DRAFT 1

Krista Streisel

IP Theory

Fall 2014

Professor David D. Friedman

***Table of Contents***

I. Introduction 2

II. Background 2

Works of Art as “Property” 2

The Public Domain 3

Historical Backdrop 3

III. The Effect of the Regime in the Digital Age 5

Technology Has Changed Everything 5

Removing Barriers to Reproduction and Distribution 5

Facilitating Creation 5

Negative Effects of Outdated Laws in Today’s World 5

IV. Expanding the Fair Use Doctrine 5

Why It Is a Good Idea 6

Why We Must Continue Compensating Artists 6

My Proposed Fair Use Interpretation 7

“The Purpose and Character of the Use” 7

The Remaining Factors 8

How This Approach Plays Out 9

Uses Benefiting the First Artist 9

Uses That Do Not Harm the First Artist 10

Uses That Provide a Net Benefit to Society 10

V. Case Study: Electronic Dance Music 11

# I. Introduction

Strict intellectual property protection has traditionally been defended on the assumption that it is needed to incentivize artists and inventors to create and innovate. However, people have been creating since the beginning of time, without any hope of profiting from their efforts and without any legal protection for their creation. It was only when technology made making the work available to the general public economically feasible did the need for legal protection seem to be a necessary incentive. The ability to reproduce and distribute works to the public enabled the spread of knowledge and ideas to the masses, yet…

Technology has once again improved, making reproduction and distribution instant and costless. A song, film, image, or book can now be copied and sent to millions of people all over the world for free and at *wireless speed*.

# II. Background

## Works of Art as “Property”

Private ownership of physical property makes sense: people have little incentive to invest their time and money in improving a resource if others are free to reap the benefits of the improvements without making the same investment. And it is in each person’s interest to make full use of the resource without improving it.

Physical property is *rivalrous*, meaning that only one person can use the property for a certain purpose at a time. Physical property is also *excludable*, which means that the person in possession of the property can prevent others from using it. For example, if I am wearing a pair of shoes, you cannot wear them at the same time, because the shoes rivalrous, and I can deny you access to my shoes by keeping them away from you.

Intellectual property, on the other hand, has the opposite characteristics: it is non-rivalrous and non-excludable. The non-rivalrous nature of intellectual property means that one person’s use of a particular work does not impair any one’s enjoyment of the same work. For example, if I download a copy of a song, play it on my computer, and then incorporate the song into my own work, my use of the song does not prevent you from simultaneously doing the same thing or from using the song in some other way, nor does it reduce or impair the extent of your use. Intellectual property in non-excludable in that, once I share an idea or expression with the world, I cannot exclude it from others; I cannot effectively “take it back.” Thus, once I play a song for you, you can write down the lyrics or hum the melody, even if I have not given you a copy of the MP3.

Because physical property is rivalrous, treating it as non-excludable in the form of a “commons” can lead to overuse. This point is illustrated in the “tragedy of the commons”: because it is in each person’s interest to use the common resource to the fullest extent, the resource will be depleted. If each person’s cows are free to graze a common pasture, then each has the incentive to add one more cow because, although an additional cow in the pasture is harmful to the collective, it is beneficial to the individual.

Non-rivalrous, non-excludable goods like intellectual property are known as “public goods.” Examples of public goods outside the realm of intellectual property include air and fireworks: a person cannot be excluded from enjoying the benefits of the good, nor does a person’s use of the good make it any less available for others to use.

\*\* Incentives for creation, free riders, etc.

Copyright laws have developed to counteract the negative implications that non-rivalry and non-excludability might have on the creation of new works. Creation often requires an investment of time, labor, and resources, and copyright protection enables creators to recoup their costs and profit from their efforts.  As the argument goes, without protection, competitors could use the IP without sharing in the investment costs, undercutting the creator and preventing him from recovering his investment and realizing a profit.  Faced with a certain loss, many would-be-creators would never make the initial investment for the innovation to come into existence.

## The Public Domain

Thus, unlike physical property, intellectual property is well suited for the “commons.” In fact, intellectual property doctrines reserve a large body of works and aspects of works for free public use. This “intellectual commons” is known as the public domain, and it includes both once copyright eligible works and elements of works ineligible for copyright protection.

In the first category are works of authorship that were once eligible for copyright protection but, because of the passage of time, have since fallen into the public domain. Anyone may copy a public domain work in its entirety.

Non-copyrightable aspects of works comprise the public domain’s second category.

No work (at least none created today) is completely original; each and every work created necessarily incorporates elements from previous works.

