

Balancing Copyright and Journalistic Integrity: Why Courts Should Integrate Originality and Newsworthiness Criteria into the Fair Use Analysis in the Digital Era

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Abstract

In the digital age, information has become more widespread and easily accessible on the Internet. With the digital emergence, the intersection of copyright law and journalism continues to present unique challenges for courts tasked with adjudicating disputes over the fair use of online content. Reporters are frequently violating the Copyright Act when using information posted on the Internet for a press story and Congress is failing to make the necessary changes to the Copyright Act to address the issues arising with the evolution of technology. This article details the evolution of the Copyright Act and the Digital Millennium Copyright Act, assessing the changes that must be made in order to keep up with the modern era. Further, the article explains how courts currently interpret the fair use exception and its application in the practice of journalism. This article explores case law that can be used to amend the fair use exception to better address the issues journalists are facing in the digital age. This article argues the necessity of integrating originality and newsworthiness criteria into the fair use analysis to effectively balance copyright protection with press freedom. The article explains how courts must adapt the fair use doctrine to accommodate the evolving landscape of digital journalism, ensuring that journalists can responsibly navigate copyright issues while fulfilling their crucial role of informing the public in an ethical manner.

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I. INTRODUCTION

Paul Nicklen, an award-winning Canadian nature photographer, filmmaker, and co-founder of the nonprofit conservationist organization SeaLegacy,¹ is the author and registered copyright owner of a video of an emaciated polar bear wandering the Canadian Arctic.²

Nicklen visited Somerset Island—near the larger Baffin Island—in the Canadian Arctic when he came across a starving polar bear.³ The wildlife photographer filmed the bear’s slow death to bring attention to the issue of starving bears in Canada.⁴ On December 5, 2017, Nicklen published the video to his Instagram and Facebook accounts with a caption urging his social media followers to “consider the ‘haunt[ing]’ and ‘soul-crushing scene’ and to take steps to mitigate the harms of climate change.”⁵ The caption also instructed “those seeking ‘[t]o license or use [the Video] in a commercial player’ to contact Caters News.”⁶

On or around December 11, 2017, Sinclair Broadcast Group, Inc. (“Sinclair”), a media conglomerate, published an article titled, “Starving polar bear goes viral in heartbreaking video.”⁷ In the article, Sinclair embedded Nicklen’s video using the Instagram and Facebook application programming interface (API) embed tool.⁸ Sinclair did not obtain a license or seek Nicklen’s consent to use the video.⁹ Additionally, Sinclair ignored a takedown notice issued by Nicklen as the video remains on Sinclair’s television stations’ websites.¹⁰

¹ PAUL NICKLEN PHOTOGRAPHY, *About Paul*, <https://paulnicklen.com/about/> (last visited Mar. 6, 2024) (stating that Paul Nicklen has won more than 30 of conservation and photography’s most prestigious awards, including the BBC’s Wildlife Photographer of the Year and the World Press Photo for Photojournalism).

² See Sarah Gibbens, *Heart-Wrenching Video Shows Starving Polar Bear on Iceless Land*, NATIONAL GEOGRAPHIC (Dec. 7, 2017), <https://www.nationalgeographic.com/science/article/polar-bear-starving-arctic-sea-ice-melt-climate-change-spd>.

³ *Id.*

⁴ See *id.* (“The wildlife photographer says he filmed the bear’s slow, beleaguered death because he didn’t want it to die in vain.”).

⁵ *Nicklen v. Sinclair Broad. Grp., Inc.*, 551 F. Supp. 3d 188, 192 (S.D.N.Y. 2021).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Nicklen sued Sinclair and affiliated companies for copyright infringement.¹¹ Sinclair presented a fair use affirmative defense, arguing that the media conglomerate did not infringe Nicklen's copyright because the fair use exception to the Copyright Act protected Sinclair's use of the video.¹² The district court balanced the four factors under the fair use doctrine and held that the factors weighed more in favor of Nicklen.¹³ However, the court noted that "the fair use inquiry is a 'fact-driven,' 'context-sensitive' consideration."¹⁴ Ultimately, the court denied Sinclair's motion to dismiss on the grounds of fair use and stated that "the fair use analysis would benefit from a better-developed factual record."¹⁵

This article highlights the copyright issues reporters face when using information posted on the Internet for press stories. Additionally, it explains the role of copyright law in today's digital age, details the evolution of the Copyright Act and the Digital Millennium Copyright Act, and assesses the changes that Congress must make to keep up with the modern era. Some scholars argue that a mandatory licensing fee should be implemented for using online content. These scholars further argue that agency guidelines should be issued as a way to handle the complexity of technological advancements. Although the solutions proposed by such scholars may be effective, this article proposes a new perspective in addressing the issue reporters are facing when using online content. This article argues the necessity of integrating originality and newsworthiness criteria into the fair use analysis to effectively balance copyright protection with freedom of the press. This article states how courts currently interpret the fair use exception and its application in the practice of journalism. Then, it explores case law that can be used to amend the fair use exception to better address the issues journalists are facing in the digital age. Finally, it explains how courts must adapt the fair use doctrine to accommodate the evolving landscape of digital journalism to ensure that journalists can responsibly navigate copyright issues while fulfilling their crucial role of informing the public in an ethical manner.

Part II of this article discusses the history and evolution of U.S. copyright law. Part III describes the fair use exception and its current application. Part IV describes the changes that must be made to the fair use doctrine to better clarify the confusion among reporters in the digital age. Finally, Part V of this article argues that Congress needs to carefully consider the effects of the fair use exception and the evolution of the digital world on the future of journalism, as it might lead to more copyright issues and unethical journalistic practices in the future.

