

Enhancing Fair Use in Protecting Appropriated Artworks: A Comparative Analysis of Safeguarding Indonesian Copyright Law

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Abstract

Appropriated artwork refers to the practice of using pre-existing objects or images into new works of art with little or no significant changes to the original form. This trend developed into the Pop Art movement, where one of the characteristic features was the use of images from mass media, as seen in the works of Andy Warhol, including the transformation of Campbell's soup cans into iconic works of art. Although widely appreciated, this work has drawn criticism regarding copyright infringement, raising the question: where do one artist's

rights draw on another? To what extent is the appropriation of copyright protected works considered legal without violating the rights of the original creator? The authors aim to provide insight into the loopholes in Indonesia copyright law by comparing it with the Copyright Act of 1976 in the United States, which offers an exception to copyright through the fair use doctrine. The research seeks to highlight the underdeveloped nature of this regime in Indonesia. The research results show that the two legal systems differ significantly in the aspects of exclusive rights, moral rights, protected works, exceptions, and duration of protection. The challenge in understanding fair use lies in determining the boundaries between the rights of one artist and another. The fair use doctrine assesses four main factors: the purpose and character of the use, the nature of the original work, the proportion of the work used, and the impact on the market. Courts in the US often favor fair use if elements of transformation are identified, measuring the extent to which the appropriated work carries elements of originality or new creativity. Indonesia could consider adopting the fair use doctrine by adapting the concept through ministerial regulations or other implementing regulations.

KEYWORDS *Copyright, Appropriated Works, Fair Use*

Introduction

Intellectual Property Rights aims to strike a balance between the public's interests and those of creators, encouraging an environment where creativity can flourish for everyone's benefit. To achieve this balance, we need a strong legal framework and effective enforcement mechanism to ensure that inventions and creative works are protected.

As globalization significantly influences the evolution of Intellectual Property Rights, it exerts a noble impact on the creative industries, especially in contemporary art. Defining "contemporary" can be tricky, it generally refers to the period after World War II up to the early 21st century, often characterized by innovative or avant-garde approaches. What makes contemporary art unique is that it doesn't have a specific origin; instead, it reinvents and reinterprets existing art forms, as seen in movements like Appropriation Art. While contemporary art is enjoyed worldwide, the lack of consistent copyright laws and regulations governing its use and distribution remains a challenge.

In Indonesia, copyright infringement continues to be a significant challenge within the creative industries, even with relatively comprehensive laws in place. This highlights the necessity for ongoing updates to copyright regulations to

keep up with technological advancements and innovations. The legal framework governing copyright in Indonesia is primarily outlined in Law No. 28 of 2014 concerning Copyright (Hereinafter, Indonesian Copyright Law). Article 1 of this law defines copyright as exclusive rights of the creator that arise automatically based on the declarative principle after a creation is manifested in a tangible form, without diminishing the restrictions as stipulated by the laws and regulations.

This legal framework aims to protect artistic creation by establishing a system of economic incentives, granting property rights to artists for their work and encouraging a wide range of creative outputs across various genres. However, the Indonesian Copyright Law falls short in providing a clear definition of art and only delineates flexible categories of art works eligible for protection. These categories include architectural works, maps, batik art or other patterned art, photographic works, paintings, portraits, cinematographic works, and more.

While contemporary art certainly falls within the scope of the Indonesian Copyright Law, challenges arise when it comes to regulating appropriation art due to its distinctive characteristics. The core issue is that many appropriation art styles are inspired by existing works; artists often draw creative ideas from their surroundings and different art forms—art is a wellspring of inspiration. For instance, conflicts often emerge when a photographer discovers that their work has been used by another artist to create a derivative piece without permission. Despite photographers' attempts to assert that such unauthorized use is illegal, the evolution of fair use doctrine seems to favor appropriators. This tension between copyright law and appropriation art raises important questions about where one artist's rights end and another's begin.

Although the Indonesian Copyright Law grants exclusive rights to creators, these rights are not entirely absolute due to the existence of the fair use doctrine. This doctrine introduces certain limitations on both moral and economic rights, allowing for situations where protected works can be used without the explicit consent of the rights holders, either with or without compensation. At the same time, it also recognizes and safeguards the moral and economic rights of the author. The regulation, scope, and application of the fair use doctrine vary across jurisdictions, with its origins in the United States.

In the United States legal framework, the fair use doctrine is outlined in Title 17, Section 107 of the 1976 United States Copyright Act (hereinafter, U.S. Copyright Act). The initial part of this section states that "fair use of a copyrighted work, including reproduction in copies or phonorecords or through any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." Due to its

common law system, U.S. courts have made numerous attempts to categorize actions that can be considered a fair use. For instance, works such as commentary, criticism, research, teaching, news reporting, or parody may qualify as fair use.

Based on evolving legal precedents, the fair use doctrine in the U.S. provides a more detailed legal defense involving a comprehensive four-step test. This test considers factors like the purpose and character of the use, the nature of the copyrighted work, the extent and significance of the portion used, and the impact on the market value of the original work.

In contrast, regulations regarding the fair use doctrine in Indonesia are less clearly defined and are more commonly recognized as "Limitations on Copyright," as outlined in Articles 43 to 49 of Chapter VI of the Indonesian Copyright Law. Unlike the United States, the Indonesian Copyright Law does not explicitly specify the qualifying factors for fair use exemptions. Instead, it outlines limitations based on reasons of protecting "public order" or "reasonable interest". The lack of detailed clarification on "reasonable interests" creates ambiguity, especially since Indonesia does not identify specific factors for fair use limitations, unlike the U.S., which incorporates four distinct factors. Consequently, copyright law varies from country to country where every jurisdiction has its own limitations in categorizing what actions fall under fair use. While the underlying principles remain consistent, the details differ. Even in the European Union, where extensive harmonization of copyright law has occurred across the 27 Member States,¹ differences persist. The disparities between Indonesia and the U.S. are more pronounced, particularly concerning copyright defenses, scope, and the fair use doctrine.

Among all copyright frameworks, the Author chooses to compare Indonesian Copyright Law with that of the U.S. because U.S. Copyright Law exemplifies a strong commitment to protecting copyright and preventing infringement. This is evident in its continual updates and modifications to the legal framework, ensuring alignment with societal evolution. For instance, every year, the United States Chamber of Commerce publishes the International Intellectual Property Index (hereinafter, IP Index), which evaluates countries based on factors such as Intellectual Property growth, the commercialization of IP assets, law enforcement, system efficiency, and participation in international treaties. This index provides a comprehensive assessment of each country's intellectual property framework, offering insight into their policies for fostering innovation, creativity, economic growth, and investment opportunities.

¹ Access to European Union Law and Corner, "EUR-Lex," accessed August 23, 2024, <https://eur-lex.europa.eu/eli/dir/2001/29/oj/eng>.

A comparison of the 2024 International IP Index shows a stark contrast between the United States and Indonesia. In the copyright category, the U.S. scored an impressive 95.48%, ranking first among the 55 countries surveyed, while Indonesia only score 30.40%, placing it in the forty-nine in the same category.² This significant disparity highlights the inefficiencies in copyright protection under Indonesian law. The high rate of copyright infringements and insufficient enforcement of copyright laws has led to Indonesia's inclusion on the United States Trade Representative's Priority Watch List for 2024.³ This list identifies countries perceived to have insufficient intellectual property protection or enforcement, prompting increased scrutiny from the United States and inviting intensified bilateral engagement.

Therefore, as appropriation art gains traction in the digital age, there has been a significant rise in copyright infringement lawsuits relating to artistic works. It often seems as though everything has already been invented; artists frequently draw from a well of influences, blending familiar elements to forge their own unique creations. This makes the quest for originality particularly challenging. Online platforms have facilitated the widespread unauthorized duplication of copyrighted artworks, making them easily accessible and manipulable. For artists engaging in this kind of work, a critical question arises: can their creations be defended as fair use of copyrighted material?

The challenge lies in establishing clear boundaries that protect existing artworks while also allowing for innovation through the fair use doctrine. This study examines the protection of contemporary artworks, particularly those involving appropriation art, by exploring the nuances of the fair use principle within the copyright laws of Indonesia and the United States. Theoretically, the authors aim to provide insight into the loopholes in Indonesian Copyright Law by comparing it with the U.S. Copyright Act which offers an exception to copyright through the fair use doctrine highlighting the underdeveloped nature of this regime in Indonesia. The goal is to identify where subjective artistic expression intersects with objective regulatory frameworks, thereby establishing standards that differentiate between inspiration and copyright infringement.

² AFFA, "International IP Index 2024: Indonesia to Catch Up on IP Commercialization," 2024, accessed July 11, 2024, <https://affa.co.id/global/2024/05/10/international-ip-index-2024-indonesia-to-catch-up-on-ip-commercialization/>.

³ Office of the United States Trade Representative, "Report on Intellectual Property Protection and Enforcement," 2024, n.d., <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/april/ustr-releases-2024-special-301-report-intellectual-property-protection-and-enforcement#:~:text=Seven countries are on the,engagement during the coming year.>

Additionally, this paper aims to investigate the feasibility of aligning Indonesian Copyright Law with the U.S.' four factor fair use assessment while ensuring appropriate limitations to prevent overly broad copyright coverage.

The focus of this writing is on how Indonesian Copyright Law should practically accommodate the fair use doctrine, particularly for appropriated artworks. Although Indonesia has regulated fair use under this law, it lacks clear limitations on the factors that determine whether a work qualifies as fair use.

