izzo-hova-lyrics (last visited Oct. 22, 2020).

91. Clark, *supra* note 82.

92. Wickman, *supra* note 87.

93. *Id.*

94. *Id*.

95. *'Hamilton' and Copyright*, *supra* note 74.

96. Larry Iser, *'Hamilton' Part II – Why Lin-Manuel Miranda didn't Really Need to Clear the Music*, FORBES (June 27, 2016, 7:00 AM), https://www.forbes.com/sites/legalentertainment/2016/06/27/hamilton-part-ii-why-lin-manuel-miranda-didnt-really-need-to-clear-the-music/#71c38ae45d51 [hereinafter *'Hamilton' Part II*]. The Second Circuit in particular, where a dispute regarding a Broadway show would be litigated, focuses most on the first fair use factor and whether a work is transformative. *Id.*

97. *Id.*

case, the court held that a work is "transformative" and subsequently a fair use, where it had a "completely different aesthetic, a different purpose and a different audience."[98] Iser posited that the "hip-hop history lesson"[99] was "undeniably [] a completely different aesthetic, a different purpose and a different audience than the original works."[100]

Deborah Mannis-Gardner, the music clearance expert who was responsible for clearing all of Miranda's references, agreed with Iser that *Hamilton* would have been protected by fair use.[101] However, as Mannis-Gardner understood, Miranda pointedly chose to license all his references out of respect to the original authors.[102] Mannis-Gardner believed "it was as if Lin wanted to take that community of hip hop and rap and make the rest of the world recognize that music."[103] Lin-Manuel Miranda arguably created "the poster child for 'transformative' works"[104] by melding hip hop, a genre typically not seen in musical theater, R&B, and other musical theater into a historical piece where he deliberately chose to have the actors be played by individuals of color.

A. Fair Use Factor Analysis

As the Supreme Court established in *Campbell v. Acuff-Rose Music*, the more transformative the work is the less significant the other factors will become, thus making the Court more likely to find in favor of fair use.[105] *Hamilton* is a transformative work.[106] Miranda—with permission—sampled lyrics and sounds,[107] but he took those samples a step further and transformed them into something new.[108] Miranda's songs, while inspired by or copied from previous work, added value to the original creation, produced an understanding of a founding father, and exhibited a completely new aesthetic.[109] Miranda demonstrated the new aesthetic by uniquely bridging the world of musical theatre and hip hop together with

98. *Id.* (citing Cariou v. Prince, 714 F.3d 649 (2d Cir. 2013)).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. 510 U.S. 569, 579 (1994).
106. *'Hamilton' Part II*, *supra* note 96.
107. Deidre Davis, *Living to See His Glory Days: Why Hamilton's Lin-Manuel Miranda is Not Liable for Copyright Infringement, But Other Writers and Composers Are*, 17 J. MARSHALL REV. INTELL. PROP. L. 92, 100 (2017).
108. *'Hamilton' Part II*, *supra* note 96.
109. *Id.*

unprecedented success.[110] Therefore, even if a court were to find that Miranda's use of copyright protected work was not fair under any one of the factors, the fair use doctrine likely still protects Miranda's work due to how transformative *Hamilton* was in its totality.

Nevertheless, the fact that the outcome of each fair use factor is so unclear illustrates the problem with the fair use test. An analysis of *Hamilton* demonstrates the grayness of the fair use test, strengthening the argument that courts need a more definitive fair use test so that authors and artists are better able to determine if their work is transformative enough to allow for the unlicensed use of copyright protected work.

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

Courts are typically more likely to find fair use where the use of the copyright protected work was for educational or non-commercial use.[111] Whether a court would find the first factor in favor of Miranda is unclear. Lin-Manuel Miranda wrote *Hamilton* to educate and entertain audiences about the life of Alexander Hamilton. Miranda created the musical because he was inspired by Hamilton's life and felt people did not know much about this founding father.[112] *Hamilton* recaptures the life of one of history's less popularized founding fathers with substantial accuracy.[113] However, *Hamilton* was also commercial, with extreme success and global sales surpassing the billion-dollar mark.[114] *Hamilton* was used for educational and commercial purposes, so whether a court would find Miranda's use of other artists' works fair under the first factor is unclear.

