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# **FAIR USE IN THE SOCIAL MEDIA ERA: INFLUENCER CULTURE, USER-GENERATED CONTENT, AND COPYRIGHT EVOLUTION**

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## **Abstract**

The proliferation of social media platforms has fundamentally reconfigured the terrain of copyright law, placing the doctrine of fair use under unprecedented scrutiny. As millions of content creators, from professional influencers to casual users, routinely incorporate copyrighted music, images, clips, and text into their creative output, the boundaries of permissible use have become contested and ambiguous. This paper examines the intersection of fair use doctrine with the influencer economy and user-generated content (UGC), tracing the evolution of copyright principles from their common law origins through their application in contemporary digital environments. Drawing upon landmark judicial decisions, comparative legislative frameworks across the United States, India, and the United Kingdom, and the operational realities of platform-based enforcement mechanisms, this paper argues that existing fair use doctrine is structurally ill-equipped to address the scale, speed, and transformative nature of social media content. It advocates for a calibrated doctrinal recalibration, one that preserves the constitutional purposes of copyright while accommodating the participatory ethos of the digital age.

**Keywords:** *Fair use, copyright, social media, influencer culture, user-generated content, DMCA, transformative use, platform liability.*

## 1. Introduction

Copyright law was conceived in an era of relative scarcity, where the reproduction of creative works required industrial infrastructure and the dissemination of content was mediated by publishers, broadcasters, and distributors. The digital revolution, and more specifically the emergence of social media as the dominant mode of cultural participation, has upended these foundational assumptions. Today, a teenager lip-syncing to a copyrighted song on TikTok, a fitness influencer overlaying a popular track on an Instagram reel, or a political commentator embedding a news clip in a YouTube video are all engaged in acts that potentially implicate copyright law.<sup>1</sup>

The legal doctrine of fair use, codified in section 107 of the United States Copyright Act 1976 and recognised in various forms across jurisdictions, was designed to allow reasonable uses of copyrighted material without authorisation in the service of criticism, commentary, education, parody, and scholarship.<sup>2</sup> However, the doctrine was crafted with a particular vision of the creative landscape in mind, one that did not anticipate the creator economy, the attention economy, or the algorithmic monetisation of content. The result is a significant gap between legal doctrine and social reality, one that courts, legislators, and platforms have struggled to bridge.

This paper proceeds in five substantive parts. Part II traces the historical and doctrinal foundations of fair use. Part III analyses the specific challenges posed by influencer culture and user-generated content. Part IV examines the role of platform-based copyright enforcement mechanisms, principally automated content identification systems. Part V undertakes a comparative analysis of fair use and fair dealing across selected jurisdictions. Part VI proposes a framework for doctrinal reform. The paper concludes with a synthesis of findings and recommendations for legislative and judicial action.

## 2. Historical and Doctrinal Foundations of Fair Use

The antecedents of fair use are traceable to the English common law doctrine of fair abridgement, which permitted the condensation of a work without constituting infringement on the basis that such use could itself constitute a distinct creative contribution. The doctrine

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<sup>1</sup> 17 USC § 107 (US Copyright Act 1976).

<sup>2</sup> *Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994).

received its first systematic judicial articulation in the United States in *Folsom v Marsh*,<sup>3</sup> where Justice Story enumerated a set of factors, the nature of the work, the quantity used, and the effect on the market, that would later be codified by Congress in 1976.

Section 107 of the Copyright Act 1976 identifies four non-exhaustive factors for the determination of fair use: (i) the purpose and character of the use, including whether such use is of a commercial nature or for non-profit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or value of the copyrighted work.<sup>4</sup> These four factors are to be weighed conjunctively, with no single factor being dispositive.

The modern trajectory of fair use jurisprudence was decisively shaped by *Campbell v Acuff-Rose Music, Inc.*,<sup>5</sup> wherein the Supreme Court of the United States elevated the concept of transformative use, use that adds something new, with a further purpose or different character, to a position of centrality within the first fair use factor. Transformativeness does not operate as a categorical defence, but its presence strongly weighs in favour of fair use and has become the analytical lodestar in subsequent litigation.

The doctrine is, by design, open-textured and context-sensitive. As Professor Patry has observed, fair use functions as a “safety valve” within the copyright system, allowing the law to achieve the flexibility necessary to accommodate uses that serve the public interest without requiring legislative intervention in every instance.<sup>6</sup> However, this very flexibility, its greatest structural virtue, is also the source of the systemic uncertainty that plagues its application in the social media context.

