

THE FAIR USE DOCTRINE AND ITS CONSEQUENCES IN LIGHT OF THE UNITED STATES CONSTITUTION, THE THREE-STEP TESTS PROVIDED IN THE BERNE CONVENTION AND THE TRIPS AGREEMENT

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INTRODUCTION

The primary objective of copyright law is to furnish the public with intellectual and artistic creations. To secure the benefit of creative works for the public and incentivize future creation, copyright protection provides authors with limited monopoly rights over their creations.ⁱ The fair use doctrineⁱⁱ plays a crucial role in the copyright mechanism as it enhances access to copyrighted works and constrains the scope of copyright protection. However, the fair use doctrine has been the subject of debate and controversy, it has been heavily criticized due to its vague and broad nature. I respectfully disagree and, in this discussion, I will examine the fair use doctrine and its consequences in light of the United States Constitution's 'IP clause' (Section 1.8.8), the three-step tests provided in the Berne Conventionⁱⁱⁱ, and the TRIPS Agreement^{iv}.

U.S. CONSTITUTION'S INTELLECTUAL PROPERTY CLAUSE

The fair use doctrine is grounded in the U.S. Constitution's Intellectual Property Clause^v, which grants Congress the power “To promote the Progress of Science and useful Arts.” Under the IP Clause, copyrights and patents are based on a utilitarian rationale that exclusive rights are necessary to provide incentives to create new artistic works and technological inventions.^{vi} Without legal protection, competitors could freely copy such creations, denying the original creators the ability to recoup their investments in time and effort, reducing the incentive to create in the first place. The IP Clause is both a grant of power and a limitation.^{vii}

The doctrine originated from the U.S. Constitution also was further elaborated on in judicial decisions, most notably the Supreme Court's ruling in the case of *Sony Corp. v. Universal City Studios, Inc.* (1984).^{viii} The Supreme Court has often and consistently summarized the objectives of copyright law. The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations.^{ix} The doctrine promotes innovation and creativity by allowing creators to build on existing works and engage in critical commentary and analysis. It allows for uses that are deemed to be “fair” based on a set of factors discussed below. While some critics argue that fair use undermines the exclusive rights of copyright owners, it is necessary to protect fundamental values enshrined in the Constitution.

Statutory Factors

The judicial doctrine of fair use would be given express statutory recognition for the first time in section 17 U.S.C.S. § 107.^x The statute outlines four relevant “factors to be considered” when deciding if the use of a copyrighted work in a specific case is considered a fair use: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Section 107 states that a determination of fair use “shall include” each of the four factors. This means that application of the four factors is obligatory, but courts may consider other factors in their analyses.^{xi}

- **Purpose and character**

Under the first factor, courts focus on whether the use should be characterized as commercial and whether it should be deemed transformative. The use is transformative^{xii}- that is, whether it adds new value, insights, or aesthetics to the original material. If the use merely repackages or republishes the original, it is unlikely to be considered fair use. Transformative uses can include criticizing the original work, proving a fact, or creating a parody.

The primary factor in determining fair use explicitly considers whether the use is commercial or nonprofit educational. In *Sony Corp.* case the court found that private, home copying of broadcast television programs was a fair use, even though the copying was nontransformative. This implies that commercial use makes it less likely that fair use will be found. In *Campbell*,^{xiii} the Supreme Court rejected the notion that commerciality by itself had any “hard presumptive significance.”^{xiv} The Supreme Court^{xv} initially favored a presumption against commercial use, defined broadly, but it soon recognized an overbreadth problem with such an approach.^{xvi}

- **Nature of the copyrighted work**

Consideration of the second factor usually focuses on whether the work is a predominately creative work, such as a film, or where it is a largely factual or functional work, such as factual compilation or a computer program.^{xvii} It aims to prevent the scope of rights in a factual compilation from covering uncopyrightable facts, but generally serves in favor of the copyright owner as most works are deemed creative.^{xviii} Courts have typically been diligent in assessing the statutory fair use factors in cases where authors are exercising fair use rights. In these cases, the commercial purpose of a second author's use of an earlier author's work is often given little weight, while commentary and other favored purposes receive considerable weight. The second factor requires a court to consider “the value of the materials used”, recognizing that “some works are closer to the core of intended copyright protection than others”.^{xix} However, it would be beneficial for courts to acknowledge that productive and transformative uses of pre-existing work also involve freedom of expression interests of follow-on authors.