110. *See* Alexis Soloski, *Sixteen Ways Hamilton Transformed Theatre – and the World*, THE GUARDIAN (May 3, 2016, 5:49 PM), https://www.theguardian.com/stage/2016/may/03/hamilton-tony-awards-broadway-lin-manuel-miranda; Alexis Petridis, Break it Down: How Hamilton Mashed up Musical Theatre and Hip Hop, THE GUARDIAN (Dec. 1, 2017, 5:00 PM), https://www.theguardian.com/stage/2017/dec/01/hamilton-mashed-up-musical-theatre-and-hiphop-lin-manuel-miranda.

111. *More Information on Fair Use*, *supra* note 3.

112. Kelsie Gibson, *So, Why Did Lin-Manuel Miranda Decide to Write a Musical About Alexander Hamilton?*, POPSUGAR (July 4, 2020), https://www.popsugar.com/entertainment/why-did-lin-manuel-miranda-write-hamilton-47591527.

113. *'Hamilton' Part II*, *supra* note 96.

114. Dawn Chmielewski, *Lin-Manuel Miranda's 'Hamilton' Crashes Broadway's Billion-Dollar Club*, FORBES (June 8, 2020) https://www.forbes.com/sites/dawnchmielewski/2020/06/08/lin-manuel-mirandas-hamilton-crashes-broadways-billion-dollar-club/?sh=53b3a6455b3c.

2. The nature of the copyrighted work

"Using a more creative or imaginative work . . . is less likely to support a claim of fair use than using factual work."[115] Courts typically provide more leeway for the copying of education or factual work.[116] Miranda copied what would likely be classified as creative work where he was inspired by or sampled lyrics and musical compositions from other artists. The second factor would likely find in favor of not being a fair use. However, the transformative nature of Miranda's work would likely minimize the importance of the nature of the copyrighted work.

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole

Under the third factor, courts will evaluate how much of the copyright protected work was used, and if the used portion was distinctive, or the "heart" of the work used.[117] However, as discussed in the *Warner Brothers* case analysis, the court does not provide a concrete way to determine what constitutes a distinctive part of a work. There is also no steadfast formula to calculate what constitutes an acceptable portion of how much of a work can be copied.[118] Miranda sampled so many different songs and made so many references throughout the entire musical, thus he did not take large samplings from any one song. As noted above, the song "My Shot" has numerous references. The musical is a culmination of so many samples that no one sample is notably more significant than another as to diminish the overall transformativeness of the work. Barring any claims that one of Miranda's samplings used the "heart" of the work[119] he sampled, the third factor would likely weigh in favor of finding fair use.

4. The effect of the use upon the potential market for or value of the copyrighted work

As discussed in the *Acuff-Rose* case, where a work is transformative, market harm and substitution are not as easily inferred and are less clear.[120] While copyright protection allows copyright owners the exclusive right to

115. *More Information on Fair Use*, *supra* note 3.
116. *Fair Use: The Four Factors Courts Consider*, *supra* note 22.
117. *More Information on Fair Use*, *supra* note 3.
118. *Id.*
119. Harper & Row Publrs. v. Nation Enters., 471 U.S. 539 (1985).
120. Campbell v. Acuff- Rose Music, 510 U.S. 569, 591 (1994).

produce derivative work,[121] the question remains of how likely were any of them to produce something resembling a historical hip-hop version of their own songs? Miranda's sampling of the songs likely would not diminish the value of the original works or supplant them in the market. Hip-hop and musical theater appear to be universally different genres of music. The logical likelihood that someone who was going to purchase The Notorious B.I.G.'s Epic Rhymes album to listen to the song "Going Back to Cali" (which was partially sampled in "My Shot"[122]), and instead chose to buy the *Hamilton* soundtrack to hear the brief reference is not high. Where harm from market substitution seems unlikely, granted not impossible, the fourth factor would likely weigh in favor of finding fair use.

Under the fair use test, whether Lin-Manuel Miranda would have been protected based on the factors alone is unclear. Factors one and two would likely find against fair use, but factors three and four would likely find in favor of fair use. However, *Hamilton* would likely be found to be transformative. So, where transformativeness minimizes the importance of the four factors,[123] Miranda's use of other artists' works would likely have been found to be fair use.

Ultimately, even though Lin-Manuel Miranda chose to clear his samplings, he likely did not need to.

B. Uncopyrightable Works

A fair use defense would not arise where Miranda sampled works that are not protected by copyright law. Two types of work that are not protected by copyright law include works in the public domain and generic/non-creative works.[124]

1. Public Domain

A work in the "public domain" does not belong to any one author or artist, is unprotected by copyright law, and can be used by anyone without acquiring permission.[125] There are four ways for a work to end up in the public domain.[126] The two ways that this section will explore is where

121. 17 U.S.C. §106 (2018).