## Historical Backdrop

For most of our country’s history, intellectual property was properly protected to the extent necessary to accomplish its purpose: promoting progress.  Copyright law restrained the scope of the restrictions by making only certain types of works eligible for protection, granting the creator few “exclusive rights” to the work, and providing protection for only the duration necessary to incentivize creation.  More fundamental than legal restrictions, however, were the technological limitations that rendered reproducing material far too expensive and time consuming for ordinary people.  Copyright law played no direct role in the lives of the consuming public or the businesses of companies operating in the industries most reliant on copyrights today.[[1]](#footnote-1) “For the first time, the law regulates ordinary citizens generally. For the first time, it reaches beyond the professional to control the amateur—to subject the amateur to a control by the law that the law historically reserved to professionals.”[[2]](#footnote-2)

The “intellectual property clause” is the only clause in the Section 8 enumeration of powers to prescribe a particular means, “by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,”[[3]](#footnote-3) and it is the only clause that specifies a purpose,[[4]](#footnote-4) “[t]o promote the Progress of Science and useful Arts.”[[5]](#footnote-5)

* “To promote the Progress of Science and useful Arts” focuses on the public good[[6]](#footnote-6)
* L. Ray Patterson argued that the progress “is best served by encouraging the distribution of works,” rather than by encouraging their creation. This is because making a work accessible compensates the public for taking the expression of ideas from the public domain. [[7]](#footnote-7) [Merges: LRP suggests authorship supplies no rationale (309)]
  + Promoting creative activity was not the focus of copyright protection at the time of the framing [Nachbar, Merges p. 309]
* Original protections were limited to practical works
* Forms of artistic expression that the framers were familiar with were subject to far greater free use
* Invention of the printing press, and later the ability to capture sounds and videos

The Copyright Act bestows upon the copyright owner the exclusive right to reproduce and distribute copies of the work, publicly display or perform the work, and create derivative works based on the work.[[8]](#footnote-8)

A true artist might not need the incentive to create, but the ability to profit from one’s art might be necessary to make art into a career. Humans have always been driven to create new works of art, make up new stories, seek new knowledge, and make new discoveries, and express themselves through paintings, sculptures, song, re-enactment, dance, and the like.

Creation often requires an investment of time, labor, and resources, and IP protection enables creators to recoup their costs and profit from their efforts.  Once a work has been created, however, Without protection, competitors could use the IP without sharing in the investment costs, undercutting the creator and preventing him from recovering his investment and realizing a profit.  As the argument goes, faced with a certain loss, many would-be-creators would never make the initial investment for the innovation to come into existence.

* Historically, creation was expensive, requiring expensive equipment, the need to hire professionals to edit, reproduction, distribution
  + The artist’s upfront investment of time meant that many needed the incentive of potential future profit to drive creation, while publishers, record companies, etc. needed the potential for future profit to make the work available to the masses

\*\*\* Discuss technological Limitations

# III. The Effect of the Regime in the Digital Age

## Technology Has Changed Everything

The digital revolution and the rise of the Internet changed the dynamic of content creation and distribution, making it possible to create and distribute content for free.

### Removing Barriers to Reproduction and Distribution

The shift from analog to digital content has removed the barriers that previously prevented the public from making copies. Unlike physical copies, digital copies can be created instantly and for free. Moreover, while physical copies were of inferior quality to the original and, like all physical goods, degraded with use and age, digital copies are identical to the original and remain in the same condition. The Internet has removed the additional barrier of physical distribution channels by permitting one user to send a file to another user located across the world, with the second user receiving it almost immediately.

### Facilitating Creation

A second, more significant, change is in the ordinary citizen’s ability to create his own content. With the proliferation of computers, smartphones, and other devices, combined with software performing functions that once required machinery available only to companies, individuals can now partake in creation of culture, rather than merely participate through consuming it.

## Negative Effects of Outdated Laws in Today’s World

Rather than balance interests, current laws impede progress through an overly protective system. The law imposes restrictions that severely hinder our ability to realize the full social utility of digital content, and it restricts individuals’ uses of IP in ways that do not threaten to the incentive to create. Our IP system gives copyright holders the ability to threaten and coerce individuals making fair use of their registered works, and it prevents purchasers from owning the digital content they buy.

* Social waste
* Restricting freedom

# IV. Expanding the Fair Use Doctrine

To align our copyright system with current realities of creation, we should expand the fair use doctrine to cover more forms of free copying and to allow for greater creation of derivative works. Under this approach, consumers could freely copy digital works. In addition, when an artist could use another artist’s work in his own art – either as a derivative work or as a nonessential, background piece – without the need to compensate or obtain the permission of the first artist.