The Legal Framework and Application Between the Indonesian Copyright Law and the United States Relating to the Fair Use Doctrine for Appropriated Artworks

A. The Fair Use Doctrine in the Copyrights section of the United States Copyright Law

The U.S. Copyright Act grants creators and artists the exclusive right to protect and control the use and distribution of their works. Nevertheless, this protection is limited by the exception of the fair use doctrine, which permits certain cases of copyrighted material. This section examines the development and framework of the fair use doctrine, including its statutory factors, relevant jurisprudence, and the limitations of the fair use defense. Furthermore, the discussion will extend to a comparative analysis of how the fair use doctrine is codified in the U.S. Copyright Act compared to its counterpart in the Indonesian Copyright Law, addressing whether Indonesia requires legal reform in this area. While fair use is codified, this section will demonstrate that no clear-cut definition or standardized assessment exists for determining what constitutes fair use, particularly in the context of appropriation art. As a result, significant challenges persist in evaluating the fairness of such uses.

The codification of the statutory fair use factors in the 1976 U.S. Copyright Act, which is examined in detail in the sections below, was intended by Congress to clarify, rather than replace, existing judge-made law. The four fair use factors are derived from the opinion of Judge Joseph Story in the 1841 case of *Folsom v. Marsh*,⁴ in which the defendant copied 353 pages from the plaintiff's 12-volume

⁴ Case No et al., "FOLSOM et Al. v. MARSH et Al.," <https://law.resource.org/pub/us/case/reporter/F.Cas/0009.f.cas/0009.f.cas.0342.2.pdf>.

biography of George Washington to create a separate two-volume work of his own.⁵

The Circuit Court of Massachusetts addressed whether the copying in question constituted piracy and whether any affirmative defenses could be raised against it.⁶ Justice Story identified a range of factors to assess whether an individual had infringed upon another's copyrighted work, while also considering circumstances where liability for piracy might not apply.

The court rejected the defendant's fair use defense with the following decision:

"A reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy [...] In short, we must often look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."⁷

Judge Story distinguished between straightforward cases of copyright infringement—where the defendant's work closely mirrors the plaintiff's, involving "the whole substance of one work copied from another, with slight omissions and formal differences only, which can be treated in no other way than as studied evasions"—and more complex cases.⁸ These latter cases required balancing "the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used." Therefore, the critical factor, in Judge Story's reasoning, was the effect of the new work: a work that "supersedes" the original and "substitutes" for it infringes the rights of the copyright owner. Judge Story's reasoning is widely regarded as the foundation of the fair use doctrine in the United States. Many aspects of his reasoning can be identified within the current statutory framework of the 1976 U.S. Copyright Act.

⁵ L Ray Patterson, "Journal of Intellectual Property Folsom v . Marsh and Its Legacy," *Journal of Intellectual Property Journal of Intellectual Property Law* 5, no. 2 (1998): 441–45.

⁶ No et al., "FOLSOM et Al. v. MARSH et Al."

⁷ No et al.

⁸ Justin Hughes, "The Respective Roles of Judges and Juries in Copyright Fair Use," *Houston Law Review* 327, no. 58 (2020): 327–54.

The fair use doctrine remained entirely judge-made law until the Copyright Act of 1976, which codified the fair use doctrine in Section 17, Title 17. Both the House and Senate reports emphasized that Section 107 was intended to align with the preexisting judge-created fair use doctrine, stating that it was “not intended to change, narrow, or enlarge fair use in any way.”⁹

The preamble of Section 17 states that notwithstanding the exclusive rights granted to the author of a copyrighted work:

“The fair use of a copyrighted work, including reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

When drafting Title 17 of U.S. Copyright Act. Section 107, it was clearly indicated that courts have the freedom to develop the interpretation of the fair use concept. In principle, they are not strictly bound by the four factors outlined in this law, which were created as guidelines for the courts.¹⁰ The language of the statute itself does not suggest that any one factor should be given greater weight in the analysis, meaning that all factors should be considered equally. However, certain inferences can be drawn from specific wording within the statute. For instance, the phrase “shall include” indicates that the four listed factors should be considered by judges, but these are not the only factors that may be relevant. Additionally, the use of the term “such as” before listing acceptable purposes implies that the list is not exhaustive and that other purposes may also qualify for a successful fair use defense.

This proposition is echoed in Judge Leval’s opinion where courts are allowed to consider additional factors in their fair use analysis. One such factor is acknowledgement of the copyrighted source.¹¹ Citing the name of the artist or author may help, but it does not automatically make a use fair. While plagiarism and copyright infringement are related matters, they are not identical and should not be conflated in application and definition. Plagiarism, using someone’s words, ideas, images, etc. without acknowledgment, is a matter of professional ethics, while copyright is a matter of law, and protects exact expression, not ideas.

⁹ Jane C Ginsburg, “FAIR USE IN THE US REDUX: REFORMED OR STILL DEFORMED?,” *Singapore Journal of Legal Studies* 1183, no. March (2024): 1–38, <https://law.nus.edu.sg/wp-content/uploads/2022/12/20230131-KGC-Lecture-Flyer.pdf>.

¹⁰ Copyright Law Revision, “House of Representatives,” *94th Congress*, <https://doi.org/10.4324/9780429305658-17>.

¹¹ Betsy Rosenblatt, “CONSIDERING THE ROLE OF FAIRNESS IN COPYRIGHT FAIR USE,” *Houston Law Review* 261 (2023): 261–93.

One can plagiarize even a work that is not protected by copyright, for example, by copying from Da Vinci as one's own. Conversely, attribution prevents accusations of plagiarism, but it does not prevent infringement of copyright. For example, reprinting a copyrighted painting without permission, while citing the original artist, would be copyright infringement but not plagiarism.¹²

The fair use doctrine plays an essential role in copyright law. Given the expansive scope of modern copyright statutes, mechanisms to prevent excessive monopoly power by copyright holders are crucial. Among these mechanisms, fair use is arguably the most significant, serving as a “safety valve” in copyright law. It allows courts to exercise flexibility, ensuring that the rigid application of copyright law does not hinder the very creativity it aims to promote.

In *Campbell* the U.S. Supreme Court characterized fair use as an affirmative defense,¹³ meaning that in copyright infringement cases, the defendant carries the burden of proof in demonstrating that the use qualifies as fair and does not constitute infringement. Consequently, the fair use defense need not be invoked unless the plaintiff first establishes (or the defendant concedes) a *prima facie* case of copyright infringement. For example, if the work is not copyrightable, the copyright term has expired, or only a minimal portion was used, the plaintiff cannot establish a *prima facie* case, rendering the fair use defense unnecessary. Moreover, fair use is just one of several limitations, exceptions, and defenses available against claims of copyright infringement.

Fair use is not confined to the purposes outlined in its preamble, nor does every use made for those purposes automatically qualify as “fair.” To assess whether a specific use of a copyrighted work constitutes fair use, Section 107 provides four non-exhaustive factors that courts must evaluate and balance. This provision, described as a limitation on the exclusive rights granted under copyright law, affirms that the fair use of a copyrighted work does not amount to copyright infringement:

“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;

¹² Niva Elkin-Koren and Neil Weinstock Netanel, “Transplanting Fair Use across the Globe: A Case Study Testing the Credibility of US Opposition,” *Hastings LJ* 72, no. 4 (2020): 1121.

¹³ U S Copyright Office, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 Justia US Supreme Court Center 569–600 (1994).

- (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.”¹⁴

Courts typically assess fair use by evaluating each factor individually and then making an overall decision on the fair use defense. In theory, no single factor holds more weight than the others, as all are considered to have equal significance in determining fair use. It is common for some factors to favor one party, others to favor the opposing party, and some to remain inconclusive. There is no fixed formula for weighing these factors; instead, the process is case-to-case basis, relying on the court's discretion and judgement.

1) Purpose and character of the use

The statutory language of the first factor directs the court to examine the “use made of a work in the particular case” and assess “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit, educational purposes.” Initially, courts focused primarily on whether the use was commercial. However, in practice, determining the purpose and character of the use is more complex than simply classifying it as commercial or noncommercial. This factor is considered the most multifaceted and intricate, often raising concerns regarding how courts weigh the various factors. Legal precedent indicates that courts do not consistently apply a uniform approach when interpreting the first factor of the fair use doctrine.¹⁵

In evaluating the purpose and character of the use, the court may initially refer to the nonexclusive list in the preamble to section § 107 of the U.S. Copyright Act, which includes purposes such as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” While this list provides useful guidance, it does not constitute a comprehensive or conclusive definition of fair use, and the analysis typically extends beyond these statutory provisions.

Over time, courts have developed additional considerations for analyzing the first factor. For instance, the Supreme Court in *Sony Corporation of America v. Universal City Studios, Inc.* stated that commercial use is presumptively not fair use, whereas noncommercial use is presumptively

¹⁴ New York: United States Court of Appeals for the Second Circuit, *Cariou v. Prince* (2013).