- **Amount and substantiality**

The third factor in the fair use analysis requires courts to take into account the extent of permissible copying varies with the purpose and character of the use. The law does not set

exact quantity limits, using more of the original work makes it less likely to be considered fair use. Courts have to analyze “not only the quantity of the materials used, but their quality and importance, too”.^{xx} The amount used is evaluated relative to the length of the entire original and in light of the amount needed to serve a proper objective. The factor must be weighed with the purpose and character of the use in mind, which can render even quantitatively large borrowings fair.^{xxi} It is probably the least important factor to a court’s decision of whether a use is fair. While courts have found that copying the “heart” of a work swings against a finding of fair use, other courts have found that a use is fair even if the entire work was copied. In the case of *Harper & Row*^{xxii}, court held that copying of the most important passages of a book weighed against fair use, even though copied material was only 30% of the book’s word count.

- **Effect of the use**

The issue to address is whether the fourth statutory factor holds any factual basis, or if it is purely a legal determination. The market-effect factor can be interpreted as an examination of whether there is competitive harm or a decrease in sales. To determine this, one must identify the extent of the harm or lost sales, which may be challenging to establish in fair use cases due to debates over past and potential future losses. The courts have acknowledged that while all the four factors are important considerations, market effect as directed by the fourth factor is probably the most crucial one.^{xxiii} The Statute does not provide express instructions for weighing each of the elements, but rather relies on courts to develop further the substance of the doctrine, as judges did prior to the codification.

The fair use doctrine’s flexibility is both a strength and a weakness.^{xxiv} The primary criticism of fair use is that it is too vague but above discussed factors and court finding offer clear guidance in practice.

U.S FAIR USE DOCTRINE IN INTERNATIONAL COPYRIGHT LAW

The three-step test^{xxv} in the Article 9(2) of the Berne Convention^{xxvi} and in Article 13 of the TRIPS Agreement^{xxvii} is a standard used to determine whether a particular use of a copyrighted work is permissible. The fact that international challenge to the fair use doctrine is likely to

arise within the context of a treaty initiated by the United States puts the government in a classic conflict of interest - having to defend the doctrine while simultaneously pursuing heightened global intellectual property protection.^{xxviii} The U.S. fair use doctrine is compatible with the test outlined in the international agreements. First, the doctrine was accepted as consistent with the three-step test^{xxix} when the U.S. joined the Berne Convention. The doctrine is statutorily expressed with several specific criteria to aid its interpretation, and the case law has developed to clarify the specific scenarios to which it applies, in alignment with the initial phase of the test. Moreover, the U.S. fair use doctrine has remained consistent with the three-step test since the U.S. joined the WTO.

Berne Convention

The three-step test of Berne is now the international standard that governs - for treaty compliance purposes - the scope of fair use and any and all other exceptions to the exclusive rights of authors.^{xxx} In 1989, upon joining the Berne Convention, the United States affirmed that its doctrine was consistent with the principles of the convention. This affirmation was accepted by Union members, international copyright experts, and WIPO^{xxxi} officials without any suggestion that the U.S. should amend its fair use provision. Despite being obligated to make substantial modifications to 17 U.S.C.S. § 107 to comply with other Berne regulations, no such changes were required for the fair use provision.

Although Berne Union members were mostly civil law countries whose statutory limitations and exceptions were more specific than the U.S. fair use provision, this doctrine based on common law, had a history dating back over 150 years^{xxxii} prior to the U.S.'s adherence to Berne.^{xxxiii} It is certainly true that fair use has privileged some uses that would have been infringements or required compensation in other nations, but that alone does not support the view that the fair use doctrine violates international norms.^{xxxiv} The Berne Convention expressly provides for a number of exceptions to the copyright holder's reproduction right.^{xxxv} The language in the Article 9(2) of Berne "It shall be a matter for legislation" gives states the right to adopt exceptions to the right reproduction, as long as the exceptions satisfy three-part test. It can be said that, unfortunately itself the Convention offers no guidance as to what constitutes a "special case" or a "legitimate interest of the author". A significant number of court rulings discussed in detail above, have provided additional insights into the fair use

doctrine, further clarifying its scope and enabling a more comprehensive understanding of its boundaries.

TRIPS Agreement

TRIPS Agreement has its own three-step test outlined in Article 13.^{xxxvi} The TRIPS three-step test is similar to its Berne counterpart in key respects, yet, it is notably different in other respects. For one thing, Article 9(2) pertained only to exceptions to their production right, whereas Article 13 extends its test to all limitations and exceptions that affect exclusive rights.^{xxxvii} Despite the differences in language and approach the fair use doctrine embodies essentially the same goals as Article 13 of TRIPS, and is applied and interpreted in a way entirely compatible with the standards set forth in that Article. First, fair use is limited in nature. The doctrine allows for the limited use of copyrighted material and does not permit wholesale copying or reproduction of copyrighted works. Second, fair use does not conflict with the normal exploitation of the work. The doctrine is intended to supplement, rather than supplant, the rights of copyright owners. Fair use is not intended to replace the need for permission or compensation when using copyrighted material for commercial purposes^{xxxviii}. Finally, fair use does not unreasonably prejudice the legitimate interests of the copyright owner. The doctrine is intended to balance the interests of copyright owners with the public's right to access and use creative works.