122. Clark, *supra* note 82.

123. Campbell, 510 U.S. at 579.

124. *Welcome to the Public Domain*, STAN. U. LIBR., https://fairuse.stanford.edu/overview/public-domain/welcome/ (last visited Oct. 23, 2020); *Feist Publications, Inc. v. Rural Telephone Service, Co*, 499 U.S. 340, 363 (1991).

125. *Id*.

126. *Id.*

"copyright law does not protect th[at] type of work"[127] or "the copyright has expired."[128]

Copyright law does not protect facts, thus placing them in the public domain.[129] Alexander Hamilton is a person, which is not a creative expression but simply a fact. History is a compilation of facts. However, if creativity is expressed in how an individual chooses to assemble a compilation of facts, or other uncopyrightable materials from the public works, the final product may be copyrightable.[130] Even though Alexander Hamilton and history are in the public domain, Miranda was able to obtain copyright protection for his works[131] because he compiled the facts in a creative way.

Work also ends up in the public domain when the copyright has expired.[132] Registered or published works in the U.S. prior to 1925 are in the public domain.[133] *Pirates of Penzance*, which premiered December 31, 1879, in New York, City,[134] is in the public domain. Therefore, in the song "Right Hand Man," Miranda's reference to the song "Modern Major General" from *Pirates of Penzance* would not require licensing.[135]

2. Generic or Non-Creative Work

In *Feist Publications, Inc. v. Rural Telephone Service, Co*., the Supreme Court found "there [was] nothing remotely creative about arranging names alphabetically in a white pages directory."[136] Where a work did not "possess more than a *de minimis* quantum of creativity,"[137] and was unoriginal, the work would not be afforded copyright protection.[138] Copyright infringement would not be an issue if any of the work that Miranda sampled was unoriginal and uncreative such that it would not be protected by copyright.

127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Terms of Use*, HAMILTON, https://hamiltonmusical.com/eu-terms/ (last visited Nov. 27, 2020).
132. *Welcome to the Public Domain*, *supra* note 124.
133. *Copyright Term and the Public Domain in the United States*, CORNELL U., https://copyright.cornell.edu/publicdomain (last visited Oct. 23, 2020)
134. *Show History*, MUSIC THEATRE INT'L., https://www.mtishows.com/show-history/617 (last visited Oct. 22, 2020).
135. *Wickman*, *supra* note 87.
136. 499 U.S. 340, 363 (1991).
137. *Id.*
138. *Id.*

In "Going Back to Cali" was there any creative merit in The Notorious B.I.G. simply spelling out his name, such that Miranda would face copyright infringement for his use of having *Alexander Hamilton* spell out his name?[139] "Generic . . . phrases are likely not able to be protected"[140] However, looking at the totality of the circumstance, Miranda not only copied spelling out a name, but also copied the sound and rhythm. The spelling itself may have been generic, but when the spelling overlaid a distinct musical composition, it would likely be creative. Therefore, Miranda likely sampled copyright protected work.

A musical composition may be registered for a copyright, which includes the music and lyrics of the song.[141] However, "song titles generally don't fall within the protection of copyright law since most are not sufficiently original or independently conceived by the artist."[142] Therefore, when Miranda titled a song in *Hamilton* "Ten Dual Commandments," inspired from The Notorious B.I.G.'s song "Ten Crack Commandments,"[143] there would likely be no copyright infringement issue, as song titles are generally not copyright protected.

IV. FAIR USE IN TRADEMARK LAW

In addition to copyright, trademarks are another major area of intellectual property law. "The Lanham Act, also known as the Trademark Act of 1946, is codified at 15 U.S.C. § 1051 et seq."[144] Under the Lanham Act, a trademark can protect "any word, name, symbol, or device, or any combination thereof. . . used by a person. . . to identify and distinguish his or her goods . . .."[145] Fair use in trademark law permits "the use of someone else's trademark in a way that will not subject the user to liability for infringing the owner's rights."[146] In trademark law, like in copyright law, for a defense of fair use to arise, the plaintiff must first prove their prima

139. Clark, *supra* note 82.

140. Michael Wechsler, *Are Song Titles & Lyrics Protected by Copyright or Trademark Law?*, THELAW.COM, https://www.thelaw.com/law/are-song-titles-lyrics-protected-by-copyright-or-trademark-law.317/ (last visited Nov. 22, 2020).

141. *Copyright Registration for Musical Compositions*, COPYRIGHT.GOV, https://www.copyright.gov/circs/circ50.pdf (last visited Nov. 22, 2020).