## Why It Is a Good Idea

The primary benefit of expanding the scope of fair use, rather than amending the existing “exclusive rights,” is that fair use is determined using a balancing approach. [\*\* Explain why important \*\*]

Expanding the fair use doctrine is also preferable because the necessary changes could come about through courts broadening their interpretation of existing statutory provisions. The Copyright Act provides four factors for courts to consider when evaluating fair use: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”[[9]](#footnote-9) The approach that I suggest achieves the desired results by merely altering the way the fair use factors are interpreted.

This approach also improves efficiency by cutting out the now unnecessary “middle man.” Because the traditional reproduction and distribution funtions are no longer needed to get copies of works to the public, keeping those fill these reproduction (e.g., book publishers, record labels) and distribution (e.g., brick and mortar bookstores, delivery supply chains) roles in the equation merely drives up costs

* Its also easier to take risks (see Merges p. 308 – Ladd and Chafee)

This approach comports with Locke’s proviso: though each additional work reserves to the artist something that is his own, what it contributes to the public domain far exceeds what it has taken out. The artist’s exclusive right to sell the work is but a sliver of the potential uses others might make of it.

In addition to increasing the number of works created and further developing our culture, widening the scope of fair use can lead to innovation in methods of reproducing and distributing works.

* “The more artistic expression is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff.”[[10]](#footnote-10)

## Why We Must Continue Compensating Artists

Among those participants in the traditional system of creating works and disseminating them to the public, artists are the only participants that remain essential. The ability to create, reproduce, and distribute works using entirely digital means has eliminated the need for the traditional, yet still existent, “exclusive rights” to reproduce and distribute works to the public. Thus, our copyright system must aim to protect artists.[[11]](#footnote-11) With reproduction and distribution costs eliminated, all that remains is the need to compensate artists – not an incentive to create works, but as a reward for their contribution and to compensate them for their time.

Though people created art long before copyright protection existed, some copyright protection is still desirable. And though technology has enabled greater creation, and the explosion of user generated content demonstrates that people are happy to create new works without the incentive of potential profit, our copyright system should still aim to allow artists to profit from their work in some way.

Many artists today create new works purely for because they enjoy doing so or for reasons other than profit.

* Individually, we want to reward the artists we like, both because we value the work they have already created and because we want them to create new works
  + I appreciate the work my favorite artist does, so I want him to be happy and have a comfortable life

\*\*\* Discuss natural rights

[Locke reasoned that the world starts out as a commons, with each person having a property right in his own body and, by extension, “the labor of his body.”  Communal property is converted into private property when someone removes it from the commons, a person mixes it with his labor, and it becomes his.]

Under this approach, some of the “moral rights” will play a larger role, particularly the right of attribution.

## My Proposed Fair Use Interpretation

### “The Purpose and Character of the Use”

The first factor, “the purpose and character of the use,” involves two inquiries: (a) whether the use is of a commercial or noncommercial nature, and (b) whether the use is transformative. While noncommercial uses tend to weigh in favor of finding fair use, and commercial uses tend to weigh against it, a noncommercial use does not necessitate fair use, and a commercial use does not bar fair use.[[12]](#footnote-12)

* The artist must still have opportunities for licensing in commercial contexts, such as uses in advertisements.
* Others should not be able to freely reproduce and distribute the artist’s work for profit if the purpose of the copy is the work itself
  + Examples include websites that charge users a fee to download music and movies; printing a painting on posters, mugs, calendars, bags, etc.

A use is “transformative” if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”[[13]](#footnote-13) A transformative work adds value to the original; it uses copyrightable expression from the original work as raw material, transformed in the creation of new information, new aesthetics, new insights and understanding. “If the secondary use adds value to the original—if [the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”[[14]](#footnote-14) The more transformative the new use, the less the other factors weigh against fair use.[[15]](#footnote-15) A secondary work need not comment on the original work.[[16]](#footnote-16) The test is how a the secondary work “may reasonably be perceived.”[[17]](#footnote-17)

* Using a song or piece of art in a movie, elements of a song in another song, etc. generally will not qualify as transformative – this must change!

### The Remaining Factors

The remaining factors should be balanced to determine whether the user or second artist of a work has given the first artist enough “credit.”

Norms within the field of art and the artist’s genre should also play a role here.