II. HISTORY AND EVOLUTION OF COPYRIGHT LAW

In order to address the copyright issues reporters are facing as they navigate the current digital landscape, it is important to analyze the history and evolution of copyright law over the years. The history and evolution of copyright law reflect the

¹¹ *Id.* at 193.

¹² *Id.* at 191.

¹³ *See id.* at 196–97.

¹⁴ *Id.* at 198.

¹⁵ *Id.* at 199.

relationship between societal norms, legal frameworks, ethical practices, and technological advancements. Throughout the years, copyright law has adapted to address challenges due to changes in society. However, despite past revisions to the Copyright Act, Congress has stagnated in its efforts and is failing to make the necessary amendments to the Copyright Act to address the issues arising from the evolution of technology.

A. The Copyright Act

The origins of copyright law can be traced back to the eighteenth century when the Statute of Anne took effect in 1710.¹⁶ Later, on May 31, 1790, Congress passed the Copyright Act of 1790.¹⁷ After the first copyright law was enacted under the United States Constitution, Congress amended the law several times as technological advancements occurred.¹⁸ Early copyright laws focused on protecting print works and mainly balancing the interests of literary authors.¹⁹ As technology evolved, Congress changed copyright laws to encompass new forms of creative expression, including dramatic works, musical compositions, photography, film, and eventually, software.²⁰

The United States Copyright Act of 1976 (the “Copyright Act”) was later enacted on October 19, 1976.²¹ The Copyright Act represented a significant milestone as it expanded and modernized copyright law and continues to provide the framework for the current existing copyright law.²² Among the main reasons why the Copyright Act revision was undertaken was the need to address “technological developments and their impact on what might be copyrighted, how works might be copied, and what constituted an infringement.”²³ The Act preempted all previous copyright law, extended the term of protection to the life of the author plus 50 years, extended protection to unpublished works, and expanded the types of works that qualified for

¹⁶ *The 18th Century*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/timeline/timeline_18th_century.html (last visited Mar. 11, 2024) (outlining the timeline of the Copyright Act and detailing how, “Named after Anne, queen of Great Britain, the statute becomes the foundation for British and American copyright law.”); *1950–2020*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/timeline/timeline_1950-2000.html (last visited Oct. 15, 2024).

¹⁷ *The 18th Century*, *supra* note 16.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*; *1950–2020*, *supra* note 16; 17 U.S.C. § 101.

²¹ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541–2602 (1976) (current version at 17 U.S.C. §§ 101–805).

²² *Copyright Law of the United States (Title 17)*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/title17/> (last visited Mar. 11, 2024); *see also* *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 493 (2001) (*quoting* 17 U.S.C. § 102(a)) (“Under the Copyright Act, as amended in 1976, “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated.”).

²³ *Copyright Timeline: A History of Copyright in the United States*, ASSOCIATION OF RESEARCH LIBRARIES, <https://www.arl.org/copyright-timeline/> (last visited Mar. 11, 2024) (explaining how the Copyright Act of 1976 revision was undertaken in part “in anticipation of Berne Convention adherence by the US. It was felt that the statute needed to be amended to bring the US into accord with international copyright law, practices, and policies.”).

protection.²⁴ Additionally, the Copyright Act codified the fair use doctrine for the first time.²⁵ The fair use doctrine “promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances.”²⁶

B. Digital Millennium Copyright Act

With the emergence of the digital age, copyright issues multiplied, posing challenges to the traditional copyright frameworks.²⁷ In an effort to keep pace with the evolution of technology and bring U.S. copyright law “squarely into the digital age,” the Digital Millennium Copyright Act of 1998 (DMCA) was signed into law on October 28, 1998.²⁸ The DMCA amended Title 17 of the United States Code and the Copyright Act of 1976 to protect copyrighted works online.²⁹ Further, the goal of the DMCA was to create “the legal platform for launching the global digital online marketplace for copyrighted works” and to “make available via the Internet the movies, music, software, and literary works that are the fruit of American creative genius.”³⁰ In order to balance the interests of copyright owners and online service providers, the DMCA included safe harbor provisions³¹ and established a notice-and-takedown system.³²

Although the DMCA appears to have improved the traditional copyright framework by taking into consideration technological advancements and making changes to copyright laws, the DMCA has generated controversy and has been increasingly

²⁴ *Id.*

²⁵ *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (noting that 17 U.S.C. § 107 “codifies the traditional privilege of other authors to make ‘fair use’ of an earlier writer’s work.” The Supreme Court of the United States held that The Nation Magazine’s use of the verbatim excerpts from President Gerald Ford’s unpublished manuscript without permission did not qualify as fair use under the Copyright Act of 1976).

²⁶ *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFFICE (last updated Nov. 2023), <https://copyright.gov/fair-use/> (“Section 107 of the Copyright Act provides the statutory framework for determining whether something is a fair use.”).

²⁷ The Digital Millennium Copyright Act, Pub. L. No. 105-304, H.R. 2281, 105th Cong., (1998); *see also* S. REP. No. 105-190, at 1 (1998).

²⁸ S. REP. No. 105-190, at 2 (1998).

²⁹ *Id.* (“The ‘Digital Millennium Copyright Act of 1998’ is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”).

³⁰ *Id.*

³¹ *See BMG Rights Mgt. (US) LLC v. Cox Commun., Inc.*, 881 F.3d 293, 300 (4th Cir. 2018) (held that to qualify for that safe harbor, an ISP . . . must have “adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers . . . who are repeat infringers.”).

