

U.S. EXPERIENCE IN DEFINING “FAIR USE” IN THE MP3 WORLD

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I. SUMMARY

“Fair Use” of copyrighted materials, especially in the MP3 context, has become a much-debated topic in Taiwan during recent years. This of course has much to do with the Tainan District Prosecutor Office’s controversial search of National Chengkung University (成功大學) dorms and seizure of student computers containing MP3 music files allegedly downloaded illegally from the Internet. Whether a fair use defense is available to students who simply downloaded MP3 files from the Internet for their personal use and private enjoyment has thus become a central issue. A judicial resolution of the issue is not expected soon, as a settlement had been reached between the students and the International Federation of the Phonographic Industry (IFPI), the representative of the record companies who claimed that their copyrights were being infringed. On the other hand, a consensus has not yet been reached on the issue within the academic and legal fields as well. If Taiwan hopes to remain at the forefront of the global digital revolution, legal issues concerning the application of fair use doctrine in the digital context must be resolved in a manner that would protect both the interests of the public and the copyright holders. At the same time, due consideration must also be given to avoid stifling further development in the digital and Internet technologies. Through analysis and evaluation of the US’ experience in a struggle to define fair use in a backdrop of evolving technologies, this paper hopes to help shed some light on the future direction of Taiwan’s handling of the fair use doctrine.

II. INTRODUCTION

With the arrival of the digital age, traditional copyright law confronts many never-before-addressed issues.¹ As availability, communication, and transmission of information, data, materials, and copyrighted works in the cyberspace become widespread, speedy, and virtually cost-free, the copyright law seems to have its hands full in trying to achieve a balance between the protection of copyright holders' rights and the general public's interests. At times, it would seem that US Congress has tipped in favor of the copyright holders, in view of a series of new legislations deliberately extending the rights of the copyright holders, including the Digital Millennium Copyright Act (DMCA)² and the Copyright Term Extension Act (CTEA),³ among others. While it is generally accepted that public interest is the center of copyright protection, these recent legislative enactments give reasons to wonder about the level of importance that the US Congress attaches to public interest during the legislative process. One cannot help but observe that the balance between public welfares and copyright holders' interests seems to have skew significantly toward the latter. The cyberspace simply provides a new battleground for these two apparently countering interests. So far, public interests seem to be losing

¹ See Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine by Cyberspace*, 53 FLA. L.REV 107, 109 (2001).

² Digital Millennium Copyright Act, Pub. L. No. 105-304, Title I. 103(a), 112 Stat. 2863 (1998), codified at 17 U.S.C. Section 1201(a)-(b) (1998).

³ Sony Bono Copyright Term Extension Act, Pub. L. No.105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. Section 301-304 (1998)).

out the fight.

The controversies and debates surrounding the availability of the fair use defense to MP3 web site operators and users perhaps epitomize this internal tension of copyright law in the new digital age. The recent US court decisions in *UMG Recordings, Inc. v. MP3 Inc.*⁴ and *A&M Records, Inc. v. Napster, Inc.*⁵ may have answered in part the questions concerning application of fair use doctrine in cyberspace. However, they do not send friendly messages to the MP3 web site operators and users. In so far as where the web site operators engage in direct copying or uploading of MP3 music files onto their sites, as in the case of MP3 Inc., the operators' liability for direct infringement and inability to invoke the fair use defense have been established.⁶

On the other hand, while no lawsuit thus far has been filed against any web site users who directly engage in copying and transferring MP3 files via the Internet, the US court seems inclined to answer in the affirmative on the issue their liability, should such a lawsuit ever be filed. This is because the Court of Appeal for the Ninth Circuit has upheld a lower court's issuance of preliminary injunction against a web site operator Napster, Inc. (Napster) in a lawsuit filed against Napster on the ground of vicarious and contributory infringement.⁷ A precondition for vicarious and contributory infringement on the part of Napster is direct infringement of the web site users who engage in the act of transmitting and copying MP3 files via the Internet with software provided by Napster. In

⁴ *UMG Recordings, Inc. v. MP3.Com, Inc.* 92 F.Supp.2d 349.

⁵ *A&M Records, Inc. v. Napster*, 2001. U.S. App. Lexis 5446.

⁶ *Id.*

⁷ *A&M Records*, 2001. U.S. App. Lexis 5446.

upholding the preliminary injunction, the court has tentatively rejected the fair use defense argued by Napster on the behalf of its users⁸. While the case has not reached the trial stage, and the fair use issue of the case is not a foregone conclusion, the legal implication seems to weigh against the users. It is the position of this paper that a straight and technical application of the fair-use inquiry under the US copyright law would establish the liability of users.

In view of the constitutionally mandated goal for the US copyright law and various other equity and policy considerations, this paper takes the position such a result is not necessarily a desirable one. Naturally, Taiwan need not necessarily follow the US court’s position on the issue of fair use. However, it is useful for Taiwan to evaluate the rationales and policies underlying the US court’s position before a conclusion is reached on the issue in Taiwan.

Fair use essentially permits those who are not the copyright holders of works, including educators, students, writers, or any individuals as a matter of fact, to use materials protected by copyrights under certain circumstances.⁹ The importance of fair use defense cannot be emphasized enough even outside the digital world. Without it, many, if not most, of the trivial and innocent, yet unauthorized, everyday uses of copyrighted works by common citizens could be sanctioned under the copyright law. Despite its paramount importance, the fair use doctrine remains “one of the most unsettled area of [copyright] law”¹⁰

⁸ *Id.*

⁹ See Eric D. Keller, Scan Now, Pay Later: *Copyright Infringement in Digital Document Storage*, 26 J. CORP. L. 177, 185 (2000).

¹⁰ *Princeton Univ. Press v. Mich. Document Services, Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996).

as it is. The confusions surrounding the fair use doctrine is now further aggravated and complicated in the digital, more specifically MP3, context. A straight application of the traditional four-factor inquiry for fair use under the US copyright law in the MP3 context would seem to deny fair use defense to some unauthorized yet trivial, personal, and innocent use of copyrighted works by common citizens. One cannot help but asks is this result truly consistent with the legislative intent and policy underlying the US copyright law? If so, does Taiwan wish to adopt such a policy?

III. HISTORICAL BACKGROUND OF COPYRIGHT AND FAIR USE

In the United States, the power to grant and regulate the copyright is delegated to the Congress by the Constitution. Article I, Section 8, Clause 8 provides:

The Congress shall have Power...To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries

Perhaps the most noteworthy aspect about the Copyright-Patent Clause in the US Constitution is that it actually states the ultimate goal to be accomplished by its allocation of power to the Congress—"To promote the Progress of Science and useful Arts." This is certainly one point to take into consideration in analyzing the scope of the fair use defense and, as a matter of fact, MP3-related copyright issues. The said clause is commonly interpreted as stating a policy authorizing the Congress, in the exercise of the delegated power, to achieve a

balance between the interests of authors and publishers on the one hand, and welfares of the public on the other. The underlying assumption is of course that by giving the authors a monopoly over their works for a limited period of time, they will have the economic incentive to engage in the creation and dissemination of works. Any costs to the public resulting from this monopolistic power will be outweighed by the public interests in having intellectual works created and distributed, not to mention the fact that such protected works will enter the public domain and become freely accessible to all after copyrights expired.¹¹

The above-discussed interpretation of the Copyright-Patent Clause is further confirmed by the 1961 Report of the Register of Copyrights on the General Revision of the US Copyright Law, which launched off a series of legislative attempts to revise the copyright law and eventually gave birth to the present US Copyright Act of 1976. The said report states: “As reflected in the Constitution, the ultimate purpose of copyright protection is to foster the growth of learning and culture for the public welfare, and the grant of the exclusive rights to authors for a limited time is a mean to that end.”¹²

Furthermore, the Committee Report accompanying the 1909 Copyright Act,¹³ the predecessor of the 1976 Copyright Act, states the constitutionally mandated objective of the congressional power in no less clear terms: “The

¹¹ See Kate O’Neil, *Again Dicta: A Legal Method of Rescuing Fair Use From the Right of First Publication*, 89 CAL. L. REV. 369, 371 (2001).

¹² House Comm. On the Judiciary, 87th Cong. 1st Sess., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 5 (Comm. Print 1961).

