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Culture and Fair Use

Michael P. Goodyear*

The intersections of race and copyright have been underexamined in legal scholarship, despite repeated calls for further scrutiny. The scholarship has so far focused primarily on identifying where copyright has fallen short in protecting the creative works of artists of color. This Article, instead, hopes to offer one viable solution for creating more inclusivity of different cultures in copyright: the approval of cultural adaptations under fair use.

Cultural adaptations—the transformation of preexisting works to reflect the cultural and social mores and norms of a different group—would appear at first glance to be prohibited as derivative works, which, under the Copyright Act, can only be created by copyright owners. A culture-centered approach to fair use, however, offers the possibility of permitting at least certain cultural adaptations. While this question would be one of first impression for courts, cultural adaptations can—and should—be understood to constitute fair use. Cultural adaptations comment on and transform the original work by recontextualizing it for different cultural markets. In addition, permitting cultural adaptations advances the goal of copyright and the public policy goal of diversity in expression and representation by fostering the creation of more works, and especially more works for and by minority artists.

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* J.D., University of Michigan Law School (2020); A.B., University of Chicago (2016). The author would like to thank Trevor Reed and Todd Larson for their invaluable insights and suggestions on earlier drafts of this Article. The author would also like to thank Michael Modak-Truran for his support and help in developing the ideas presented in this Article. Finally, the author would like to thank the editors of the Fordham Intellectual Property, Media, & Entertainment Law Journal for their helpful suggestions and for bringing this article to print.

INTRODUCTION

Copyright offers protection for the works of all artists. Whether an artist weaves a Navajo rug, composes a rap, fires a ceramic tea-cup, or films the next Hollywood blockbuster, the work should be protected so long as it meets the basic requirements for copyright. Copyright law has not, however, provided equal opportunities for artists of all races. The Copyright Act is framed in a Western understanding of art and creativity—a poor fit for many traditional and modern forms of creativity practiced by Black, Native American,[1]

[1] The debate about whether the term "Native American" or "American Indian" is more politically correct is a complex one. Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, 23 AM. INDIAN Q. 1, 1 (1999). The general consensus of Native people appears to be that they prefer to be identified with their specific tribe. *See* Amanda Blackhorse, *Blackhorse: Do You Prefer 'Native American' or 'American Indian'? 6 Prominent Voices Respond*, INDIAN COUNTRY

and Latinx communities, as well as others.[2] This has allowed white artists and industries to appropriate the artistic creations of other races and cultures with little compensation to the original creators. It has further facilitated the development of significant barriers to certain genres.[3] However, copyright can be recrafted in a way that both considers and helps promote culture.

Almost immediately, one is confronted with the problem that the term "culture" is inherently opaque and difficult to define.[4] The United Nations Educational, Scientific, and Cultural Organization's ("UNESCO") Convention on the Protection and Promotion of the Diversity of Cultural Expression defines cultural diversity as the "manifold ways in which the cultures of groups and societies find expression . . . [including] through diverse modes of artistic creation

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TODAY (Sept. 13, 2018), https://indiancountrytoday.com/archive/blackhorse-do-you-prefer-native-american-or-american-indian-kHWRPJqIGU6X3FTVdMi9EQ [https://perma.cc/G5WD-5QDA]. To address Native people as a larger group, this Article uses the terms "Native" and "Native American" to identify those tribes historically residing within the borders of the United States. Federal law instead refers to Native American individuals as "Indian" or "American Indian." 25 U.S.C. § 2201. Since this Article also discusses the country of India, using those terms to refer to Native American persons could be confusing for the reader. While Native Hawaiians are Indigenous communities within the United States, the application of federal law to them has been different due to them not being considered Indian for the purpose of federal Indian law. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 1041–44 (7th ed. 2017) (noting that there have been efforts to change this status quo). This Article uses the term "Indigenous" to refer to all native peoples, both within and outside of the United States.

2 *See* K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER SOC. POL'Y & L. 365, 365–66 (2008) (noting how U.S. copyright excluded Black artists from the beginning of the United States); Sherylle Mills, *Indigenous Music and the Law: An Analysis of National and International Legislation*, 28 Y.B. TRADITIONAL MUSIC 57, 57, 62 (1996) (describing the non-commercial perceptions of arts and culture in Indigenous and other cultures).

3 *See* Greene, *supra* note 2, at 370–71 (describing the appropriation of Black artistic creations by white people); *see also* Trevor G. Reed, *Fair Use as Cultural Appropriation*, 109 CAL. L. REV. 1373, 1392–93 (2021) (describing how the flexibility of fair use has permitted cultural appropriations of Native American culture and creative works).

4 Fiona Macmillan, *Cultural Diversity, Copyright, and International Trade*, *in* 2 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 411, 414 (Victor A. Ginsburgh & David Throsby eds., 2014) (noting the inherent circularity of defining cultural diversity); Sean A. Pager, *Does Copyright Help or Harm Cultural Diversity in the Digital Age?*, 32 KRITIKA KULTURA 397, 399 (2019) ("Such broad, somewhat circular language offers little hint as to how to concretize diversity. . . . [I]n practice, different sorts of diversity tend to be emphasized in different contexts.").

[and] production . . . ."[5] Cultural activities, goods, and services are those that "embody or convey cultural expressions, irrespective of the commercial value they may have."[6] In the United States, a focus on culture and cultural diversity typically centers around race, gender, political viewpoint, and other forms of sociologically created differences.[7] This Article uses the U.S.-centric understanding of culture, defining it specifically as a unique form of expression that is produced, consumed, and recreated—at least in part, although not exclusively or monolithically—by a racial or ethnic social group.[8]

Despite the important role of culture in copyright, it has largely been unexamined in the literature. In 1999, lawyer and entertainment law scholar K.J. Greene found that legal scholarship mostly neglected the relationship between culture and copyright.[9] Despite calls for examining the racial implications of intellectual property,[10] this dearth of scholarship has largely persisted. Scholarship examining the relationship between minority cultures and copyright primarily focuses on identifying the problem of how U.S. copyright affects

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5 Convention on the Protection and Promotion of the Diversity of Cultural Expressions art. 4(1), Oct. 20, 2005, 2440 U.N.T.S. 311.

6 *Id.* art. 4(4).

7 Philip M. Napoli, *Diminished, Enduring, and Emergent Diversity Policy Concerns in an Evolving Media Environment*, *in* TRANSNATIONAL CULTURE IN THE INTERNET AGE 165, 167 (Sean A. Pager & Adam Candeub eds., 2012) (referring to the most central of axes of social differences as influencers of culture). *Cf. id.* at 172–73 (discussing that other countries typically understand cultural diversity to refer to different languages and nationalities).

8 Future scholarship could apply the arguments articulated in this Article to cultural works created on the basis of other axes of social differences, such as gender and sexuality.

9 K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMMC'NS & ENT. L.J. 339, 342 n.11 (1999) ("Few intellectual property scholars have examined the relationship between culture and copyright. This fact seems surprising since much of the subject matter of copyright—art, music, literature, dance—must be considered products of various cultures.").

10 *See generally* Anjali Vats & Deidré A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735 (2018) (offering "context for the conversations that are occurring in Critical Race IP.").

minorities[11] rather than suggesting solutions.[12] In looking to rectify the tension between culture and copyright, the most commonly advocated solution is the adoption of moral rights,[13] a set of rights most countries have incorporated into their copyright laws, but that remain largely unrecognized in the United States.[14] A recent article by Trevor Reed takes a unique perspective by arguing that cultural appropriation (of Native American works in particular) should be limited by reinvigorating the second fair use factor: the nature of the

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[11] *See, e.g.*, Robert Brauneis, *Copyright, Music, and Race: The Case of Mirror Cover Recordings* 1–3 (Geo. Wash. Univ. L. Sch., Legal Stud. Rsch. Paper No. 2020-56, 2020) (identifying the racial dimension inherent in music copyright through the example of mirror covers); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997) (discussing how U.S. laws benefit Native American artists that want to market their crafts, but are poorly equipped to prevent all unauthorized uses of Native American arts and traditions); Greene, *supra* note 2 (discussing how copyright protections pose disparate problems to different races and genders, but have been particularly harmful to Black women); Bryan Bachner, *Facing the Music: Traditional Knowledge and Copyright*, 12 HUM. RTS. BRIEF 9, 9 (2005) (noting how copyright fails to protect traditional knowledge of Indigenous communities).

[12] The most prominent exception is K.J. Greene, who suggested reparations as a possible solution for past copyright wrongs against Black artists. K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1209–12 (2008). Anjali Vats and Deidré A. Keller suggested taking a critical race lens to examine intellectual property, which could lead to more potential solutions in the future. *See generally* Vats & Keller, *supra* note 10.

[13] Moral rights, or *le droit moral*, protect the "part of the artist's own being or personality [that] is incorporated into the work," providing artists with "certain perpetual rights . . . that can affect future treatment of the work." Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Is U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 108–09 (2004). Moral rights have been suggested as a solution for the disconnect between culture and copyright by several scholars. *See id.* at 106–28 (advocating for the expansion of state and federal moral rights protections in the United States); *see also* Greene, *supra* note 12, at 1202–07 (decrying the limited moral rights available under U.S. copyright law and how moral rights violations have particularly harmed Black artists); Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 492–93 (2005).

[14] The scant moral rights that are available under the U.S. Copyright Act are based on the Visual Artists Rights Act ("VARA"). Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law,* 41 HOUS. L. REV. 263, 282 (2004) ("The enactment in 1990 of the Visual Artists Rights Act (VARA) did grant limited attribution rights, but only with respect to an extremely narrow class of works."); *see also id.* at 300 ("VARA's coverage is too limited to supply a meaningful source of attribution rights for most authors . . . .").

copyrighted work.[15] This Article, instead, acknowledges that cultural appropriation by white people is a problem, and that it will likely remain one, but it reverses the lens to instead focus on how non-white authors can culturally adapt works intended for white audiences to reach diverse and new markets. In a previous Article, I advocated a standalone cultural adaptation exception for copyright in the context of film in India.[16] However, that proposal is outside the realm of existing U.S. copyright law.

This Article, instead, hopes to offer one potential practical method under the U.S. Copyright Act to mitigate the disparate treatment of racial minorities under U.S. copyright law. Drawing inspiration from my previous work on cultural adaptation in Bollywood, this Article examines the question of cultural adaptation under the U.S. Copyright Act. It proposes that under existing precedent, fair use can be interpreted to allow cultural adaptations, increasing the possibility for artists from different cultures to adapt works to their own unique experiences and audiences.

In Part I, this Article traces some of the most notable ways in which U.S. copyright law has excluded other cultures. Part II defines cultural adaptations and how creative works are partially consumed based on one's race and culture. Part III sets the scene for the legal analysis of this Article by examining whether the primary purpose for copyright in the United States is to allow authors to profit or to encourage the creation of new works. In Part IV, this Article explains how U.S. fair use offers an opportunity for cultural adaptations not present in other countries. It then fits cultural adaptations within the confines of the four-factor fair use test. Part V explains some of the most salient benefits of permitting cultural adaptations under fair use before offering concluding thoughts.

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15 Reed, *supra* note 3, at 1418–36.

16 Michael P. Goodyear, *Adapting Indian Copyright: Bollywood, Indian Cultural Adaptation, and the Path to Economic Development*, 23 VAND. J. ENT. & TECH. L. 517 (2021).

I. THE NEGLECT OF NON-WHITE CULTURE IN U.S. COPYRIGHT

The Copyright Act of 1976 does not explicitly discriminate on the basis of race or culture.[17] But copyright law was originally crafted in a Western society strongly influenced by the forces of racism and nationalism.[18] Race is the socially constructed differentiation of groups based on phenotype.[19] Despite being a social construction, race (and its associated cultures) has long been a critical factor in how the law has treated individuals, whether by design or in effect.[20] To understand the predicament of racial minorities under copyright law, it is important to first examine the history of copyright law in the United States. Through the lens of critical race theory, this Part explains how the structural elements of U.S. copyright law have left minority artists' works unprotected and open to white exploitation.

The rise of critical race theory from the 1980s onward increased professional and scholarly consideration of how law affects different racial groups—with the ultimate goal being a "norm of 'racial equality' where different groups will not continue to suffer the oppression and subordination that they have suffered."[21] While races and cultures are continuously shifting and evolving, critical race theory has understood intellectual property principally as a model for protecting white, or Western, privilege, as well as this group's understanding of society.[22] As communications scholar Anjali Vats

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17 *See* Brauneis, *supra* note 11, at 1.