### **3. Influencer Culture, User-Generated Content, and the Copyright Dilemma**

The influencer economy represents a qualitatively distinct phenomenon within the broader landscape of digital content creation. Unlike traditional media producers who operate within established licensing frameworks, influencers typically create content independently, at scale, and in real time, frequently incorporating third-party copyrighted material as incidental

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<sup>3</sup> *Folsom v Marsh* 9 F Cas 342 (CCD Mass 1841).

<sup>4</sup> William F Patry, *Patry on Fair Use* (Thomson Reuters 2022) § 1:1.

<sup>5</sup> *Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994).

<sup>6</sup> William F Patry, *Patry on Fair Use* (Thomson Reuters 2022) § 1:1.

background, expressive embellishment, or commentary. The legal status of these uses is rarely clear-cut, and the practical costs of pre-clearance are prohibitive for the vast majority of content creators.

User-generated content (UGC) poses an even more acute doctrinal challenge. Platforms such as YouTube, TikTok, Instagram, and X (formerly Twitter) host billions of pieces of content, a significant proportion of which incorporates copyrighted material. The sheer volume of this content renders case-by-case judicial adjudication structurally impractical. Rights-holders, platforms, and creators are consequently left to navigate an enforcement ecosystem governed primarily by algorithmic systems and platform-specific terms of service rather than judicial precedent.<sup>7</sup>

The four statutory fair use factors, when applied to common influencer practices, yield profoundly ambiguous results. Consider a beauty influencer who incorporates a thirty-second excerpt from a popular song as background music in a tutorial video. As to the first factor, the use is arguably commercial (the influencer monetises her channel) but also arguably transformative (the music is subordinate to the instructional content). As to the second, the original work is creative and thus attracts stronger copyright protection. As to the third, thirty seconds may constitute a substantial portion of a short musical composition. As to the fourth, widespread unlicensed use of this kind could, in aggregate, substitute for licensed uses through platforms such as Spotify or Apple Music, thereby depressing the relevant market.<sup>8</sup>

This doctrinal ambiguity is not merely academic. The power asymmetry between rights-holders and individual creators means that most disputed uses are resolved not through litigation but through extra-judicial mechanisms, takedown notices, demonetisation, and content blocking, that systematically disadvantage creators. The landmark decision in *Lenz v Universal Music Corp*<sup>9</sup> held that rights-holders must consider fair use before issuing DMCA takedown notices, but enforcement of this obligation has proven ineffective in practice, and the volume of automated takedowns continues to grow exponentially.

A further complication arises from the phenomenon of reaction and commentary content, a

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<sup>7</sup> Tiffany Hsu and others, 'The Viral Video Economy: Copyright Disputes on Social Platforms' (2021) 33 Harvard Journal of Law & Technology 441.

<sup>8</sup> *Monge v Maya Magazines, Inc* 688 F3d 1164 (9th Cir 2012).

<sup>9</sup> *Lenz v Universal Music Corp* 801 F3d 1126 (9th Cir 2015).

staple of the influencer genre. Reaction videos typically involve a creator watching and commenting upon existing content, a film trailer, a music video, a sporting event, in real time. The commentary and criticism purpose of such content aligns closely with the traditional justifications for fair use recognised in section 107. Yet the amount of third-party content reproduced in reaction videos often exceeds what courts have traditionally regarded as permissible under the third factor, and the commercial character of the use engages the fourth factor adversely.<sup>10</sup>

The Supreme Court's recent decision in *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith*<sup>11</sup> has substantially complicated the fair use landscape for content creators. The Court, limiting the transformativeness analysis under the first factor to the specific commercial use at issue rather than the work in the abstract, held that mere aesthetic or stylistic transformation is insufficient to establish fair use when the secondary use serves the same commercial market as the original. The implications of this ruling for the influencer economy, where creators regularly adapt existing works for commercial digital publication, are profound and unsettled.

#### **4. Platform-Based Enforcement Mechanisms and the Automation of Copyright**

The Digital Millennium Copyright Act 1998<sup>12</sup> established a regime of conditional safe harbour for online service providers, immunising them from copyright liability for user-uploaded content provided they implement notice-and-takedown procedures and do not have actual knowledge of infringing content. This framework, replicated in various forms across other jurisdictions, has profoundly shaped the architecture of the contemporary internet and the practical enforcement of copyright against UGC.

In practice, major platforms have developed sophisticated automated content identification systems, most notably YouTube's Content ID, to manage copyright at scale. These systems enable rights-holders to automatically identify, monetise, block, or track content that matches their registered works. The operational logic of these systems is fundamentally algorithmic: they match audio and visual fingerprints against reference databases with minimal human

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<sup>10</sup> Rebecca Tushnet, 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It' (2004) 114 Yale Law Journal 535.

<sup>11</sup> *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith* 598 US 508 (2023).