¹³ H.R. Rep. No. 222, 60th Cong. 2d Sess. 7 (1909).

enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writing, ...but upon the ground that the welfare of the public will be promoted by securing to the authors for limited periods the exclusive rights to their writing.” The report went on to state: “In enacting a copyright law the Congress must consider ... two questions: First how much will the legislation stimulate the producer and so benefit the public, and second, how much will the monopoly granted be detrimental to the public?”

Even the Supreme Court has echoed the same theme in several landmark cases. In the *United States v. Paramount Pictures*,¹⁴ the court stated that “the copyright law...makes reward to the owner a secondary consideration.” In *Mazer v. Stein*,¹⁵ the Supreme Court offered the following explanation for its ruling: “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’” Also, in the *Twentieth Century Music Corp. v. Aiken*,¹⁶ the Supreme Court reasoned that “the limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance between competing interests: Creative work is to be encouraged and rewarded, but

¹⁴ *United States v. Paramount Pictures*, 334 U.S. 131, 158, 68 S.Ct. 915, 929, 92 L.Ed. 1260 (1948).

¹⁵ *Mazer v. Stein*, 347 U.S. 201, 74 S. Ct. 460, 98 L.Ed. 630 (1954).

¹⁶ *Century Music Corp. v. Aikens*, 422 U.S. 151, 95 S. Ct. 2040, 45 L.Ed.2d 84 (1974).

private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts.”

Fair use is a defense to copyright infringement on the ground that the infringer’s use of the copyrighted materials is “reasonable.” The concept originated from common law in the US. In the United States, Justice Story first articulated the fair use doctrine in *Folsom v. Marsh*¹⁷, which not only provided the cornerstone for the doctrine, but was also eventually codified in the Copyright Act of 1976.¹⁸ In the said case, the court acknowledged that a person could borrow significant parts of an original work if that use was “fair and reasonable.”¹⁹ Justice Story explained that “in truth, in literature, in science, and in art, there are, and can be, few, if any, things which in an abstract sense, are strictly new and original through out...Every book...borrows, and must necessarily borrow, and use much which was well known and used before.”²⁰

The *Folsom* court also identified five elements of the fair use defense, including a) the nature and objects of the selection made; b) the quantity and value of the materials used; c) the degree to which the use may prejudice the sale of the original work; d) the degree to which the use may diminish the profits of the original work; and e) the degree to which the use may supersede the objects of the original work.²¹

¹⁷ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1875) (No.4901).

¹⁸ See Kristine J. Hoffman, Comment, *Fair Use or Fair Game? The Internet, MP3, and Copyright Law*, 11 ALB. L. J. SCI. & TECH. 153, 170 (2000).

¹⁹ *Folsom*, 9 F. Cas. 342.

²⁰ *Id.*

²¹ *Id.*

As for the underlying justification of the fair use defense, it is well stated by the US Supreme Court's discussion of the fair use defense provided by the Copyright Act of 1976, "from the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose,' to promote the Progress of Science and useful Arts...²²'" The Supreme Court's statement indicates that the purpose and objective of fair use is consistent with the constitutionally mandated goal underlying copyright, that is, to encourage and foster progress and development of science, arts, and culture. In other words, one must keep in mind in applying the fair use defense to avoid giving excessive weight on the economic interests and rights of the copyright holders, at least not to the point of stifling the underlying goal and objective of the fair use defense, and, as a matter of fact, the copyright law.

IV. FAIR USE UNDER THE US COPYRIGHT ACT OF 1976

A. The Four-Factor Inquiry for Fair Use

Over 120 years after the first articulation of the fair use doctrine in the Folsom case, the doctrine was formally codified in Section 107 of the Copyright Act of the 1976.²³ The statute lists four non-exhaustive and illustrative factors (four-factor inquiry) to consider in determining whether a fair use exists: a) the

²² Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

²³ 17 U.S.C. 107 (1994).

purpose and character of the defendant’s use of the copyrighted work; b) the nature of the copyrighted work; c) the amount or substantiality of the portion of the work used by defendant; d) and the effect of the defendant’s use on the market for the copyrighted work.²⁴ Section 107 was not intended to either change or limit the common law doctrine on fair use.²⁵

While the court must apply the four-factor inquiry in determining the availability of a fair use defense, it is not supposed to be the sole criteria.²⁶ In other words, the four-factor inquiry is simply a minimum analysis that a court must carry out whenever fair use is at issue. In making a four-factor inquiry for fair use, a court may neither consider each of the four statutory factors in isolation nor give priority or more weight to any of them. All four factors are to be explored, analyzed, and weighed together, in light of the purpose of copyright law.

As indicated in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court in general disfavors a strict or rigid interpretation of the fair use defense.²⁷ In *Campbell*, the Supreme Court overruled the Ninth Circuit Court of Appeal, criticizing the court for rigidly interpreting the statute. According to the *Campbell* court, fair use requires and permits “courts to avoid rigid application of the copyright statute, when, on occasions, it would stifle the very creativity

²⁴ See Carol M. Silberberg, *Preserving Educational Fair Use in the Twentieth Century*, 74 S. CAL. L. REV. 617, 626 (2000).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Campbell*, 510 U.S. at 577 .

which the law is design to foster.”²⁸ For the reasons stated above, the four fair use factors should be viewed as a general guideline under which a case-by-case analysis must be conducted, rather than a bright-line test for fair use.

B. Factor One—Purpose and Character of the Defendant’s Use

1. Is Defendant’s Use Transformative?

In cases where fair use is at issue, the court must first examine the nature of the defendant’s use of the copyrighted work. This of course draws directly on Justice Story’s fair use formulation in the *Folsom* case--“the nature and objects of the selection made.”²⁹ Quoting from the *Folsom* case, the Campbell court indicates that the focus of the inquiry begins with whether the defendant is using or borrowing the copyrighted work to create any new work, and, if so, whether the new work “merely supersedes the objects of the original creation or whether and to what extent it is *transformative*.”³⁰ So, what constitutes a “transformative use?” It is a use that results in a new work that has a different purpose from the original work and makes some new contribution of intellectual value.³¹ A new work is transformative, if it alters the original with new expression, meaning, or message.³² The preamble to Section 107 of the Copyright Act lists examples of valid transformative uses including “criticism,

²⁸ *Id.*

²⁹ *Folsom*, 9 F. Cas. 342.

³⁰ *Id.*

³¹ See Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75, 118 (2000).

³² *Id.*

comment, news reporting, teaching...scholarship or research.” While a transformative use is not absolutely necessary for a finding of fair use, as the goal of copyright protection is to promote science and the arts, a general presumption in favor of fair use exists where a transformative use of the copyrighted work is found.³³

The more transformative the new work, the more likely fair use will be found, and the less will be the significance of other factors, such as the commercial nature of the use discussed below. In other words, the greater the transformation, the less likely the commercial nature of the use negates the applicability of a fair use defense.

A commonly accepted transformative use of a copyrighted work is creating a parody based on the copyrighted work.³⁴ A parodist’s commonly must quote from an existing copyrighted work, or use some elements of the copyrighted work, to create a new work. The new work would in turn constitute the comments or criticisms of the existing copyrighted work. An important underlying consideration for permitting a fair use in a parody would seem to be the constitutionally protected freedom of speech. As parodies are considered comments toward the original works, an over-restrictive application of the fair use defense in this context would run the risk of violating or stifling that sacred freedom. Therefore, the courts commonly give great latitude to the use of others’ works in parodies.

³³ Folsom, 9 F. Cas. 342.

³⁴ *Id.*

In the *Campbell v. Acuff-Rose Music Inc.* case³⁵, the US Supreme Court ruled that a popular rap music group 2 Live Crew's song "Pretty Woman" was a parody of the rock ballad "Oh, Pretty Woman" written by Roy Orbison and William Dees. As a result, 2 Live Crew's use of the Orbison song was determined to be a legitimate fair use. According to Campbell, who wrote "Pretty Woman" for 2 Live Crew, he intended his song to satirize the original work (i.e. "Oh, Pretty Woman") through comical lyrics. The Campbell court pointed out that the 2 Live Crew's song copied the first line of the Orbison song, but then "quickly generates into a play on words, substituting predictable lyrics with shocking ones" to show how "bland and banal the Orbison song" was.³⁶ In finding that a fair use exists, the Court accepted the argument that the intention of 2 Live Crew was to ridicule the "white-bread original" and "remind us that sexual congress with the nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences."³⁷ The Court's opinion placed a heavy emphasis on the transformative value of the defendant's work, concluding that it had social benefits because it shed lights on the original work and was essentially a humorous form of criticisms.