18 *See* Vats & Keller, *supra* note 10, at 745. It should be noted that copyright was protected in the U.S. Constitution, which, when drafted, explicitly excluded Black men and women from freedom and copyright protection for the works they created. *See* Greene, *supra* note 2, at 365–66.

19 *See* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7–8 (1994).

20 *See id.* (describing how race dominates every aspect of our lives, including the role of and impact of law on individuals); *see also generally* Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293 (2018) (using disability law frameworks to examine and address discrimination and structural inequality against Black people under U.S. law); William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1 (2011) (providing an overview of structural racism in U.S. law).

21 Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21, 25 (2005); *see also* Greene, *supra* note 2, at 367–68.

22 *See* Vats & Keller, *supra* note 10, at 740–41, 760–61.

and intellectual property law scholar Deidré Keller concluded, a study of race and culture in the context of intellectual property should not be limited to the dichotomy of white and Black, but instead a comparison of the white or Western-created laws and their effects on racial minorities.[23]

The structure of copyright protections and rights under the Copyright Act have long provided unequal opportunities for racial minorities and their cultural expressions.[24] From 1776 until the 1960s, U.S. intellectual property law's relationship with artists of color was defined by "appropriation, degradation, and devaluation."[25] The music industry, in particular, profited enormously from the innovation of Black artists by capitalizing on fundamental genres of American music such as ragtime, blues, and jazz, while providing minimal remuneration or recognition for those styles' Black progenitors.[26] Music is representative of how U.S. copyright law considered Western perspectives on creative works, while failing to recognize non-Western artists and artistic traditions. The structural elements of U.S. copyright—(1) requiring fixation in a tangible form, (2) disfavoring improvisation, and (3) mandating a known, recently living author—have led to lower compensation and recognition for racial minority artists or withheld protection altogether.[27]

Fixation is a basic requirement for any U.S. copyright protection—the work must be contained in a tangible physical form.[28] This model of protection imposed a distinctly Western European tradition on copyright for all music.[29] While Western Europe has a tradition of composers who drafted their music in written notation,[30] other cultures around the globe have often lacked a written composition

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23 *Id.* at 761.

24 *See id.* at 771 (noting the "inadequacies of conventional intellectual property law to protect all forms of knowledge"); *see also* Greene, *supra* note 9, at 367 (noting that although copyright law is facially neutral, it was created in a society of racial inequality).

25 Greene, *supra* note 2, at 370.

26 *Id.* at 372–73.

27 *See* Greene, *supra* note 9, at 342, 378–79.

28 17 U.S.C. §§ 101–102.

29 *See* Bachner, *supra* note 11, at 1.

30 Especially from the nineteenth century, orality gave way to composition and notation. *See* Jason Toynbee, *Copyright, the Work and Phonographic Orality in Music*, 15 SOC. & LEGAL STUD. 77, 83 (2006).

tradition, instead placing greater emphasis on a keen musical ear and improvisation.[31]

The centrality of fixation for music was set in an infamous court decision from 1948. In *Supreme Records v. Decca Records, Inc.*, the issue before the Southern District of California was whether a white singer's cover recording of a song recorded by a Black singer was lawful.[32] In 1948, sound recordings were not yet protected under federal copyright, so the case was brought under unfair competition law.[33] But, in deciding the case, Judge Yankwich imposed his own (white) musical tastes on intellectual property law; he concluded the original recording by a Black artist was "thi[c]k, mechanical, [and] lacking inspiration," while a cover created by a white artist was "rich, against a musically colorful background. . . . sound[ing] full, meaty, [and] polished."[34] In addition, he held that anything added to a song in a recording alone, rather than the underlying musical work, could be freely copied.[35] This was disastrous for Black and other non-white musicians, many of whom did not write down their songs in musical notation, which was necessary prior to 1978 to receive copyright protection for musical works.[36]

This long-standing bias favoring written over oral music[37] is inherent in U.S. copyright law, leaving out protections for Black and other musical traditions. For example, African tribal music was transmitted orally for generations, and this tradition was maintained when Africans were brought as slaves to the United States.[38] Based on their African oral musical traditions and enforced illiteracy under U.S. slavery, enslaved Black people created and shared music almost exclusively through performance.[39]

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31 *See, e.g.*, DOUGLAS COHEN ET AL., MUSIC: ITS LANGUAGE, HISTORY, AND CULTURE 49–50, 56–58 (2015) (describing the oral musical traditions of Africa and East Asia).

32 90 F. Supp. 904, 905, 910 (S.D. Cal. 1950) (noting that the original version was recorded by Paula Watson, while the cover at issue was recorded by Evelyn Watson).

33 *Id.* at 906–08. Sound recordings were first granted federal copyright protection in the Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

34 *Supreme Recs.*, 90 F. Supp. at 912.

35 *Id.* at 909, 911 (indicating that additions to a song were non-copyrightable performance elements).

36 *See* Brauneis, *supra* note 11, at 19–22.

37 *See* Judith Becker, *Is Western Art Music Superior?*, 72 MUSICAL Q. 341, 350 (1986).

38 THOMAS E. LARSON, HISTORY AND TRADITION OF JAZZ 16–17 (5th ed. 2012).

39 *See* Hines, *supra* note 13, at 470.

In many ways, the experiences and methods of creation by Black artists—along with their under-inclusion in copyright law—can be likened to those of Indigenous artists.[40] Native American and Indigenous artwork, music, and traditional knowledge are also frequently left outside the confines of intellectual property protection; this is due to existing for millennia, lacking an identifiable author, and being created by multiple people or an entire community.[41] Scholar Trevor Reed explained that the unequal treatment of Indigenous creative works stems from the Copyright Act (1) requiring that works be fixed; (2) requiring that they are original; and (3) not allowing ideas to be protected.[42] Indigenous cultures seldom physically record folklore or traditional knowledge.[43] For example, Indigenous traditional oral music in the United States and around the world rarely manifests in written form.[44] The resulting lack of protections for Indigenous artists led to their exploitation by creative industries.[45] For example, the Zulu tribesman who composed the famous song from Disney's *The Lion King*, "The Lion Sleeps Tonight," was merely paid a small amount and only received credit for writing the song decades later.[46] The Zulu composer was not alone; the low

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40 *See* David E. Wilkins, *African Americans and Aboriginal Peoples: Similarities and Differences in Historical Experiences*, 90 CORNELL L. REV. 515, 516–23 (2005) (describing the broader similarities between the mistreatment and lower legal protections throughout U.S. history for Black and Native American people).

41 *See* Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and Very New*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929, 957–58 (2002); *see also* Erin M. Genia, *The Landscape and Language of Indigenous Cultural Rights*, 44 ARIZ. ST. L.J. 653, 670 (2012) ("In general, [I]ndigenous peoples' worldviews hold communally owned property and stewardship as paramount."); Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law?*, 7 J. HIGH TECH. L. 180, 180 (2007) ("[T]his Western concept of a limited monopoly over a symbol, song or ceremony contradicts Native American conceptions of cultural property and what it means to them and their existence both as a sovereign community and as an individual.").

42 Reed, *supra* note 3, at 1392–93.

43 *See* Farley, *supra* note 11, at 28–29.

44 *See* Mills, *supra* note 2, at 64–65 ("While it is traditional for Western music to be reduced to a tangible, written or recorded memorialization, music from oral traditions is rarely crystallized into fixed forms.").

45 *See* Genia, *supra* note 41, at 669 (describing how cultural exploitation is facilitated, in part because of intellectual property laws, as they are now, "are inadequate to deal with concerns specific to Indigenous cultural rights . . . .").

46 *See* David Browne, *'The Lion Sleeps Tonight': The Ongoing Saga of Pop's Most Contentious Song*, ROLLING STONE (Nov. 7, 2019, 11:39 AM),

degree of originality required for copyright allowed imitators of artistic styles to make windfalls while the progenitors of those styles languished in obscurity since artistic style is not eligible for copyright protection.[47] Several scholars and lawyers have tried to find a place for Indigenous community cultural expressions and traditional knowledge through specific intellectual property protections.[48] However, problems with using copyright to protect Indigenous cultural heritage have persisted. Such oral forms of music creation were directly at odds with U.S. copyright law's requirement that music be notated to receive protection.[49]

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https://www.rollingstone.com/music/music-features/lion-sleeps-tonight-lion-king-update-879663 [https://perma.cc/K5YF-SV77].

47 *See* Greene, *supra* note 9, at 381, 383 (noting examples of progenitors of jazz dying penniless).

48 *See, e.g.*, Giovanna Carugano, *How to Protect Traditional Folk Music? Some Reflections upon Traditional Knowledge and Copyright Law*, 31 INT'L J. SEMIOTICS L. 261 (2018) (arguing for a place for traditional music within copyright law); Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275 (2001) (advocating for a specific international law protecting traditional knowledge); Farley, *supra* note 11, at 2–3 (concluding that intellectual property, at present, can provide sufficient protection for those Indigenous artists that want to disseminate their art, but not for Indigenous groups preventing outside use of their art); Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1 (2001) (describing the difficulties with protecting traditional knowledge under existing copyright law and efforts by different countries to address this shortcoming); Richard Awopetu, Note, *In Defense of Culture: Protecting Traditional Cultural Expression in Intellectual Property*, 69 EMORY L.J. 745 (2020) (suggesting that U.S. federal trademark law prevent the registration of Indigenous trademarks by non-Indigenous entities); Emily Choi, *Safeguarding Native American Traditional Knowledge Under Existing Legal Frameworks: Why and How Federal Agencies Must Re-Interpret FOIA's "Trade Secret Exemption,"* ADVISORY COUNCIL ON HIST. PRES. (2019), https://www.achp.gov/sites/default/files/2019-10/FOIA%20tribal%20confidentiality%20paper%2010.21.19.pdf [https://perma.cc/G5W2-YP33] (advocating for defining traditional Native knowledge as trade secrets under FOIA); Anil K. Gupta, *Rewarding Conservation of Biological and Genetic Resources and Associates Traditional Knowledge and Contemporary Grassroots Creativity* (Indian Inst. Mgmt., Working Paper No. 2003-01-06, 2003), https://www.researchgate.net/profile/Anil-Gupta-8/publication/46436376_Rewarding_Conservation_of_Biological_and_Genetic_Resources_and_Associated_Traditional_Knowledge_and_Contemporary_Grassroots_Creativity/links/562dd8ba08ae04c2aeb4ab0e/Rewarding-Conservation-of-Biological-and-Genetic-Resources-and-Associated-Traditional-Knowledge-and-Contemporary-Grassroots-Creativity.pdf [https://perma.cc/AT39-8EUJ] (describing the role of intellectual property rights for benefit sharing with traditional communities).

49 *See* Hines, *supra* note 13, at 470.

The fixation issue was not remedied by including sound recordings in the Copyright Act. Sound recordings have been protected since 1972, but receive more narrow protections than other copyrightable works.[50] The sound recording itself cannot be copied directly under copyright law, but anyone can freely imitate a sound recording, provided there is not an underlying musical work with copyright protection of its own.[51] After 1978, phonorecords of sound recordings could be used to meet the fixation requirement for musical works.[52] Fixation in a sound recording now qualifies for musical work copyright registration, but only if the recording artist and composer are the same person.[53] However, this shift in the law still requires fixation—neglecting songs that were neither written nor recorded and merely sung or performed live.[54]

Improvisation is another non-Western musical practice not encompassed within U.S. copyright law. Improvising plays a central role in a number of musical traditions. African music emphasizes improvisation—with varying stanzas, melodies, and notes—instead of written stasis.[55] Stemming from these African musical traditions, improvisation maintains an important and central role in Black music in the United States, from spirituals to hip hop.[56] The various musical styles that emerged from Black musical traditions, such as jazz and blues, emphasize spontaneous—never written—improvisation.[57] Indeed, blues music was traditionally not transcribed on sheet

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50 17 U.S.C. § 114(b) ("The exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.").

51 *See* Brauneis, *supra* note 11, at 21–22.

52 *See id.* at 22.

53 *See id.* (Under the 1976 Act, "musical works need not be fixed in visible notation, but can be fixed in 'phonorecords,' that is, copies of sound recordings."); U.S. COPYRIGHT OFF., CIRCULAR 56A, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 2 (Mar. 2021), https://www.copyright.gov/circs/circ56a.pdf [https://perma.cc/XVP2-GRGQ].

54 *See* U.S. COPYRIGHT OFF., MUSICAL WORKS, SOUND RECORDINGS & COPYRIGHT 2, https://www.copyright.gov/music-modernization/sound-recordings-vs-musical-works.pdf [https://perma.cc/WH9L-ZP4M] (Feb. 2020) (noting that fixation is required for sound recordings, such as in CDs or digital music files).

55 *See* Hines, *supra* note 13, at 472.