³² The Digital Millennium Copyright Act, Pub. L. No. 105-304, H.R. 2281, 105th Cong. (1998) (The DMCA established “protections for online service providers in certain situations if their users engage in copyright infringement, including by creating the notice-and-takedown system, which allows copyright owners to inform online service providers about infringing material so it can be taken down . . .”).

critiqued.³³ *Agence France Presse v. Morel*³⁴ was a complex case involving the DMCA, in which a photographer had an exclusive contract with a worldwide licensing agent.³⁵ The photographer took photos of a Haitian earthquake and posted the photos to Twitter via Twitpic.³⁶ Another photographer claimed the photographs, and Agence France Presse (AFP) transmitted the images with the non-copyright owner's byline on it.³⁷ The court held that copyright infringement existed, holding AFP, Getty, and the Washington Post liable.³⁸

Among the major critiques of the DMCA is one involving the fair use doctrine and how it must be considered before sending a DMCA notice for takedown.³⁹

III. UNDERSTANDING THE FAIR USE DOCTRINE AND ITS CURRENT APPLICATION

The fair use doctrine is an exception to the Copyright Act.⁴⁰ The fair use doctrine provides a flexible framework that allows for the limited use of copyrighted material without acquiring permission or paying the copyright owner.⁴¹ Initially, courts mainly focused on traditional uses of copyrighted material, such as quoting from books or articles in news stories, when evaluating fair use.⁴² Courts consider four factors when determining whether or not the use made of a work in a case qualifies as fair use:

- (1) the purpose and character of the use, including whether the 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

³³ Thomas S.E. Hilton & Ingrid C. Ulstad, *An Ethics Analysis of the Digital Millennium Copyright Act*, 5 ISSUES IN INFORMATION SYSTEMS 495, 495 (2004) (stating how as a results of the application of the DMCA, “[c]ritics have charged that fair use provisions of prior copyright laws have been weakened, that invasion of privacy has been legalized, that quality in software and business has been degraded, and that due process has been abridged.”).

³⁴ *See Agence France Presse v. Morel*, 934 F. Supp. 2d 547 (S.D.N.Y. 2013).

³⁵ *Id.* at 554.

³⁶ *Id.* at 551.

³⁷ *Id.* at 552.

³⁸ *Id.* at 583.

³⁹ *See Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008) (held that a copyright owner proceeding under the DMCA with a “good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law” must evaluate whether the material makes fair use of the copyright).

⁴⁰ 17 U.S.C. § 107 (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, . . . is not an infringement of copyright.”).

⁴¹ Patricia Aufderheide, *Journalists, Social Media and Copyright: Demystifying Fair Use in the Emergent Digital Environment*, 9 J. BUS. & TECH. L. 59, 61 (2014) (“Features of copyright law that provide access to copyrighted material still under a limited monopoly—the balancing features of copyright law—have grown in importance as monopoly rights have expanded. The most valuable and significant of these is the broad and flexible doctrine of fair use.”).

⁴² *See Triangle Pubs., Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 880 (S.D. Fla. 1978), *aff'd*, 626 F.2d 1171 (5th Cir. 1980) (“The defense of fair use is most universally recognized in connection with the function of literary criticism. Here substantial passages may be quoted since clearly the review merely supplements but does not replace the function of the work being reviewed. Closely related is the recognition of the defense of fair use where defendant's work is used for scientific or historical or educational purposes.”).

copyrighted work as a whole; and
 (4) the effect of the use upon the potential market for or value of the
 copyrighted work.⁴³

Although courts mainly balance the four factors when conducting the analysis, the factors that courts may consider when determining whether fair use exists are non-exhaustive.⁴⁴ Additionally, unpublished works are not barred from being considered fair use if such determination is made from the balancing of the four factors.⁴⁵ Overall, the fair use exception to the Copyright Act serves as an affirmative defense while also allowing the consideration of the First Amendment right of free expression in its analysis.⁴⁶ In the cases *Eldred v. Ashcroft* and *Golan v. Holder*, the Supreme Court of the United States held that “the ‘traditional contours’ of copyright protection, i.e., the ‘idea/expression dichotomy’ and the ‘fair use’ defense,” serve as “built-in First Amendment accommodations.”⁴⁷

In the realm of journalism, fair use enables news reporters to use copyrighted material.⁴⁸ The fair use doctrine is essential for news companies as it enables them to

⁴³ 17 U.S.C. § 107; *See* *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260 (2d Cir. 1986) (“The purpose of fair use is to create a limited exception to the individual’s private property rights in his expression—rights conferred to encourage creativity—to promote certain productive uses of existing copyrighted material. Fair use has been defined as ‘a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner [by the copyright].’”); *see also* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 425–55 (1984) (holding that “noncommercial home use recording of material broadcast over the public airwaves was a fair use of copyrighted works and did not constitute copyright infringement.”).

⁴⁴ Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, 2020 SING. J. LEGAL STUD. 265, 267 (2020) (“These broad, supple, indeed manipulable, criteria afford considerable flexibility in the assessment of fair use. This flexibility has enabled the exception to adapt to new means of expression and communication of works, but gives it at times an unpredictable character.”).

⁴⁵ *See* *Salinger v. Random House, Inc.*, 811 F.2d 90, 95 (2d Cir. 1987), *opinion supplemented on denial of reh’g*, 818 F.2d 252 (2d Cir. 1987) (“That fair use applies to unpublished works does not determine, however, the scope of the defense as applied to such works.”).

⁴⁶ *See* *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (“[T]he ‘fair use’ defense codified at § 107 allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself for limited purposes. ‘Fair use’ thereby affords considerable latitude for scholarship and comment, and even for parody.”) (citation omitted); *see also* David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner’s Guide*, 33 UNIV. S.F. L. REV. 1, 38 (1998) (“‘Fair use’ is the ‘safety valve’ of copyright law’s strict liability nature. The ‘fair use’ defense recognizes that rigid application of the copyright statute would at times hinder the purpose of the copyright laws to promote original and creative works for the benefit of society.”).