¹⁵ Louis Peter and Pataki Jr, “Copyright Protection for Computer Programs Under the 1976 Copyright Act Copyright Protection for Computer Programs Under the 1976 Copyright Act.”

fair use, but it does not not guarantee such a determination.¹⁶ However, in the Campbell case in 1994, the Court clarified that relying on a commercial/noncommercial dichotomy as a bright-line test is incorrect, and such a presumption is inappropriate. Instead, commercial use is merely a factor to consider when applying the first fair use element. The Court explained that the commercial assessment should focus on whether the user profits from the exploitation of copyrighted material without compensating the copyright holder for the work.¹⁷

The Court also recognized the importance of the infringer's intent, specifically whether the infringer acted in bad faith with the intent to supplant the original work's value. In Campbell, the Court concluded that for a new work to qualify as fair use, it must alter the original in terms of "new expression, information, aesthetics, insights, meaning, or message," emphasizing the need to add value to the original copyrighted work. The Court further held that the primary objective in applying factor one is to determine whether the new work merely "supersedes" or "supplants" the original work,¹⁸ or instead adds something new with a different purpose or character. Thus, the critical question is whether the new work is "transformative," a concept that has since shaped the entire assessment of the first fair use factor, which will be discussed in more detail in the section below. Before the rise of the transformative doctrine, defendants often argued that their work was a parody to justify a fair use claim and avoid sanctions in copyright cases. This approach, however, sometimes became an abuse of the law, as defendants would attempt to stretch the scope and definition of parody, fitting the alleged infringing work into the category of parody, even when it was clearly not one.

2) The nature of the copyrighted work

The second factor requires the Court to examine the nature of the copyrighted work, specifically whether it is "expressive or creative," such as

¹⁶ U S Copyright Office, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (1984).

¹⁷ *Office, Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 Justia US Supreme Court Center.

¹⁸ Barton Beebe, "AN EMPIRICAL STUDY OF U.S. COPYRIGHT FAIR USE OPINIONS UPDATED, 1978-2019," *JOURNAL OF INTELLECTUAL PROPERTY AND ENTERTAINMENT LAW* 10, no. 1 (2020): 39, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3758229.

a fictional work, or “more factual” in nature.¹⁹ The U.S. Copyright Act provides greater latitude for the dissemination or borrowing of factual or historical works, making fair use more likely in such cases than in works of fiction.²⁰ Conversely, establishing fair use becomes more challenging when imaginative and artistic works are involved.²¹

This factor also considers whether the copyrighted work is published or unpublished. For unpublished works—those not yet disseminated to the public by their author—the scope of fair use is significantly narrower. However, as transformation has become a central concept in fair use analysis, the importance of the second factor has diminished. Even before the transformative doctrine gained prominence, the second factor was already regarded as carrying the least weight among all fair use factors.

The Second Circuit has held that when a use is transformative, the second factor is afforded minimal weight. The Ninth Circuit has taken this position further, asserting that “the more transformative the new work, the less significant the other factors will be.”²²

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

The statutory language of the third factor is relatively straightforward, addressing both the “amount” and “substantiality” of the borrowed material. When applying this factor, courts evaluate both the “quantity of the materials used” from the copyrighted work and the “quality and importance” of those portions in relation to the original work. The application of this factor varies on a case-by-case basis. Ultimately, the court must determine whether the amount, quality, and proportion of the material taken are “reasonable in relation to the purpose of the copying”.

The permissible degree of copying under the third factor varies significantly depending on the purpose of the copying. Notably, there is no definitive threshold separating permissible borrowing from impermissible use. However, the extent of copying is inherently tied to its purpose, with the “how much” often dependent on the “what for,” meaning, how much may

¹⁹ Andy Warhol, Foundation For, and T H E Visual, Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith (2023).

²⁰ U.S. Supreme Court, *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) (1985).

²¹ Elkin-Koren and Netanel, “Transplanting Fair Use across the Globe: A Case Study Testing the Credibility of US Opposition.”

²² New York: United States Court of Appeals for the Second Circuit, *Cariou v. Prince*.

be taken depends on the use to be made of the materials, as outlined under the first factor.²³

Courts assess both the quantity of material taken and its quality and importance to the original work. Secondary use must “conjure up” enough of the original to achieve its transformative purpose, and artists are not strictly limited to taking only what is deemed necessary. For example, the Supreme Court has ruled that copying an entire work can constitute fair use when done for non-commercial purposes, such as videotaping broadcast television programs for personal use.²⁴

That said, as a general principle, the more material that is copied, the less likely it is to qualify as fair use. Conversely, the less material copied, the greater the likelihood that the use will fall within the protections of the fair use doctrine. Using most or all of a work does not preclude a finding of fair use, although it tends to make the third factor less favorable to the defendant. Nevertheless, even a small portion of a work can weigh against fair use if the portion used is deemed substantial in essence. The U.S. Supreme Court, for instance, held that quoting fewer than 400 words from President Ford's 200,000-word memoir was sufficient to make the third factor unfavorable to the defendants, as the excerpt represented the “heart of the work.”²⁵

In various precedents applying the third factor, its significance, like that of the second factor, appears to have diminished with the growing emphasis on the doctrine of “transformation” in fair use analysis. The concept of transformation seems to have largely subsumed the third factor, much as it has with the second. When a use is highly transformative, the amount copied from the original work becomes less critical in determining fair use. In some cases, courts have even concluded that this factor favors fair use despite the entirety of the original work being copied, provided the transformation is substantial enough to justify the use.

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

The fourth factor in fair use analysis is often referred to as the “market effect” factor. In 1985, the Supreme Court described it as “undoubtedly the single most important element of fair use”. The statutory language requires courts to consider not only the actual market harm caused by the alleged

²³ Office, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984), 417.

²⁴ Ginsburg, “FAIR USE IN THE US REDUX : REFORMED OR STILL DEFORMED ?”

²⁵ Court, Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985).

infringer's actions but also the potential impact of "unrestricted and widespread conduct of the sort engaged in by the defendant, would result in a substantially adverse impact on the potential market for the original work". This factor focuses on the financial harm—both actual and potential—suffered by the copyright holder as a result of the infringing work.

Specifically, the fourth factor evaluates "cognizable" financial harm, primarily when the appropriating work acts as a substitute for the original. The central inquiry is whether the secondary work "usurps the market" for the original by providing a competing substitute. Within this framework, the scope of market harm considered is broad, including both existing markets and reasonably foreseeable derivative markets that the copyright holder might develop or license others to create. Such harms may be considered regardless of whether the author has actively pursued these opportunities.²⁶ This also includes harm in the form of lost or diminished licensing prospects, the impact on direct sales, or other financial detriments. In practice, the plaintiff's and defendant's works are often marketed differently, with distinct audiences, purchasers, and price points. When this is the case, it is unlikely that the defendant's work would have a significant market impact on the plaintiff's plaintiffs.

While the fourth factor was once viewed as the most critical element in fair use determinations, its primacy has been challenged in recent cases due to the growing emphasis on the first factor, particularly the transformative use doctrine. This shift suggests that some courts now consider the first factor to be nearly determinative in fair use analysis.

B. Early Appropriation Art Cases Shaping the Fair Use Doctrine

The treatment of the copyright issues involved in appropriation art in the United States has evolved significantly over the years.

1) Art Rogers v. Jeff Koons.

The case of *Rogers v. Koons* was the first to address the application of copyright law to appropriation art in the United States. In this case, photographer Art Rogers was commissioned to take a black-and-white photograph, which captured Jim Scanlon and his family's eight new

²⁶ Elkin-Koren and Netanel, "Transplanting Fair Use across the Globe: A Case Study Testing the Credibility of US Opposition."

German Shepherd puppies. Rogers invested substantial artistic skill in the photograph, carefully selecting the lighting, location, seating arrangement, and the position of the puppies to craft the final composition. These choices drew upon his extensive experience and artistic development. Beyond composition, he also made specific technical choices regarding camera settings and natural lighting. The photograph was professionally produced and sold as a print for \$200, adding to Rogers' portfolio and professional catalogue, through which he earned his livelihood. Additionally, he licensed the image under the title "Puppies." (Figure 2).

At that time, renowned artist and sculptor Jeff Koons was preparing for an exhibition and encountered a postcard of Rogers' "Puppies" through Museum Graphics. Intrigued by its potential for his exhibition theme, Koons decided to recreate the image in a three-dimensional form, commissioning artisans to produce a life-like colored sculpture without Rogers' permission. Koons provided specific instructions, emphasizing that the sculpture should replicate the photograph exactly, including details such as the angle and posture of the figures, the "big smile" on the woman's face, and the texture of the puppies' fur. Once completed, the work, titled "String of Puppies," (Figure 1), was displayed at the Sonnabend Gallery, where three of the four copies were sold to collectors, collectively earning \$367,000.²⁷



Figure 2 (left): Rogers, A. (1980). Puppies. (Photograph in black and white) California.



Figure 1 (right): Koons, J. (1988). String of Puppies. (Polychromed wood).

However, Koons' use of Roger's "Puppies" to create "String of Puppies" was not authorized by plaintiff.

²⁷ US Copyright Office, "Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)" 301 (1992): 1992, <http://copyright.gov/fair->.

In 1989, Rogers sued Koons for copyright infringement and unfair competition, also implicating the gallery for producing, selling, or displaying derivative works based on his photograph. The court examined whether Koons' near-exact, three-dimensional reproduction of Rogers' photograph—altered only by color and minor details—violated copyright law. Key issues included copyright ownership, authorization, and whether the work was replicated for profit.