56 *See id.*

57 *See id.* at 478, 481.

music at all, instead focusing on the musician's ear and building off common lyrics and musical forms.[58] African and Black music are not alone in utilizing improvisation. For instance, Middle Eastern music emphasizes melodic, improvised solos (called "taqsims") and ornamentations.[59] Indian classical music is also heavily based on unwritten improvisation.[60]

Despite the broad importance of improvisation across global musical traditions, it is not protected under, and even maligned by U.S. copyright law. Improvisation, as a spontaneous and live performance, does not meet the fixation requirement for copyright. In addition, improvisation from set melodies is at odds with copyright's understanding of derivative works. A derivative work is a work "based upon one or more preexisting works . . . in which a work may be recast, transformed, or adapted."[61] Thus, arrangements or covers of copyrighted musical works qualify as derivatives and receive copyright protection.[62] However, derivative works can only be authored by the copyright holder (i.e., the composer), as it is one of the copyright holder's exclusive rights.[63] Unlike other exclusive rights conferred upon the owner of a copyrighted musical work, there is no

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58 *See* Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 596 (2010).

59 *See* JOHNNY FARRAJ & SAMI ABU SHUMAYS, INSIDE ARABIC MUSIC: ARABIC MAQAM PERFORMANCE AND THEORY IN THE 20TH CENTURY 76–77 (2019) ("One of the most recognizable and distinguishing features of Arabic music is ornamentation (*zakhrafa* in Arabic): the art of taking a plain melody and embellishing it."); Bashir Saade, *East Meets East—A Shakuhachi and Nay Duo*, MIDDLE E. INST. (Sept. 16, 2013), https://www.mei.edu/publications/east-meets-east-shakuhachi-and-nay-duo [https://perma.cc/D3PQ-NNLY]; *see also* Marie Irene Heinrich, The Dastgāh Concept in Contemporary Iranian Art Music: Navigating Interculturalism in Reza Vali's *Kismet* for Flute Trio 4 (Dec. 1, 2017) (Doctoral dissertation, Griffith University), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3280534 [https://perma.cc/HL2A-WT77] (describing the importance of improvisation in Persian music, but noting that Western classical musicians typically do not improvise).

60 NEIL SORRELL & RAM NARAYAN, INDIAN MUSIC IN PERFORMANCE: A PRACTICAL INTRODUCTION 1–2, 4 (1980) (describing the importance of improvisation in North Indian music, and how this improvisation is done inside the systems of *rag* and *tal*, and how South Indian music, in comparison, tends to have less scope for improvisation).

61 17 U.S.C. § 101.

62 17 U.S.C. § 103.

63 17 U.S.C. § 106(2); *see also* Arewa, *supra* note 58, at 598; Brauneis, *supra* note 11, at 24; U.S. COPYRIGHT OFF., *supra* note 53, at 2.

compulsory license for derivative works.[64] This allows the holder of a copyright in a musical work to refuse or condition the creation of a derivative work on unequal or even unconscionable terms, such as requiring the performer to sign over all rights in the derivative work.[65]

Related to the derivative work problem, a new issue has emerged since the inclusion of sound recordings in the Copyright Act of 1976: sampling—"the act of taking a portion of one sound recording and reusing it as an instrument or an audio recording in a different song or piece."[66] For example, the modern genres of hip hop and rap both depend heavily on sampling for musical expression.[67] Yet, sampling was quickly blocked by the courts. In *Grand Upright Music, Ltd. v. Warner Brothers Records*, the Southern District of New York held that Biz Markie's rap song "Alone Again" impermissibly sampled a portion from Gilbert O'Sullivan's "Alone Again (Naturally)."[68] The Court held—devastatingly for genres like rap—that sampling without permission from the original copyright owner constituted blatant copyright infringement.[69] Obtaining licenses for every sample presented a significant logistical and financial burden

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64 *See* Michael P. Goodyear, *Synchronizing Copyright and Technology: A New Paradigm for Sync Rights*, 87 MO. L. REV. (forthcoming 2022) (manuscript at 15) (on file with author) (explaining how compulsory licenses exist only for the reproduction and distribution of music works, but not other rights).

65 *See* Brauneis, *supra* note 11, at 24.

66 *The Ultimate Guide to Digital Sampling*, SOUNDBRIDGE (June 10, 2019), https://soundbridge.io/digital-sampling [https://perma.cc/PB7S-AJ5S].

67 *See* Hines, *supra* note 13, at 488; *see also generally* Andrew Bartlett, *Airshafts, Loudspeakers, and the Hip Hop Sample: Contexts and African American Musical Aesthetics*, 28 AFR. AM. REV. 639 (1994) (discussing the context and importance of sampling in hip hop and rap).

68 780 F. Supp. 182, 183–85 (S.D.N.Y. 1991).

69 *Id.* It should be noted, however, that there is a circuit split over whether sampling is *per se* copyright infringement. In addition to the court in *Grand Upright Music*, the Sixth Circuit also held that all sampling is *per se* copyright infringement, as sampling requires willful copying. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801–02 (6th Cir. 2005) (rejecting a de minimis defense for sampling). The Ninth Circuit explicitly rejected the holding in *Bridgeport*, however, holding that the de minimis rule applied for sampling. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 880, 884, 887 (9th Cir. 2016) (holding that a three-horn hit was not infringement because it was a de minimis use). A de minimis defense alone, however, only allows minimal borrowing of a sound recording, such as the single three-horn hit in *VMG Salsoul*, which is far less than the borrowing usually necessary for forms of expression such as rap.

for rap artists.[70] And unlike other parts of music copyright, there is no compulsory license for sampling (i.e., reproducing the sound recording); it is instead up to the copyright owner's discretion whether to license the work or not, and to name the price.[71] This forced rap artists to change how they create music or risk copyright sanctions.[72] Indeed, the challenges posed by copyright to Black artists have led many to alter their creativity or leave music entirely.[73]

A third way in which U.S. copyright law has not equally protected racial minorities' creative works is in requiring a known, recently alive author to gain copyright protection.[74] Many centuries-old, traditional Indigenous and non-Western songs and arts have communal or unknown creators.[75] U.S. copyright law requires a known author and only protects works for a limited period of time, leaving these important but ancient works in the public domain.[76] While such works remain unprotected, others can exploit traditional music and arts for their own profit without worrying about copyright infringement claims.[77] This facilitates the free commercial repurposing of Indigenous cultural symbols and practices.[78] U.S. copyright law defines creative arts as endeavors that are at least partially about making a profit,[79] but this commercial approach is at odds with other

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70 *See* Hines, *supra* note 13, at 490 ("The process was lengthy; on the eve of his album release, an artist might still be awaiting permission to use a sample.").

71 *See id.*; *see also* Brauneis, *supra* note 11, at 24.

72 *See* Hines, *supra* note 13, at 491 (noting, for example, that the protection of sound recordings from sampling "destroyed the creative sampling styles of rap groups such as Public Enemy, who distinguished themselves as a rap group via their clever use of hundreds of indecipherable samples in their songs.").

73 *See id.* at 491–92 (remarking that the copyright regime "punishes those who push musical artistry to new levels.").

74 *See* Greene, *supra* note 9, at 354–61.

75 *See* Mills, *supra* note 2, at 63 ("In many non-Western or traditional communities, music is passed through generations, owned 'temporarily' by certain individuals or groups.").

76 *See id.* at 62–63.

77 *See id.* at 59–60 (noting that the "market for non-Western sounds . . . provides . . . artists and companies [an incentive] to exploit the lack of legal protection for non-Western music."); Bachner, *supra* note 11, at 1 (arguing that the United States "consider[s] traditional music to be part of the public domain.").

78 *See* Dan Burk, *Copyright, Culture, and Community in Virtual Worlds*, 5 LAWS 1, 9 (2016).

79 *See* Twentieth Century Music Co. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative

artistic traditions. For example, Indigenous and non-Western societies around the globe value music as integral to their communities' culture, and for non-commercial purposes such as medicine.[80] The commercial appropriation of Indigenous cultural expression can be especially harmful due to the spiritual or sacred nature of these works.[81] Thus, in these three ways, copyright law's structure poorly serves living musical traditions.[82]

In response to the inequality perpetrated by Western copyright laws, other countries have started providing more robust copyright protections for diverse and Indigenous creative arts. In Senegal, for example, the government passed legislation specifically protecting folklore from unauthorized use in 1973, requiring royalty payments when using folklore works.[83] Meanwhile, Qatar protects national folklore and assigns authorship to the state to prevent improper use or commercial exploitation of traditional works.[84] In Brazil, copyright law specifically provides protection for performers, including those performing folklore expressions.[85] Azerbaijan does not protect

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labor. But the ultimate aim is, by this incentive, to stimulate artistic activity for the general public good."). More recent studies have suggested that the incentive-driven structure of copyright does not necessarily make sense for encouraging creativity. *See, e.g.*, David A. Simon, *Culture, Creativity, & Copyright*, 29 CARDOZO ARTS & ENT. L.J. 279, 283 (2011) (suggesting "culture is composed of entities that replicate for their own sake.").

80 *See* Mills, *supra* note 2, at 57, 62. For example, the Pintupi in Australia use music for war, youth initiation, and healing. *See id.* at 62.

81 *See, e.g.,* Kremers, *supra* note 13, at 108 n.619; Reed, *supra* note 3, at 1384–88. Trademarks that use Native American tribes' names or imagery are also allowed, especially after the Supreme Court rulings in *Matal v. Tam* and *Iancu v. Brunetti* that § 2(a) of the Lanham Act, prohibiting disparaging, immoral, or scandalous marks, was unconstitutional. *See* Anthony J. McShane & Andrea Stein Fuelleman, *The Trademarks THE SLANTS, REDSKINS, and Now FUCT Are Registrable Trademarks Following the Supreme Court's* Iancu v. Brunetti *Ruling*, 31 INTELL. PROP. & TECH. L.J. 1, 1–2 (2019) (noting that the mark "REDSKINS," previously found to be unregistrable by a court, was reinstated following *Tam*).

82 *See* Arewa, *supra* note 58, at 602.

83 Law No. 2008-09 of January 25, 2008 on Copyright and Neighboring Rights in Senegal, arts. 156–57 (Sen.), https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/sn/sn004en.html [https://perma.cc/H9AN-VB4A]; *see also* Mills, *supra* note 2, at 71–72.

84 Law No. 7 of 2002 on the Protection of Copyright and Related Rights, arts. 1, 32 (Qatar), https://wipolex.wipo.int/en/text/129460 [https://perma.cc/59DX-EEMF].

85 Lei No. 9.610, de 19 de Fevereiro de 1998, Diário Oficial da União [D.O.U.] de 20.2.1998 (Braz.), https://wipolex.wipo.int/en/text/490948 [https://perma.cc/MN7X-HAZ4].

works of folklore under copyright, but instead protects these works under a separate law entirely.[86] Similarly, Ethiopia includes tangible and intangible cultural heritage under its cultural heritage protection law, which prevents uses of traditional artistic expressions and works that impair their historical, scientific, or artistic value.[87] Many other countries at least acknowledge the special position of traditional knowledge under copyright and patent law, if not provide active protection for it.[88]

In stark contrast, U.S. copyright law and international copyright laws[89] have generally failed to provide protections for traditional and non-Western forms of cultural expression. The very limited exceptions are for Native American works, which are somewhat protected under false advertising and trademark law, but not copyright law.[90] The Indian Arts and Crafts Act of 1990 prohibits misrepresentation of goods as Native American or Alaska Native goods.[91] Alaska has adopted a similar Alaska Native handicraft certification program.[92] Under its power to investigate unfair trade practices, the Federal Trade Commission ("FTC") has investigated cases of companies falsely claiming a good is made by Native American

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[86] Law of the Republic of Azerbaijan "On Legal Protection of Azerbaijani Folklore Expressions" (as amended up to Law No. 638-IVQD of April 30, 2013) (Azer.), https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/az/az101en.pdf [https://perma.cc/ST88-2JFF].

[87] Proclamation No. 209/2000 Research and Conservation of Cultural Heritage Proclamation, June 27, 2000, art. 22 (Eth.), https://www.wipo.int/tk/en/databases/tklaws/articles/article_0047.html [https://perma.cc/7VCM-EK3K].

[88] *See Traditional Knowledge, Traditional Cultural Expressions & Genetic Resources Laws*, WORLD INTELL. PROP. ORG., https://www.wipo.int/tk/en/databases/tklaws [https://perma.cc/B7J8-U8J9] (listing 167 intellectual property laws worldwide that address traditional knowledge, traditional cultural expression, and genetic resources).