142. Wechsler, *supra* note 140.

143. McCarthy, *supra* note 80.

144. *Lanham (Trademark) Act*, NOLO, https://www.nolo.com/legal-encyclopedia/content/lanham-act.html (last visited Dec. 2, 2020).

145. Brian Farkas, *Trademarking a sound*, NOLO, https://www.nolo.com/legal-encyclopedia/trademarking-a-sound.html (last visited Dec. 2, 2020).

146. Maria Crimi Speth & Aaron K. Haar, *Fair Enough: The "Fair Use" Defense to Trademark Infringement*, JAUBERG WILK, http://www.jaburgwilk.com/news-publications/fair-use-defense-to-trademark-infringement (last visited Dec. 2, 2020).

facie case of infringement.[147] "The Lanham Act expressly protects fair use from liability for trademark infringement. . .."[148]

In *Hamilton*, "[t]he Whoa's in My Shot share an interval with the AOL dial up sound."[149] In evaluating fair use, Miranda's use of the AOL dial up sound would not be viewed through the lens of copyright protection. The AOL dial up sound that accompanies the "You've Got Mail" message is a protected trademark (serial number 75528557), classified as a sound mark.[150] The trademark is currently still active.[151] The question would then be, was Miranda's use of the sound mark permissible under fair use and should it be?

The Supreme Court determined that "some possibility of consumer confusion must be compatible with fair use."[152] However, "where the two marks are entirely dissimilar, there is no likelihood of confusion."[153] Miranda was inspired to use the AOL dial up sound as a symbol of "the sound of an idea first connecting with the world."[154] Miranda's use of the dial up sound's intervals was overlaid with lyrics, which may have made it dissimilar enough that there would be "no likelihood of confusion."[155] Therefore, if there would be no consumer confusion that would indicate that Miranda's use of the dial up sound's interval was fair. There are two types of fair uses in trademark law: descriptive or nominative.[156] Here, Miranda's use of the sound mark does not seem to be expressly referring to another product or service, thus determining which type of fair use Miranda could be protected under is unclear. Miranda's use of the dial up sound's interval was ultimately dissimilar to the protected sound mark, so it would likely be fair use.

147. Linda A. Friedman, *Online Use of Third Party Trademarks: Can Your Trademark Be Used without Your Permission?,* AM. BAR ASSOC. (Feb. 20, 2016).

148. *Id.*

149. Lin-Manuel Miranda (@Lin_Manuel), Twitter (June 8, 2016, 9:25 AM), https://twitter.com/Lin_Manuel/status/740535313437708288.

150. Nick Greene, *18 Sounds You Probably Didn't Realize Were Trademarked*, MF (June 17, 2015), https://www.mentalfloss.com/article/65162/18-sounds-you-probably-didnt-realize-were-trademarked.

151. YOU'VE GOT MAIL, Registration No. 2628523

152. KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 121 (2004).

153. Brookfield *Commc'ns, Inc. v. W. Coast Ent. Corp*., 174 F.3d 1036, 1054 (9th Cir. 1999)

154. Miranda, *supra* note 149.

155. Brookfield Communs., Inc., 174 F.3d at 1054.

156. *Fair Use of Trademarks (Intended for a non-legal audience)*, INT'L TRADEMARK ASSOC., https://www.inta.org/fact-sheets/fair-use-of-trademarks-intended-for-a-non-legal-audience/ (last updated Jan. 16, 2020) ("Descriptive fair use permits use of another's trademark to describe the user's products or services," whereas, "nominative fair use permits use of another's trademark to refer to the trademark owner's actual goods and services associated with the mark.").

Frequently, copyright law will be the better body of intellectual property law to protect a sound than trademark law.[157] In copyright and trademark law, an individual can be sued for infringement upon the protected sound, however, with copyright law there is no need to show the sound has a secondary meaning.[158]

The trademark fair use analysis would likely not solve the grayness found in the copyright fair use analysis, as some of the factors do not correlate well to the types of works that copyright protects. However, the trademark fair use analysis may benefit from applying the transformativeness principle from the copyright analysis. The use of trademark protected work would likely have a lesser chance of causing consumer confusion where the work was transformed, like how Miranda transformed the dial up sound.