2. Commercial Use Inquiry

Also a very important issue is whether the defendant's use is commercial in nature. In fact, the 1976 Copyright Act House Report includes the following statements.³⁸ "The commercial or non-profit character of an activity, while not

³⁵ *Campbell*, 510 U.S. at 569.

³⁶ *Id.*

³⁷ *Id.*

³⁸ H.R. Rep.No. 94-1476, at 67 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5689

conclusive with respect to fair use, can and should be weighed along with other factors in a fair use decision.” It is important to point out that the inquiry focuses on the commercial or non-commercial nature of the use in question, rather than the nature of the defendant entity making the use.³⁹ Therefore, both individuals and large business enterprises could engage in commercial uses within the definition of the copyright law in this regard. Of course, the commercial nature of the use by itself should not per se preclude a valid fair use defense. In cases where the defendant has engaged in commercial use of the copyrighted work, consideration must still be given to other issues, such as whether the use in question constitutes a transformative use. If transformation is found, the use may still constitute a fair use.⁴⁰ Finally, the crux of the profit-non-profit distinction is not whether the motive of the defendant’s use is monetary gain, but whether the defendant could stand to profit from the exploitation of the copyrighted materials without paying the customary price to the copyright holder.⁴¹

3. Good Faith Inquiry

In the *Harper & Row, Publishing, Inc. v. Nation Enterprise*⁴² case, the Supreme Court gave significant weight to the lack of “good faith” on the part of the defendant in examining the first fair-use factor. The court quotes with emphasis from the *Time Inc. v. Bernard* case that fair use presupposes “good

[hereinafter 1976 House Report].

³⁹ *Cretsingers*, *supra* note 34.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Harper & Row*, 471 U.S. 539.

faith” and “fair dealing”⁴³ before it went on to reject The Nation magazine’s fair use argument. In the Harper & Row case, former US President Ford contracted with Harper & Row, Publishing, Inc. to publish his unwritten memoir, giving the publishing company an exclusive first serial right to license prepublication excerpts of the memoir. When the memoir was near completion, Harper & Row negotiated a prepublication licensing agreement with the Times magazine. Under the agreement, Times agreed to pay \$25,000 (\$12,500 in advance and remainder at publication) in exchange for the exclusive right to 7,500 words of excerpts from the memoir on Ford’s account of his pardon of former President Richard Nixon. Shortly before the Time article’s scheduled release, The Nation published a 2,250-word article containing about 300 to 400 words of verbatim quotes from the Ford memoir. The Nation had obtained the memoir from an unauthorized source. The Supreme Court opinion strongly emphasized on the facts that The Nation had timed its article to “scoop” the Time article, and sought to exploit the headline value of its copyright infringement, making a news event out of its unauthorized first publication. Evidently, these facts helped the court to find a lack of good faith on the part of The Nation.

While news reporting may generally be considered a transformative use, the court pointed out the “newsworthy” nature of a protected work is not an independent justification for unauthorized copying. The fact that news reporting was the general purpose of The Nation’s use was only one of the factors to be considered, said the court.

⁴³ Time Inc. v. Bernard Geis Association, 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

C. Factor Two—Nature of the Copyrighted Work

1. Is the Copyrighted Work a Fictional or Factual Work?

The second factor has to do with whether the copyrighted work being used by the defendant has a factual basis or an entirely fictional or creative nature. This inquiry again draws on Justice Story’s fair use formulation--“the value of the materials used.”⁴⁴ Some works are simply closer to the core of intended copyright protection than others, and, therefore, has much more “value” from the standpoint of copyright law.⁴⁵ Fair use of works with higher copyright “value” is therefore more difficult to establish.

Since copyright protects creative expression, rather than the ideas or facts being expressed, it seems only reasonable and natural that creative or fictional works receive more expansive copyright protection. Expression of facts generally receives less copyright protection, because rewarding the mere acquisition of facts with copyright protection would frustrate the intent of a copyright monopoly, that is, to encourage distribution and dissemination of ideas and information. There is also in general a greater public need and interest for the dissemination of works of facts than works of fiction, further justifying less protection for works of facts.

2. Is the Copyrighted Work Published?

Also, whether the original work is unpublished or published is a key issue,

⁴⁴ Folsom, 9 F Cas. 342.

⁴⁵ See Pierre N. Level, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1125 (1990).

although not necessary determinative. Under ordinary circumstances, an author's right to control the first public appearance of his or her work will outweigh a claim of fair use.⁴⁶ For example, in the Harper & Row case, an unauthorized use of a soon-to-be-published memoir of Ford was deemed to fail the fair use inquiry, despite the fact that the memoir was a factually based work, rather than a completely fictional work. This indicates that while the copyright law generally gives less protection to factual work, the fact that the memoir was unpublished at the time The Nation article came out tipped the balance against The Nation significantly.

D. Factor Three—The Amount and Importance of the Portion Used.

1. How much was borrowed?

The amount and the importance of the borrowed portion from the original copyrighted work are also to be considered.⁴⁷ This particular inquiry derives from Justice Story's fair use formulation concerning "the quantity and value of the materials used."⁴⁸ Generally speaking, the greater the quantity or portion borrowed, the less likely the fair use defense would be applicable. Therefore, someone who borrows the entire work would most likely have problems prevailing on this factor. Nevertheless, the Supreme Court had held that a full copying of the original protected work could sometimes constitute a fair use.

⁴⁶ Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 US 539 (1985).

⁴⁷ Level, *supra* note 45, 1130.

⁴⁸ Folsom, 9F Cas. 342.

For example, the reproduction of entire work “does not have its ordinary effect of militating against a finding of fair use” in the context of home videotaping of television programs, according to the Supreme Court in the *Sony Corporation of America v. Universal City Studios, Inc.*⁴⁹

2. How Important Was the Portion Borrowed To the Entire Work?

In addition to examining the amount or the size of the portion used, the court must also examine the importance of the portion used relative to the entire original copyrighted work.⁵⁰ There have been instances in which although the portion used was relatively small, yet it was the essential aspect of the original work or the parts from which the original work derived its unique economic value. Should that be the case, the use may not constitute a fair use, although the portion use is not significant in terms of volume or size.

For example, in the *Harper & Row* case⁵¹, the Supreme Court denied a fair use finding, although *The Nation* article quoted only about 300 to 400 words directly from the Ford memoir. The Court pointed out that, as these quotes were from the chapter on Ford’s pardon of Nixon, they were the “most interesting and moving parts of the entire manuscript.”⁵² The assumption was that many readers might have been interested in buying the memoir primarily due to their curiosity for this part of the memoir. In other words, the excerpts quoted may be

⁴⁹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984).

⁵⁰ See Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L., 24, 32 (1997).

⁵¹ The third factor in a fair use inquiry is “the amount and substantiality of the portion used.”

⁵² *Harper & Row*, 471 U.S. 539.

limited, yet it is the bulk part of the memoir from which economic value of the memoir derived. The borrowed portion's qualitative importance cannot be ignored. Under the circumstances, the fact that, quantity wise, only a small portion was borrowed did not justify the defendant's conduct.

E. Fourth Factor—Impact on the Market for the Original Work

1. Potential Market Harm to the Original Work?

The fourth factor considers the extent to which the defendant's use of the copyrighted work may harm the market value of the copyrighted work.⁵³ Again, this inquiry derives from the part of Justice Story's fair-use formulation that asks "the degree to which the use may prejudice the sale of the original work" and "the degree to which the use may diminish the profits of the original work."⁵⁴ As far as this fourth factor is concerned, it is not necessary to prove actual or the certainty of the harm.⁵⁵ As long as a preponderance of evidence is submitted to prove meaningful likelihood of future harm exists, the criterion is met.

In examining the fourth factor, the court asks whether defendant's activity or conduct, if widespread, would adversely impact the entire market.⁵⁶ In other words, even if defendant's conduct, by itself, is too insignificant to have any real market impact, the fair use defense may nonetheless be unavailable, because it has the potential of becoming a widespread conduct.

⁵³ Loren, *supra* note 50.

⁵⁴ Folsom, 9 F Cas. 342.

⁵⁵ Loren, *supra* note 50.