[89] *See* Macmillan, *supra* note 4, at 415–24 (arguing that the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") has restricted cultural diversity by exacerbating the negative effects of Western copyright law upon cultural diversity); *see also* Mills, *supra* note 2, at 75–78.

[90] The United States has acknowledged and passed laws addressing the poor fit of intellectual property for protecting Native American traditional knowledge. *See* Kremers, *supra* note 13, at 72–92.

[91] Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305(e); *see also* Kremers, *supra* note 13, at 72–81.

[92] ALASKA STAT. ANN. §§ 45.65.010–45.65.070 (West 2015); *see also* Kremers, *supra* note 13, at 81–85.

people.[93] The United States Patent and Trademark Office ("USPTO") also created a Database of Native American Tribal Insignia as a reference tool of official tribal insignia for trademark examiners to deny trademarks falsely suggesting a connection with Native American tribes.[94] While these initiatives are a worthy start,[95] they focus on unfair competition and trademark law, leaving the poor protection for Native American works under U.S. copyright law untouched.[96]

II. CULTURAL ADAPTATION AND CULTURAL CONTEXT

Given the shortcomings of U.S. copyright law in protecting racial minorities' creative expressions, how can copyright be better attuned to more equitably protect artistic works? One possibility is to consider cultural adaptation. Cultural adaptation is important to addressing the culture-based consumption model and responding to the high influence that cultural context has in marketing a work, even as cultures continue to meld and overlap. But cultural adaptations could be blocked under copyright law as derivative works.[97]

As mentioned above, the definition of "culture" used in this Article is the U.S.-centric understanding of culture[98]—defined as a unique form of expression that is produced, consumed, and

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93 15 U.S.C. § 45(a); Kremers, *supra* note 13, at 86.

94 U.S. PATENT & TRADEMARK OFF., *Native American Tribal Insignia*, www.uspto.gov/trademark/laws-regulations/native-american-tribal-insignia [https://perma.cc/2FSB-JTY4]. Note, however, that the USPTO does allow non-infringing marks that can be derogatory toward Native American people, such as the Washington Redskins football team. *See generally* McShane & Fuelleman, *supra* note 81 (describing the state of Native American-related trademarks such as "REDSKINS" after *Tam* and *Brunetti*).

95 These initiatives, however, are not without controversy. *See* Kremers, *supra* note 13, at 72–92 (examining the shortcomings of each of these laws).

96 *See* Dr. Jane Anderson, *Indigenous/Traditional Knowledge & Intellectual Property* 1 (Issues Paper, Duke Univ. Sch. of L. Ctr. for Study of Pub. Domain, 2010) (explaining how existing copyright laws leave Indigenous culture vulnerable to appropriation); Reed, *supra* note 3, at 1377–78 (noting that there are "no federal laws other than copyright that prohibit the appropriation of Indigenous songs, dances, or other forms of Indigenous cultural expression.").

97 17 U.S.C. § 106 (granting the right to create derivative works to the copyright holder as an exclusive right).

98 *See* Napoli, *supra* note 7, at 167.

recreated by a particular social group, which, for the purposes of this Article, is a racial or ethnic social group. The definitions and understandings of culture have developed in significant ways over the past century and a half.[99] While one authoritative definition of culture is still elusive,[100] modern definitions have started to coalesce around certain themes. One recent linguistic understanding of culture, for example, defines it as:

> A complex set of meaning systems that consists of patterns of traditions, beliefs, values, schemas, norms, and symbols, that are shared to varying degrees by interacting members of a social group and that influence (but do not determine) each member's behaviour and his/her interpretations of the "meaning" of other people's behaviour.[101]

This and other modern definitions of culture highlight the plurality and worth of culture, that culture is not immutable, and that membership in a social group influences one's behaviors and values, but is not the sole, or even necessarily primary, determinant.[102] While the history of culture and race is complicated and problematic,[103] race and ethnic groups are still seen as important cultural groups and influences on one's culture.[104]

For the purposes of this Article, cultural adaptation is defined as adapting preexisting works to reflect the cultural and social mores and norms of a group and to speak to that specific group as an

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[99] *See generally* Tony Bennett, *Cultural Studies and the Culture Concept*, 29 CULTURAL STUD. 546 (2015) (discussing different definitions of culture from the mid-nineteenth to the early twentieth centuries).

[100] *See* ARNOLD GROH, THEORIES OF CULTURE 5 (2019) ("The concept of culture is wide and fuzzy, and theories of culture are even more innumerable . . . none of them can fully claim to have attained the final definition of culture.").

[101] HELEN SPENCER-OATEY & DÁNIEL Z. KÁDÁR, INTERCULTURAL POLITENESS: MANAGING RELATIONS ACROSS CULTURES 4 (2021).

[102] *See id.*

[103] *See*, Charles Hirschman, *The Origins and Demise of the Concept of Race*, 30 POPULATION & DEV. REV. 385, 393–94 (2004) (describing nineteenth century Social Darwinism, eugenics, and understanding of cultures in relation to race).

[104] Haney López, *supra* note 19, at 18 ("[T]here is a significant overlap between race and culture, or in my formulation, community.").

audience.[105] In other words, cultural adaptation is modifying a work aimed at one culture to address another. Artists can remake and recontextualize existing works for a different cultural audience.[106] For example, a film aimed toward the average U.S. moviegoer could be reformulated by adding Indian motifs, themes, and norms, to appeal to a Bollywood moviegoer, someone for whom the original U.S. cultural work might have little appeal.[107]

Cultural adaptations can appeal to different markets due to the importance of culture on consumption. Though someone's race or ethnicity does not dictate their tastes,[108] it can still have an important influence on them.[109] One of the most common examples is food consumption. Taste is not solely a physiological experience, but is strongly influenced by cultural stimuli, such as the geographical, political, and historical context in which one is raised and to which one is exposed.[110] For example, spicy food is indispensable to Korean cuisine, yet only 10.5% of Americans consume any kind of pepper on a daily basis; many Americans may have a much lower tolerance

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105 *See* Goodyear, *supra* note 16, at 521 ("'Indian cultural adaptation' is defined as adding Indian elements to preexisting expression to create a new film specifically for Indian audiences.").

106 *See* Pager, *supra* note 4, at 403.

107 *See* Goodyear, *supra* note 16, at 541–42.

108 *See* Winfried Lüdemann, *Why Culture, Not Race, Determines Tastes in Music*, CONVERSATION (Sept. 3, 2015, 12:42 AM), https://theconversation.com/why-culture-not-race-determines-tastes-in-music-46639 [https://perma.cc/Q8FZ-NSM2] ("[These differences in taste] are the result of any number of contributing factors, including upbringing in the parent culture, education, peer-group interaction, expression of a person's individual identity, even a marker of territory.").

109 *See* Mary-Jon Ludy & Richard D. Mattes, *Comparison of Sensory, Physiological, Personality, and Cultural Traits in Regular Spicy Food Users and Non-Users*, 58 APPETITE 19, 19 (2012).

110 *See* Susanne Højlund, *Taste as a Social Sense: Rethinking Taste as a Cultural Activity*, 4 FLAVOUR, no. 6, 2015, at 2, https://flavourjournal.biomedcentral.com/track/pdf/10.1186/2044-7248-4-6.pdf [https://perma.cc/6XQR-8P63].

for spice in general.[111] While such preferences can be attributed to a variety of factors, culture is frequently a significant one.[112]

Yet cultural differences in taste are not limited to food. Musical tastes are primarily dictated by the cultural influences to which people are exposed,[113] and thus, are often shaped by one's racial or ethnic group. However, musical preferences are not exclusively shaped by this identity nor do all members of the group have the same tastes and preferences.[114] For example, one study at the University of Mississippi found that a large percentage of the music Black individuals listen to tends to consist of rap, R&B, and gospel music—genres typically associated with Black artists and culture—while white individuals listen to these genres much less frequently.[115] Another study found that Black college students preferred music created by those of the same cultural background.[116] A third study found that stronger identification with one's race increases the likelihood of that individual preferring music created by artists of the same race or background.[117]

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111 *See* Ludy & Mattes, *supra* note 109, at 19. The stereotype of white Americans being unable to handle spicy food is pervasive in society. *See,* Nick Rose, *Why 'White' Is the Least-Spicy Option at this Korean Restaurant*, VICE (Jan. 17, 2017, 5:00 PM), https://www.vice.com/en/article/d7kv7j/why-white-is-the-least-spicy-option-at-this-korean-restaurant [https://perma.cc/2WU9-Z9SJ].

112 *See* Ludy & Mattes, *supra* note 109, at 25 ("[T]hese findings indicate that culture may be more important that [sic] physiological sensitivity in driving the desire to consume spicy foods.").

113 *See* Jacqueline Howard, *Where Your Taste in Music Comes From*, CNN (Apr. 12, 2017, 10:18 AM), https://www.cnn.com/2016/08/10/health/where-taste-in-music-comes-from/index.html [https://perma.cc/QK4F-P9EJ].

114 *See* John Sonnett, *Musical Relationships: Intersections of Race, Gender, Genre, and Listening Situation*, 15 CULTURAL SOCIO. 44, 54–63 (2021) (presenting data showing music listening patterns of artists of different races based on listener race and gender); Julian Schaap & Pauwke Berkers, *"Maybe It's . . . Skin Colour?" How Race-Ethnicity and Gender Function in Consumers' Formation of Classification Styles of Cultural Content*, 23 CONSUMPTION MKTS. & CULTURE 599, 611 (2020) (finding in a study that "gender and race-ethnicity matter in the classification of rock music, even (or particularly) when the salience of race-ethnicity and/or gender is rejected discursively.").

115 Sonnett, *supra* note 114, at 56 (the percentage of consumption for R&B and Gospel were particularly low for white consumers).

116 Jan McCrary, *Effects of Listeners' and Performers' Race on Music Preferences*, 41 J. RSCH. MUSIC EDUC. 200, 206 (1993).

117 Shantal R. Marshall & Laura P. Naumann, *What's Your Favorite Music? Music Preferences Cue Racial Identity*, 76 J. RSCH. PERSONALITY 74, 74 (2018).

Indeed, there are identifiable consumption models based on race and culture across artistic media. For example, a survey evaluating music genre tastes showed that Black consumers identified rap, hip hop, R&B, jazz, gospel, soul, and reggae as being representative of the United States more than other consumers did.[118] The same survey also showed that Latinx consumers identified Latin music more than other consumers.[119] Similar race-influenced consumption models have been observed in studies on race, culture, and movie preferences in the United States.[120] For example, Black adolescent consumers prefer television shows that exhibit more racial diversity, particularly shows with Black characters.[121]

It is critical to understand these cultural preferences to create a work that appeals to a given consumer base. Popular, non-white directors have incorporated aspects of their own cultures into their movies to reach like-minded audiences.[122] In India, films have distinctly Indian norms and mores.[123] A cultural disconnect between

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118 *Public Opinion on the Music Genres Which Are Representative of America Today in the United States as of May 2018, by Ethnicity*, STATISTICA (Jan. 8, 2021), https://www.statista.com/statistics/864610/music-genre-modern-america-ethnicity. [https://perma.cc/6T2L-TB2Y].

119 *Id.*

120 *See* Maryann Erigha, *Do African Americans Direct Science Fiction or Blockbuster Franchise Movies? Race, Genre, and Contemporary Hollywood*, 47 J. BLACK STUD. 550, 562 (2016) ("The assumption that [w]hite audiences, who are the imagined target of most mainstream American popular culture productions, might not patronize Black work outside of stereotypical genres would lead to studio executives privileging the desires of [w]hite audiences. . . . ") (internal citations omitted); Kaden Lee, *Race in Hollywood: Quantifying the Effect of Race on Movie Performance*, BROWN UNIV. 1, 6–7 (Dec. 20, 2014), https://blogs.brown.edu/econ-1400-s01/files/2015/01/ECON1400_KadenLee.pdf [https://perma.cc/6S9T-GMY4] ("[D]istribution [of Tyler Perry movies] may have been targeted to [Black] communities where they would be well-received.").

121 *See* Morgan E. Ellithorpe & Amy Bleakley, *Wanting to See People Like Me? Racial and Gender Diversity in Popular Adolescent Television*, 45 J. YOUTH & ADOLESCENCE 1426, 1434–35 (2016).

122 *See, e.g.*, Greg Braxton, *Tyler Perry Studios, the House 'Madea' Built, Becomes a Landmark for Black Hollywood*, L.A. TIMES (Oct. 2, 2019, 3:00 AM), https://www.latimes.com/entertainment-arts/tv/story/2019-10-02/tyler-perry-studios-atlanta-dedication [https://perma.cc/M9E2-7SSF] (describing the importance of Black culture in Tyler Perry's works and for his primarily Black audience).