V. FAIR USE AND THE UTILITARIAN THEORY

"Utilitarianism is considered to be the theory that has mostly affected the common law IP school of thought."[159] The utilitarian theory contemplates, with no definitive answer, "how to balance the social costs and benefits associated with giving legal effect to IP laws and rules."[160] The questions surrounding the extent and duration of copyright-owner control are matters of public policy.[161] These public policy questions represent the epitome of the utilitarian theory at work: "What is a fair return for authors? And when does control over subsequent use harm creativity, technological progress, or freedom of expression?"[162] This section explores how to balance fair use in relation to the utilitarian theory.

The utilitarian theory as understood in copyright law is how to provide enough economic incentive to authors to encourage them to create works.[163] The pragmatic, yet unanswerable question is, what is the ideal balance between allowing a copyright owner to control and monetize their own expression weighed against advancing progress in the arts by allowing fair use? The Supreme Court reasoned that fair use is "necessary to fulfill

157. Farkas, *supra* note 145.

158. *Id.*

159. Giovanni Tamburrini & Sergey Butakov, *The Philosophy behind Fair Use: Another Step towards Utilitarianism*, 9 J. INT'L COMM. L. & TECH 190, 194 (1994).

160. Neil Wilkof, *Theories of Intellectual Property: Is it Worth the Effort?*, 9 J. INTELL. PROP. L. & PRACTICE 257, 257 (2014).

161. Sag, *supra* note 4, at 1372.

162. *Id.*

163. Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 322 (2018).

copyright's very purpose, 'to promote the Progress of Science and useful Arts.'"[164]

"The struggle to balance the competing interests of copyright holders and the public is at a critical point today."[165] In achieving the goal of copyright law, as grounded in the Constitution,[166] many scholars believe that fair use should be expanded; however, that is not the belief of all scholars.[167] Professor Henslee contended that music and sound recordings should be removed from the scope of fair use all together, proposing new language for 17 U.S.C. § 107 saying, "[t]his section shall not apply to musical works and sound recordings."[168] Professor Henslee believed that music sampling should require a license from the copyright owner.[169] Requiring authors of new works who copy or sample existing creations to license from the copyright owner is a measure to balance the economic interest of the current copyright holder. DIY Musician captured Professor Henslee's point, "[t]hink about it: without copyright law, music would be a hobby."[170] The protections afforded by copyright law would not exist, permission for any use would not be sought, and an artist or author would never receive payment.[171] There is an understandable problem that if fair use is too broad, copyright holders will not be able to monetize their creations, thus diminishing the economic incentive to create.

However, potentially diminished economic incentive does not mean that fair use is meritless. The enforcement of copyright arguably hinders the advancement and progress of the arts.[172] Therefore, the expansion of fair use may better achieve copyright law's goal of progress.[173] At its core, utilitarianism is about serving the greatest number with the greatest good. While licensing may seem like a good way to balance progress with the economic interests of copyright owners, not everyone can afford the costs associated with licensing. Fair use allows an artist or author access to

164. *Id.* at 356–57 (quoting Campbell v. Acuff-Rose, 510 U.S. 569, 575 (1994)) (quoting U.S. CONST. art. I, § 8, cl. 8).

165. William Henslee, *You Can't Always Get What You Want, but if You Try Sometimes You Can Steal it and Call it Fair Use: A Proposal to Abolish the Fair Use Defense for Music*, 58 CATH. U. L. REV. 663, 666 (2009).

166. U.S. CONST. art. I, § 8, cl. 8.

167. *Id.* Henslee, *supra* note 165 at 665.

168. *Id.* at 698.

169. *Id.* at 700.

170. *Music Copyright: 5 Things Every Musician Must Know*, DIY MUSICIAN (July 30, 2014), https://diymusician.cdbaby.com/music-rights/5-things-every-musician-know-copyright/.

171. *Id.*

172. *Fair Use*, DIGITAL MEDIA L. PROJECT (Jan. 22, 2021), https://www.dmlp.org/legal-guide/fair-use.

173. U.S. CONST. art. I, § 8, cl. 8.

existing work so that they can transform it into a new expression, which benefits society.[174] Where a work is transformative and will not simply supplant the copyright protected work in the market, there is no net economic loss.[175] The fair use doctrine may provide a pathway to creativity that was previously impeded by financial barriers.