Koons defended his work under the fair use doctrine, which allows limited use of copyrighted material without permission for specific purposes. In evaluating his defense, the court applied the four factors of fair use: (1) the purpose and character of the use, including whether it was transformative; (2) the nature of the copyrighted work; (3) the amount and substantiality of the original work used; and (4) the impact of the use on the market value of the original piece. This fair use assessment is inherently context-dependent, requiring analysis based on the unique circumstances of each case:

a. Purpose and character of use

The Supreme Court has established that copies made for commercial gain are presumptively unfair. In this case, Koons argued that his sculpture served as a satire or parody of broader society. Generally, parody or satire involves an artist closely mimicking another's style to create a new work that humorously critiques or comments on the original. However, while "String of Puppies" may offer a satirical view of materialism, it does not clearly parody Rogers' photograph, "Puppies," itself. The circumstances indicate that Koons' copying of the photograph "Puppies" was done in bad faith, primarily for profit-making motives, and did not constitute a parody of the original work.²⁸

b. Nature of Roger's work

"Puppies" is a published, original work, portraying a creative and imaginative nature, along with Rogers' intent to earn a livelihood from his photography, weighs against a fair use finding, as the work's originality and commercial purpose suggest it deserves copyright protection.

c. Amount and substantiality of work used

The critical issue is the extent of the copyrighted expression used, rather than any factual content within the original work. Koons

²⁸ Copyright Office.

replicated the essence of Rogers' photograph almost entirely, far exceeding what would have been necessary even if the sculpture were intended as a parody. By copying the core elements of "Puppies," Koons captured the very essence of Rogers' work.²⁹

d. Effect of the Use on the Market Value of the Original

The court emphasized that the fourth factor, considered the "most important" in fair use analysis, requires weighing the benefit to the copyright owner against the public benefit of the alleged fair use. Under this factor, the copyright owner need only show that if such unauthorized copying became public, it would damage the potential market for the copyrighted work. In this case, the record shows no indication that Koons created "String of Puppies" for anything other than commercial sale as high-priced art. Thus, potential harm to Rogers' market is presumed, indicating prejudice against Rogers' ability to profit from his original work. The court ultimately concluded that Koons' use of Rogers' work did not qualify as fair use.³⁰

2) Andrea Blanch v. Jeff Koons.

Fourteen years after the Rogers v. Koons case, the United States Court of Appeals for the Second Circuit revisited a copyright infringement issue concerning appropriation art in Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).³¹ In 2000, Jeff Koons was commissioned by Deutsche Bank and the Solomon R. Guggenheim Foundation to create a series of seven paintings titled "Easyfun-Ethereal". One of these paintings, "Niagara", is central to the dispute. Similar to the other works in the series, "Niagara" features fragmented images collaged against a scenic backdrop.



The painting "Niagara" features four pairs of women's feet and lower legs prominently suspended over images of confections, a large chocolate fudge brownie topped with ice cream, a tray of donuts, and a tray of apple danishes, set against a background of a grassy field and Niagara Falls. The legs are arranged side by side, each pair pointing vertically downward, extending from the top of the painting about two-thirds of the way down. Together, the four pairs of legs span the entire width of the canvas. Koons based the images in "Niagara" on photographs from fashion magazines and

²⁹ "Rogers v. Koons.Pdf," n.d.

³⁰ "Rogers v. Koons.Pdf."

³¹ Office, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 Justia US Supreme Court Center.

advertisements. One of the pairs of legs in the painting was adapted from a photograph by Andrea Blanch, a professional fashion and portrait photographer. The photograph, titled "Silk Sandals by Gucci," (Figure 3) (hereinafter, Silk Sandals) was featured in the August 2000 issue of Allure magazine.³² It depicts a woman's lower legs and feet, adorned with bronze nail polish and glittery Gucci sandals, resting on a man's lap in what appears to be a first-class airplane cabin. Blanch had significant involvement in the creation of the image, selecting the model, sandals, and nail polish, controlling the camera, and overseeing the lighting, composition, and choice of the airplane interior. She also arranged the positioning of the woman's feet on the man's lap. Koons scanned Blanch's Silk Sandals photograph and incorporated a version of the image into "Niagara." (Figure 4). He used only the legs and feet, removing the background and the man's lap, and altered the angle and orientation of the legs.

	
<p>Figure 3 (left) : Blanch, A. (2000). Silk Sandals by Gucci. (Photograph in colour) Allure Magazine</p>	<p>Figure 4 (right) : Koons, J. (2000). Niagara. (painting) Guggenheim.</p>

Koons reported that his net compensation from "Niagara" amounted to \$126,877, while Blanch was paid \$750 for her photograph Silk Sandals. Although Blanch retains the copyright to the photograph, she has neither published nor licensed it since its appearance in Allure. In 2003, Blanch filed a lawsuit against Koons for copyright infringement. The court once again considered the four factors of the fair use doctrine, emphasizing that such assessments must be made on a case-by-case basis:

- a. Purpose and character of use

The court referenced the discussion in the Campbell case, stating that:

³² F.3d, "467 F.3d 244," 2006, 244–63.

“The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersedes the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message ..., in other words, whether and to what extent the new work is “transformative.” Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such transformative works thus lie at the heart of the fair use doctrine’s”³³

Hence, if the secondary use adds value to the original by transforming it into new information, new aesthetics, or new insights, it is protected under the fair use doctrine. Koons, by his own admission, used Blanch’s image as a medium for commentary on the social and aesthetic effects of mass media. His goal was not to repurpose Silk Sandals but to use it in the creation of “new information, new aesthetics, new insights, and understandings.” The key test for determining whether Koons’s use of Silk Sandals in “Niagara” is transformative is whether it “merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” Koons not only altered the color, size, and proportionality of the image but also changed its medium and imbued the artwork with a new meaning and purpose, distinct from Blanch’s original. Thus, the court found that Koons’s use was transformative. Furthermore, the court emphasized that a defense of fair use will not be sustained if the secondary use can be viewed as commercial exploitation—when the user derives significant financial benefit from the copyrighted material. In contrast, fair use is more likely when the secondary use serves the broader public interest. The greater the private financial gain from the secondary use, the less likely it will be considered fair. Despite Koons’s substantial profit from the sale of “Niagara”, the court acknowledged that the public exhibition of art, even when it generates revenue for artists or museums, is widely seen as having societal value. Given that the creation and exhibition of the painting did not constitute commercial exploitation, and there was no

³³ Blanch Koons, “Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)” 244 (2006): 2006.

indication of bad faith, the court concluded that the first fair-use factor strongly favored Koons.

b. Nature of Blanch's work

While acknowledging that *Silk Sandals* is a creative work, the court stated that this does not mean the second fair-use factor, though it may slightly favor Blanch, holds significant weight in the overall fair-use analysis. The second fair-use factor carries limited importance in this case because Koons used Blanch's work in a transformative way—specifically to comment on the social and aesthetic implications of her image—rather than to exploit its inherent creative qualities.

c. Amount and Substantiality of the Portion Used

Blanch testified in her deposition that her key creative decisions in the shoot included selecting the airplane cabin as the setting and positioning the female model's legs on the male model's lap. However, neither the airplane background nor the man's lap appear in "Niagara", which focuses solely on the woman's legs and sandal-clad feet. The court concluded that the amount and substantiality of Koons's copying were "reasonable in relation to the purpose of the copying."³⁴

d. Effect of the Use on the Market Value of the Original work

Blanch argued that the market value of her work had not been affected by Koons's actions. As a result, the fourth fair-use factor strongly favored Koons. Ultimately, Koons's work is considered highly transformative of Blanch's, making the finding of fair use particularly appropriate. This case, however, marks a shift in the court's approach to assessing fair use in appropriation art.³⁵ It diminishes the relevance of the second fair-use factor and places greater emphasis on the first factor, particularly with the introduction of the doctrine of "transformativeness."³⁶

3) *Patrick Cariou v. Richard Prince, et al.*

In 2000, photographer Patrick Cariou published "Yes Rasta" (Figure 6), a collection of photographs featuring Rastafarians in Jamaica. The book achieved modest success, with a print run of 7,000 copies and generating

³⁴ Jacey Norris, "Art or Artifice: The Second Circuits Misapplication of the Fair Use Factors in *Cariou v. Prince* in Light of *Kienitz v. Sconnie Nation*," *DePaul J. Art, Tech. & Intell. Prop. L.* 25, no. 2 (2015): 429–65.

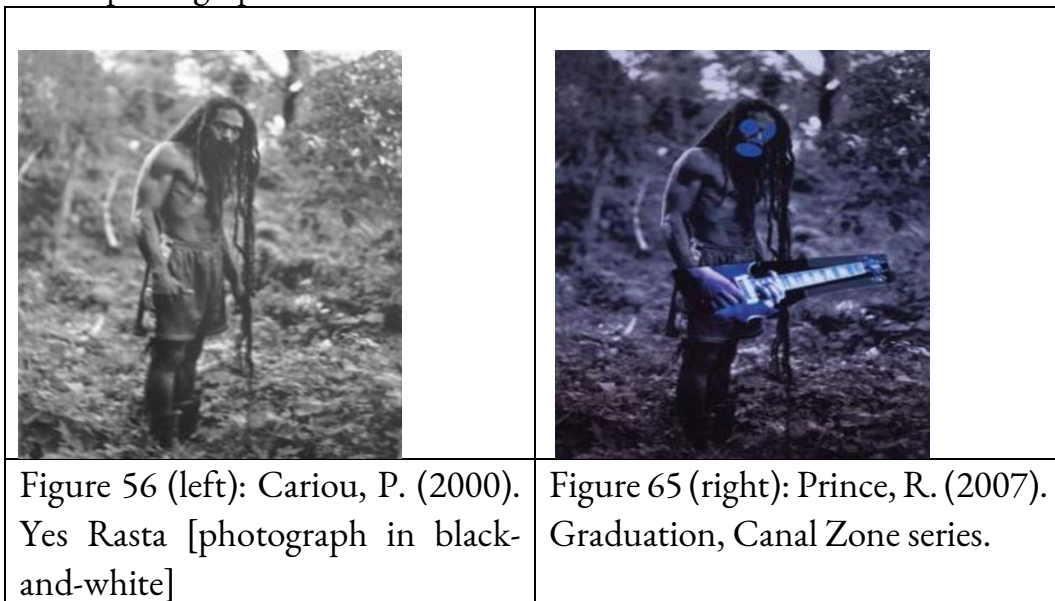
³⁵ Rachel Isabelle Butt, "Appropriation Art and Fair Use," *Ohio State Journal on Dispute Resolution* 25, no. 4 (2010), <https://core.ac.uk/download/pdf/159591497.pdf>.