⁵⁶ *Id.*

In the *Campbell v. Acuff-Rose Music, Inc.* case,⁵⁷ the Supreme Court further clarified that the potential market harm envisioned by the copyright law in general must derive from the ability of the defendant’s work to serve as “substitutes” for the original work in the market. This inquiry may in term draws on the level of transformation in the defendant’s work. In other words, the greater the transformation, the less likely the new work could serve as a substitute of the original work in the market place, the less likely is the potential market harm to the original work. For example, in the *Campbell* case, the Supreme Court found that 2 Live Crew’s parody of Roy Orbison’s song “Oh, Pretty Women” did not pose potential market harm to the Orbison song. The court did not think widespread parody, in particular in rap form, in the market would affect the value of the rendition of “Oh, Pretty Women” in the easy-listening market. The court could not foresee potential market harm, because the parody was a transformative use of the original work, decreasing the likelihood that the new work would fulfill a similar purpose or serve as a substitute.

Courts must also consider the potential harm to the derivative markets of the copyrighted works⁵⁸. Today’s markets have expanded along with the rapid development of technologies in computers, video games, toys, and other technologies. The scope of copyright would seem to extend to those derivative markets that the copyright holders could develop themselves directly or via licensing. In fact, copyright protection reaches even those markets that the

⁵⁷ *Campbell*, 510 U.S. 569 at 575.

⁵⁸ *Loren*, *supra* note 50.

copyright holders have consciously decided not to enter.

However, the extent and weight of the potential for market harm must be carefully evaluated. Otherwise, the fourth factor will almost always favor the copyright holders, especially since the courts are allowed to consider the potential market impact if defendant's activity becomes widespread. Copyright holders will argue that any unauthorized use reduces the potential market by reducing his or her ability to collect licensing fees. Virtually every unauthorized use may then fail to meet the fourth factor. The purpose of a fair use defense would thus be destroyed.

2. Is the Defendant's Use Commercial?

The commercial nature of the defendant's use is certainly a factor to consider in determining the potential for market harm to the original work. The finding of a commercial use should in general weight against a fair use defense. However, there can be no presumption of potential market harm based on a finding of commercial use by the defendant. For example, in the Campbell case⁵⁹, the Supreme Court distinguished the case from another Supreme Court case Sony Corp. of America v. Universal Studio,⁶⁰ Inc. in which it was presumed that a defendant's commercial use of the copyrighted work had the potential of causing market harm to the copyrighted work. The Court made the distinction on the ground that, unlike the Sony case, the present case involved something beyond mere duplication for commercial purpose. The Sony court's discussion of presumption was applicable to verbatim copying of the original in

⁵⁹ Campbell, 510 U.S. at 569.

⁶⁰ Sony, 464 U.S. at 417.

its entirety for commercial purposes. The Sony ruling was interpreted to mean when a commercial use amounts to mere duplication of the entirety of an original, it clearly “supersedes the objects”⁶¹ of the original, and serves as a market replacement of the original, creating the likelihood that the market harm to the original work will result.

V. ADAPTING FAIR USE DOCTRINE TO TECHNOLOGY

A. MP3—Upsides and Downsides

Digital technology has developed significantly and rapidly in recent years. Data compression technology now allows users to store, as files on the hard drives of their personal computers, copies of musical recording.⁶² This means that users can listen to the music on their computers or send the music as files via email attachments. Of course, users may also post these files on Internet web sites, making the copied files available for all to download onto their own personal computers. As a result, one file can be the source of many copies. In comparison to this new technology, earlier compression formats like Musical Instrument Digital Interface (MIDI) took hours to download over the Internet because the digital information on a single CD required hundreds of computer floppy diskettes to store.⁶³

⁶¹ Folsom, 9 F. Cas. at 345.

⁶² See Lisa M. Needham, *A Day in the Life of the Digital Music Wars: The RIAA v. Diamond Multimedia*, 26 Wim. Mitchell L. Rev. 1135, 1140 (2000).

⁶³ *Id.*

The development of Motion Pictures Experts Group, Audio Layer 3 (MP3) represents an enormous advancement from the previous music compression formats such as MIDI. MP3 compresses music files at a 12-to-1 ratio with near-CD sound quality.⁶⁴ The MP3 files can be transmitted relatively quickly online, making the Internet a more effective and attractive distribution channel.

MP3's popularity on the Internet threatens the recording industry's traditional distribution channels by drastically reducing record label's traditional control over the promotion of artists.⁶⁵ An independent recording artist can now promote her music directly to her fans by making the music available in the form of a downloadable MP3. She no longer has to solely rely on a record label to promote her music to radio stations to reach a large potential fan base. MP3 proponents therefore argue that the new technology is in fact a "great equalizer" because it shifts the power from a few record labels and consumers.⁶⁶

Recording artists and record labels however fear that the advancement in technology have led to widespread piracy of music in the form of illegal copying and distribution of sound recording. CD-ripping software like MusicMatch Jukebox and MP3 Blaster 32 2000 allows a person to store tracks from a CD as a digital file on her computer hard drive.⁶⁷ Although CD-ripping software enables a computer to make a "backup" copy on her hard drive that would be considered "fair use," there is no protection mechanism currently in

⁶⁴ *Id.*

⁶⁵ See Ines G. Gonzales, *Copyright Recording Industry Association of America, Inc. v. Diamond Multimedia Systems, Inc.*, 15 Berkeley Tech. L. Rev. L. J. 57,65 (2000).

⁶⁶ *Id.*

⁶⁷ *Id.*

place to stop her from sharing that copy with others, thus infringing on the copyright holder’s exclusive rights to reproduce and to distribute her copyrighted works.

In addition, hundreds of pirated web sites and file transfer protocol (FTP) sites offer free downloads of copyrighted materials. The Recording Industry Association of America (RIAA) has responded with an anti-piracy campaign. The RIAA monitors the Internet daily and routinely in an attempt to shut down pirate websites by sending cease-and-desist letters and by filing lawsuits. The FTP sites are especially difficult to patrol and monitor.⁶⁸ This is because a FTP site may be moved very easily by mapping it to a new Internet protocol (IP) address. In addition, most FTP sites are not advertised. The addresses of these sites are spread via email or conversations in chat rooms, making them difficult to track down. To make the matter even worse, MP3 files can be saved in a file extension other than <mp3> (e.g., <zip>, <gz>), making it even more difficult to find illegally copied MP3 files.

Independent labels and artists favor the use of MP3 technology.⁶⁹ The technology provides a convenient way for unknown artists to get their music out for people to hear. It gives them a voice among the giants so that they can be heard without being overshadowed by the big recording labels and stars. It is well known that names like EMI, Capital, Island, and etc, dominate the recording industry. Generally speaking, an everyday garage band isn’t going to

⁶⁸ *Id.*

⁶⁹ See Symposium, *Panel III: Digital Audio*, 11 FORDHAM. INTELL. PROP. MEDIA & ENT. L. J. 361, 383 (2001).

get a break with these companies. MP3 gives these bands, which have little or no chance of making it with the big labels, an opportunity to make it on their own. They rip their songs into MP3 format and post them on the Internet for everyone to take free of charge. For a nominal fee, the cost of recording the CD and possibly for starting a web site, which most people can get for free from their service providers or from other Internet sites, an unknown band could make its music available to potentially millions of listeners. Traditionally, this was something that could not have been done unless the band happened to have a lot of money or a connection to a big label. Without the Internet as a distribution channel, this still would not be possible.

MP3 provides valuable marketing and exposure for all in the music industry. MP3 is valuable not only for independent artists seeking exposure, but also can be useful and lucrative marketing tools for the big labels as well. The Internet offers both groups worldwide exposure to millions of web surfers everyday. By offering music on the Internet, the music industry could save a great deal of money by eliminating the expense of pressing CDs, shipping them, delivering them to a store, and many other costs associated with retail sales outlets.⁷⁰

B. Time Shifting as Fair Use

Sony Corporation of America v. Universal City Studios, Inc.⁷¹ is in every sense a landmark case as far as US copyright law is concern. It was one of the

⁷⁰ *Id.*

⁷¹ *Sony*, 464 U.S. at 417.

earlier attempts by the US Supreme Court to squarely confront copyright issues created by technological advancements. Due to the arrival of new technologies, new means of reproduction and new mediums through which copyrighted materials may be disseminated and transmitted have arrived on the scene. How to apply the traditional fair use inquiry became a new challenge as a result. In the Sony case, the US Supreme addressed a fair use issue spurred on by new home video-tape recording technology by finding that the so-called “time-shifting” use of copyrighted work constituted fair use. The so-called time shifting is the use of Betamax video-tape recorder to record publicly televised or broadcasted programs on TV for at home personal viewing at a later time.