As the fair use test stands now, the aim of the utilitarian theory is not being met because there is a potential lack of benefit to all parties. The *Warner Brothers* case illustrates the failure of the fair use doctrine and its negative impact on the utilitarian theory. The Harry Potter Lexicon benefitted society by providing a creative work. RDR Books was injured when it was found liable for infringement and had to stop printing the Lexicon in addition to paying statutory damages.[176] The injunction effectively ended the benefit to society because the Lexicon could no longer be printed for consumption. The plaintiffs potentially could have received a larger benefit than they did from statutory damages. If the plaintiffs had arranged a licensing agreement with RDR Books, there could have been an opportunity for higher financial gain with the Lexicon's success. The utilitarian theory cannot achieve equilibrium and provide the greatest good where (1) all parties suffer because the fair use test is too gray, and (2) there is not a sufficient test to determine if a work is transformative enough to permit the unlicensed use of copyright protected work.

VI. IMPLICATIONS & SUGGESTIONS

In its application, a court's determination of when to find fair use is fact intensive and unpredictable.[177] The fact that the courts apply a case-by-case, fact intensive analysis leads to grave uncertainty. The uncertainty with the fair use doctrine may prove to run counter-intuitive to the goal of progress.[178] If an author does not know if they will be compensated for someone else's use of their copyright protected work, the incentive to create new works may be diminished. Conversely, if a new author does not know if they can fairly use part of a copyright protected work, there may be

174. *Fair Use*, *supra* note 172.

175. Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 998 (2007) ("If copyrights have any legitimacy, it is when they protect against unauthorized copying that results in a demonstrable loss of profits that the copyright owner can prove she would have had but for the defendant's infringement.").

176. *Id.*

177. *Measuring Fair Use: The Four Factors*, STAN. U. LIBR., https://fairuse.stanford.edu/overview/fair-use/four-factors/ (last visited Apr. 27, 2021).

178. U.S. CONST. art. I, § 8, cl. 8.

a fear of litigation preventing them from creating, as litigation is costly. The most serious threat of such uncertainty is a decrease in the amount of creative work.

The fair use factors, in practice, are so gray that, "[i]t's not just creators who are confused; the courts are also confused."[179] "The legal record is a tangled web of ambiguous opinions that provide little security or clarity to those who depend on either copyright protection or the freedoms promised by the concept of fair use."[180] The ambiguity and potential harm to both copyright owners and new artists and authors is exactly the reason we need a more definitive fair use test. Copyright owners have little way of knowing when someone will use their work and be protected under the fair use doctrine, so they cannot possibly predict to what extent they will be able to monetize their creation. New artists and authors cannot predict if they will be protected under fair use, so they have no way of knowing if they can afford to create due to the potential costs of licensing or litigation. The uncertainty on both ends threatens progress.

One solution to this problem is to have clearer guidelines. In the interest of progress, the guidelines should expand the fair use doctrine. Amanda Sky Hall said, "creativity is not a competition." However, society has indeed turned creativity into a competition. There is a rush to the market, a rush to create new ideas, and now a rush to litigate. While every person certainly should have a right to make money, the monetization of creativity can sometimes serve as an insurmountable impediment to progress. The entire purpose of copyright protection was to incentivize progress in the arts.[181] However, with the lengthy duration of copyright protection, and the costs associated with licensing, progress may suffer. Fair use expansion would allow for a way around the costs associated with licensing to aid in creativity.

The fair use test needs clearer guidelines because the factors are too ambiguous. To make the fair use test clearer, the list of factors should be changed and expanded. A suggested five-factor analysis for finding fair use is as follows:

1. Is the work transformative?
2. What proportion of the work is used?
3. Does the new work supplant the copyrighted work in the market?
4. What is the motive behind the copying?

179. Meyer, *supra* note 28.
180. *Id.*
181. U.S. CONST. art. I, § 8, cl. 8.

5. Does the user have the "Right to Cite"?[182]

Under the first factor, transformativeness contemplates whether the new work has a new "expression, meaning or message?"[183] The focus of the analysis should center on this factor when determining if a work will be considered a fair use. Transformative works should achieve copyright's goal of progress.[184] Additionally, where a work is transformed from the copyrighted work there likely would not be market usurpation. Implementing this new factor would require the legislature to define what transformativeness means. The benefit is that there would be a more concrete way for artists and authors to gage if their work will be protected under fair use.

However, this new factor would likely not solve every question of fair use immediately or in the long run. This factor would take time to develop its own body of caselaw. The lack of caselaw means that the application of this factor is devoid of concrete precedent. Artists and authors could rely on previous decisions, but the applicability of such precedent would merely be persuasive as it would come from now antiquated legislation. Additionally, even with a definition of what is transformative, there is always some gray area in the law and its application. However, the goal of this factor would not be to eliminate all grayness, but just to provide more guidance than 17 U.S.C. § 107 currently gives.