³⁶ F.3d, "467 F.3d 244."

just over \$8,000 in sales. Richard Prince, a prominent appropriation artist, has built his career since the mid-1970s by using photographs and other existing images, incorporating them into paintings and collages, and recontextualizing them as his own artistic creations.³⁷

In 2007, Prince incorporated 35 photographs from Cariou's "Yes Rasta" series into a collage project titled "Canal Zone" (Figure 5). Prince significantly altered the photographs by painting over the subjects' facial features, such as adding "lozenges," and by using only selected portions of some images. In 2008, he purchased three additional copies of "of "Yes Rasta" and went on to produce 30 more artworks in the "Canal Zone" series, 29 of which included partial or complete images from "Yes Rasta". Each artwork in the series was unique: some featured painted canvases with enlarged or tinted photographs, others included photos from different artists, and many combined inkjet printing, acrylic paint, and pasted elements. In some cases, Prince made minimal modifications, such as adding only one or two additional elements to the original images.³⁸

In 2008, the Gagosian Gallery held an exhibition featuring twenty-two of Prince's "Canal Zone" artworks and published an accompanying catalogue. The catalogue included images of all the "Canal Zone" artworks (except one), as well as photographs depicting "Yes Rasta" images in Prince's studio. Notably, Prince did not seek or obtain permission from Cariou to use his photographs.



Cariou filed a lawsuit against Prince and the gallery in district court, alleging copyright infringement. In his defense, Prince argued that his works

³⁷ Cariou Prince, "Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013)" 694 (2013): 2013.

³⁸ Prince.

constituted fair use, asserting that they were substantially transformative.³⁹ However, the court ruled that transformativeness requires the secondary use to serve a purpose such as commenting on the original photographs, critically engaging with their content, addressing popular culture elements associated with them or Cariou, or connecting to their historical context. Since Prince's works did not meet these criteria, the court denied his claim of fair use and ordered the withdrawal of all appropriated works. However, the court of appeals then ruled otherwise, through analyzing the 4 factors of fair use:

a. Purpose and character of use

The court clarified that for a new work to qualify as transformative, it must display significant changes in expression, meaning, or message, meaning it does not necessarily need to comment on the original work. In this case, 25 out of Prince's 30 artworks demonstrated an entirely different aesthetic from Cariou's photographs.⁴⁰ While Cariou's black-and-white portraits and landscapes were serene and deliberately composed, emphasizing the natural beauty of Rastafarians and their surroundings, Prince's works were crude, jarring, and chaotic, featuring collages with color, unsettling forms, and additional elements. The differences in composition, presentation, scale, color, media, and overall aesthetics established that Prince had added something new.

Furthermore, the purposes of the works diverged significantly. Cariou aimed to create classical portraiture devoid of popular culture elements, while Prince sought to address themes such as gender equality, interpersonal relationships, and contemporary aspects of music. The court noted that Prince's work could still be transformative even without directly commenting on Cariou's photographs, culture, or Prince's stated intentions. Instead of relying solely on the artist's explanations, the court considered how the artworks could "reasonably be perceived" to determine their transformative nature.

³⁹ New York: United States Court of Appeals for the Second Circuit, *Cariou v. Prince*.

⁴⁰ Isabelle Butt, "Appropriation Art and Fair Use."

b. Nature of Cariou's work

Cariou clearly exercised significant creativity in producing his photographs, carefully composing and capturing them before publishing them as part of his book, "Yes Rasta", as his original work.⁴¹

c. Amount and Substantiality of the Portion Used

The substantiality of portion appropriated for Prince's "Canal Zone" artworks varies. In certain works, such as "Charlie Company", Prince made minimal alterations to the source photograph. In contrast, other pieces, such as "Djuana Barnes, Natalie Barney, Renée Vivien and Romaine Brooks Take Over the Guanahani", used the entire source photograph but heavily obscured and altered it to the extent that Cariou's original was barely recognizable. Of the 30 artworks in the "Canal Zone" series, 25 were deemed transformative, as Prince had significantly changed the photographs, creating something new and different.⁴² Consequently, this factor strongly favored Prince. However, the remaining five works closely resembled Cariou's photographs and did not exhibit significant changes in expression, meaning, message, or aesthetics.

d. Effect of the Use on the Market Value of the Original

Prince's works did not usurp the market for Cariou's original photographs. Cariou had not extensively marketed or advertised his work, and there was no evidence of harm to the actual or potential market for "Yes Rasta".⁴³ Conversely, Prince profited from the sale of some of his artworks, indicating that the markets for the two artists do not overlap.

C. The Ascent of the Doctrine of Transformativeness

The concept of "transformativeness" is not explicitly defined in the U.S. Copyright Act. Instead, it has evolved over time through judicial opinions and legal precedents. Today, courts often consider the doctrine of "transformativeness" as a key consideration in analysing the first factor of fair use, fundamentally altering the assessment process. This concept originated from a

⁴¹ New York: United States Court of Appeals for the Second Circuit, *Cariou v. Prince*.

⁴² Elkin-Koren and Netanel, "Transplanting Fair Use across the Globe: A Case Study Testing the Credibility of US Opposition."

⁴³ Norris, "Art or Artifice: The Second Circuits Misapplication of the Fair Use Factors in *Cariou v. Prince* in Light of *Kienitz v. Sconnie Nation*."

landmark 1990 Harvard Law Review article authored by U.S. District Court Judge Pierre Leval.⁴⁴ In the article, Judge Leval challenged the prevailing focus on commerciality within the “purpose and character” analysis of fair use. Instead, he proposed that the primary inquiry should be whether the use is transformative.

Judge Leval observed a lack of consensus on the interpretation of fair use, noting that judicial decisions often reflected intuitive reactions to specific fact patterns rather than a systematic application of consistent principles. To remedy this, he advocated for focusing on “whether, and to what extent, the challenged use is transformative, by determining if the secondary use adds value to the original.” According to Judge Leval, a transformative use is one that is “productive” and employs the copyrighted material “in a different manner or for a different purpose from the original.”⁴⁵ Such use, in his view, involves repurposing the original as raw material to create new information, aesthetics, insights, or understandings, which is precisely the kinds of activities that the fair use doctrine aims to protect for the benefit of society.

Judge Leval further argued that “the more transformative the new work, the less will be the significance of other considerations in the first fair use factor, such as commercialism”.⁴⁶ This framework underscores that “transformativeness” involves determining whether the original work has been transformed into something new. By transforming the prior work, the secondary user contributes creatively, which can justify the copying. However, not all modifications of the original work qualify as transformative. For example, a derivative work that merely rephrases or repackages the original content without adding new expression, meaning, or purpose would not meet the standard of “transformativeness.”

Judge Leval’s article laid the groundwork for the doctrine of transformation in fair use analysis. This concept gained formal recognition in the landmark Supreme Court case of *Campbell*, where the Court adopted and expanded upon Judge Leval’s ideas, effectively embedding “transformativeness” into fair use jurisprudence. As noted, it was the Court’s endorsement in *Campbell* that elevated Judge Leval’s scholarly proposal into an authoritative legal standard.

⁴⁴ Patricia Aufderheide, “Leval, Pierre N. Toward a Fair Use Standard, 103 Harv. L. Rev. 1105 (1990),” *Communication Law and Policy* 25, no. 3 (2020): 412–17, <https://doi.org/10.1080/10811680.2020.1767419>.

⁴⁵ Benjamin Moskowitz, “Toward a Fair Use Standard Turns 25: How Salinger and Scientology Affected Transformative Use Today,” *Fordham Intellectual Property, Media and Entertainment Law Journal* 25, no. 4 (2015).

⁴⁶ Kenneth A. Plevan, “The Second Circuit and the Development of Intellectual Property Law: The First 125 Years,” *Fordham Law Review* 85, no. 1 (2016): 143–82.

In *Campbell*, the Court examined whether two Live Crew's songs, which incorporated some of Roy Orbison's copyrighted song "Oh, Pretty Woman," which juxtaposed shocking new lyrics with parts of the original, constituted fair use. The Court not only cited Judge Leval's article but also echoed his reasoning, drawing upon foundational principles of fair use established by earlier decisions. Specifically, The Court articulated the critical inquiry for "transformativeness" as follows:

"Whether the new work merely 'supersedes the objects' of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. It asks, in other words, whether and to what extent the new work is 'transformative.'"⁴⁷

This emphasis on transformation reflects its alignment with the overall objective of copyright law: fostering the creation of new, original works. The Supreme Court in *Campbell* highlighted this connection, noting that "although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright is generally furthered by the creation of transformative works." The Court underscored that while a work need not be transformative to qualify as fair use, transformative works exemplify the fair use doctrine's purpose by providing "breathing space within the confines of copyright."

The *Campbell* decision firmly established transformation as a pivotal consideration in fair use analysis, positioning it at the center of how courts evaluate whether a secondary use aligns with the fundamental principles of copyright law. From this point onward, transformation became the cornerstone of fair use assessments.⁴⁸

In practice, transformation is typically assessed by examining the alterations made to the original work by the secondary user. However, courts have also considered the broader context in which the original work is incorporated into the secondary work.⁴⁹ Factors such as the "composition, presentation, scale, color palette, and media" of the secondary work, as well as its overall "expressive nature,"⁵⁰ are often evaluated to determine whether the secondary work qualifies as transformative.