123 *See* Ramola Talwar Badam, *Is Bollywood a Hollywood Clone?*, CBS NEWS (June 4, 2003, 5:05 PM), https://www.cbsnews.com/news/is-bollywood-a-hollywood-clone [https://perma.cc/J285-QK9S] ("When you take an idea and route it through the Indian heart, it changes entirely.").

the film and the audience can make movies complete failures at the box office.[124] For example, Hollywood films frequently fail to engage Latinx moviegoers—not to mention the poor representation of Latinx people in Hollywood, both behind the camera and on screen.[125] But films that directly engage the Latinx community are often well-received.[126] Thus, marketing a work to the cultural audience with which it will resonate may be critical to its success or failure.

However, while such cultural consumption remains tied to race, increasingly, these barriers are being broken down. For example, the number of non-Latinx consumers of Latin music has skyrocketed over the past few years, with performers like Bad Bunny and J Balvin leading the new wave of mainstream Latin music in the United States.[127] This is, in part, due to minority artists trying to reach a broader audience.[128] Perhaps the most important aspect, however, is the increase in consumers exposed to different cultural forms of

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[124] *See* Goodyear, *supra* note 16, at Part V(D) (describing how U.S. films in India have spectacularly failed when they ignored Indian movie norms and culture).

[125] *See generally* Stacy L. Smith et al., *Latinos in Film: Erasure on Screen & Behind the Camera Across 1,200 Popular Movies*, UNIV. S. CAL. ANNENBERG (2019), http://assets.uscannenberg.org/docs/aii-study-latinos-in-film-2019.pdf [https://perma.cc/5T8P-RD2N] (comprising a report on the representation of Latinx people in film); Patrick Ryan, *Where Are the Movies for Hispanic Audiences?*, USA TODAY (May 3, 2017, 8:31 PM), https://www.usatoday.com/story/life/movies/2017/05/03/how-to-be-a-latin-lover-hispanic-moviegoers-underrepresented/100699460 [https://perma.cc/PV4V-ZANT] (explaining the lack of Latinx-focused movies in Hollywood); Alonso Duralde, *Why Are So Many Films for Latinos Bad?*, SALON (Jan. 28, 2011, 3:01 PM), https://www.salon.com/2011/01/28/from_prada_to_nada_latino_film [https://perma.cc/W6VB-Z9BG] (complaining about the lack of good Latinx-focused movies by Hollywood).

[126] *See, e.g.*, Ryan, *supra* note 125 (describing the success of Eugenio Derbez's *How to Be a Latin Lover*, which drew an audience that was eighty-nine percent Latinx).

[127] *See, e.g.*, Nicole Acevedo, *More People in the U.S. Are Listening to Latin Music Albums, Surpassing Country*, NBC NEWS (Jan. 4, 2019, 4:03 PM), https://www.nbcnews.com/news/latino/more-people-u-s-are-listening-latin-music-albums-surpassing-n954831 [https://perma.cc/U63P-UR72].

[128] *See, e.g.*, Tambay Obenson, *Tyler Perry Has a White Audience Problem He'd Like to Solve*, SHADOW & ACT (Oct. 25, 2016), https://shadowandact.com/tyler-perrys-talks-his-white-audience-problem [https://perma.cc/74CW-XG25] (describing some of Tyler Perry's efforts to reach white consumers in addition to his Black audience base).

expression, especially in large cities and other areas with a high concentration of diversity.[129]

Based on these cultural consumption markets, cultural adaptation can beneficially expand works intended for one cultural audience to another. In the United States, this typically flows in one direction.[130] Legal scholar K.J. Greene found that cultural appropriation in the arts is primarily characterized by white businesses and artists benefitting at the expense of minority artists.[131] Examples abound, such as Urban Outfitters launching a Navajo-themed clothing and accessory line and French designer Isabel Marant creating a line accused of copying the Tlahuitoltepec blouse of the Indigenous Mixe community in Mexico.[132] Copyright law provides little protection for minorities against this exploitation.[133] U.S. copyright law insufficiently protects music created by Black artists, allowing both the appropriation of Black works and the unconscionable transfer of rights by those with a poorer understanding of the law.[134] There has also been longstanding appropriation of Native American culture by white people for generations,[135] which some scholars have compared to the broader taking of "*all* things Indian for others' use."[136] Such adaptation of Native American culture has been perpetrated

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129 *See* Tom Vanderbilt, *The Secret of Taste: Why We Like What We Like*, GUARDIAN (June 22, 2016, 1:00 AM), theguardian.com/science/2016/jun/22/secret-of-taste-why-we-like-what-we-like [https://perma.cc/X46R-6TEE] (describing how our tastes change over time, based, in part, on exposure to new and different perspectives and stimuli).

130 *See generally* Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591 (2019) (establishing and discussing the problem of one-way appropriation of minority cultural creations by dominant ones).

131 Greene, *supra* note 9, at 368 (citing the example of the cultural appropriation of works by Black blues artists).

132 *See* Amber Lee, *Homage or Faux Pas: Cultural Appropriation in Fashion Apparel*, CTR. FOR ART L. (June 29, 2020), https://itsartlaw.org/2020/06/29/homage-or-faux-pas-cultural-appropriation-in-fashion-apparel [https://perma.cc/U6VU-S4MA] (providing examples of possible cultural appropriation in the fashion industry); *see also* Navajo Nation v. Urban Outfitters, Inc., 935 F. Supp. 2d 1147, 1161–69 (D.N.M. 2013).

133 *See* Greene, *supra* note 9, at 368–69 (citing the example of white mirror covers of music created by Black artists).

134 *See id.* at 372–73.

135 *See generally* PHILIP J. DELORIA, PLAYING INDIAN (1998) (documenting different ways in which white settlers have relied on and borrowed Native American culture to create a national identity).

136 Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 866 (2016).

without permission and is often controversial.[137] Yet cultural adaptation can flow the other way, allowing minority artists to borrow from works made primarily for white audiences and transform them to appeal to their own cultural audiences. This promotes more creative works authored by minority artists—similar to the way white artists draw on works by artists of color.[138]

However, these cultural copies may constitute derivative works that infringe copyrights in the existing works.[139] First, courts have interpreted what qualifies as a derivative work rather broadly.[140] In addition, any derivative work that violates the copyright owner's exclusive right is not eligible for copyright protection.[141] This reinforces a belief that unauthorized derivative works are unvaluable to society if they are similar enough to the original to affect the original's market.[142] Cultural adaptation appears to be stymied by exclusive derivate work rights, but cultural adaptations could be permissible under an exception to the exclusive rights: fair use.[143]

III. THE PURPOSE OF COPYRIGHT: CREATION VS. PROFIT

Before examining the standing of cultural adaptations under fair use, it is essential to understand the purpose of copyright. The Intellectual Property Clause in the U.S. Constitution states the purpose of copyright protection (and protection for other forms of

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137 Reed, *supra* note 3, at 1375–77 (describing differing Native American views on cultural adaptation and how copyright law fails to protect Native American culture from such appropriation).

138 *See* Greene, *supra* note 9, at 372–73 (describing how white artists capitalized on Black creations through the mirror cover phenomenon).

139 *See* Rachana Desai, *Copyright Infringement in the Indian Film Industry*, 7 VAND. J. ENT. L. & PRAC. 259, 267–68 (2005) (discussing how the Indian film industry frequently uses U.S. films as inspiration and how this can often be classified as an infringement of the U.S. copyright owner's derivate works right under the Copyright Act).

140 *See* Patrick R. Goold, *Why the U.K. Adaptation Right Is Superior to the U.S. Derivative Work Right*, 92 NEB. L. REV. 843, 844–45 (2014) (describing the myriad cases in which courts have defined works as derivative).

141 17 U.S.C. § 103(a) ("[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

142 *See* Hariqbal Basi, *Indianizing Hollywood: The Debate Over Copyright Infringement by Bollywood*, 18 UCLA ENT. L. REV. 33, 40 (2011).

143 *See infra* Part IV(C).

intellectual property) is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[144] Courts have interpreted the clause to encourage the creation and distribution of creative works.[145] Melville Nimmer, one of the leading authorities on copyright law, deduced that the "primary purpose of copyright [i]s not to reward authors," but to promote creation.[146] Indeed, the purpose of creating new works has been the goal of copyright since the British Statute of Anne in the early eighteenth century through present day.[147]

While copyright's purported goal is to foster a greater effusion of creativity,[148] its efficacy to do so is debatable.[149] For example,

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144 U.S. CONST. art. I, § 8, cl. 8.

145 *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'"); Stewart v. Abend, 495 U.S. 207, 228 (1990) (acknowledging that "dissemination of creative works is a goal of the Copyright Act"); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting) ("Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create . . . .").

146 MELVILLE NIMMER, NIMMER ON COPYRIGHT § 1.03[A], at 1–8 (2021). *See also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

147 JULIE COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 24–25 (4th ed. 2015) ("[T]he Statute of Anne was expressly meant to be, as its title stated, '[a]n act for the encouragement of learning.'"); Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 747 (2013) ("[C]opyright law is thought to incentivize the very production of that expression.").

148 *See Stewart*, 495 U.S. at 228–29 (stating that the purpose of copyright is to create and distribute creative works); Malla Pollock, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 809 (2001) (finding that "progress" in the Intellectual Property Clause of the Constitution refers to spreading knowledge and technology).

149 *See* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 10–15 (2008) (arguing that limiting secondary works, especially in the internet age, particularly chills the creation of new works); William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 909 (1997) (arguing that copyright primarily benefits industry distributors such as publishers and record labels rather than artists). *But see* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 212 (2003) (arguing that more copyright means more creative production); Robert P. Merges, *The Concept of*

copyright can encourage creativity for popular and marketable artists while discouraging market entry for lesser-known artists.[150] This can lead to the latter producing fewer works, or even leaving the arts entirely. Industries that profit in lieu of individual artists are especially problematic in terms of equity, given that content industries are underinclusive of women and minorities.[151] Even if copyright leads to the creation of more works, this does not necessarily translate to more works that reflect the population's cultural diversity.[152]

An especially insidious side effect of overly strong copyright protection is that it can discourage secondary creations by inhibiting artists from building on prior works.[153] Copyright's chilling effect on secondary creation, for example, may particularly affect minority artists who seek to repurpose mainstream or dominant cultural media for their own artistic aims and markets.[154] This, in turn, limits minority artists and reduces the number of diverse works created.

In practice, copyright has traditionally been about artists creating for profit. However, as law and culture scholar Madhavi Sunder advocated in a 2006 *Stanford Law Review* article, it could instead incorporate a cultural approach that acknowledges and furthers how

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Property in the Digital Age, 45 HOUS. L. REV. 1239, 1263–66 (2008) (arguing that artists will invest more time in their work if it is protected by copyright).

150 *See* Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 790 (2004) (asserting that "protection against unauthorized copying provides dramatically disproportionate benefits to the most popular creations: it enables the publishers seeking to create blockbusters to finance enormous promotional campaigns, which drown out valuable, artistic creations that lack competitive marketing efforts."); Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities*, 76 S. CAL. L. REV. 1067, 1091–98 (2003) (describing how the dominance of the industrial corporate media model of copyright creates significant barriers to independent producers and creators); Neil W. Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1917 (2000) ("[C]onglomerate content providers reap the lion's share of the copyright benefit and others bear most of the copyright burden.").

151 *See* Netanel, *supra* note 150, at 1884 (stating that commercial media "neither encompasses a wide, representative spectrum of viewpoint[s] nor carries the voices of diverse and antagonistic sources.").

152 *See* Pager, *supra* note 4, at 401.

153 *See id.*

154 *See* Rebecca Tushnet, *Free to Be You and Me? Copyright and Constraint*, 128 HARV. L. REV. F. 125, 133–34 (2015) (discussing the socioeconomic, racial, and gender groups who benefit less from copyright at present).

different cultural perspectives can and do work together and influence each other to create new works.[155] Sunder's idea is in line with copyright law's approach to different groups more broadly, as U.S. copyright law recognizes the unique needs of different populations and explicitly contains carve outs for at least some of those groups. For example, Sections 121 and 121A of the Copyright Act allow for the lawful reproduction of copyrighted works in accessible formats for the blind and visually impaired.[156] However, Sunder left unanswered the question of how to facilitate inter- and intra-cultural borrowing in a socially just manner that facilitates equitable social exchange between cultural groups.[157] Allowing at least a degree of cultural adaptation under fair use could provide one solution to allow cultural borrowing.