The second factor removes the substantiality aspect from the original third fair use factor and quantifies how much can be borrowed from copyright protected work. A potential way to quantify the amount of work that can be copied is to set a percent limit. For example, if the new work samples more than five percent from the copyright protected work, then the amount is too high and there will not be a finding of fair use. A percentage cap on usage could work to protect the market value of the copyright protected work, instead of considering the "heart" of the work[185] as well. The Supreme Court found against fair use where the "heart" of the work was used.[186]

The new second factor could potentially run the risk of Gamesmanship; however, Justice Breyer stated that "appropriation of the

182. FRANÇOIS LEVÊQUE &YANN MÉNIÈRE, THE ECONOMICS OF PATENTS AND COPYRIGHT 74 (2004), https://pdfs.semanticscholar.org/5c3a/b7462a11a11102c0a47c7fca29bdf9647130.pdf.

183. Campbell v. Acuff-Rose Music, Inc.,510 U.S. 569, 579 (1994).

184. U.S. CONST. art. I, § 8, cl. 8.

185. Harper & Row Publrs. v. Nation Enters., 471 U.S. 539 (1985).

186. *Id.* at 544, 569.

'heart' of the manuscript . . . is irrelevant to copyright analysis because copyright does not preclude a second author's use of information and ideas."[187] If the sample of the copyright protected work is small enough in proportion to the whole, then the new work should not supplant the original work in the market.

The third factor guides courts to look at the impact the new work has on the market, like the current fourth factor does now. However, market harm here is focused on actual harm. Under this factor, the plaintiff must prove that the new work supplanted their work in the market, such as showing a loss of revenue. Additionally, when evaluating if the new work supplanted the copyright protected work in the market, the court could look at the overall similarity of the two works and their market segments. Market usurpation would be unlikely where the two works do not seem similar to the consumer or where the works were in different market segments. This factor detracts from the current fourth factor's analysis of *potential* harm. Potential harm is broad sweeping and can cut off creativity.

One issue that would arise with analyzing a potential harm is that the court may not be in the best position to determine that. How could a court possibly determine, or be presented with sufficient evidence that Eminem could ever have intended to transpose *Renegade* into a hip-hop history lesson? The fair use test would be better served focusing on *actual* harm.

The fourth factor focuses on if the copying was ill-intentioned to usurp market success or driven by a genuine desire for progress. Courts should consider if the work was created with societal benefit in mind. Where copying is done with a genuine desire for progress, the courts should be more lenient in finding fair use to help achieve the overall goal of copyright law.[188] This factor would correlate with the second factor. Where there could be a risk of Gamesmanship from a new artist or author calculating the proportion of work they could safely borrow, there is the risk of deliberate market harm. Therefore, the second and fourth factors can be considered in lock-step.

However, this factor should be given the least amount of deference. Determining an individual's *mens rea* can run a similar risk to the previous factor of a court attempting to determine *potential* market harm. Thus, due to the subjectiveness and dangers of misapplication, this factor should be given the least deference.

187. Harper & Row Publirs., 471 U.S. at 599 (Breyer, J., dissenting).
188. U.S. CONST. art. I, § 8, cl. 8.

A "right to cite"[189] as the fifth factor in the fair use analysis would require courts to ask if the author or artist gave proper credit to the copyright holder. In broadening fair use and implementing a clearer test, the U.S. should adopt the French copyright principal as the fifth factor. In France, the "'right to cite' (*droit de citation*), . . ., allows free quotation from a copyrighted work, as long as explicit reference is made to the creator."[190]

France uses this principal as an exception to creators' economic rights.[191] The U.S. could implement a "right to cite"[192] policy to serve as an exception to creators' economic rights. As the law stands, creators have complete control over their copyright and can charge whatever price they want for a license.[193] Copyright holders have broad economic rights and tight control over their works for an extremely long period of time. As previously discussed, the control copyright owners have over the fees they choose for licensing and the duration of the copyright protection both may serve as prodigious impediments to the very goal of copyright – progress.[194] Instituting a "right to cite"[195] policy within the fair use doctrine, would remove some of the control copyright owners have, which would open the door for the opportunity of progress and social benefit.

The "right to cite"[196] would be beneficial for all parties. Copyright owners would receive proper credit and publicity for their works, and individuals seeking to use copyright protected work under the fair use doctrine would avoid litigation. Copyright holders may push back on this notion, as there may be a preference for a financial gain as opposed to social recognition, however, those competing interests go back to the original issue of utilitarianism. Regardless of some discord, incorporating a "right to cite"[197] into the current fair use test would help reduce the grayness surrounding the fair use test.