The defendant in the Sony case was Sony Corporation of America, a manufacturer and seller of home video tape recorders.⁷² Universal City Studios, the copyright holder of some of the television programs broadcasted on the public airwaves, sued Sony for contributory copyright infringement, because some members of the general public used video tape recorders manufactured and sold by Sony to record TV programs of which Universal was the copyright holder.⁷³ However, Universal sought no relief against any Betamax consumers.⁷⁴ No issue concerning the transfer of tapes to other persons, the use of home-recorded tapes for public performances, or the copying of programs transmitted on pay or cable television systems was raised in the lawsuit.

The Supreme Court rejected Universal’s contributory infringement claim

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

against Sony, mainly because Sony's products was widely used for legitimate and unobjectionable purposes, mainly time shifting.⁷⁵ The Supreme Court went as far as stating that the mere fact that Sony's products were capable of being placed to substantial non-infringing uses was sufficient. The availability of fair use defense to Sony was not negated by the facts that Sony's products may be put to some other illegitimate uses. The Supreme Court reasoned that it did not need to explore all the different potential uses of the machines in question in trying to determine whether infringement existed. Rather, the Supreme Court only needed to consider whether a significant number of possible uses would be non-infringing.

In finding that the unauthorized recording of Universal's copyrighted programs or the time shifting constituted fair use, the Supreme Court applied the traditional four-factor fair use inquiry. In evaluating the first factor, the Supreme Court gave significant weight to the non-commercial and private nature of the time shifting at home.⁷⁶ The court's analysis especially focused on the fact that time shifting merely enables a viewer to see a work which he had been invited to see in its entirety free of charge on TV in the first place. In other words, the tap-recording of the programs merely allows the viewers to postpone or "shift" the viewing "time" to a later time. Further, the court pointed out that Universal had failed to show that private time-shifting at home had actual or potential negative market impacts. In addition, the court strongly emphasized on policy reasons including the public interest in making television broadcasting

⁷⁵ *Id.*

⁷⁶ *Id.*

more available, and the fact time shifting may enlarge the total viewing audience.⁷⁷ These are policy considerations consistent with the goal of copyright law and fair use defense in promoting progress in arts and science.

The fact that Universal owned the copyrights of only about 10% of the television programs being broadcasted also played a role in the Supreme Court’s decision.⁷⁸ This leaves open the possibility that had copyright holders of a greater percentage of the copyrighted works being used objected to the unauthorized use, would the Supreme Court have ruled otherwise? After all, such would be the case only if greater impact on the market of copyrighted works resulted from time shifting. Whether the Supreme Court under the circumstances would still accept the time-shifting theory would seem to be an entirely different story.

C. Space Shifting as Fair Use

In *Recording Industry Association of America (RIAA) v. Diamond Multimedia Systems, Inc.*⁷⁹, another milestone in fair use was reached as a result of technological advancements. This time a federal court found that “space shifting” copyrighted works constituted fair use. The court had reached the decision by extending the Supreme Court’s rationales in the Sony case to a new MP3 product—“The Rio PMP300” (Rio).

The defendant of the Diamond case was Diamond Multimedia Systems,

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Recording Industry Association of America v. Diamond Multimedia Systems*, 180 F.3d 1072 (9th Cir. 1999).

Inc. (Diamond), a personal computer multimedia and Internet connective company that manufactured products such as audio appliance, video accelerators, modems, and home networking products.⁸⁰ Rio is a small portable digital audio player that allows users to copy MP3-format files from their computer hard drives to the device and replays the audio through headphone.⁸¹ The Rio was specifically designed to read and play MP3 files. Prior to Rio's affordable technology, MP3 users were usually resigned to a set of headphones and their computer hard drives to enjoy the MP3 formatted music. The Rio makes MP3 files portable, allowing a listener to hear up to one hour of music or sixteen hours of spoken music. The Rio also has flash memory card that can store up to an additional hour of music. The Rio is a playback-only machine. It cannot upload music to a computer or make a duplicate of any files that it holds. The device's only output is an analog audio signal channeled through the headphones. Diamond did not register the device, pay royalties for the device, or incorporate any Serial Copyright Management System (SCMS) into the device, as mandated by the Audio Home Recording Act (AHRA) for all digital audio recording devices.⁸²

The US Congress had passed the AHRA to prohibit the manufacture, importation, and distribution of digital audio recording devices, unless two requirements were met.⁸³ First, a digital audio recording device must employ a

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Audio Home Recording Act of 1992, Pub. L. No. 102-563, 2, 106 Stat. 4237 (1992) (codified in the scattered section of 17 U.S.C.).

SCMS. A SCMS sends, receives, and acts upon information about copyright status of the files that it plays.⁸⁴ Second, the person importing, distributing, or manufacturing a digital audio recording device pays a two percent royalty for each device sold to the Register of Copyright which acts on behalf of the copyright holders.⁸⁵

Plaintiff RIAA had filed a suit to enjoin the manufacturing and distribution of the Rio under AHRA.⁸⁶ Upon appeal to the United States Court of Appeal for the Ninth Circuit, the court found that the Rio was not a digital audio recording device under the ambit of the AHRA. Only “digital audio recording devices” are subjected to the requirements of AHRA. The statutory definition of “digital audio recording device” is a device that is able to reproduce, either “directly or indirectly from a transmission,” a “digital music recording.”⁸⁷ As the Rio is only able to copy MP3-format files from computer hard drives and replay the audio through headphone, the court determined Rio neither made a direct recording from a digital music recording, nor indirectly made a recording from a transmission of digital music recording.⁸⁸ The court had based its ruling primarily on the fact it found the statutory language of Section 1001(5)(B) under AHRA specifically precludes computer hard drive from the definition of digital music recording. Therefore, the court concluded that Rio was not a digital audio recording device under the purview of AHRA.

⁸⁴ *Id.* 1002 (a)(2).

⁸⁵ *Id.* 1004(a), 1005.

⁸⁶ *Diamond*, 180 F.3d at 1080.

⁸⁷ *Id.*

⁸⁸ *Id.*

Pertinent to the present discussion on fair use in the MP3 context was the Ninth Circuit's acceptance of a space shifting argument by the defendant. The court had concluded that the Rio's primary function, facilitating personal use, paralleled the desired goal of the AHRA to ensure the right of individuals to make private recordings of copyrighted works for their own use. The court then went on to justify its ruling by stating that the Rio "merely makes copies in order to render portable or 'space-shift' those files that already reside on a user's hard drive.

D. Direct Copying by Operators of MP3 web sites—Fair Use Inapplicable

In the Diamond case, the court did not get a chance to dwell and address on the issue of fair use in the MP3 context extensively. Therefore, UMG Recordings, Inc. v. MP3.Com⁸⁹ may be deemed as the first major court ruling on the issue. The case clearly established MP3 web site operators' liability for direct copyright infringement in cases where they directly uploaded or reproduced copyrighted works on their websites for access by the users of the web sites.

The defendant of the UMG case was MP3.Com, a popular source of MP3 files. MP3.Com allowed its members access to MP3 files donated by members who have composed and performed the music themselves.⁹⁰ In such cases, MP3.Com has not infringed anyone's copyright. However, MP3.Com

⁸⁹ UMG Recordings, Inc. v. MP3, Inc. 92 F. Supp. 2d 349.

⁹⁰ *Id.*

additionally offers a service called My.MP3.Com, which presents copyright problems. In providing the said service, MP3.Com, rather than the composers or the copyright holders of the music, was the one that placed the MP3 files that come into its possession on the web site, so that My.MP3.Com users would have access to them.⁹¹ MP3.com produces these digital files from prerecorded, store-bought copies of sound recordings. The musicians, producers, and or copyright holders may never know that their copyrighted materials are being put to such use. User can listen to these files via any Internet connection; they only need to enter their names and passwords at the My.MP3.Com site in order to do so.