Some scholars note that the fair use analysis should—and often does—consider whether the use benefits the public interest, much like how Sections 121 and 121A benefit the visually impaired.[158] Even the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* suggested there is a role for public interest considerations, stating that even when a work is not transformative, "there may be a strong public interest in the publication of . . . secondary work[s]."[159] Although the United States is not a signatory,[160] the vast majority of countries

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155 Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 324 (2006) (suggesting "that concerns ranging from the compulsion to represent oneself historically (within and against community) to a commitment to preserve and share cultural knowledge spur individuals and communities to participate in creative industry.").

156 17 U.S.C. §§ 121, 121A.

157 *See* Sunder, *supra* note 155, at 324, 328–29 (noting that a "central concern of a cultural approach to intellectual property should be how to facilitate cultural production" in such a way).

158 *See* Christine Steiner, *Intellectual Property and the Right to Culture*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS 9–10 (WIPO ed., 1998), https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_2.pdf [https://perma.cc/46FE-9MVG] ("The four-part test contained in copyright law is not the only measure of fair use; courts look to other factors as well. For example, it is relevant whether the taking is socially desirable or creative conduct that stimulates the public interest."); *see also* Amanda Reid, *Deciding Fair Use*, 2019 MICH. ST. L. REV. 601, 612 (2019) (asserting the public interest inherent in fair use).

159 510 U.S. 569, 578 n.10 (1994) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1132, 1134 (1990)).

160 *See Country Profiles*, UNESCO, https://en.unesco.org/creativity/countries?member_parties=1 [https://perma.cc/9JF6-8MY5].

have signed onto the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions ("Diversity Convention").[161] This makes cultural diversity, if not a customary international norm, at least a goal that the majority of the world agrees is worth advancing.[162] The Diversity Convention requires that State Parties "formulate and implement their cultural policies and . . . adopt measures to protect and promote the diversity of cultural expressions."[163] Therefore, promotion of cultural diversity within the United States would align with international norms. Diversity is also an important goal in domestic policy—especially in the arts—to include valuable underrepresented perspectives and improve opportunities and well-being for racial minority communities.[164]

While Congress could amend the Copyright Act to expressly establish carve outs for uses of works by different cultural groups to promote more creativity, courts already can account for culture when determining the legality of uses of copyrighted works under fair use.[165] If public interest is to be considered when making fair use determinations, courts should acknowledge both the purpose of copyright—primarily the creation and distribution of new works rather than generating profits—and the benefits of having more diverse works of art. These two aims should color fair use analyses

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[161] *See id.* (151 parties, including the European Union, have signed the Convention).

[162] *See* Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1490 (2020) (describing how a normative position is considered customary international law if enough states support it in their practice and law).

[163] The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, *supra* note 5, art. 5.

[164] Jason VanAlstine et al., *Cultural Diversity in the United States and Its Impact on Human Development*, 18 J. IND. ACAD. SOC. SCIS. 125, 140 (2015) (concluding that increased diversity correlates with net positive human development, including health, education, and income); Sherylynn Sealy, *Diversity and Inclusion in Arts and Culture*, N.Y. UNIV. J. POL. INQUIRY (Sept. 18, 2017), https://jpinyu.com/2017/09/18/diversity-and-inclusion-in-arts-and-culture/ [https://perma.cc/7VBV-NLSF] (discussing the benefits of diversity and inclusion in the arts in particular); Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 FORDHAM L. REV. 2483, 2486–87 (2015) (describing interviews with law firms in which the firms cited diversity as the "right thing to do" and critical to firms' economic success).

[165] *See* 17 U.S.C. § 107 (describing the non-exclusive, four factor test judges apply when determining whether a use of a copyrighted work is fair).

and increase the chance that cultural adaptation could be permitted under fair use.

IV. CULTURAL ADAPTATION IN COPYRIGHT

In a previous Article, I argued that Indian cultural adaptation of Bollywood films should be recognized as an affirmative defense to claims of copyright infringement.[166] The Article focused on the burgeoning Indian film industry and framed the issue of cultural adaptation within the context of law and economic development.[167] In particular, it argued that cultural adaptation was a logical extension of existing copyright infringement exceptions given its similarity to other recognized copyright defenses, such as the uncopyrightability of facts, the idea/expression dichotomy, *scène à faire*, and fair use.[168] It also stressed the difficulties of enforcing copyrights in India[169] and the growing amount of legal scholarship that suggests that weaker intellectual property laws can help promote growth in developing countries.[170]

While the Article suggested that the model of recognizing cultural adaptation as a copyright exception could be expanded to other countries, such as Nigeria and its Nollywood film industry,[171] it did not examine cultural adaptation in countries with more long-standing copyright regimes, such as the United States. In contrast, this Article aims to fill that lacuna by arguing that cultural adaptations should be more broadly permitted under U.S. copyright law through the fair use doctrine.

The copyright regimes in India and the United States share many similarities, in part due to both countries deriving their copyright laws from their shared, former British colonizers.[172] But the extant

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166 *See generally* Goodyear, *supra* note 16.

167 *See id.*

168 *See id.* at Part V(B).

169 *See id.* at Part III(E).

170 *See id.* at Part IV.

171 *See id.* at Part V(F).

172 U.S. copyright law is derived from the initial British Statute of Anne in the eighteenth century. COHEN ET AL., *supra* note 147, at 7–8. The British East India Company enacted the first copyright law in India, the Copyright Act of 1847. Ayush Verma, *An Overview of the Copyright Act, 1957*, IP LEADERS (Mar. 30, 2020), https://blog.ipleaders.in/an-

copyright laws in both countries today—the Indian Copyright Act of 1957 and the U.S. Copyright Act of 1976—share important differences in their limitations on the exclusive rights of copyright holders. In particular, fair use (or fair dealing, as it is called in India) is substantially different in both countries.[173] The following Sections provide an overview of Indian fair dealing and American fair use. It explains the separate analysis I undertook in my earlier Article, and illustrates why permitting cultural adaptations is appropriate under the U.S. legal regime. Indian fair dealing is rigid in its exceptions,[174] while U.S. fair use involves a holistic weighing of four non-exclusive factors.[175] These differences present a greater possibility for cultural adaptation to be included within the American fair use analysis than is seen under Indian fair dealing. This allows one to consider cultural adaptation under U.S. law as a potentially permitted practice under the existing fair use doctrine,[176] rather than as a standalone exception like under Indian law.[177] The final Section of this Part analyzes how cultural adaptations would likely be interpreted under U.S. fair use.

A. Fair Dealing in India

The Indian Copyright Act of 1957 contains over thirty specific exceptions to exclusive rights of a copyright holder.[178] These exceptions are generally quite narrow, with each delineating a specific authorized use of a copyrighted work or phonorecord. For example, Sections 52(1)(b)–(c) permit transient storage of copyrighted works in electronic communications and in providing electronic links and access.[179] Sections 52(1)(d), (e), (q), and (r) allow reproduction of documents related to the legislature and judiciary.[180] The other

overview-of-the-copyright-act-1957 [https://perma.cc/G9U4-TJGK]. The British government also instituted the Indian Copyright Acts of 1911 and 1914. *Id.*

173 *See infra* Parts (IV)(A)–(B).

174 *See* The Copyright Act, 1957, §§ 52(1)(a)–(z) (India).

175 *See* 17 U.S.C. § 107.

176 *See infra* Part IV(C).

177 *See* Goodyear, *supra* note 16, at Part V(B).

178 The Copyright Act, 1957, §§ 52(1)(a)–(z) (India).

179 *See id.* § 52(1)(b) (addressing transient storage in an electronic communication to the public); *id.* § 52(1)(c) (addressing transient storage in providing electronic links or access).

180 *Id.* § 52(1)(d) (addressing reproduction for judicial proceedings); *id.* § 52(1)(e) (addressing reproduction of legislative work prepared by the Secretariat of a Legislature

exceptions to exclusive rights under Section 52(1) are similarly discrete.[181] Many of these exceptions are quite similar to the exceptions set forth under the U.S. Copyright Act, as will be described in the following Section.

Perhaps the broadest exception under Section 52(1) is fair dealing. But even the fair dealing exception is restricted to three specific cases: use for the purposes of "(i) private or personal use, including research; (ii) criticism or review, whether of that work or of any other work; or (iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public."[182] These permissible purposes effectively reflect the preamble to Section 107

exclusively for use by members of that Legislature); *id* § 52(1)(q) (addressing reproduction of any legislative act or judicial order); *id.* § 52(1)(r) (addressing translation in any Indian language of a legislative Act).

[181] *Id.* § 52(1)(aa)–(ad) (addressing specific uses of computer programs); *id.* § 52(1)(f) (addressing reproduction in certified copies); *id.* § 52(1)(g) (addressing reading of reasonable extracts from published literary or dramatic works); *id.* § 52(1)(h) (addressing publication in a collection for instructional use); *id.* § 52(1)(i) (addressing reproduction for instruction, exams, or answers to exams); *id.* § 52(1)(j) (addressing performance for an educational institution); *id.* § 52(1)(k) (addressing public performance of recording in residences or non-profit organizations); *id.* § 52(1)(l) (addressing performance of a literary, dramatic, or musical work by amateurs or a religious institution not for a profit); *id.* § 52(1)(m) (addressing reproduction of a current event article in a periodical); *id.* § 52(1)(n) (addressing library electronic copies for preservation); *id.* § 52(1)(o) (addressing reproduction of three copies for libraries if a book is not for sale in India); *id.* § 52(1)(p) (addressing reproduction of an unpublished literary, dramatic, or musical work kept in a library, museum, or other public access institution); *id.* § 52(1)(s) (addressing painting, drawing, engraving, or photography of a work of architecture or displaying architecture); *id.* § 52(1)(t) (addressing painting, drawing, engraving, or photography of a statue in a public place); *id.* § 52(1)(u) (addressing inclusion of background in a cinematographic work); *id.* § 52(1)(v) (addressing use of a mold, cast, sketch, plan, model, or study by an artist); *id.* § 52(1)(w) (addressing making a functional three-dimensional object from a two-dimensional artistic work); *id.* § 52(1)(x) (addressing reconstruction of a building by its original architectural drawings or plan); *id.* § 52(1)(y) (addressing exhibition of a literary, dramatic, artistic, or musical work in a cinematographic film following its copyright expiration); *id.* § 52(1)(z) (addressing ephemeral broadcast recordings by the broadcaster); *id.* § 52(1)(za) (addressing performance of a literary, dramatic, or musical work or communication of a sound recording as part of a government or religious ceremony); *id.* § 52(1)(zb) (addressing reproduction for the purpose of disability access); *id.* § 52(1)(zc) (addressing importation of copies of a literary or artistic work incidental to other goods being lawfully imported).

[182] *Id.* § 52(1)(a).

of the U.S. Copyright Act[183] on fair use. But, unlike U.S. fair use, Indian fair dealing ends here. There is no balancing test, only three specifically delineated permissible uses.

Under India's fair dealing, there is little room for cultural adaptation. Unless the use fits under one of the three categories of fair dealing in Section 52(1)(a), it cannot qualify for this exception. All three categories are poor fits for cultural adaptations. The first category merely permits private uses, such as research, and excludes public sharing of works.[184] The second category only allows critiques, not works that build off original works.[185] The third category is limited to reporting, which does not include transformative works that are developments of the original.[186] Cultural adaptations build off the original work, but do not fall within any of these three categories. The Indian Copyright Act's narrow understanding of fair dealing prevents other uses, such as cultural adaptations, from being included.

B. Fair Use in the United States

Like Indian copyright law, the U.S. Copyright Act provides a series of specific exceptions to the bundle of exclusive rights held by the copyright owner. In the United States, limitations on a copyright owner's rights—or exceptions to copyright infringement[187]—

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[183] 17 U.S.C. § 107 (addressing "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."). Notably, the preambular purpose of commentary, which is perhaps the most important for transformative use under U.S. fair use, *see infra* Part IV(C)(1), is absent from § 52(1)(a) of India's Copyright Act. *Cf.* Copyright Act, No. 14 of 1957, § 52(1)(a) (1957) (India).

[184] *See* The Copyright Act, 1957, § 52(1)(a)(i) (India).

[185] *Id.* § 52(1)(a)(ii).

[186] *Id.* § 52(1)(a)(iii).