⁴⁷ *Id.*; *see also* *Golan v. Holder*, 565 U.S. 302, 328 (2012); *see also* David Tan & Angus J. Wilson, *Copyright Fair Use and the Digital Carnavalesque: Towards A New Lexicon of Transformative Internet Memes*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 864, 877 (2021) (“It is unsurprising that in the context of a robust free speech culture emboldened by the First Amendment, U.S. courts have interpreted the notion of transformative use liberally—and consequentially the fair use defense—when the freedom of speech would be unduly constrained by the enforcement of the rights of copyright owners.”).

⁴⁸ *See* 17 U.S.C. § 107.

publish content they otherwise might not be permitted to.⁴⁹ However, the current application of the fair use doctrine is very broad as its interpretation is vague which prompts the question regarding what is fair use.⁵⁰ In *Campbell v. Acuff-Rose Music, Inc.*,⁵¹ the Court was faced with the issue of deciding “whether 2 Live Crew’s commercial parody of Roy Orbison’s song, ‘Oh, Pretty Woman,’ may be a fair use within the meaning of the Copyright Act of 1976.”⁵² Because fair use is judged on a case-by-case basis, the Court weighed the four factors and held that the commercial parody constituted fair use.⁵³ In its opinion, the Court mentioned how it had “only once before even considered whether parody may be fair use, and that time issued no opinion because of the Court’s equal division.”⁵⁴ As a result, the Court’s broadness in its interpretation of the fair use doctrine leads to a vague understanding of fair use.⁵⁵

Further, *Los Angeles News Serv. v. KCAL-TV Channel 9*,⁵⁶ also offers an example of the obscurity revolving around the fair use doctrine. In this case, an independent news organization recorded a riot from its helicopter.⁵⁷ The videotape was copyrighted and licensed to the media.⁵⁸ However, an unlicensed news station used the video and broadcast it several times on its commercially sponsored news programs.⁵⁹ The independent news organization sued the station for copyright infringement.⁶⁰ The district court and the court of appeals conflicted in their balance of the four factors under the fair use doctrine as the district court found that the fair use defense was valid, and the court of appeals held that fair use did not exist as the “use was

⁴⁹ Patricia Aufderheide & Peter Jaszi, *Copyright, Free Speech, and the Public’s Right to Know: How Journalists Think about Fair Use*, CTR. FOR SOC. MEDIA AND SOC. IMPACT (Feb. 2012), <https://cmsimpact.org/resource/copyright-free-speech-publics-right/> (“For journalists and journalistic enterprises, the copyright doctrine of fair use—the right in some circumstances to quote copyrighted material without permission or payment—is integral to getting work done and distributed. Journalists use it to quote sources and source material, refer to previous incidents, comment or critique, and to summarize, among other uses. The business of journalism is sustained in part by fair use, which enables appropriate, timely, unlicensed quotations and references to newsworthy material. Fair use incorporates journalists’ free speech rights within copyright.”).

⁵⁰ Bradley E. Abuzzi, *Copyright and the Vagueness Doctrine*, 45 UNIV. MICH. J. L. REFORM 351, 353 (2012) (“The defense of fair use is also poorly sketched out in the copyright statutes. Instead, it has been left to the courts to elaborate in case-specific applications, and the cases ultimately offer little guidance to speakers. Indeed, we often celebrate fair use for its flexibility and open-ended character. But the vagueness in the substantial similarity test and the fair use defense has significant implications for speakers.”).

⁵¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁵² *Id.* at 571–72.

⁵³ *Id.* at 594.

⁵⁴ *Id.* at 579.

⁵⁵ *Id.* at 581 (“Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners’ suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair.”).

⁵⁶ *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997).

⁵⁷ *Id.* at 1120.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

nontransformative, commercial, and improper.”⁶¹ The Court ultimately found copyright infringement and ruled in favor of the independent news organization that filmed the video from its helicopter.⁶²

The flexibility in the fair use exception raises a lot of uncertainty regarding the application of the doctrine.⁶³ In an effort to guide journalists, the Center for Media & Social Impact published a handbook known as the *Set of Principles in Fair Use for Journalism*, which assists journalists in the United States with interpreting the fair use exception.⁶⁴ The document states that “[f]air use is flexible—but it is not unreliable,” and proceeds to explain how judges ask two key questions when interpreting fair use: (1) “Did the unlicensed use ‘transform’ the copyrighted material by using it for a different purpose than that of the original, or did it just repeat the work for the same intent and value as the original?”; and (2) “Was the material taken reasonably appropriate in kind and amount, considering the nature of the copyrighted work and of the use?”⁶⁵ Further, the handbook offers seven situations that journalists may face while considering whether the content they are using for their press stories constitutes fair use and what the limitations are for journalists under each principle.⁶⁶ The seven situations are: (1) “Incorporation of copyrighted material captured incidentally and fortuitously in the process of recording and disseminating news;” (2) “Use of copyrighted material as proof or substantiation in news reporting or analysis;” (3) “When copyrighted material is used in cultural reporting and criticism;” (4) “When copyrighted material is used as illustration in news reporting or analysis;” (5) “When copyrighted material is used as historical reference in news reporting or analysis;” (6) “Using copyrighted material for the specific purpose of starting or expanding a public discussion of news;” (7) “Quoting from copyrighted material to add value and knowledge to evolving news.”⁶⁷

IV. ADAPTING THE FAIR USE DOCTRINE FOR DIGITAL JOURNALISM

As the digital world evolves, the relationship between copyright law and technology becomes more evident.⁶⁸ The fair use doctrine has changed over time to reflect

⁶¹ *Id.*

⁶² *Id.* at 1123.