Furthermore, the purpose behind the creation of each work plays a crucial role in the assessment. The intent of the secondary author, whether aimed at

⁴⁷ F.3d, "467 F.3d 244."

⁴⁸ Betsy Rosenblatt, "CONSIDERING THE ROLE OF FAIRNESS IN COPYRIGHT FAIR USE."

⁴⁹ C.A.9, "Mattel Inc. v. Walking Mountain Prods."

⁵⁰ Elkin-Koren and Netanel, "Transplanting Fair Use across the Globe: A Case Study Testing the Credibility of US Opposition."

creating new meaning, insights, or expressions, can significantly influence the transformation analysis.⁵¹ Notably, even if the second work itself is not overtly transformative, its use may still qualify as fair if the purpose underlying the secondary use is deemed transformative.

While transformation is a critical element in fair use analysis, it has not entirely supplanted the other fair use factors. Instead, it serves as one of several considerations, albeit the most significant, within the first factor: the "purpose and character of the use."⁵² This broader inquiry also encompasses additional aspects, such as whether the use is commercial or nonprofit educational, whether it reflects bad faith on the part of the user, or whether it qualifies as parody.

In regards to the question on the legal force or status of the doctrine of "transformativeness", the adoption of the term transformative through judicial interpretation, rather than inclusion in the U.S. Copyright Act, is consistent with the common law tradition and treaty interpretation practices. This approach aligns with the origins of the fair use doctrine, which developed as a judge-made "equitable rule of reason."⁵³ This rule enabled courts to circumvent the rigid application of copyright laws when such rigidity would stifle the creativity the law aims to foster. Given the doctrine's roots in common law and the intentionally flexible language of the statute, judicial interpretations have a valid and essential role in shaping its application.

The Supreme Court has underscored this flexibility, noting that the statutory provision for fair use serves as guidance, rather than imposing rigid rules, on how courts should apply it. The integration of "transformation" into fair use analysis has particularly benefited appropriation art, offering clearer protection for artists of derivative works.⁵⁴ Post-Campbell, appropriation art cases have increasingly been decided in favor of defendants who successfully demonstrated the transformative nature of their works. Pre-Campbell, no appropriation artist had prevailed in fair use claims; since then, there have been three significant wins in favor of appropriation art, with potential for more in the future.⁵⁵ This marks significant progress in balancing copyright protection with the promotion of creative expression.

⁵¹ Koons, "Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)."

⁵² Norris, "Art or Artifice: The Second Circuits Misapplication of the Fair Use Factors in *Cariou v. Prince* in Light of *Kienitz v. Sconnie Nation*."

⁵³ Niki Kuckes, "From Andy Warhol to Barbie : Copyright 's Fair Use Doctrine After *Andy Warhol Foundation v . Goldsmith*," *Roger Williams University Law Review* 29, no. 2 (2024).

⁵⁴ C.A.9, "Mattel Inc. v. Walking Mountain Prods."

⁵⁵ Ginsburg, "FAIR USE IN THE US REDUX : REFORMED OR STILL DEFORMED ?"

The application of the fair use doctrine is particularly challenging, except in the most straightforward cases of appropriation, which is rarely the case as originality is a rather subjective assessment. This difficulty partly arises from the diverse range of contexts in which the doctrine may be invoked, spanning from instances where a photographer reproduces a copyrighted image for personal use to scenarios where an artist incorporates copyrighted materials into new creative works.

Fair use analyses rarely yield a single "correct" outcome. Each case is inherently influenced by an intuitive emotional response to the particular use in question, shaped by the specific facts presented. This instinctive reaction often operates independently of the formal legal analysis of the doctrine.

The difficulty of arriving at a clear-cut definition lies in the inherently flexible nature of the doctrine. As highlighted in the House and Senate Reports: "Although the courts have considered and ruled upon the doctrine of fair use over and over again, no real definition of this concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."

Over time, U.S. courts have evolved their approach to applying fair use in appropriation art cases, initially adhering closely to statutory provisions before gradually broadening the interpretation beyond the more rigid standards set forth in the U.S. Copyright Act. Appropriation art, which emerged as a distinct expression within the pop art movement in recent decades, serves as a unique category of copyrighted work. Its treatment under fair use analysis may indicate a potential trend toward even more lenient standards in assessing fair use.

Section 107 of the U.S. Copyright Act outlines the framework for evaluating fair use but leaves substantial room for interpretation. This includes not only defining the scope of the four statutory factors, which are broadly worded, but also determining how these factors should be weighed against one another. The Supreme Court has underscored that the statute provides only "general principles" for the fair use doctrine, entrusting its application to judicial discretion based on the circumstances of each case.⁵⁶

The Supreme Court has repeatedly emphasized the importance of a flexible, context-sensitive approach to fair use. It has clarified that the statutory factors are not exhaustive, highlighting the significance of terms like "include" and "including" in the language of the provision. Consequently, certain factors may carry more weight in some contexts than in others.

⁵⁶ Supreme Court of the United States, "Google LLC v. Oracle Am., Inc. 141 S. Ct. 1183 (2021) Court," <https://www.copyright.gov/fair-use/>.

Thus, the four-factor test is not a set of stringent formulas guaranteeing success based on the majority of factors but rather serves as a guideline that requires substantial judicial discretion. While each factor has a distinct and specific meaning, the broader assessment of fair use remains inherently adaptable and subject to evolution as more jurisprudence develops, particularly in the area of appropriation art.

D. The Whereabouts of Fair Use Doctrine in Indonesian Copyright Law

Unlike the U.S Copyright Act, the Indonesian Copyright Law does not codify the doctrine of fair use. Although the term fair use itself is not explicitly stated, the Indonesian Copyright Law uses several other terms with similar meanings to fair use, including terms like 'Limitations on Protection,' 'No Copyright Protection,' 'Copyright Duration,' and other relevant terms.

These limitations to copyright is regulated under Chapter VI, Articles 43 to 51 of the Indonesian Copyright Law. Article 33 specify that actions exempt from copyright infringement must meet certain conditions, namely, they must have permission from the creator and are activities that do not generate profit or are non-commercial, including social initiatives such as education and knowledge dissemination, as well as research and development.

The use, reproduction, duplication, and/or modification of a work and/or related rights product, in whole or in substantial part, is not considered copyright infringement if the source is fully cited and no harm is caused to the creator.⁵⁷ Article 44(1)(a) of the Indonesian Copyright Law addresses the concept of fair use in copyright exceptions, which is based on maintaining a balance in enjoying the economic benefits of a work.

The application of the fair use principle in Indonesia is limited to works protected under the copyright law, as it permits the use of copyrighted material without the copyright holder's consent under specific conditions. However, certain works are excluded from this principle. These include works specified under Article 42 of the Indonesian Copyright Law, such as the outcomes of public meetings of state institutions, legislation, state addresses or speeches by government officials, court decisions or judicial rulings, and decisions of arbitration bodies or similar entities. Additionally, works whose copyright protection period has expired and those that do not meet the criteria outlined in

⁵⁷ States.

Articles 1(2) and 1(3) of the Indonesian Copyright Law are also exempt from fair use provisions.

The principle of fair use is also reflected in Article 46 of the Indonesian Copyright Law, which states, "duplication for personal use of a work that has been announced may be made only in a single copy and without requiring the consent of the author or copyright holder."⁵⁸ This provision allows individuals to duplicate works as long as the duplication remains within reasonable limits. The restrictions include 1) temporary duplication of a work is not considered a copyright infringement if it meets specific conditions, such as for education, research, lectures, writing academic papers, national security, public purpose, government administration, legislative, and judicial functions, or performances or stage presentations that are not charged, provided they do not harm the legitimate interests of the Author; 2) duplication during digital transmission or the creation of a digital copy for storage purposes; and 3) duplication carried out by an individual with the Author's consent for the purpose of transmitting the Work.⁵⁹

The law provides regulations on reasonable limits that allow individuals to reproduce copyrighted works within acceptable boundaries. These limitations, encompassed within the concept of fair use, aim to balance accessibility for others while ensuring protection for the rights of creators.

The concept of fair use in Indonesia is neither clearly nor explicitly defined under the Indonesian Copyright Law. The absence of a clear and explicit definition has led to significant ambiguities in the interpretation and application of the doctrine, especially in cases involving appropriation art. Unlike the United States, where fair use is codified and supported by extensive jurisprudence, Indonesia's legal framework lacks detailed statutory provisions and case law to outline the scope and limitations of fair use. As a result, there is no consistent judicial approach to addressing copyright disputes involving fair use, further exacerbating the uncertainty faced by creators and artists alike.⁶⁰

⁵⁸ Muhammad Anas Fadli et al., "Let's Play Content as a Fiduciary Collateral under Indonesian Law: Potential Challenges," *Yuridika* 38, no. 3 (2023): 481–98, <https://doi.org/10.20473/ydk.v38i3.44756>.

⁵⁹ Sardjana Orba Manullang et al., "Limits of the Concept of Fair Use in Law Number 28 of 2014 Concerning Copyright," *Jurnal Hukum Dan HAM Wara Sains* 2, no. 03 (2023): 181–87, <https://doi.org/10.58812/jhhws.v2i03.251>.

⁶⁰ Nafila Andriana Putri, "Copyright Protection for Internet Memes: The Doctrine of Fair Use in Indonesia," *JIPRO: Journal of Intellectual Property* 6, no. 2 (2023), <https://doi.org/10.20885/jipro.vol6.iss2.art3>.