To gain access, MP3.Com members must first verify with MP3.Com that they own copies of the music in question.⁹² Owners of such copies may use Beam-It, a program provided by MP3.Com to complete this step. Beam-It lets users place a physical copy of the compact disc into the computer's CD drive; it then transports the identifying information on the CD to MP3.Com. It is essential to note that with Beam-It, a copy of the music is never transported. Only the information needed by My.MP3.Com to match it to a CD already in its library is taken. My.MP3.Com user can gain access to a certain sound recording only if that recording is already in the library.⁹³

Alternatively, if the user does not own a copy of the music, the user may

⁹¹ *Id.*

⁹² See Sara Steetle, *UMG Recording, Inc. v. MP3.Com, Inc.: Signaling the Need for A Deeper Analysis of Copyright Infringement of Digital Recording*, 21 LOY. L. A. ENT. L. J. 31,40 (2000).

⁹³ *Id.*

purchase the CD online through MP3.Com's online partners.⁹⁴ The members are then permitted to listen to MP3 files even before the physical CD arrives in the mail. Once an MP3.Com partner confirms that a member has purchased the music, the company gives the member access to that music from the My.MP3.Com library. The data is transferred over the Internet via "streaming," a technique that allows information to flow through the Internet to the user's computer without saving it as a MP3 file on the users' hard drives.⁹⁵ The music is played on the user's computer with the aid of any number of sound programs. While the user listens, and afterwards, the original MP3 files remains on MP3.Com.'s server for other members to use.

In reality, borrowing another's CD easily circumvented all the requirements regarding purchase of CD before having access to the music on the defendant's web site. MP3.Com contends that while it cannot prevent such unauthorized use of its service, it does attempt to limit the number of people with access to MP3 files by requiring each user to have a unique username and password. But this requirement is also easily evaded. MP3.Com members can disseminate their passwords, thus allowing friends who have never even seen a copy of the sound recording to access MP3.Com files.

In January of 2000, Universal Music Group, EMI, Warner Brothers, BMG, and Sony, under the umbrella of RIAA, filed suits against MP3.Com for violating the right of reproduction in the sound recordings held by producers

⁹⁴ *Id.*

⁹⁵ *Id.*

through its My.MP3.Com service.⁹⁶ MP3.Com presented several affirmative defenses, including the fair use defense, but the court ultimately struck all of them down. The court applied the-four factor inquiry, and found MP3.Com liable for direct copyright infringement of the reproduction right.⁹⁷

Regarding the first factor of the four-factor inquiry for fair use, the court pointed out that the defendant's use was commercial in nature.⁹⁸ While subscribers to My.MP3.Com were not charged any fee, the defendant did stand to benefit commercially and financially from the advertisements placements drawn from a large subscription base. The court rejected MP3.Com's argument that My.MP3 service was essentially a transformative use in that it simply “space shifted” sound recording the subscribers could otherwise rightfully enjoyed from playing their CDs. The court reasoned that the fact unauthorized copies were being transmitted in a different medium, the Internet, gave no transformative value, that is, adding some new aesthetics, new insights, or new understanding to the original music. The court stated putting music in the MP3 format and making it accessible via the Internet is no more a transformative use of the copyrighted work than is the re-transmission of radio broadcasts over telephone lines.

In examining the second factor of fair use, the court had no problem in finding that the copyrighted work at issue--the creative music recording--was close to the core of intended copyright protection. Similarly in examining the

⁹⁶ *UMG*, 92 F. Supp. 2d 349.

⁹⁷ *Id.*

⁹⁸ *Steetle*, *supra* note 92.

third factor, the court easily concluded that the defendant copied and replayed the copyrighted works at issue in their entirety.

With respect to the fourth factor, the court found that the defendant's activities invaded plaintiff's statutory right to license their copyrighted sound recording to others for reproduction. The defendant had argued that its activities could only enhance plaintiffs' sales, since subscribers can have no access to any particular recording on defendant's web site, unless they have purchased their own copies of the CD. However, the court rejected the argument. Other arguments by MP3.Com, including that it was providing a service "pirates" would otherwise perform, were also turned down by the court.

E. A & M Records, Inc. v. Napster Inc. Observed Implications

The outcome of *A&M Records, Inc. v. Napster, Inc.*⁹⁹ is of paramount importance not only to the issue of MP3 web site operators' liability for vicarious and contributory infringement of copyrights in instances where they do not directly engage in copying and transmission of MP3 files via the Internet. It is of even more importance to the MP3 web site users' liability for direct copyright infringement, the basis of any contributory or vicarious liability on the part of the web site operators. Central to the issue is of course the availability of the fair use defense to the web site users. While the case has not yet been resolved, the Ninth Circuit Court has already upheld the lower court's issuance of a preliminary injunction against defendant Napster, Inc. The court's opinion appears to indicate that it is inclined to find the fair defense inapplicable to the

⁹⁹ *A & M Records*, 92 F.Supp.2d at 356.

web site users.

Napster had facilitated the transmission of MP3 files between and among its users. Through a process called “peer-to-peer” file sharing, Napster allows its users to make MP3 music files stored on individual computer hard drives available for copying by other Napster users, to search for MP3 files stored on other users’ computers, and to transfer exact copies of the contents of other users’ MP3 files from one computer to another via the Internet.¹⁰⁰ These functions are made possible by Napster’s MusicShare software, available free of charge from Napster’s Internet site, and Napster’s network servers and server-side software.¹⁰¹ Napster provides technical support for the indexing and searching of MP3 file, as well as for its other functions, including a “chat room,” where users can meet to discuss music, and a directory where participating artists can provide information about their music.¹⁰²

In order to copy MP3 files through the Napster system, a user must first access Napster’s Internet site and download the MusicShare Software to his individual computer.¹⁰³ Once the software is installed, the user can access the Napster system. A first time users is required to registered with the Napster system by creating a “user name” and password. If a register user wants to list available files stored in his computer’s hard drive on Napster for others to access, he must first create a “user library” directory on his computer hard drive. The user then save his MP3 files in the library directory, using self-designated

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

file names. He next must log into the Napster system using his user name and password. His MusicShare software then searches his user library and verifies that the available files are properly formatted. If in the correct MP3 format, the name of the MP3 files will be uploaded from the user's computer to the Napster servers. The content of the MP3 files remain stored in the user's computer. Once uploaded to the Napster server, the user's MP3 file names are stored in a server-side "library" under the user's name and become part of a "collective directory" of files available for transfer during the time the user is logged onto the Napster system. The collective directory is fluid; it tracks users who are connected in real time, displaying only file names that are immediately accessible.

To transfer a copy of the contents of a requested MP3 file, the Napster server software obtains the Internet address of the requesting user and the Internet address of the "host user," meaning user with the available files.¹⁰⁴ The Napster server then communicates the host user's Internet address to the requesting user. The requesting user's computer uses this information to establish a connection with the host user and downloads a copy of the contents of the MP3 files from one computer to the other over the Internet.¹⁰⁵

As the facts indicate, Napster does not directly perform or carry out the act of copying or reproducing the MP3 files. In fact, at no time were the files stored on its web site. These MP3 files are transmitted via the Internet directly between the hard drives of the web site users' computers. Therefore, any liability Napster

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

may have must be either or both vicarious and contributory copyright infringement. To establish any such liability on the part of Napster, the court must find that the users’ conduct constituted copyright infringement and that no fair use defense is available to them.

Napster contends that its users did not directly infringe the plaintiffs’ copyrights, because they were engaging in fair use of the protected works. Napster specifically identified three alleged fair use: sampling, where users make temporary copies of a work before purchasing; space-shifting, where users access through the Napster system a sound recording they already own in audio CD format; and finally permissive distribution of recording by both new and establish artists.

In examining the first factor of the fair use, the court found that downloading MP3 files do not transform the copyrighted works.¹⁰⁶ This finding is consistent with the court’s reluctance to find fair use when an original work is merely being retransmitted in a different medium. The court also found that the Napster users engaged in commercial use of the copyrighted materials, largely because a host user sending a file cannot be said to engage in a personal use, when the host user does get something for free (i.e.the ability to share music files of other users) in exchange for distributing that file to an anonymous requesters. Consistent with prior court findings on the point, the Napster court reasoned that direct economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial

¹⁰⁶ *Id.*

use. The court pointed out the definition of a financially motivated transaction, under the No Electronic Theft Act, includes trading infringing copies of a work for other items, and the receipt of other copyrighted works.¹⁰⁷

In terms of the second factor, the court also had no problem in finding the music recordings were “close to the core of intended copyright protection”. Similarly, in examining the third factor, the court easily concluded that the copying of entire protected works in the present case “militated against a finding of fair use.”