⁶³ Hal R. Varian, *Copying and Copyright*, 19 J. ECON. PERSP. 121, 125 (2005) (“The fair use exemption is notoriously vague, but perhaps intentionally so, as it allows the law to deal flexibly with cases as they arise.”).

⁶⁴ *Set of Principles in Fair Use for Journalism*, AM. UNIV. CTR. FOR SOC. MEDIA, at 1 (June 2013), https://cmsimpact.org/wp-content/uploads/2016/01/principles_in_fair_use_for_journalism.pdf (“This set of principles does not describe the full extent of fair use rights. Instead, it describes how those rights should apply in certain common situations for journalists.”).

⁶⁵ *Id.* at 4–5 (“If the answers to these two questions are ‘yes,’ a court is likely to find a use fair. Because that is true, such uses often are not challenged in the first place.”).

⁶⁶ *Id.* at 1.

⁶⁷ *Id.* at 10–15.

⁶⁸ See Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1838 (2009) (stating that “new technology enables novel ways to enjoy copyrighted

the changes in the digital age.⁶⁹ With technology advancements inundating society, the application of the fair use doctrine has expanded to encompass new channels of media, such as television and the Internet.⁷⁰ In the modern era, the progression of the fair use doctrine in journalism is evidenced in key legal precedents and shifting interpretations by courts.

Associated Press v. Meltwater U.S. Holdings is an example of how courts have handled issues in the digital age, including the challenges of using copyrighted material in digital news reporting and online publications.⁷¹ In this case, the Associated Press (“AP”), a news cooperative, sued Meltwater, an Internet media monitoring service, for copyright infringement.⁷² The opinion explains how Meltwater used a computer program to compile news articles from different sources on the web, including many AP stories, and provided story excerpts in daily reports to subscribers.⁷³ Meltwater argued its excerpting of the stories constituted fair use.⁷⁴ Upon conducting the fair use analysis and balancing the four factors, the court held Meltwater’s affirmative defense of fair use failed as “[n]either the purpose nor use of the Meltwater News Reports, nor its excerpts from the Registered Articles in the News Reports, is transformative.”⁷⁵

With new technological advancements, uncertainty arises regarding the scope of copyright law and blurred lines surround the fair use exception.⁷⁶ In the digital age,

content...When technology creates new means of copying or communicating copyrighted works, difficult questions arise about the relationship between existing copyright law and the use of the copyrighted content made available through the new technology.”).

⁶⁹ See Cynthia M. Cimino, *Fair Use in the Digital Age: Are We Playing Fair?*, 4 TUL. J. TECH. & INTELL. PROP. 203, 221 (2002) (stating how “judicial decisions have shifted the fair use inquiry from its traditional focus on whether or not a substantial amount of the protected work was taken to a focus on a market-driven analysis. This view correlates to the prevailing notion that fair use is a privilege granted to subsequent users that subordinates and limits the public interest side of copyright law.”).

⁷⁰ Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (“Fair use has been invoked as a defense to claims of copyright infringement in a wide array of cases over the past thirty years, including when someone has drawn expression from an earlier work in order to parody it, quoted from an earlier work in preparing a new work on the same subject, published a photograph as part of a news story, made a time-shifted copy of television programming, photocopied a document for submission as evidence in a litigation, reverse engineered a computer program to get access to interface information, cached websites to facilitate faster access to them, or provided links to images available on the Internet, just to name a few.”).

⁷¹ *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 540–41 (S.D.N.Y. 2013).

⁷² *Id.* at 541.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 550, 552.

⁷⁶ David H. Donaldson Jr., *After 40 Years, Copyright Law Needs To Be Tweaked*, UT NEWS: TEXAS PERSPECTIVES (Jan. 8, 2018), <https://news.utexas.edu/2018/01/08/after-40-years-copyright-law-needs-to-be-tweaked/> (“Perhaps one of the biggest problems with the current copyright law is the absence of clarity on what constitutes ‘fair use.’ Fair use is intended to recognize that certain types of uses of copyright material are ‘fair’ and not the basis for an infringement claim. But beyond four general, nonspecific criteria in the law, there are few clear standards. This gray area can hamper

“insecurity has grown about how to employ fair use journalistically, particularly in the fast-moving area of social media.”⁷⁷ Journalists have been left astray and are frequently violating the Copyright Act as they seek clarity in understanding whether or not the online content they are using in their press stories constitutes fair use.⁷⁸

In order to address the issues news reporters are facing, copyright law must be changed.⁷⁹ Some scholars have proposed that a licensing fee should be implemented for using online content.⁸⁰ Ben Depoorter and Peter S. Menell argue that fair use will be promoted upon the “adoption of a fee-shifting rule that enables cumulative creators to recover their litigation costs if it is determined that (1) their use of a copyrighted work is fair, or (2) their licensing offer equals or exceeds what a court determines to be an appropriate liability.”⁸¹

Scholars further argue that agency guidelines should be issued as a manner to handle the complexity of technological advancements.⁸² Jason Mazzone explains how

artists who sample the works of others or rely on parody for their creative work. Often the answer cannot be determined until the last court rules. Clearer standards are needed—either in the law or as a result of industry recognition of basic best practices—and would go far to improve the copyright regime.”).

⁷⁷ Aufderheide, *supra* note 41, at 63.