This lack of clarity is particularly problematic in cases involving appropriated art, where existing works are reimagined or reinterpreted to create new creative expressions and are often found within Indonesia. Despite the potential for such works to contribute to cultural dialogue and innovation, the absence of judicial precedent or clear statutory guidelines leaves creators of appropriated art vulnerable to accusations of copyright infringement, increasing the likelihood of being at fault.

Indonesia needs a clear exception, similar to the fair use doctrine, as many local artists often appropriate the works of others in their practice. This results in challenges for copyright holders to enforce their rights, while also creating uncertainty for the artists engaging in appropriation.⁶¹

For instance, in 2018, Balinese artist Ida Bagus Ratu Antoni Putra, widely known as Monez, created a striking floral mural for the popular Bali eatery, Folie Kitchen.⁶² The design quickly gained attention, going viral on social media due to its vibrant colors and intricate details. However, the mural's popularity led to an unfortunate incident when another restaurant replicated Monez's work without permission (Figure 7). This act of copying sparked a debate over the extend of copyright infringement within the local art community, underscoring the urgent need for artists to safeguard their creative works from unauthorized reproductions.



Figure 7 Monez's illustration and the appropriated work.

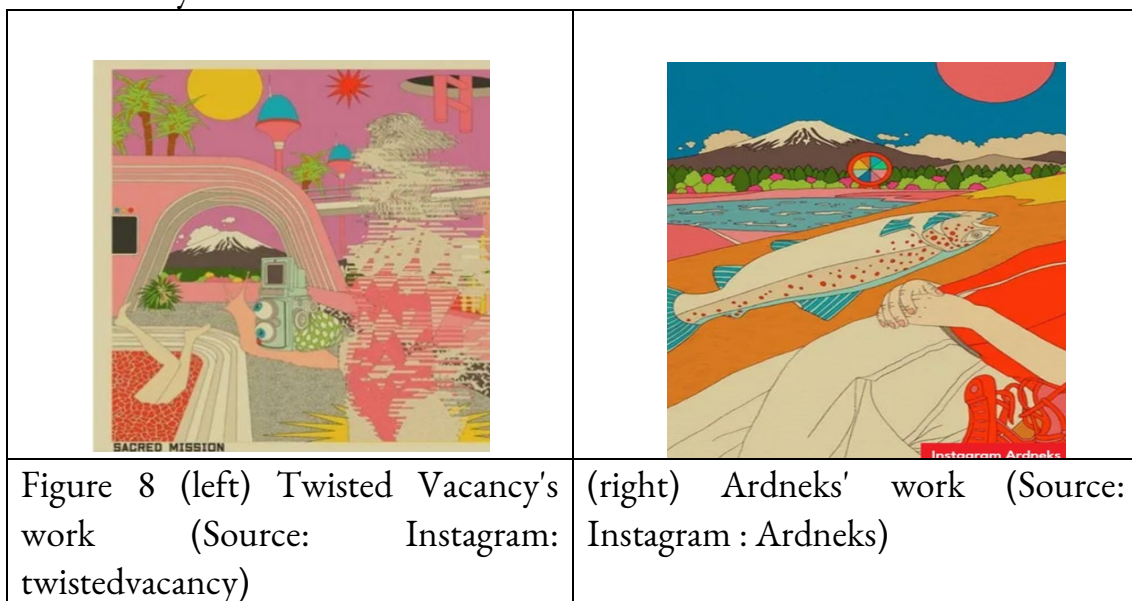
Source: Instagram: monez

A more complex example, where the line between inspiration and infringement is difficult to draw, involves the case from March 2021 between

⁶¹ Hadiputranto Hadinoto and Partners (Baker and Mackenzie), "Indonesia: Law No. 28 of 2014 on Copyright," *Client Alert*, no. 28 (2015), <http://www.bakermckenzie.com/aljakartacopyrightlawencateddec14/>.

⁶² Gede Bayu Segara Putra, I Nyoman Artayasa, and I W ayan Swandi, "Kajian Konsep, Estetik Dan Makna Pada Ilustrasi Rangda Karya Monez," *Prabangkara* 21 (2017): 68–79, <https://jurnal.isi-dps.ac.id/index.php/prabangkara/article/view/227/139>.

Indonesian illustrator Kendra Ahimsa, known by her online alias Ardneks, and the crypto artist Twisted Vacancy. Ardneks accused Twisted Vacancy of closely replicating her works without proper attribution or permission. Many in the art community noted striking similarities between the two artists' pieces (Figure 8).⁶³ However, Twisted Vacancy rejected the allegations, asserting, "I don't see the resemblance. The hair is different, the blue is different. How can you explain that the identity will never be confused between mine and Ardneks'?" He elaborated on his perspective, claiming not to understand how a work could be perceived as similar or distinct, further stating, "I've encountered several designers whose body of works differ, but they evoke the same vibe. It's tricky,"⁶⁴ he explained. This situation highlights the ongoing challenge in defining clear boundaries between original creativity and derivative works, especially in the realm of digital art and emerging fields like crypto art, where influences often intersect in subtle, nuanced ways.⁶⁵



The issue of art appropriation is not limited to Indonesian artists copying works from another, there are also cases involving the alleged infringement of foreign artists' works. For example, in 2019, Indonesian artist Miranti Minggar was accused of copying a photograph by Canadian photographer Lillian Liu,

⁶³ Tim MNC Portal, "Polemik NFT Dan Seni Kripto: Celah Eksploitasi Hak Cipta Karya Seni Digital," *Sindo News*, 2021, <https://nasional.sindonews.com/read/628773/18/polemik-nft-dan-seni-kripto-celah-eksploitasi-hak-cipta-karya-seni-digital-1639537962>.

⁶⁴ et al., "Perlindungan Hak Cipta Seniman Atas Pembajakan Ilustrasi Digital Dalam Bentuk Non-Fungible Token," *JIPRO: Journal of Intellectual Property* 6, no. 2 (2023): 100–114, <https://doi.org/10.20885/jipro.vol6.iss2.art4>.

⁶⁵ Maya Ruthiani, "Transferring Copyright Ownership of Nft," *Perspektif* 1, no. 3 (2023): 216–24, <https://doi.org/https://doi.org/10.30742/perspektif.v28i1.845>.

with the only difference being the medium.⁶⁶ Miranti Minggar's work has been recognized multiple times, even being acknowledged by Harper's Bazaar. Lillian Liup uploaded several articles and exhibition photos of Miranti's work alongside Rocka Radipa, claiming that her work had been reproduced without her permission⁶⁷ (Figure 9).



This highlights the importance of having a thorough exception to the copyright law, to prevent infringements and ensure fair recognition of creators' intellectual property. Furthermore, the judicial process in Indonesia is often perceived as daunting and cost-prohibitive. Litigating a copyright case requires substantial financial resources to cover court fees, legal representation, and other associated expenses. These costs frequently outweigh the potential benefits of pursuing legal action, discouraging many plaintiffs from bringing their cases to court.

In practice, disputes over fair use on appropriated art are often resolved outside the judicial system. Plaintiffs frequently opt for private settlements to avoid the lengthy and expensive litigation process. When cases do proceed to court, criminal proceedings are sometimes pursued in the hope of imposing substantial fines on the alleged infringer. The Indonesian Copyright Law sets a maximum fine for copyright violations at an impressive IDR 40.000.000.000

⁶⁶ Muhammad Afif et al., *Perlindungan Hak Cipta Terhadap Karya Fotografi Yang Diadaptasi Menjadi Lukisan Tanpa Izin*, 2024.

⁶⁷ Ruthiani, "Transferring Copyright Ownership of Nft."

(forty billion), a figure that can be appealing for plaintiffs seeking monetary compensation rather than the resolution of moral or economic rights disputes.

However, this significant cap on fines has led to instances of misuse. The high penalties intended to serve as a deterrent against copyright infringement are sometimes exploited by litigants seeking financial gain rather than justice. Such misuse undermines the core principles of copyright law, which aim to balance the protection of creators' moral and economic rights with the promotion of creative expression and public access to works.

The absence of a structured fair use doctrine in Indonesia not only hinders the development of its creative industries but also limits the ability of artists, researchers, and other stakeholders to navigate the legal landscape with confidence. Without judicial consistency, statutory clarity, or a robust framework for interpreting fair use, the potential for misuse of copyright law persists. This leaves both copyright holders and users uncertain about their rights and responsibilities, stifling the kind of creative and cultural growth that the fair use doctrine is designed to support in other jurisdictions. This issue is particularly relevant in Indonesia, a nation renowned for its rich cultural heritage and diverse art forms, supported by vibrant artistic communities spread across its many islands.

E. Potential for Codification of Fair Use in Indonesian Copyright Law

Indonesia is a signatory to several international trade agreements, including the TRIPS Agreement and the Berne Convention, which establish copyright obligations for member states. These treaties incorporate the principle of national treatment, a cornerstone in copyright law, ensuring that nationals of other member states receive the same protection as the nationals of the host country where copyright protection is sought. This principle is first articulated in Article 2 of the Paris Convention, which stipulates that nationals of member states must enjoy equal protection under the law as domestic nationals.

The concept is further reinforced in Article 3 of the TRIPS Agreement, which states:

"Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property."

The TRIPS Agreement, negotiated under the auspices of the WTO, serves as a foundational legal instrument for the regulation of intellectual property rights within the context of international trade. It sets forth minimum standards

for various forms of intellectual property protection, including copyright and related rights, which member states are obligated to uphold. Under TRIPS, the principle of national treatment obligates member states to provide effective and equitable opportunities to foreign inventors and creators of intellectual property, ensuring they receive no less favourable treatment than that afforded to domestic inventors and creators.