Finally, in addressing the fourth factor, the court determined that Napster users’ conduct reduced audio CD sales among college students and raised barrier to plaintiffs’ entry into the market for the digital downloading of music.¹⁰⁸

The court determined that sampling nevertheless constitutes a commercial use, even if some users eventually purchase the music.¹⁰⁹ In particular, the court noted that if sampling becomes a widespread conduct, it could have the potential to seriously harm the market for plaintiffs’ works.

Napster also pointed out to the court that space shifting constituted fair use in the *Diamond* case, and that a space shifting argument is equally legitimate in the present case.¹¹⁰ Rejecting the Napster’s argument, the court distinguished

¹⁰⁷ See Karin J. Bernstein, *Net Zero: The Evisceration of the Sentencing Guideline Under the No Electronic Theft Act*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 57, 65 (2001).

¹⁰⁸ A & M Records, Inc. v. Napster, 239 F.3d 1017.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

the present case from both the time shifting in the Sony case and the space shifting in Diamond case on the ground that neither of the prior cases simultaneously involved distribution of copyrighted works to the general public. In these two cases, the time-shifted and space-shifted works were available only to the original authorized listeners or viewers. In Diamond, the copyrighted music was transferred from the user’s computer hard drive to the user’s portable MP3 player. So too in the Sony case, the majority of VCR purchases did not distribute taped television broadcasts, but merely enjoyed them at home. In contrast, once a user lists a copy of the music he or she already owns on the Napster system, it becomes available to million of unauthorized users, not just the original CD owners who are authorized users.

In examining the court’s ruling in the Napster case so far, one cannot help but wonder about an apparent policy-shift in the judicial application of the four-factor test for fair use after the Sony case. A close comparison of the somewhat factually similar Sony and Napster case would seem to clearly demonstrate this point. This shift may give a glimpse of the future direction of judicial decisions on fair use cases.

The Sony and Napster cases both involve a new technology that excited the consumers at large, but made the copyright holders extremely edgy. The studios that filed the suit in the Sony case were worried that the ability to tap-record television programs, including movies, in the privacy of homes would negatively impact the movie industry on a large scale. The music industry responded to MP3 in much the same way as the motion picture industry responded to the VCRs. Moreover, both cases involve claims of contributory and vicarious copyright infringements.

Despite these similarities, and despite Napster's claim that its service has substantial non-infringing uses very similar to those of home VCRs, the Napster court seems disinclined to adopt the conclusion reached in the Sony case, primarily because cases since the Sony case have been much stricter in applying the four-factor test for fair use.

The Napster court's characterization the downloading of copyrighted materials by Napster users as a commercial use played a pivotal role in its finding against fair use so far. That characterization was made despite the fact that, just like people who tap TV programs, most Napster users download MP3 music files for personal and at-home enjoyment. To support its finding of commercial use, the court even went out of its way to apply No Electronic Theft Act's rather stringent definition of "financially motivated transaction."¹¹¹ Consistent with a shift to decrease emphasis on direct monetary gains, the Napster court, stated, "direct economic benefit is not required to demonstrate a commercial use."¹¹² Under this logic, Napster users benefited by getting in return something free which they would otherwise have to pay (i.e. files of other users). In this regard, people who video-tapped TV programs at home would seem to differ in that they usually do not exchange or trade their tapped programs with others.

The truth of the matter is courts since the Sony case have assessed the purpose and use factor much less generously in determining whether a use is

¹¹¹ Bernstein, *supra* note 107, 68.

¹¹² *A & M Records*, 239 F.3d 1017.

non-commercial.¹¹³ In *Sony*, the Supreme Court found that commercial use of copyrighted materials would have been presumptively unfair¹¹⁴, but by the time of the *Campbell* case, the Supreme Court had begun to caution against over-emphasizing the commercial use of copyrighted works.¹¹⁵ The more recent decisions have consistently focused a lot less on monetary gain as a critical factor and more on whether the users stand to profit from exploitation of the copyrighted materials without paying the customary price.

For example, in *American Geophysical Union v. Texaco Inc.*¹¹⁶, the court considered whether Texaco was liable for copyright infringement when researchers copied articles from journals that Texaco had purchased. The purpose of the use was primarily to afford researcher the personal convenience of having readily accessible copies. The court found that personal convenience, a use that the *Sony* court endorsed, did not weigh in Texaco's favor for fair use. Nor did that court find that the use was non-commercial even though it was for research purpose, a use specifically mentioned in the fair use permeable.¹¹⁷ The court stated that while the use did not constitute commercial exploitation, it could not ignore the for-profit nature of the Texaco enterprise, since Texaco reaps some indirect economic advantages from the photocopying.

Consistent with the trend to de-emphasize the importance of direct

¹¹³ See Stephanie Green, *Reconciling Napster With the Sony Decision and Recent Amendments to Copyright Law*, 30 AM. BUS. L. J. 57, 65 (2001).

¹¹⁴ *Sony*, 464 U.S. 417.

¹¹⁵ *Campell*, 510 U.S. 569.

¹¹⁶ *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2nd Cir. 1993).

¹¹⁷ *Id.*

monetary gain, in *Worldwide Church of God v. Philadelphia Church of God*¹¹⁸, the court found that although the copying of a religious book was not for profit, the users nevertheless benefited because they did not have to account to the copyright holders.

The Sony and Napster courts were in particularly different in the emphasis they gave to the transformative character of use in examining the first factor of the four-factor test. Very clearly both the purpose and use of VCR recording and downloading music files are alike in that both involve mere mechanical copying of materials. However, the Sony court addressed only whether use was commercial or non-commercial and virtually ignored the non-transformative and mechanical nature of VCR recording and the fact that nothing was added to the use of the original copyrighted work.¹¹⁹ In contrast, the Napster court so far gives much emphasis on this issue.

Courts since the Sony case have placed overwhelming focus on whether the use was transformative. In the *Campbell* case¹²⁰, a case decided 10 years after the Sony case, the Supreme Court stated that the extent to which the use is transformative is the more critical inquiry. Despite the fact that the Sony decision recognizes that merely mechanical copying may survive fair use analysis, cases since Sony have emphasized that where there is a finding that such use is not transformative, it weighs against a finding of fair use. In the

¹¹⁸ *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110 (9th Cir. 2000).

¹¹⁹ *Sony*, 464 U.S. 417.

¹²⁰ *Campbell*, 510 U.S. 569.

American Geophysical Union case¹²¹, the court found that if the secondary use is a mere duplication, then the value generated by the secondary use is little or nothing more than the value in the originals. The court then concludes that there is no justification for fair use because the non-transformative copy serves the same purpose as the original and therefore does not foster creativity, consistent with the goal of copyright law. Similarly, in *Worldwide Church of God* case,¹²² the court found that the unauthorized copying of religious book was not transformative and that this factor weakens its claim for fair use.

While the Sony court gave minimal consideration to the second and third factors, factors that would have weighed against a finding of fair use in the Sony case, more recent courts have been giving much more emphasis on them. In the *Napster* case, the court also found that the second factor, and the third factor weighed against *Napster*, since the copyrighted music's were undoubtedly creative works and that people usually download MP3 music files in their entirety.¹²³ However, while the same is true in the Sony case, as copyrighted TV programs were no less creative and people also tapped programs in their entirety, it did not keep the court from finding a fair use. This strongly suggests that the Sony court gave much less weight to these two factors.

The *Napster* court's finding of commercial use by *Napster* users left *Napster* very little hope of surviving the fourth factor of the test, as the Sony court had pointed out that harm should be presumed where use is

¹²¹ *American Geophysical Union*, 60 F.3d 913.

¹²² *Worldwide Church of God*, 227 F.3d 1110.

¹²³ *A & M Records*, 239 F.3d 1019.

commercial.¹²⁴ Moreover, the Napster court also essentially recognized much less tangible forms of harms to copyright holders when it acknowledged Napster had a “deleterious effect on the present and future digital download market.” This underlies an attitude very different from that of the Sony court. The latter had declined a finding of market harm after concluding that the plaintiff studios had not introduced evidence of any actual or potential harm.