⁷⁸ *Id.* at 60 (“In particular, journalistic re-use of social media is nearly endemic. At the same time, it is fraught, as demonstrated by lawsuits and—much more frequently—threatening cease-and-desist letters.”); Aufderheide & Jaszi, *supra* note 49, at 1 (“[J]ournalists are facing ever-greater challenges to applying the doctrine in daily life. Social media, video, and user-generated content pose new challenges and unfamiliar choices. Online aggregators, bloggers and citizen journalists copy original material and further destabilize business models. The executives heading their own news organizations mistakenly point to fair use as imperiling their future. Legal conflicts and claims create confusion and anxiety.”).

⁷⁹ See Weiskopf, *supra* note 46, at 11 (“The Internet poses yet another technological leap stretching the applicability of existing copyright law. Congress’ long history of amending copyright laws in reaction to technological innovation strongly suggests that Congress will eventually amend the statutory copyright laws to respond to new issues created by the Internet.”).

⁸⁰ Ben Depoorter & Peter S. Menell, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CAL L. REV. 53, 53–54 (2014) (proposing a mechanism in which “a cumulative creator has authority to make a formal offer of settlement to use copyrighted material for a project. If the copyright owner does not respond to the offer, the cumulative creator would be permitted to use the work provisionally by paying the settlement amount into escrow. If the copyright owner rejects the proposed license fee and sues for infringement, the copyright owner will bear the cumulative creator’s litigation costs if (1) the court determines that the use of the material qualifies as fair use, or (2) the court determines that the fair use doctrine does not excuse the use but the cumulative creator’s offer of settlement (the proposed license fee) exceeds the amount of damages that the court determines to be appropriate. In the former case, the escrow amount is returned to the cumulative creator. In the latter case, the copyright owner receives the infringement award from the escrow account, and the remainder returns to the cumulative creator.”).

⁸¹ *Id.* at 85.

⁸² *E.g.*, Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 138 (2004) (“Because of the lack of strong agency involvement, the implementation of the regulatory approach in the context of copyright suffers from additional flaws and fails to take full advantage of the potential benefits of a fully regulatory approach. First, copyright law does not currently take full advantage of the potential expertise offered by an administrative agency. The Copyright Office’s role, though increasing, is still limited. The vast bulk of its rulemaking authority relates to non-substantive issues like registration.

“[g]uidelines can help inform the choices an agency [such as the Copyright Office] will face in adopting fair use regulations. The agency will need to select a point on the continuum from standards to rules.”⁸³ The scholar then proposes that “the agency’s regulations can be written more like rules, more like standards, or as a combination of rules and standards.”⁸⁴

Although the scholars may have a point in proposing licensing fees and agency guidelines, a simpler approach to effectively balancing copyright protection with press freedom is amending the fair use doctrine to integrate originality and newsworthiness criteria into the fair use analysis factors. Courts have implicitly applied the originality and newsworthiness criteria in previous cases. Incorporating the two criteria as additional factors to the fair use balancing test would clarify the doubts reporters have and would also streamline the process for courts to determine fair use in a more effective and consistent manner.

A. Originality Criterion in Fair Use Analysis

Beginning with the originality criterion, this factor would impact the interpretation and application of the fair use doctrine as it would be directly tied to recognizing information and creative expression in the content being used by reporters in press stories. Originality is a requirement under the Copyright Act.⁸⁵ In order to qualify as “original,” a work must be “independently created by the author” and must possess “at least a modicum” or “some minimal degree of creativity.”⁸⁶ In *Feist Pubs., Inc. v. Rural Tel. Servs. Co., Inc.*,⁸⁷ the Court states that originality “is this bedrock principle of copyright that mandates the law’s seemingly disparate treatment of facts and factual compilations.” Although originality is a requirement to qualify for copyright protection, it is not a factor under the fair use exception.⁸⁸ However, cases such as *Harper*

And although it reports to Congress on issues of policy, these reports are purely advisory. Thus, its ability to directly apply its expertise is limited. Moreover, the Copyright Office does not have as much expertise on this front as it potentially could. Most of the staff of the Office remains concerned with the ministerial tasks with which the Office is charged. The Office thus lacks the economic and technological expertise that would make it an even more effective source for informed copyright policy. One side effect of this lack of expertise is a reliance upon the regulated industries for information about copyright markets and technology.”); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 399 (2009) (proposing “a role for the one branch of the federal government that has so far been left out of the picture: the executive branch. In most areas of the law where clear legal directives are needed to guide behavior in particular contexts and where Congress and the courts are unable to supply the clarity, we turn to administrative agencies. An administrative agency can, and should, regulate fair use.”).

⁸³ Mazzone, *supra* note 82, at 424.

⁸⁴ *Id.* at 425.

⁸⁵ 17 U.S.C. § 102(a).

⁸⁶ *Feist Pubs., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 340, 345, 347 (1991) (“Article I, § 8, cl. 8, of the Constitution mandates originality as a prerequisite for copyright protection,” and originality is “the very ‘premise of copyright law.’” “To qualify for copyright protection, a work must be original to the author.”).

⁸⁷ *Id.* at 347.

⁸⁸ *See* 17 U.S.C. § 107.