Hence, Indonesia, as a signatory to the TRIPS Agreement and the Berne Convention, has committed to upholding the principle of national treatment in copyright protection. By adopting this principle, Indonesia also underscores its broader obligation to align its domestic copyright laws with the international standards articulated in these treaties in order to afford similar protection.

Indirectly, the principle of national treatment further requires Indonesia to incorporate exceptions and limitations to copyright protection, such as fair use, as provided under international frameworks, following its standards and flexibilities. This flexibility highlights the importance of doctrines like fair use or similar mechanisms to balance the rights of copyright holders with societal needs, including education, research, and access to knowledge.

Although Indonesia's copyright law currently lacks explicit provisions for fair use, its commitments under TRIPS and the Berne Convention necessitate the development of mechanisms that align with international norms. One such mechanism Indonesia can adhere to is the three-step test outlined in Article 9(2) of the Berne Convention. This provision allows member states to permit reproduction of copyrighted works in specific cases, provided these exceptions: (1) are confined to special cases, (2) do not conflict with the normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the author.

Fair use, typically defined as the use of copyrighted materials for specific transformative purposes, is a key principle in copyright law, particularly in the United States. This doctrine allows limited uses of copyrighted works without requiring permission from the rights holder. Examples of such uses include commentary, criticism, news reporting, research, and education. The U.S. Copyright Act, specifically Article 107, first established this legal framework. According to this law, using, retrieving, reproducing, or modifying a copyrighted work, in whole or in significant part, is not considered an infringement as long as the source is properly acknowledged.⁶⁸

⁶⁸ Siby Samuel, "Challenges and Opportunities in Intellectual Property Rights (IPR) in the Age of Generative AI: Balancing Innovation and Protection," *International Journal of*

In Indonesia, the concept of fair use is governed by Articles 43 through 49 of the Indonesian Copyright Law. These provisions state that non-commercial uses, with the consent of the original author, are not deemed copyright violations. When a work or related rights product is used, reproduced, or modified in substantial parts, it is not considered an infringement if the source is duly credited. However, it is crucial to ensure that such use does not interfere with the legitimate interests of the author or rights holder, particularly in educational contexts. For personal gain, only one copy of a work may be reproduced without the author's consent, provided it does not involve a substantial portion of the original work and does not conflict with the author's or rights holder's legitimate interests.

Article 44, paragraph (1)(a) of Indonesian Copyright Law addresses "reasonable interest," as a general exception, striking a balance between the economic benefits of a work and its use under exceptions to copyright protection. Despite this, the application of the fair use principle is subject to certain limitations. These include factors such as the purpose and nature of the use, the nature of the creation, the amount and portion used, and the impact of the use on the market or the value of the work.

Appropriation art often faces inherent challenges in avoiding conflicts with original works. For an appropriated work to be eligible for copyright protection, it must demonstrate a high degree of originality. The evolving landscape of fair use, particularly in appropriation art, has been shaped significantly by case law, including *Art Rogers v. Jeff Koons*, *Andrea Blanch v. Jeff Koons*, and *Patrick Cariou v. Richard Prince*. These cases highlight the critical roles of "transformativeness" and contextual alteration in determining fair use; both factors are now central to court decisions on whether an appropriated work can be deemed fair use. With each new appropriation case, courts have continued to refine their assessments, suggesting that these two criteria may become even more influential in future rulings.

"Transformativeness" a cornerstone of fair use in appropriation art, can be conveyed through various artistic choices, including composition, presentation, scale, colour, or medium. These elements should create an expression so distinct from the original work that it becomes uniquely identifiable. However, artists must carefully balance the amount of the original work they incorporate; excessive borrowing can undermine claims of "transformativeness" and thereby weaken fair use defences.

The complexity deepens when an appropriated work addresses social issues, values, or criticisms. Artists must be mindful of the powerful meanings that images carry within different cultural and societal contexts, making the choice of context crucial. Context, defined as the environment or setting surrounding an image, is key to reshaping the borrowed work's meaning. By re-contextualizing the original element, the artist can communicate a new message, one that resonates with viewers on a different level. For appropriation artists aiming to advance the art form and inspire discourse, creativity and depth of expression are essential. Ideally, their work should allow a reasonable observer to recognize and connect with the intended message, thus ensuring that the new context justifies the appropriation.

Having this said, it is clear enough to urge the adoption of the three-step test. Indonesia can address legal uncertainties and develop a more structured approach to copyright exceptions. While the country may not fully implement the fair use doctrine, the test offers a practical framework for crafting exceptions that balance the protection of copyright holders' rights with the needs of society. For example, it provides guidance on permissible transformative uses and ensures that exceptions are narrowly tailored to minimize harm to copyright owners while supporting legitimate public interests, similar to the aim of fair use itself. Thus, by ratifying TRIPS and the Berne Convention, Indonesia is not only obligated to afford equal protection to foreign nationals but also to develop copyright exceptions in line with international standards.

The limited incorporation of the fair use doctrine into Indonesia's copyright framework can be attributed, in part, to the doctrine's highly fact-specific and flexible nature. While this flexibility is often lauded for accommodating diverse circumstances, it also invites significant criticism for its lack of practical guidance and consistency in application. The open-ended nature of the fair use doctrine frequently leads to divergent outcomes across cases, creating uncertainty for users and rightsholders alike. Furthermore, the doctrine's designation as an affirmative defense introduces additional complexities, as it places the burden of proof on the user, heightening unpredictability and potential legal risk.

To address these challenges, one potential solution is to aim for the harmonization of fair use. While maintaining the essence of fair use as a flexible doctrine, harmonization to Indonesian law will foster greater clarity and consistency in its application. This approach balances the need for adaptability with the demand for predictability, enabling Indonesian citizens and legal persons to navigate the doctrine with greater confidence.

Harmonization offers several benefits that align with the overarching goals of copyright law. It encourages legitimate uses of copyrighted works, thus promoting creativity and cultural participation. For instance, artists engaging in transformative or appropriative art often face chilling effects under the current indeterminate fair use framework, as the risk of liability deters them from creating new works. Establishing clearer rules on fair use can mitigate these chilling effects by delineating permissible uses, thereby empowering creators to explore new avenues of artistic expression without undue fear of infringement claims.

Moreover, harmonization also allows Indonesian Copyright Law to align more to international copyright law standards, thus having wider discretionary options to allow copyright exceptions. It also incentivizes socially beneficial uses of copyrighted works while maintaining the balance between the rights of creators and the public interest. This structured guidance fosters broader participation in cultural and educational activities, aligning with the fundamental purpose of copyright: incentivizing creativity for the benefit of society.

However, harmonization of fair use may raise concerns about the potential loss of flexibility, arguing that a rigid, formalistic application of fair use could undermine the nuanced, case-by-case analysis of exceptions. Judicial discretion, they argue, allows courts to account for specific circumstances and ensure fair outcomes tailored to each case. However, these concerns are mitigated by the inherently adaptable nature of fair use as a statutory standard. Courts retain the authority to deviate from established rules when warranted, ensuring that the doctrine remains dynamic and responsive to evolving contexts. The harmonization process does not eliminate judicial discretion and flexibility but rather provides a clearer framework within which courts can operate, enhancing legal certainty while preserving the doctrine's foundational flexibility.

Thus, the harmonization of fair use represents a pragmatic approach to addressing Indonesia's lack of thorough exception framework. By establishing clearer guidelines, harmonization promotes a more predictable and transparent copyright framework that encourages legitimate uses, supports innovation, and fosters cultural engagement. Importantly, this refinement of fair use does not compromise its core adaptability, as judicial discretion remains integral to its application. For Indonesia, harmonizing fair use or its equivalent could help bridge the gap between the current legal framework and international standards, providing clarity for users and creators while advancing the broader goals of copyright law.

Conclusion

The U.S. Copyright Act and Indonesian Copyright Law differ significantly in several key areas, including exclusive rights, moral rights, types of protected works, exceptions, and duration of protection. While both countries grant authors exclusive rights to reproduce, distribute, and create derivative works, the scope and enforcement of these rights vary. Section 107 of the US Copyright Law outlines the factors for evaluating fair use, but leaves substantial room for interpretation. The challenge of understanding fair use lies in defining the boundaries between one artist's rights and another. In practice, the fair use doctrine can offer adequate protection to copyright holders while also encouraging artists to engage in the appropriation of existing works. All new works are, in some form, built upon preexisting ones. Most authors do not create from "nature," rather, they draw from the works of others who came before them and made their creations publicly available. To allow the reproduction of artistic works without overstepping copyright protections, the U.S. Copyright Act established the fair use exception, which assesses four key factors: the purpose and character of the use, the nature of the original work, the amount and substantiality of the portion used, and the effect on the market. Although the four factors are codified, their application lacks consistent jurisprudence, as the assessment of these factors is highly fact-dependent and varies on a case-by-case basis, determining how these factors should be weighed against one another. . This inconsistency makes it even more challenging to clearly define the scope of fair use. However, one can agree on the "transformativeness" test, which evolves from the first fair use factor. Transformativeness assesses whether the appropriated work introduces originality or creativity. For work to be transformative, it must add something new, with a different purpose or different character, altering the first new expression, meaning, or message, in a way that the personality of the new artist can be detected. Thus, this test also considers the artist's intentions, whether the artist intended to create something new or merely replicate the original work. Often, courts will rule in favor of fair use if an element of transformation is identified.

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