<sup>12</sup> Digital Millennium Copyright Act 1998 (US), 17 USC § 512.

oversight. The consequence is that content is frequently blocked or demonetised on the basis of technical matches that take no account of whether the use in question would constitute fair use under applicable law.<sup>13</sup>

The structural bias of automated enforcement systems against fair use is well-documented. In *Lenz v Universal Music Corp*, the Ninth Circuit confirmed that fair use is an affirmative right under the Copyright Act, not merely an affirmative defence, and that the failure to consider fair use before issuing a takedown notice could constitute misrepresentation under section 512(f) of the DMCA.<sup>14</sup> However, the practical burden of demonstrating that a rights-holder acted in bad faith is exceptionally high, and most improper takedowns go unchallenged.

The European Union's Copyright Directive 2019/790<sup>15</sup> introduced a more prescriptive approach to platform copyright enforcement in Article 17 (formerly Article 13), requiring certain online platforms to obtain licences from rights-holders or, in the absence of licence, to prevent the upload of infringing content through proactive filtering measures. While the Directive includes explicit protections for quotation, criticism, review, caricature, parody, and pastiche, the practical interaction of mandatory filtering with these exceptions has generated considerable concern among digital rights advocates and legal scholars. The risk that legitimate fair dealing uses will be suppressed by over-zealous algorithmic filtering, a phenomenon sometimes termed 'upload filters', represents a significant threat to the effective exercise of user rights.<sup>16</sup>

The role of platform terms of service in shaping copyright practice warrants particular attention. Most major social media platforms operate licensing frameworks, including blanket music licences with rights-holders, that permit certain uses of copyrighted content on their platforms without triggering liability. However, these frameworks are contractual and platform-specific; they do not create legal rights that persist outside the platform environment, nor do they address the interests of creators who seek to exercise statutory fair use rights rather than rely on platform licenses.

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<sup>13</sup> Tiffany Hsu and others, 'The Viral Video Economy: Copyright Disputes on Social Platforms' (2021) 33 *Harvard Journal of Law & Technology* 441.

<sup>14</sup> *Lenz v Universal Music Corp* 801 F3d 1126 (9th Cir 2015).

<sup>15</sup> European Parliament and Council Directive 2019/790/EU on Copyright and Related Rights in the Digital Single Market [2019] OJ L30/92.

<sup>16</sup> Stephanie Bair and Laura Pedraza-Farina, 'Anti-Innovation Norms' (2019) 112 *Northwestern University Law Review* 1069.

## 5. Comparative Analysis of Fair Use and Fair Dealing

The doctrine of fair use, as codified in United States law, is distinctive in its open-ended, factor-based character. Its flexibility has permitted judicial adaptation to technological change, from photocopying to digital sampling, but has also generated significant doctrinal uncertainty. By contrast, many other jurisdictions have adopted the narrower concept of fair dealing, which permits specific enumerated uses of copyrighted material rather than the generalised balancing exercise required by section 107.

In India, section 52 of the Copyright Act 1957<sup>17</sup> enumerates a list of permitted acts constituting fair dealing, including private or personal use for research, criticism, review, reporting of current events, and performance for educational purposes. The Indian framework does not extend to the broad category of transformative uses recognised under United States fair use doctrine, and its application to social media content creation remains largely untested by the courts. The rapid growth of the influencer economy in India, which by some estimates encompasses several million active content creators, makes this doctrinal gap a matter of pressing national importance.

The United Kingdom's Copyright, Designs and Patents Act 1988<sup>18</sup> provides for fair dealing in respect of research and private study, criticism, review and reporting of current events, parody, caricature, and pastiche. The parody and pastiche exception, introduced by the Enterprise and Regulatory Reform Act 2013, has particular relevance to social media content creation, as it creates space for satirical and comedic transformations of existing works. However, the UK framework, like the Indian, does not contain a general transformiveness principle comparable to that articulated in *Campbell v Acuff-Rose*, and its application to commercial influencer content is uncertain.

A comparative survey reveals a fundamental tension between the flexibility of the US fair use model and the legal certainty of enumerative fair dealing systems. For the purposes of social media content creation, which is global in reach but jurisdiction-specific in legal application, this divergence creates significant practical difficulties. A piece of content that constitutes fair use under US law may simultaneously infringe copyright under English or Indian law. In the absence of international harmonisation, the effective protection of creator rights in the digital

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<sup>17</sup> Copyright Act 1957 (India), s 52.

<sup>18</sup> Copyright, Designs and Patents Act 1988 (UK), ss 29–31.

environment requires either expanded enumerative exceptions or the adoption of a more flexible fair use standard in jurisdictions that currently employ fair dealing frameworks.