VI. ATTEMPTING TO APPLY THE FOUR-FACTOR INQUIRY TO MP3 WEB SITE USERS

A. Factor One—Purpose and Character of the Defendant’s Use

A direct, rigid, and technical application of the four-factor inquiry for fair use under the US copyright law tends to establish the liability of MP3 web site users who engage in direct copying of MP3 files containing copyrighted materials.

An examination of the first-factor of fair use reveals that, as pointed out by the A&M Records court¹²⁵, it is unlikely for the users to prevail on this point. First, the users were not engaging in any transformative use of the copyrighted songs. They were not engaging in any of the acknowledged transformative uses such as engaging in criticism, comments, news reporting, or teaching. Their conduct simply reproduced the entire original works without altering the original with new expression, meaning, or message.

¹²⁴ *Sony*, 464 US 417.

¹²⁵ *A & M Records*, 239 F.3d 1019.

Were the users engaging in a transformative use of copyrighted works by “space-shifting” the works, as argued by Napster in the A&M Records case? In addition to the consideration made by the Ninth Circuit in rejecting the space shifting argument in the A&M Records case—whether the use of the copyrighted works was strictly confined to one’s personal use—the logics of the Sony case would also seem to dictate that considerations should also be given to whether to the source from which copies were made.

In the Sony case, the time shifting argument made sense, because the viewers had been invited to view the publicly broadcasted programs in the first place. They simply delayed the viewing time by recording the programs for personal viewing at a later time. In other words, copies were made from broadcasted programs for which the viewers were authorized to view in the first place. Therefore, the source of the copies was not something that the users had no permission to rightfully enjoy or use. It is a completely different case with the MP3 files circulating in the Internet, the source of copies made by the MP3 users. In most instances these files were unauthorized copies themselves. Even in situations where they were authorized copies, the persons downloading or reproducing them from the Internet received no permission or authorization to use or copy them in such a manner.

As for the space shifting argument in the Diamond case, it is important to point out that, in reaching its decision for the case, the court focused primarily on the applicability of the AHRA to the device Rio. The court ruling was premised on the fact Rio did not qualify as a “digital audio recording device” and therefore was not under the purview of AHRA, the legal basis from which the plaintiff filed the lawsuit. Space shifting actually did not play a central role

in the case. Plus, as the facts of the Diamond case were rather unique, an extension of the space shifting theory beyond the factual context of the case seems rather difficult.

Generally speaking, the greater the transformation, the less likely the commercial nature of the uses negates the availability of the fair use defense. In the present case, virtually no transformation could be found, something that weigh against the MP3 users significantly. Moreover, in view the A&M Records court's reasoning that the exchange of copyrighted materials between the MP3 users in the case constituted a commercial use, it would seems that simply downloading the MP3 files from the Internet without engaging in any exchange of MP3 files would not constitute a commercial use? In situation where this is the case, the users would be able to make this argument in support of their fair use defense.

Also pointed out in the previous discussion that the focus of the inquiry is the commercial or non-commercial nature of the use, rather than the users themselves. Therefore, the fact that the MP3 users are mostly individuals, while the copyright holders are mostly major record labels, has no bearing on the issue of fair use. However, the discrepancy in financial resources and political influences between the two groups would inevitably make us feeling sympathetic toward the former.

B. Factor Two—Nature of the Copyrighted Work

The A&M Records court was correct in pointing out that MP3 files generally contain musical works, which constitute purely fictional or creative works entitled to the maximum copyright protection.

While examining factor two of the fair-use inquiry, the courts have traditionally asked whether the copyrighted work is published. The purpose is to protect the right of first publication by the copyright holder. In the context of cyberspace, one cannot help but asks whether a similar right of first digitalization should be protected? In cases where the users have converted the copyrighted musical recordings into digital form before the copyright holders did, should this fact tip the balance in favor of the copyright holders in order to protect the right of first digitalization?

C. The Amount and Importance of the Portion Used

As the users typically copy the entire copyrighted musical works, it would seem difficult for them to prevail on this point. As discussed above, an analogy with the present case and the Sony case seems a far stretch. Therefore, unlike the Sony case, the fact that the entire works were copied would indeed “militate” against a finding of fair use.

D. Impact on the Market

In view of the prevalence of the unauthorized downloading from the Internet, the serious impact on the market of the original work can be presumed, not to mention the fact that copyrighted works’ potential derivative market in the cyberspace may also be harmed by the unauthorized circulation of their works on the Internet. In addition, the MP3 files of the music do serve as legitimate substitutes to the original works in the market, adding strength to the arguments in favor of negative market impacts.

Unlike the Sony case, the major copyright holders and market holders of

musical recordings have demonstrated unprecedented unity in their quest to crackdown on unauthorized uses in the cyberspace. This unity reflects two things—first, that the Congress and the courts are under a lot of pressure to tip the balance in favor of protecting the copyright holders’ interests, and two, the prevalence of the unauthorized downloading has indeed caused major impacts in the market.

VII. CONCLUSION-IMPLICATION FOR TAIWAN

As mentioned above, a rigid and straightforward application of the traditional fair-use inquiry seems to weigh against a finding of fair use by the MP3 users. However, as discussed above, the Supreme Court has traditionally stressed on the importance of avoiding a strict and rigid interpretation and application of the fair use doctrine. In addition, the four-factor inquiry is not intended to be an exclusive criterion upon which rulings on fair use are to be made. In view of the harsh result created by a straightforward application of the inquiry—finding the direct copyright infringement by potentially millions of individual users—one cannot help but asks is this result consistent with the constitutionally mandated goal of promoting progress in science and arts? Previous Supreme Court cases have repeatedly emphasized that the protection of copyright holder’s economic interests is “secondary” to the public interests in general. Is this policy being met with such a strict interpretation of the fair use? One is inclined to answer in the negative. But then, if application of the traditional fair use inquiry in the cyberspace brings awkward and unintended results, how should we remedy the situation? The US has traditionally dealt

with such problems by enacting more legislation. However, in view of the strong conglomerate and business interests involved, the possibility of such legislation appears slim at this time.

In view of the US experience, it is advisable for Taiwan to first reach a policy consensus about the order of priority for all the interests involved in copyright protection. Then decide how to deal with the fair use issue accordingly. When necessarily, do not rule out the possibility of a clear-cut legislative resolution to avoid confusions and delays. Keep in mind that the ultimate policy-goal should always be fostering progress in science, literature. From this standpoint, cautions must be taken to ensure that the copyright law is not used to unduly suppress the free-flow of information in the digital world. As stated above, while the development of digital technology such as MP3 may have increased the prevalence of copyright infringement, it has also created opportunities for copyright holders to receive additional rewards for their creative works as their copyrighted works may now be made available in various never-before-seen digital forums.

Despite this overall policy consideration, it is also true that copyright infringement has just about become a common practice in people's everyday life. With the help of technologies such as MP3 technologies, unauthorized copying could take place in the privacy of home, speedily, and cost-free. Because it is so easy and common to copy without authorization, people no longer have the guilty conscience that typically accompanies wrongdoing. Efforts must be made to educate and heighten people's awareness in this regard. Of course, sometimes, one cannot help but sympathize with them, rather than those powerful copyright holders, especially those major international record

and movie companies. However, if Taiwan is truly to become a knowledge-based economy, and begin developing its own technologies, efforts must be made to deal with the ongoing prevalence of copyright infringements.

摘要

著作之「合理使用」，尤其是與 MP3 之間的相關議題，近來因台南地檢署對國立成功大學宿舍進行搜索，廣受媒體大眾之討論。究竟學生僅為其個人用途或享受而從網路上下載 MP3，是否屬於著作之合理使用範圍，已成為討論之議題中心。

從本次事件中學生與財團法人國際唱片業交流基金會(IFPI)的和解過程中可以看出來，唱片業者主張學生下載 MP 的行為，對其著作權有所侵害的。對此法院尚未有判決之產生，且著作之合理使用範圍應為何，學界與實務界間也還未達成共識。

台灣在這一波全球性的數位革命中，若想不落人後的躍進至科技尖端，有關於著作合理使用範圍的法律議題，應在能避免對數位與網路科技

之發展造成阻礙的前提下，以能保障大眾和著作人雙方利益的方式來加以解決。

因此本文意圖透過分析及討論之後美國在這方面的經驗，幫助台灣探討如何在未來處理與 MP3 科技有關之「合理使用」議題。

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吳翊如參考文獻~

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