CONCLUSION

To put it briefly, the fair use doctrine is a vital part of U.S. copyright law that seeks to balance the interests of copyright holders and the public interest. The doctrine is consistent with the United States Constitution's "IP clause". While there may be some criticism of the fair use doctrine's scope, it remains an essential component of promoting creativity, innovation, and free speech in society. The doctrine allows for transformative uses of copyrighted material, which may generate new works that enrich society. For example, a parody or criticism of a copyrighted work may constitute fair use, as it adds value to the original work.

In conclusion, while the fair use doctrine and the three-step test in the Berne Convention and the TRIPS Agreement both seek to balance the interests of copyright owners with the public's right to access and use creative works, they take different approaches to achieving this goal. The fair use doctrine provides a more flexible approach, while the three-step test provides a more structured approach. Ultimately, the effectiveness of each approach will depend on how well they are implemented and enforced.

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ENDNOTES

ⁱ Lauren Gorab, A Fair Use to Remember: Restoring Application of the Fair Use Doctrine to Strengthen Copyright Law and Disarm Abusive Copyright Litigation, 87 Fordham L. Rev. 703 (2018), pg. 706.

ⁱⁱ In the United States, fair use often is said to have originated with Justice Joseph Story's opinion in Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841), although intimations of fair use can be discerned in opinions before Story's and in earlier English case law.

ⁱⁱⁱ Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886.

^{iv} The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994.

^v U.S. Constitution art. I, § 8, cl. 8.

^{vi} The Annotated Constitution of the United States, Article I, Section 8, Clause 8, <https://constitution.congress.gov>

^{vii} *Graham v. John Deere Co.*, 383 U.S. 1, 5, 86 S. Ct. 684, 687 (1966)

^{viii} "Under Article I, 8 of the Constitution, the monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit; rather, the limited grant is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 419 (1984).

^{ix} Pierre N. Leval, *Toward A Fair Use Standard.*, 103 Harv. L. Rev. 1105, 1105 (March 1990).

^x United States Code, Title 17, Chapter 1, Sec. 107, Historical and Revision Notes house report no. 94-1476.

^{xi} Even courts are required to consider and evaluate all four factors, the first factor and fourth factor usually hold more significance. However, it is noteworthy that the Supreme Court's ruling in *Google* case placed greater emphasis on the second factor (nature of the copyrighted work). *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1163 (2021).

^{xii} The phrase "transformative use" has loomed large in fair use jurisprudence ever since the Supreme Court embraced transformativeness as the heart of fair use in its 1994 *Campbell* decision.

^{xiii} The Court found that it was error for the court below to have concluded that the commercial nature of petitioners' parody had rendered it presumptively unfair. The Court held that no such evidentiary presumption was available to address either §107(1), the character and purpose of the use, or §107(4), market harm, in determining whether transformative use, such as parody, was a fair one. The Court held that a parody's commercial character, which tended to weigh against a finding of fair use, was only one element that should be weighed in a fair use enquiry. Therefore, the court below was found to have given insufficient consideration to the nature of the parody under the fair use factors as set forth in §107 in weighing the degree of copying. *Campbell v. Acuff-Rose Music, Inc.* - 510 U.S. 569, 114 S. Ct. 1164 (1994).

^{xiv} Matthew Sag, *Predicting Fair Use*, 73 Ohio St. L.J. 47, 55, 2012.

^{xv} Lower courts believed that a commercial use created a presumption of unfair use, while a noncommercial use created a presumption of fair use. See, e.g., *Advanced Comput. Servs. of Mich. v. MAI Sys. Corp.*, 845 F. Supp. 356, 358 (E.D. Va. 1994).

^{xvi} Michael W. Carroll, *Fixing Fair Use*, 85 N.C.L. Rev. 1087, pg. 1101-1102, 2017.

^{xvii} Tyler G. Newby, *What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?* Stanford Law Review, Vol. 51, No. 6 (Jul., 1999), pp. 1633-1663.

^{xviii} Michael W. Carroll, above No 13.

^{xix} Graham Dutfield, *Global Intellectual Property Law*, 2nd Edition, Edward Elgar Publishing Limited, 2020, pg. 142.

^{xx} Graham Dutfield, above No 19.

^{xxi} In some contexts, such as critical comment or parody, copying an entire work may be acceptable, generally depending on how much is needed to achieve the purpose. The focus of the inquiry is on what was taken from the plaintiff's work, not on how much of the defendant's work is comprised of copied material. See, e.g., Michael W. Carroll, above No 13.