The second factor, “the nature of the copyrighted work,” examines whether the copyrighted work is creative in nature and whether it was published. Creative works, such as photographs, are “closer to the core of intended copyright protection than are more fact-based works” and are thus less likely to weigh in favor of finding fair use.[[18]](#footnote-18) Published works, on the other hand, “are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred.”[[19]](#footnote-19)

* An artist should have the right of disclosure

The third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” examines whether the use uses only as much of the copyrighted work as is necessary to achieve the purpose of the use – whether the use is “reasonable in relation to the purpose of the copying.”[[20]](#footnote-20) This involves two inquiries: (a) quantitative and (b) qualitative. The qualitative analysis considers the amount of the copyrighted work used in the secondary use, as compared to the whole copyrighted work. The qualitative analysis examines the significance of the piece used to the copyrighted work.[[21]](#footnote-21) Even if the secondary work uses only a small portion of the copyrighted work, the use will nevertheless weigh against a finding of fair use if the portion used was the “heart” – the most important part – of the work.[[22]](#footnote-22)

* In some cases, the second artist must provide more than attribution merely in the list of credits buried on his website. For example, a rapper who has made a sample a prominent part of his song would need to include the name of the first artist along side his as an author of the song (e.g., Rapper feat. Artist)

The fourth factor considers the direct market harm caused by the secondary use, as well as the potential harm that could result if the secondary use became widespread and common (*Campbell*). Market harm includes not only diverted sales or lost royalties where consumers substitute the secondary use for the copyrighted work, but also creating barriers to the copyright owner’s entry into new markets and preventing the copyright owner from creating or authorizing derivative works similar to the secondary use.

* Because the first artist will retain the right to license the work for commercial uses, other artists who incorporate the first artist’s work in their own should share licensing revenues

### How This Approach Plays Out

#### Uses Benefiting the First Artist

Often, an artist’s use of another artist’s work will prove to be beneficial to the other artist, because using the first artist’s work will lead, directly or indirectly, to a monetary benefit for the first artist. A second artist’s use will give wider exposure to the first artist’s work, which will help to popularize the first artist, as well as the particular work.

On way this can occur through artist attribution, which can help the original artist garner attention and attract new fans, which can in turn lead to a monetary benefit for the first artist. This can help popularize obscure works and unknown artists, increasing attention paid to and recognition of the artist, which in turn can lead to sales.

For better known artists and more popular works, wider use of the work in other works will expose it to a larger audience and, when coupled with attribution, will help consumers identify the artists, as well as the title of the piece – it may be that they have seen (e.g., on a mug) or heard (e.g., in the artist’s own set, as a clip in an ad) the work before and did not know who made it or the title.

The benefit need not be solely monetary, though. Artists frequently create for purposes other than profit, including recognition in their field. Academics and scholars will find wider exposure of their work particularly valuable. Attribution will also be valuable to those who create works that, by their nature, are difficult to “sign.” For example, despite the millions of people familiar with popular landmarks, many are unaware of the artist who created them. Including the landmark’s artist in the credits of a movie in which the landmark appears will bring recognition to the artist.

#### Uses That Do Not Harm the First Artist

Even when a second use of a work does not benefit the first artist, the second use will often not necessarily harm the first artist either.

One way this may occur is by eliminating dead weight loss. Dead weight loss is the net loss society experiences when a person who values use of a work at a price less than the price charged, so the person forgoes use entirely. The potential user does not receive the benefit of using the work, and the seller misses out on the profit he would have earned from the sale, despite the lower price.

Dead weight loss can occur even when the potential user is not willing to pay for use of the work at all and will only use the work if he can do so for free. People derive benefit from a work by enjoying the experience it provides, gaining the knowledge and ideas it conveys, and incorporating aspects of the work into their own expressions.

Material goods cost money to produce, so the buyer must pay more than the cost to produce for the seller to avoid a loss – dead weight loss exists to the extent of the difference between the total cost to produce the item and the price the buyer is willing to pay. Thus, if a widget costs $3 to produce and the manufacturer offers to sell it for $5, then the manufacturer misses out on $1 of profit, and the would-be-buyer does not obtain any benefit from the widget.

An artist can derive a profit from a particular potential user only if the potential user is willing to pay for use of the work. Unlike material goods, producing an additional copy of the work or permitting an additional use costs the artist nothing – the artist incurs no cost from the reproduction or use. If a person will not pay for the work, then the artist cannot profit from the person, regardless of whether the person uses the work or not. Thus, a dead weight loss exists if the person forgoes use: while the artist suffers no lost profit, the would-be-user loses out on the benefit he would have derived from free use of the work.