[187] There is a debate about whether fair use is more accurately described as a defense or a limitation on the rights of the copyright holder. Fair use is technically "not an infringement of copyright" under § 107, which implies that it is not a defense. 17 U.S.C. § 107. But the Supreme Court in *Campbell* referred to fair use as an "affirmative defense." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994). The question of whether fair use is best described as a defense or not is a complex one. *See* Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621, 674–77 (2019) (examining the muddied waters of defining the true nature of fair use); Reid, *supra* note 158, at 620 (advocating for labeling fair use a defense instead of an affirmative defense as a method for reinvigorating the public interest purpose in fair use).

are specifically enumerated in Sections 107 through 122.[188] Most of these carveouts are rather narrow and limited to a specific type of entity or media. For example, Section 108 details conditions under which libraries and archives can reproduce copyrighted works.[189] Section 109 sets out the first sale doctrine for the resale of copies and phonorecords of copyrighted works.[190] Sections 112, 114, 115, and 116 establish special rules for the reproduction and public performance of musical works and sound recordings.[191] Sections 111, 118, 119, and 122 relate to broadcasting exceptions.[192] Sections 110, 117, and 120 articulate limitations on exclusive rights related to certain performances and displays, computer programs, and architectural works, respectively.[193] Finally, Sections 121 and 121A establish carveouts to the reproduction right for the blind and the visually impaired.[194]

Of the sixteen statutory limitations in the Copyright Act, the broadest exception is Section 107: fair use.[195] Fair use advances the purpose of copyright "by allowing 'others to build freely upon the ideas and information conveyed by a work.'"[196] The provision specifically notes that fair use includes reproducing or otherwise using a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[197] However, instead of being limited to these specific examples, like Indian fair dealing, Section 107

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188 17 U.S.C. §§ 107–122.

189 *Id.* § 108.

190 *Id.* § 109.

191 *Id.* § 112 (addressing ephemeral recordings); *id.* § 114 (addressing the scope of sound recordings); *id.* § 115 (addressing compulsory licensing for phonorecords); *id.* § 116 (addressing public performance by coin-operated phonorecord players).

192 *Id.* § 111 (addressing secondary transmissions of broadcast programming by cable); *id.* § 118 (addressing the use of works in noncommercial broadcasting); *id.* § 119 (addressing secondary transmissions of distant television programming by satellite); *id.* § 122 (addressing secondary transmissions of local television programming by satellite).

193 *Id.* § 110 (addressing performances and displays); *id.* § 117 (addressing computer programs); *id.* § 120 (addressing architectural works).

194 *Id.* § 121 (addressing reproductions for the blind or other people with disabilities); *id.* § 121A (addressing the Marrakesh treaty obligations).

195 *Id.* §§ 107–122.

196 Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 262 (4th Cir. 2019) (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991)).

197 17 U.S.C. § 107.

articulates a non-exclusive four-factor balancing test to determine if a use is fair, weighing: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market.[198] The multi-factor test is judicially created—unlike many other statutory limitations in the Copyright Act—as it was originally established by Supreme Court Justice Joseph Story in the circuit court decision *Folsom v. Marsh*.[199] This is generally considered the first fair use case in the United States.[200]

The Supreme Court has repeatedly emphasized the importance of weighing these four factors holistically.[201] In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court—drawing from Judge Pierre Leval's seminal *Harvard Law Review* article[202]—elucidated transformativeness as a crucial consideration under the first factor.[203] The Court held that transformative works "lie at the heart of the fair use doctrine[]" and "the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use."[204] To be transformative, a use must be "something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[205]

The holistic four-factor test has not, however, lent itself to neatly delineated categories of what qualifies as fair use. Different courts

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198 *See id.*

199 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) ("In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.").

200 *See* Oren Bracha, *Commentary on:* Folsom v. Marsh *(1841)*, *in* PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_us_1841 [https://perma.cc/EZH7-AV9L]. *But see* Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1372–73 (2011) (arguing that the history of fair use in the United States should more accurately be considered to start with the English fair abridgment cases of the eighteenth and nineteenth centuries).

201 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994) ("Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purpose of copyright.").

202 Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

203 510 U.S. at 578–79.

204 *Id.* at 579.

205 *Id.*

weigh either the first or the fourth factor most heavily.[206] In a study of fair use cases from 1978–2005, intellectual property law scholar Barton Beebe found that the overall weight of each factor varied.[207] In decisions ultimately resulting in a finding of fair use, the first factor weighed in favor ninety percent of the time; the third factor ninety-six percent of the time; the fourth factor ninety-five percent of the time; and the second factor was used ambiguously at best.[208] Beebe also found that courts differed in whether they evaluated each factor in isolation or instead looked at the overall use of the work.[209]

In an updated version of the study, Beebe found that the fair use application largely remained the same from 2006–2019.[210] Beebe determined that one of the most notable changes in recent years, however, was the increased importance of transformativeness, concluding that "a finding of transformativeness exerts by far the greatest impact of any finding on a court's likelihood of making an overall determination of fair use."[211] Other recent studies of fair use decisions also show that transformativeness is gaining a more dominant role in the analysis.[212] However, even with transformativeness'

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206 *See* Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) (looking at whether the works added "new expression, meaning, or message"); Bill Graham Archives v. Dorling Kinderseley Ltd., 448 F.3d 605, 615 (2d Cir. 2006) (holding that the new purpose of the work was transformative); Authors Guild v. Google, Inc., 804 F.3d 202, 214 (2d Cir. 2015) ("[H]arm . . . to the market for, or the value of, the copyright for the original, 'is undoubtedly the single most important element of fair use.'" (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985))); Philpot v. WOS, Inc., No. 18-CV-339-RP, 2019 WL 1767208, at *7 (W.D. Tex. Apr. 22, 2019) (stating that the fourth factor is "the most important of the four"); Dhillon v. Doe, No. C 13–01465, 2014 WL 722592, at *6 (N.D. Cal. Feb. 25, 2014).

207 Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 597, 610, 615, 617 (2008).

208 *Id.*

209 *Id.* at 561–63.

210 Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978–2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 4 (2020).

211 *Id.* at 25.

212 *See* Clark D. Asay et al., *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 906–07 (2020) (finding through an empirical study that transformative use is "eating" the fair use analysis); *see also* Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 240 (2019) (finding in an empirical study that transformativeness is "approaching total dominance" in fair use determinations); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 715 (2011) (tracing the rise of transformativeness in fair use determinations).

increased importance, the fair use determination remains an extremely flexible application of the four factors, with courts applying the factors holistically in different—and sometimes even contradictory—ways.[213]

Many critique the unpredictability of the fair use analysis.[214] A clearer set of rules could be beneficial for creators to know *ex ante* whether their use of another's work is fair.[215] However, the current, fluid approach to fair use is valuable within the copyright context. The flexibility in applying all four factors allows courts to address and incorporate new concepts and technologies as they emerge and become more popular in the public space. For example, interpreting certain uses of software as transformative promotes greater innovation and creativity in software creation.[216] For works involving the internet, courts can consider social media and digital interactions that were not originally contemplated by the drafters of the Copyright Act in 1976.[217] This same fluidity can allow courts to consider anew the role of culture in fair use.

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[213] *See* Beebe, *supra* note 210, at 33 (explaining that the fourth factor still correlates the most strongly with a finding of fair use and acknowledging that different cases have turned on the first or fourth factors); Michael P. Goodyear, *Fair Use, the Internet Age, and Rulifying the Blogosphere*, 61 IDEA 1, 7–13 (2020) (explaining how different courts have emphasized either the first or fourth factor in fair use determinations).

[214] *See, e.g.*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004) ("[F]air use in America simply means the right to hire a lawyer to defend your right to create."); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1468 (2008) ("Given the lack of clear rules for fair use and misappropriation, knowledge of copyright law is often no better than ignorance of copyright law."); Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008) (describing fair use as "billowing white goo"); Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 433 (2008) (arguing that fair use is difficult, if not impossible to define).

[215] *See* Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 198 (2017) (describing the potential benefits of "rulification" of fair use); Goodyear, *supra* note 213, at 22–37 (elucidating which factors matter the most for a fair use determination on blogs).

[216] *See* Clark D. Asay, *Transformative Use in Software*, 70 STAN. L. REV. ONLINE 9, 14–19 (2017) (describing the important role of software reuses in classical fair use scenarios and emphasizing how software reuses can be seen as transformative).

[217] *See generally* Lauren Levinson, *Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal*, 64 UCLA L. Rev. 1038 (2017) (advocating for courts broadening their understanding of transformativeness to address new digital innovations).

C. Culture Through the Lens of Fair Use

While the fluidity of the fair use doctrine poses problems in some cases, its flexibility creates the potential for cultural adaptation to fit within its confines. Considering cultural adaptation in the analysis would be an issue of first impression for the courts. At least between 1994, when *Campbell* was decided, and February 2022, not a single federal copyright case addressed cultural adaptations in the context of fair use.[218]

The fair use doctrine appears to acknowledge that the goal of copyright is the proliferation of creative works. Fair use, by its very nature, recognizes that few new works are created without borrowing from existing ones.[219] As the Supreme Court has concluded, fair use "permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[220]

As explained above,[221] cultural adaptations seem to fall squarely within derivative works under the Copyright Act, prohibiting creation without permission from the copyright owner of the original work. While copyright law could be amended to specifically provide for cultural adaptation, as proposed in India,[222] U.S. courts can permit cultural adaptations under the extant fair use doctrine. In theory, fair use allows new works to build on preexisting ones; in reality, those uses permitted by courts vary due to the ambiguity inherent in the fact-specific and holistic analysis.[223] Existing fair use analysis does not bar cultural adaptations, but rather leaves the outcome undetermined.

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218 This conclusion is based, in part, on a review of the U.S. Copyright Office's Fair Use Index, which tracks major copyright fair use decisions. *See* U.S. COPYRIGHT OFF., *U.S. Copyright Office Fair Use Index*, https://www.copyright.gov/fair-use/fair-index.html [https://perma.cc/95C3-QAAV].

219 Sag, *supra* note 200, at 1371.

220 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)) (internal quotations and citations omitted).

221 *See supra* Part II.

222 *See* Goodyear, *supra* note 16, at Part V(B).

223 *See supra* notes 206–213 and accompanying text.

The four enumerated factors are simply to be considered in the analysis; they are not exhaustive.[224] Thus, it is possible to independently consider culture under fair use. So far, however, courts have almost completely limited their fair use analyses to the four factors listed under Section 107. Therefore, the following Sections of this Article will examine how cultural adaptations could be interpreted under the four factors of the fair use analysis to permit such use.

1. The First Factor

The first factor, the purpose and character of the work, asks (1) whether the use is for a commercial purpose and (2) whether the use is transformative.[225] This Section will examine cultural adaptations under both subfactors in turn. The purpose and character inquiry is especially important as it influences the outcome of the third and fourth factors.[226]

Use of a work for commercial purposes weighs against a finding of fair use; by comparison, using a work for an educational or nonprofit purpose weighs in favor of fair use.[227] In addition, if it is customary to purchase a license for the type of use at issue, such use is likely considered commercial.[228]

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[224] 17 U.S.C. § 107; *see also* Cariou v. Prince, 714 F.3d 694, 705 (2d Cir. 2013) (describing the Section 107 factors as "non-exclusive.").

[225] *See* Kelly v. Arriba Soft Corp., 336 F.3d 811, 818–19 (9th Cir. 2003) (describing the first factor of fair use as a two-prong analysis looking at commercial purpose and transformativeness).

[226] *See* Dr. Seuss Enters., LP v. ComicMix LLC, 983 F.3d 443, 451 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2803 (2021).

[227] *See* Katz v. Google, Inc., 802 F.3d 1178, 1182 (11th Cir. 2015) (finding that the use of a photograph on a blog that generated no income was educational and noncommercial); Clark v. Transp. Alts., Inc., No. 18 Civ. 9985, 2019 WL 1448448, at *4 (S.D.N.Y. Mar. 18, 2019) (holding that a post on a non-profit organization's blog was non-commercial); Bell v. Powell, 350 F. Supp. 3d 723, 728–30 (S.D. Ind. 2018) (holding that the inclusion of a photograph in an educational brochure about sexual assault was fair use); Dhillon v. Doe, No. C 13–01465, 2014 WL 722592, at *4 (N.D. Cal. Feb. 25, 2014) (finding fair use where a non-commercial blog published a headshot in an article).

[228] *See* Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 265 (4th Cir. 2019) (asking "whether the use was exploitative, in that others usually pay to engage in similar conduct," with the example of commercial enterprises usually purchasing licenses to use stock photography, so a failure to pay for a license there weighs against a finding of fair use).

Most cultural adaptations would qualify as commercial uses under this definition. Educational and non-profit uses of cultural adaptations would favor a finding of fair use, but many artists create cultural adaptations for profit. The commercial purpose behind for-profit cultural adaptations would likely weigh against a finding of fair use.

However, a finding of transformative use considerably outweighs commercial purpose.[229] A 2019 study found transformative use as the only statistically significant consideration within the first factor.[230] Indeed, transformativeness is so powerful that the study found it diminishes the impact of the second and third factors and strongly affects how courts interpret the fourth factor.[231] Therefore, elucidating whether cultural adaptations are transformative may be decisive in a fair use determination.