^{xxii} Respondents failed to establish that their unauthorized use of quotations from a public figure's unpublished manuscript was sanctioned by the fair use doctrine. Respondents admitted to lifting verbatim quotes. The unpublished nature of book was a key factor that negated the defense of fair use. The four statutory factors relevant to determining whether the use was fair were not satisfied. Respondents use had the intended purpose of supplanting copyright holder's commercially valuable right of first publication. The use infringed upon the copyright holder's interest in confidentiality and creative control. Respondents took what was essentially the heart of the book and copied much of it verbatim. Finally, the use of copyrighted material had an actual effect on the market for first rights to publish excerpts from the book. *Harper & Row, Publr. v. Nation Enters* - 471 U.S. 539, 105 S. Ct. 2218 (1985)

^{xxiii} Graham Dutfield, *Global Intellectual Property Law*, Second Edition, Edward Elgar Publishing Limited, 2020, pg. 141.

^{xxiv} Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1857 (2007).

^{xxv} The three-step test in the Berne Convention and the TRIPS Agreement is a standard used to determine whether a particular use of a copyrighted work is permissible. The test requires that the use (1) be limited in nature, (2) not conflict with the normal exploitation of the work, and (3) not unreasonably prejudice the legitimate interests of the copyright owner.

^{xxvi} The United States joined the Berne Convention in 1989, which was seen by many as a noteworthy development in international copyright law. Although certain modifications to domestic legislation were required to meet the conditions of Berne Convention membership, there were still some elements of U.S. copyright law that were not fully aligned with the principles of the convention. Prior the signing of the TRIPS Agreement, the Berne Convention was the major multilateral treaty providing international protection for copyright. Protection under the Berne Convention relies on two central principles: national treatment and international minimum standard of protection. Under the Article 9(2) of the Berne Convention: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

^{xxvii} The TRIPS Agreement is an international agreement on intellectual property rights that establishes minimum standards for the protection and enforcement of intellectual property rights. The three-step test is a provision in the TRIPS Agreement that is used to determine whether a particular use of a copyrighted work is permissible. The test requires that the use be limited in nature, not conflict with the normal exploitation of the work, and not unreasonably prejudice the legitimate interests of the copyright owner. Under the Article 13 of the TRIPS Agreement: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".

^{xxviii} Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 Colum. J. Transnat'l L. 75, 85.

^{xxix} Samuelson, Pamela and Hashimoto, Kathryn, *Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?* UC Berkeley Public Law Research Paper, (August 7, 2018), pg. 2.

^{xxx} Schwartz, Eric, *An Overview of the International Treatment of Exceptions*. PIJIP Research Paper no. 2014-02 American University Washington College of Law, Washington, D.C.

^{xxxi} World Intellectual Property Organization

^{xxxii} The term "fair use" was commonly used in common law copyright law, originating from a series of UK legal decisions. However, when the law was codified, the term "fair dealing" was adopted instead. Fair use provision in the U.S. and the fair dealing provision in the UK both identify certain special cases for which they apply by listing specific purposes in their preambles. However, the U.S. fair use provision is more detailed compared to the UK's fair dealing provision.

^{xxxiii} M.R.F. Senftleben, *Copyright, Limitations and the Three-step test. An Analysis of the Three-Step Test in International and EC Copyright Law*, Den Haag: Kluwer Law International, (2004).

^{xxxiv} Jane C. Ginsburg, 'Fair Use for Free, or Permitted-but-Paid?' 29 Berkeley Technology Law Journal 1383, 1414-1431 (2014).

^{xxxv} Tyler G. Newby, *What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?* Stanford Law Review, Vol. 51, No. 6 (Jul., 1999), pp. 1633-1663.

^{xxxvi} TRIPS mandate that WTO members comply with Berne's Articles 1-21, which includes Article 9(2).

^{xxxvii} Samuelson, Pamela and Hashimoto, Kathryn, *Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?* UC Berkeley Public Law Research Paper, (August 7, 2018), pg. 9.

^{xxxviii} it is significant that no WTO member state has accused the U.S. of violating TRIPS Agreement due to its broad fair use doctrine in the 24 years since the agreement came into effect. The likelihood of a facial challenge

to the U.S. fair use limitation is highly improbable due to various empirical studies that confirm that the U.S. fair use case law follows predictable patterns. The Campbell case by the U.S. Supreme Court, which recognized a rap parody version of a popular song as fair use, has been particularly influential. Fair use and the idea and expression distinction are crucial in ensuring that U.S. copyright law aligns with constitutional free speech and expression standards (See e.g., Eldred v. Ashcroft (2003)). The widespread implementation of fair use in American copyright law was evident at the time the U.S. and other nations acceded to TRIPS and has only become more apparent since then.