& Row Publishers, Inc. v. Nation Enterprises⁸⁹ have reflected the importance of incorporating originality as a factor to consider when determining fair use.⁹⁰

In adding originality as a separate factor under the fair use analysis, courts may become more likely to recognize transformative uses of copyrighted material as fair use.⁹¹ For example, in *Cariou v. Prince*, the court considered whether an artist's use of copyrighted photographs taken by a photographer constituted fair use.⁹² The court conducted the fair use analysis and held that the use of the photographs was transformative in part as the artist's images "have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's."⁹³ However, the court also noted, "[o]ur conclusion should not be taken to suggest, however, that any cosmetic changes to the photographs would necessarily constitute fair use."⁹⁴ The court's reference to the "original" work and the changes made to the "original" work in this case emphasizes the importance of integrating originality as a factor under the fair use analysis. Thus, the consideration of originality in determining whether the content used by reporters in press stories constitutes fair use would encourage creativity as courts would consider the changes in the work, which would mean that journalists would have to be more aware of the original stage of the content and how the posted content is different. Ultimately, incorporating originality as a criterion would help reporters determine how courts may rule based on the consideration of the status of the content being used in the press stories.

⁸⁹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985) ("Perhaps the controversy between the lower courts in this case over copyrightability is more aptly styled a dispute over whether The Nation's appropriation of unoriginal and uncopyrightable elements encroached on the originality embodied in the work as a whole. Especially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression.").

⁹⁰ *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 213–14 (2d Cir. 2015) (noting how each factor in the fair use analysis "stands as part of a multifaceted assessment of the crucial question: how to define the boundary limit of the original author's exclusive rights in order to best serve the overall objectives of the copyright law to expand public learning while protecting the incentives of authors to create for the public good," and how "the more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives, shrinking the protected market opportunities of the copyrighted work.").

⁹¹ *See Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013), *holding modified by Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021), *holding modified by Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021).

⁹² *Id.* ("If 'the secondary use adds value to the original—if [the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society,'" and in order to constitute fair use, it "must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.").

⁹³ *Id.* at 708.

⁹⁴ *Id.* ("A secondary work may modify the original without being transformative. For instance, a derivative work that merely presents the same material but in a new form, such as a book of synopses of television shows, is not transformative.").

B. Newsworthiness Criterion in Fair Use Analysis

The field of journalism revolves around the concept of “newsworthiness.”⁹⁵ In order for journalists to publish stories, the event has to be “newsworthy,” meaning it is timely and serves the public’s interest.⁹⁶ Although newsworthiness is not explicitly included in the fair use analysis, courts have considered newsworthiness in prior decisions and have conflicted with the idea of considering newsworthiness, often tying it to the fair use factor of purpose and character.⁹⁷

In his treatise *Nimmer on Copyright*,⁹⁸ well-known scholar Melville Nimmer writes about the factor of newsworthiness, explaining how “the Court implicitly acknowledges the distinction between levels of newsworthiness” in *Harper & Row Publishers, Inc. v. Nation Enters.*

In *Monge v. Maya Magazines, Inc.*,⁹⁹ a singer and her manager sued a magazine publisher for copyright infringement related to publishing previously unpublished photos of their clandestine wedding in a celebrity gossip magazine. The court noted how “the tantalizing and even newsworthy interest in the photos does not trump a

⁹⁵ Aufderheide & Jaszi, *supra* note 49, at 2–3 (“Journalists experience the need for fair use in particular in the following typical situations: (1) Providing evidence or proof of a news item. Quoting conclusions of a report; reproducing a damning memo; quoting a source’s words; photographing breaking news on the scene; using an audio clip of a press conference; (2) Illustrating a news item. Providing audio or visual amplification to a factual statement; providing “color” quotes; adding quotes from bystanders; including photographs twitpic’ed from the scene; recording natural sound for a radio piece; (3) Including copyrighted material that incidentally appears in the news. Music, posters, photos, copyrighted designs on T-shirts, and other incidental copyrighted material that merely travels with the core news elements being employed to tell the story; (4) Providing historical understanding or depth to the news. Excerpts from earlier reports; archival photographs; a montage of previous magazine and newspaper covers; using UGC archived videos from YouTube; (5) Enhancing cultural critique. Using excerpts from books or plays; reproducing art from press kits; including screen shots of a film being reviewed.”).

⁹⁶ *Id.* at 2.

⁹⁷ *See Swatch Grp. Mgt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 83–85 (2d Cir. 2014) (“Even assuming that Bloomberg was fully aware that its use was contrary to Swatch Group’s instructions, Bloomberg’s overriding purpose here was not to ‘scoop []’ Swatch or ‘supplant the copyright holder’s commercially valuable right of first publication,’ [citations omitted] but rather simply to deliver newsworthy financial information to investors and analysts.” “A news organization thus may not freely copy creative expression solely because the expression itself is newsworthy. Nevertheless, we agree with the district court’s conclusion that, under the unusual circumstances of this case, the purpose and character of Bloomberg’s unaltered dissemination of Swatch Group’s expression weighs in favor of fair use, for two reasons.”); *see also In re Est. of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353, 1367 (N.D. Ga. 2002) (where the estate of Martin Luther King, Jr. sued CBS, Inc. for using excerpts from Dr. Martin Luther King Jr.’s speeches in a documentary series, the court considered the public’s interest which relates to newsworthiness).

⁹⁸ 5 *Nimmer on Copyright* § 19E.03 (2024) (“Some of the briefer quotes from the memoirs are arguably necessary adequately to convey the facts; for example, Mr. Ford’s characterization of the White House tapes as the ‘smoking gun’ is perhaps so integral to the idea expressed as to be inseparable from it.”) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 573 (1985)).

⁹⁹ *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1173 (9th Cir. 2012) (“While the parties agree that the pictures at issue are newsworthy, we must nevertheless proceed cautiously because ‘[t]he promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use ‘news report’ of the [work].’”).

balancing of the fair use factors.”¹⁰⁰ Consequently, the court proceeded to state that “because publication of photographic evidence that constitutes proof of a newsworthy event is not automatically fair use, we turn to the degree to which Maya’s use transformed the works.”¹⁰¹ In other words, the court considered the newsworthiness of the event but did not allow it to determine whether there was fair use or not.