In the alternative, if the fair use doctrine would not be amenable to expansion or clearer guidelines, a solution could be to eliminate fair use. While the elimination of fair use may appear harmful to artists, the damage to progress is not nearly as detrimental as it appears on its face. With the

189. LEVÊQUE & MÉNIÈRE, *supra* note 182, at 74.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Legal Issues Involved in the Music Industry*, LAW FOR CREATIVE ARTS, https://law-arts.org/pdf/Legal_Issues_in_the_Music_Industry.pdf (last visited Oct. 4, 2020).
194. U.S. CONST. art. I, § 8, cl. 8.
195. LEVÊQUE & MÉNIÈRE, *supra* note 182, at 74.
196. *Id.*
197. *Id.*

removal of fair use, an artist or author would still have the option to either license or wait the duration of copyright protection to sample copyright protected work. In lieu of the fair use doctrine, two changes that would need to be made to copyright law, as to not significantly hurt artists, is to shorten the duration of copyright protection and to set a licensing structure.

Patent law protects utility patents for 20 years after the filing date and protects design patents for 14 years after the time the patent was given.[198] Copyrights for works created after 1978 are granted for the life of the author plus 70 years.[199] Focusing on just the 70 years after the author's death, copyright protection lasts for three and half times as long as patent protection, at a minimum. Fundamentally, because copyright law and patent law stem from the same elemental purpose – progress and advancement[200] – the drastic difference in their durations calls for some reconciliation. Copyright law's duration can make someone else's work virtually inaccessible to an author or artist. Thus, the duration of copyright protection should change to align with the duration of patent protection.

Licensing fees can be structured in one of three ways: (1) a flat fee, (2) a royalty system, or (3) a free use.[201] Licensing costs are decided at the discretion of the copyright owner, so the costs can vary from affordable to exorbitant.[202] Licensing should move away from a flat fee pricing structure. Because the cost of licensing can prevent some artists or authors from creating work if they cannot afford a high upfront fee, licensing should move to a royalty structure.

Requiring artists and authors to license the work they wish to use from a copyright holder forces them to hedge on how successful they will be. If the author or artist creates a work that is ultimately unsuccessful, the chance that an infringement suit would have been brought is not as high for two potential reasons: (1) the copyright owner would never know about the infringement because the new work was not commercially successful, or (2) the copyright owner would not have cared about the use because the unsuccessful work would not be usurping the market from them.

However, a royalty system would allow authors and artist to sample work and not have to gamble on their success or pay money up front that they do not have.

198. *Duration of Patent Protection*, JUSTIA, https://www.justia.com/intellectual-property/patents/duration-of-patent-protection/ (last updated May 2019).

199. *Copyright Basics FAQ*, STAN. U. LIBR, https://fairuse.stanford.edu/overview/faqs/copyright-basics/ (last visited Oct. 25, 2020).

200. U.S. CONST. art. I, § 8, cl. 8.

201. *Legal Issues Involved in the Music Industry*, *supra* note 193.

202. *Id.*

Another suggestion would be for a fair use office to be created. When an individual wants to patent or trademark their work, they must apply with the USPTO.[203] Trained individuals make the determination if a set of work meets the standard to grant a patent.[204] For a fair use determination, there could be fair use copyright examiners that would function like patent examiners. A solution to the grayness of fair use, and the ensuing litigation, would be to proactively assign a status of a work being fair use. Preemptively determining if a work is fair use will help avoid the costs of either potentially unnecessary licensing or litigation.

Clearer guidelines and an expansion of the fair use doctrine is the best way to achieve the goals of copyright law.[205] The fair use doctrine needs a better test to allow artists and authors to determine when their work is transformative enough as to permit the unlicensed use of copyright protected work. Salvador Dali said it best, "a true artist is not one who is inspired, but one who inspires others." The villainization of copying, sampling and inspiring are counterintuitive to progress. While authors and artists deserve the chance to monetize their creations, so too does society deserve the benefit of progress.

203. *Patent Process Overview*, U.S. PATENT & TRADEMARK OFFICE, https://www.uspto.gov/patents-getting-started/patent-process-overview (last visited Dec. 2, 2020); *Trademark Process*, U.S. PATENT & TRADEMARK OFFICE, https://www.uspto.gov/trademarks-getting-started/trademark-process (last visited Dec. 2, 2020).

204. *Id.*

205. U.S. CONST. art. I, § 8, cl. 8.