## 6. Towards a Reformed Doctrinal Framework

The foregoing analysis identifies three principal deficiencies in the current legal framework as applied to social media content: (i) doctrinal ambiguity in the application of fair use factors to digital creative practices; (ii) the systematic suppression of legitimate fair use through automated enforcement mechanisms; and (iii) the inadequacy of existing comparative frameworks to address the global reality of social media content creation. The following reform proposals are advanced in response to these deficiencies.

First, legislative clarification of the fair use standard as applied to UGC and influencer content is warranted. The United States Congress should consider codifying a presumption of fair use in respect of non-commercial transformative uses of copyrighted works, subject to a reasonable market harm analysis. Such a provision would provide content creators with greater certainty while preserving the rights of copyright owners against commercially substitutive uses. The model could draw upon the Canadian fair dealing framework, which was expanded by the Copyright Modernisation Act 2012 to include a non-exhaustive list of permitted purposes alongside an express reasonableness standard.<sup>19</sup>

Second, the automated copyright enforcement regime established under the DMCA and replicated elsewhere requires structural reform. The obligation established in *Lenz v Universal Music Corp* to consider fair use before issuing takedown notices should be strengthened by statutory amendment to impose meaningful penalties, including presumptive damages, for the knowing issuance of takedown notices in circumstances where fair use is reasonably apparent. Concurrently, platforms should be required to implement a mandatory human review process for contested takedown decisions before imposing sanctions on content creators.<sup>20</sup>

Third, the international community should consider developing a multilateral framework for the recognition of fair use principles in cross-border digital content creation. The WIPO Copyright Treaty provides a partial foundation for such harmonisation,<sup>21</sup> but its three-step test,

<sup>19</sup> Pamela Samuelson, 'Unbundling Fair Uses' (2009) 77 Fordham Law Review 2537.

<sup>20</sup> *Lenz v Universal Music Corp* 801 F3d 1126 (9th Cir 2015).

<sup>21</sup> WIPO, 'Understanding Copyright and Related Rights' (WIPO Publication No 909E, 2016) 12.

which permits exceptions only in certain special cases that do not conflict with normal exploitation of the work, has been interpreted restrictively in some jurisdictions. A more expansive multilateral standard, grounded in the principle of proportionality, would better serve the interests of the global creator economy.

Fourth, platform accountability for over-enforcement should be enhanced through regulatory intervention. The European model of mandatory human review for content moderation decisions, introduced in the Digital Services Act 2022, offers a template for reforming the notice-and-takedown architecture in a manner that better protects user rights without compromising the legitimate interests of rights-holders.<sup>22</sup>

## 7. Conclusion

Fair use doctrine stands at a critical juncture. Conceived in a world of relatively bounded creative economies, it is today called upon to govern a global digital environment in which hundreds of millions of creators produce, remix, and distribute copyrighted content at unprecedented scale. The influencer economy and the broader phenomenon of user-generated content have exposed the structural limitations of both the doctrine itself and the enforcement architecture that surrounds it.

The four-factor test of section 107, as refined by *Campbell v Acuff-Rose* and its progeny, remains a sophisticated instrument for case-by-case analysis. But the systemic challenge of social media copyright is not primarily one of doctrinal sophistication, it is one of scale, automation, and power asymmetry. The doctrinal elegance of transformative use analysis offers little practical protection to a creator whose content is algorithmically blocked within seconds of upload, without human review and without any opportunity to invoke statutory rights.<sup>23</sup>

The reform proposals advanced in this paper, legislative clarification, strengthened DMCA liability for abusive takedowns, international harmonisation, and enhanced platform accountability, are directed at addressing these systemic failures. Taken together, they would preserve the constitutional purposes of copyright law, the promotion of the useful arts and the protection of creative incentive, while giving meaningful effect to the participatory promise of

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<sup>22</sup> European Parliament and Council Directive 2019/790/EU on Copyright and Related Rights in the Digital Single Market [2019] OJ L130/92.

<sup>23</sup> *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith* 598 US 508 (2023).

the digital age.<sup>24</sup>

Copyright law has always evolved in response to technological change. From the printing press to photography, from radio to cable television, the law has adapted, sometimes slowly, sometimes imperfectly, to new modes of creative production and distribution.<sup>25</sup> The social media era demands a comparable evolution: one that takes seriously both the rights of original creators and the irreducibly creative, transformative, and communicative character of the digital content that now constitutes so much of our shared cultural life.



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<sup>24</sup> Rebecca Tushnet, 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It' (2004) 114 Yale Law Journal 535.

<sup>25</sup> *Burrow-Giles Lithographic Co v Sarony* 111 US 53 (1884).