Although courts may have disagreed with the determination of fair use based solely on the newsworthiness of the content, the proposal of incorporating newsworthiness as a criterion does not serve as an ultimate determination, but rather as a consideration and factor that should be taken into account when conducting the fair use analysis. With the integration of the newsworthiness element to the fair use analysis, a shift would occur in courts as the factor would be considered to determine fair use and, therefore, would allow for reporters to use content posted online for stories in situations that arise to the point of being deemed as “newsworthy.”

V. EFFECTS OF THE FAIR USE EXCEPTION AND THE EVOLUTION OF THE DIGITAL WORLD ON THE FUTURE OF JOURNALISM

As technology progresses, journalism practices must also evolve to keep up with the digital age. With the rapid advancements and the emergence of the digital world and social media, courts have recognized the need to balance the rights of copyright owners with the public’s interest in accessing information in an easy and quick manner.¹⁰² The fair use exception and the evolution of the digital world create several implications for the future of journalism.¹⁰³ Among these implications is that with the increase of available information online, the competition for publishing news and being first in reporting increases substantially.¹⁰⁴ This means that journalists must be cautious when compiling online information for press stories as not only could they face the issue of gathering fake news, but they may also encounter a fair use issue by not following the necessary steps to determine whether the content being utilized constitutes fair use. Ultimately, “understanding copyright as protection both for yesterday’s and for tomorrow’s journalists is integral to maintaining the journalistic

¹⁰⁰ *Id.* at 1168.

¹⁰¹ *Id.* at 1174.

¹⁰² *See Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 586 (S.D.N.Y. 2018) (highlighting the emergence of digital technology and the importance of integrating originality and newsworthiness as criteria to the fair use analysis as it raised the issue of news companies utilizing online content posted on social media in their stories).

¹⁰³ *See Set of Principles in Fair Use for Journalism*, *supra* note 64, at 1.

¹⁰⁴ *Id.* at 9 (“Journalists recognize the importance of timeliness, which is part of the core mission of journalism. They respect the importance of deadlines not merely for their business model but to meet the mission of informing the public in a timely way. This is particularly true for issues of public safety, public health, and fast-moving news of universal interest and impact. Therefore, journalists consider the issue of timeliness in relation to public importance as well in making their fair use decisions. Consideration of the urgency of the public’s need to know may influence not only a decision to fairly use material; it may also affect how much material is taken. By the same token, however, journalists understand that merely beating the competition to a story should not, in itself, a justification for violating the copyrights of third parties.”).

mission.”¹⁰⁵

The practice of journalism is one that is heavily based on ethics.¹⁰⁶ The Code of Ethics outlines the duty of a journalist and the role of being honest and transparent when informing the public.¹⁰⁷ Implied in the duty of a journalist is the responsibility of being aware of whether the content being published constitutes fair use. In order to better comply with this responsibility, the fair use analysis should be amended to include originality and newsworthiness as criteria for courts to consider.

VI. CONCLUSION

While Congress, the courts, and scholars consider different solutions to address the vagueness of the fair use exception, it seems that the debate is a circular one in which uncertainty supersedes clarity, and the best solution is to amend the fair use exception to provide a better understanding of what constitutes fair use. Licensing fees and agency regulatory control are valid solutions to the copyright issues reporters are facing when using online content in press stories. However, the integration of the factors of originality and newsworthiness into the fair use factor test addresses the needs of both copyright owners and reporters. Copyright owners can determine whether litigation is needed in a case where a reporter’s use of the original work is not fair use, and reporters can stay conscious of the factors under the fair use exception and adapt the content being used to fit within the fair use factors.

Originality and newsworthiness are not the only solutions to the issues reporters are facing when gathering online content for press stories. The factors of originality and newsworthiness are merely to be considered by courts when conducting an analysis based on a non-exhaustive list of factors. Just like in previous cases, courts are to consider the factors in light of the facts of each case.

The reasoning behind adding originality as a factor to the fair use analysis is supported by the emergence of technology and the idea of “transformative use” that courts have previously explored. The originality factor allows for clarity in determining the background of the content being used in news reports. Additionally, the reasoning behind adding newsworthiness as a factor to the fair use analysis is to further the mission of the journalism industry while also providing context to copyright owners. The newsworthiness factor promotes ethical journalism while balancing copyright protection.

If courts were to consider originality and newsworthiness in the analysis of fair use, they would be protecting copyright owners as well as the public’s interest. With

¹⁰⁵ Aufderheide & Jaszi, *supra* note 49, at 7 (noting how it is important for journalists to value “the features permitting access to copyrighted material as highly as those protecting that material.”).

¹⁰⁶ See *SPJ Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISTS (Sept. 16, 2014), <https://www.spj.org/ethicscode.asp>.

¹⁰⁷ Aufderheide & Jaszi, *supra* note 49, at 2 (“The duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues. Conscientious journalists from all media and specialties strive to serve the public with thoroughness and honesty.”).

the evolution of the Internet, it may become difficult to determine whether a use is constituted as fair use. However, the integration of the originality and newsworthiness factors can help identify whether the use of copyrighted content is considered fair use as reporters adapt to the digital landscape. Originality is a requirement under copyright law and newsworthiness is a factor courts have considered in the past but have not agreed unanimously to integrate into the fair use determination. Technology is evolving at the pace of an eyeblink, and reporters are violating the Copyright Act left and right. With the rapidness of the digital age, action must be taken to address the uncertainty revolving around the fair use doctrine by allowing courts to consider originality and newsworthiness when determining whether fair use exists.