* Any amount buyers pay to obtain a copy goes to compensate the artist for work he has already completed, not for the copy itself.
* Though the second artist might prefer to use a certain piece, rather than obtain a license to use it, he may select a different piece that does not require a license to incorporate into his own work
* If a certain book, film, or song is unavailable to download for free, consumers will forgo downloading it at all

#### Uses That Provide a Net Benefit to Society

Even if a second use of an artist’s work does in fact harm the artist (e.g., the artists loses royalties that he otherwise would have earned if the second artist was required to, and in fact did, license the work), that harm may be outweighed by the net benefit to society and development of art in general

* Leads to more works – the very purpose of copyright law
* Reduces barriers to entry for new artists
  + Allows newbies to develop their skills without making the investment
* Eliminates transaction costs – hiring lawyers, negotiating, maintaining collective licensing groups, lost revenue from holdups

# V. Case Study: Electronic Dance Music

*To my knowledge, scholarly legal works have not examined EDM in this context*. The discussions of EDM either have mentioned it only briefly or have focused on the remixing aspect (generally in reference to EDM artists remixing pop songs, which they do far less often than remixing the work of other EDM artists).

I will discuss the nature of electronic dance music (EDM) and how it illustrates many of the points I make in this paper. EDM artists both create their own original music in digital format, using electronic means – the “producer” aspect – and incorporate the works of others into their sets (i.e., continuous streams of music, where multiple songs flow seamlessly), which they perform live or record for an audience – the “DJ” aspect.

Key points:

* The genre relies on sharing: Each EDM artist must use other EDM artist’s works
* Sharing is mutually beneficial: X must use other’s songs in his set, and including Y’s song makes his set more desirable for listeners. The more artists who use Y’s song, the greater Y’s audience and the more popular Y’s song will become.
* EDM is given away for free: Artists make their sets available for consumers to download or stream for free
* Many EDM artists do not require other EDM artists to obtain a license before using their work
* EDM is enjoying huge success: it has quickly become one of the most popular and profitable genres. Artists earn their profits through their performances at nightclubs or enormous music festivals.

The bottom line: EDM artists are permitting others to freely use their works YET they are making tons of money AND more works are being created

1. Lawrence Lessig, Remix**:** Making Art and Commerce Thrive in the Hybrid Economych. 3 (Puomo Digital Publ’g & Mktg. 2008) (Penguin Press 2008). [↑](#footnote-ref-1)
2. *Id*. ch. 5. [↑](#footnote-ref-2)
3. U.S. Const. Art. I, § 8 cl. 8. [↑](#footnote-ref-3)
4. Ralph S. Brown, Eligibility for Copyright Protection: A Search for Principled Standards, 70 Minn. L. Rev. 579, 589-96 (1985); Merges p. 303. [↑](#footnote-ref-4)
5. U.S. Const. Art. I, § 8 cl. 8. [↑](#footnote-ref-5)
6. Ralph S. Brown, Eligibility for Copyright Protection: A Search for Principled Standards, 70 Minn. L. Rev. 579, 589-96 (1985); Merges p. 303. [↑](#footnote-ref-6)
7. L. Ray Patterson, Free Speech, Copyright, and Fair Use, 40 Vand. L. Rev. 1, 3-13, 57-63 (1987); Merges p. 305. [↑](#footnote-ref-7)
8. 17 U.S.C. § 106. [↑](#footnote-ref-8)
9. 17 U.S.C. § 107 [↑](#footnote-ref-9)
10. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 928 (2005). [↑](#footnote-ref-10)
11. For importance of authors, see Paul Goldstein, Copyright, 38 J. Copyright Soc’y 109-111 (1991); Merges p. 301. [↑](#footnote-ref-11)
12. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 (1994). [↑](#footnote-ref-12)
13. *Campbell*, at 579. [↑](#footnote-ref-13)
14. Castle Rock, 150 F.3d at 142 (quotations removed) [↑](#footnote-ref-14)
15. Campbell, 579. [↑](#footnote-ref-15)
16. Campbell, at 577. [↑](#footnote-ref-16)
17. Campbell, at 582. [↑](#footnote-ref-17)
18. Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2002). [↑](#footnote-ref-18)
19. Id. [↑](#footnote-ref-19)
20. Campbell, at 586; Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 629 (7th Cir. 2003). [↑](#footnote-ref-20)
21. Blanch; Campbell [↑](#footnote-ref-21)
22. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 561 (1985). [↑](#footnote-ref-22)