The definition of transformativeness is essential but remains mired in the sweeping rhetoric of courts. In his 1990 *Harvard Law Review* article, Judge Leval wrote, "the secondary use adds value to the original—if the . . . [underlying 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."[232]

When the Supreme Court adopted Leval's concept of transformativeness in *Campbell*, Justice Souter similarly concluded that the purpose of the transformativeness inquiry is "to see . . . whether the new work merely 'supersede[s] the objects' of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[233]

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229 *See* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269 (11th Cir. 2001) (stating that the user's "for-profit status is strongly overshadowed and outweighed in view of its highly transformative use . . . .").

230 Liu, *supra* note 212, at 168.

231 *Id.*

232 Leval, *supra* note 202, at 1111.

233 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (internal citations omitted).

Since *Campbell* was decided, judges' interpretations of when use is transformative has varied considerably.[234] At least one scholar lambasted the transformative use inquiry, arguing that it improperly focuses on what is new rather than what is creative, ultimately failing artists.[235] This focus is problematic for artists, especially appropriation artists, and courts have been inconsistent in looking only at what is new. In *Cariou v. Prince*, the Second Circuit defined transformativeness as altering a work to create a "new expression, meaning, or message."[236] This adaptation does not require a brand-new work; rather, it requires a work with an "entirely different aesthetic."[237] The *Cariou* decision echoed earlier opinions that focused on a new purpose rather than a completely new work.[238] In March 2021, the Second Circuit clarified this standard, emphasizing that a transformative use calls not for just a new aesthetic, but for a different purpose or a new meaning or message.[239]

Over the past two and a half decades, courts have adopted an increasingly broad understanding of transformative use, expanding beyond parodies, quotes in biographies, and reverse engineering, to uses such as appropriation art and research copies.[240] While varied interpretations continue to persist, scholarship has shown that judges seem to agree that a work is transformative if it involves both physical transformation—the physical altering of a work—and purpose transformation—using the work for a different purpose than

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234 *See* Liu, *supra* note 212, at 204–16.

235 Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 565–67 (2016) (citing the examples of Richard Prince, Jeff Koons, Shepard Fairey, Banksy, Elizabeth Peyton, and Sarah Morris as being "caught in [the transformative use test's] web.").

236 714 F.3d 694, 706 (2d Cir. 2013).

237 *Id.*

238 Bill Graham Archives v. Dorling Kinderseley Ltd., 448 F.3d 605, 608–12 (2d Cir. 2006) (finding that the reproduction of seven copyrighted photographs was fair use due to the new context and purpose of the photographs: to illustrate history in a history book).

239 Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99, 110–16 (2d Cir. 2021), *rev'd in part*, *vacated in part* 11 F.4th 26 (2d Cir. 2021). The decision was slightly revised in August 2021 in light of the Supreme Court decision in Google, LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021).

240 *See* Liu, *supra* note 212, at 171. *But see* Andy Warhol Found. for the Visual Arts v. Goldsmith, 992 F.4th 26, 41 (2d Cir. 2021) (tightening the standard for fair use, noting that adding something new refers to a different purpose or conveying a new meaning or message).

originally intended.[241] This scholarship demonstrates the crux is that the work has been adapted for a different purpose.[242]

Individual courts' decisions appear to support this, but fact-specific differences remain. Courts have generally determined that altering either the purpose *or* context of the work—compared to merely embedding copyrighted content for illustrative purposes—qualifies as transformative.[243] But courts have also reasoned that merely displaying a copyrighted work in a new context is insufficient to qualify as a transformative use.[244] For example, in *Brammer v. Violent Hues Productions, LLC*, the Fourth Circuit went even further by holding that merely using a photograph for its content but not for a new purpose is not transformative.[245] The *Brammer* court emphasized a new *purpose* rather than a new *context*.[246] Similarly, in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, the Ninth Circuit found an alleged parody of *The Cat in the Hat* about the O.J. Simpson double murder trial—titled *The Cat NOT in the Hat! A Parody by Dr. Juice*—was not a transformative use, as the work

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241 *See* Liu, *supra* note 212, at 169–70 ("[C]ourts unsurprisingly found transformative use in 100% of the decisions involving both physical and purposive transformation.").

242 *See* Liu, *supra* note 212, at 170 (finding that where judges found only physical transformation, 32.7% of uses were found to be transformative, and where judges found only purpose transformation, 60.7% of decisions ultimately found a transformative use); *see also Andy Warhol Found.*, 992 F.4th at 42 (emphasizing that courts should primarily look at whether a use has a different purpose).

243 *See* Katz v. Google Inc., 802 F.3d 1178, 1182–83 (11th Cir. 2015) (finding that surrounding commentary in a blog post changed the context of the copyrighted work in a transformative way); *see also* Swatch Grp. Mgmt. Servs., Ltd. v. Bloomberg LP, 756 F.3d 73, 84 (2d Cir. 2014) ("Courts often find such uses [of copyrighted works] transformative by emphasizing the altered purpose or context of the work, as evidenced by the surrounding commentary or criticism."); *see also* Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412, 428 (S.D.N.Y. 2018) ("[T]he use of an image solely to illustrate the content of that image, in a commercial capacity, has yet to be found as fair use in this District.").

244 *See, e.g.*, Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 264 (4th Cir. 2019) (finding that the mere inclusion of a photograph in a new context was not enough to be transformative); Ferdman v. CBS Interactive, Inc., 342 F. Supp. 3d 515, 534 (S.D.N.Y. 2018) (finding that an article merely containing a photograph was not transformative); Barcroft Media Ltd. v. Coed Media Grp., LLC, 297 F. Supp. 3d 339, 351–52 (S.D.N.Y. 2017) (finding that the display of images in the exact same way for the exact same purpose as the original work was not transformative).

245 922 F.3d at 264.

246 *Id.* at 263 (looking at whether a new use would "generate a societal benefit by imbuing the original with new function or meaning" (quoting Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007))).

used Dr. Seuss' style without infusing a different meaning or commenting on *The Cat in the Hat* itself.[247] This holding was recently upheld in another Dr. Seuss case involving a work, *Oh the Places You'll Boldly Go*, which placed Star Trek characters and motifs inside the framework of Dr. Seuss' *Oh the Places You'll Go*.[248]

Alternatively, in *Bill Graham Archives v. Dorling Kindersley*, new context was an important indicator of transformative use. There, the Second Circuit found that placing reproductions of concert posters in a history book for illustration purposes created a completely new context for the posters that was sufficiently transformative.[249] Similarly, in *Cariou v. Prince*, the Second Circuit held that a work need not *comment* on the original work to qualify as a transformative use—adding "new expression, meaning, or message" was sufficient.[250]

Perhaps most important to transformative use is that the work adds something significantly new and changes the original work's expression. Courts have repeatedly stated that the new creator must do more than merely try to "get attention" and "avoid the drudgery in working up something fresh."[251] Instead of simply using existing characters and plots, a transformative use should "feature[] plot elements found nowhere within the covers" of the original work.[252]

Fitting within this understanding, cultural adaptations can significantly alter existing expressions to create new works. Though not all cultural adaptations necessarily meet this test, those that add significant expression (i.e., significantly modifying aspects of the

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247 109 F.3d 1394, 1401–02 (9th Cir. 1997).

248 Dr. Seuss Enters., LP v. ComicMix, LLC, 983 F.3d 443, 452–53 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2803 (2021) (explaining that "broadly mimic[king] Dr. Seuss'[s] characteristic style" is not the same as "hold[ing] his style up to ridicule," and was merely retelling the same tale with the expressive elements of Dr. Seuss (quoting *Penguin Books USA, Inc.*, 109 F.3d at 1401) (internal quotations omitted)).

249 448 F.3d 605, 615 (2d Cir. 2006).

250 714 F.3d 694, 706 (2d Cir. 2013) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)); *see also* Andy Warhol Found. for the Visual Arts v. Goldsmith, 992 F.4th 26, 41–42 (2d Cir. 2021) (upholding *Cariou*'s emphasis on new meaning or message).

251 *Penguin Books USA*, 109 F.3d at 1401 (quoting *Campbell*, 510 U.S. at 580).

252 SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1270 (11th Cir. 2001) (describing the transformativeness of *The Wind Done Gone*, a fictional work on *Gone with the Wind*).

work to make it fit a different cultural group) create works with substantially different feels, messages, and norms. Cultural adaptations aim to reach audiences missed by the original works, frequently because cultural norms expressed in the original do not appeal to other cultures. This is certainly the case in India, where U.S. films that experience little success become hugely popular as Bollywood adaptations.[253] Incorporating cultural norms of a specific group can make a previously unenticing work more attractive to that group. Accordingly, the significant changes necessary to cultural adaptations likely favor the new context inquiry, as well as the new purpose inquiry by speaking to different cultural audiences.

In addition to the context/purpose test, some courts continue to emphasize criticism, the original transformativeness inquiry from *Campbell*.[254] On its face, requiring a subsequent work be critical of the original seems to qualify only a narrow subset of works. But copyright scholars employing literary theory understand criticism to broadly encompass almost any retelling that comments on the original in some way.[255] Under this understanding of criticism, most cultural adaptations would qualify as commentaries, because they almost all comment on the original to some degree. Cultural adaptations identify and supplant aspects of the original that would not appeal to a new cultural audience, essentially commenting on these culturally unappealing aspects. The very cultural adaptation itself shows the work may have ignored—whether through design or

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253 *See* Goodyear, *supra* note 16, at Part V(D) (for example, the first major Hollywood-produced Bollywood film, *Saawariya*, only made a profit of $2 million at the box office after post-production costs).

254 *See* Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1199 (2007) ("[C]ourts inquire whether the retelling is 'transformative'; to satisfy this criterion, the work must contain a discernible element of critical commentary.").

255 *See id.* ("[W]ithin the framework of literary theory this test is broad enough to encompass almost anything . . . ."); *see also* Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL'Y & L. 461, 474, 496 (2006) ("[T]he representations offered through slash give us a critical vantage point from which to critique, analyze, and reinterpret the cultural products that are [originally] offered . . . ."); *see also* Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 L. & CONTEMP. PROBS. 135, 137, 143 (2007) ("[M]eaning cannot be imposed by authors or owners but rather is negotiated among texts, authors, and audiences.").

not—different cultural perspectives, being limited to particular (often dominant) cultural audiences.

No matter which test is employed for transformative use, at least some cultural adaptations would appear to qualify as transformative uses. Reimagining existing works in different cultural contexts and reaching different cultural audiences adds significant expression to works under the context/purpose test, while also commenting on the cultural shortcomings of an original work.

2. The Second Factor

The second factor—the nature of the copyrighted work—evaluates whether the original work is creative or factual and whether it has been published.[256] Compared to the first factor, the second factor's analysis is streamlined. Many courts also note that the second factor is rarely dispositive of a fair use analysis outcome.[257]

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[256] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994) (citing cases that compared soon-to-be published speech with published speech and creative and factual works).

[257] Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 178 (2d Cir. 2018) ("This factor 'has rarely played a significant role in the determination of a fair use dispute,' and it plays no significant role here."); Authors Guild v. Google, Inc., 804 F.3d 202, 220 (2d Cir. 2015) ("The second factor has rarely played a significant role in the determination of a fair use dispute."); Davis v. Gap, Inc., 246 F.3d 152, 175 (2d Cir. 2001) ("The second statutory factor, the nature of the copyrighted work is rarely found to be determinative."); Dr. Seuss Enters., LP v. Penguin Books USA, Inc., 109 F.3d 1394, 1402 (9th Cir. 1997) (noting that the second factor "typically has not been terribly significant in the overall fair use balancing . . . ."); Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1205 (Fed. Cir. 2018), *overruled on other grounds*, 114 S. Ct. 1183 (2021) (noting that the circuits agree that the second factor typically has not been that significant in the overall fair use analysis); Ferdman v. CBS Interactive, Inc., 342 F. Supp. 3d 515, 538 (S.D.N.Y. 2018) (undertaking a second factor analysis, but noting "[t]his factor 'has rarely played a significant role in the determination of a fair use dispute.'" (internal citations omitted)); Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412, 430 (S.D.N.Y. 2018) ("[T]he second factor does not carry much weight in the fair use analysis and is 'rarely found to be determinative.'" (internal citations omitted)); Arrow Prods., Ltd. V. Weinstein Co., LLC, 44 F. Supp. 3d 359, 371 (S.D.N.Y. 2014) ("[T]his factor 'may be of less (or even of no) importance when assessed in the context of certain transformative uses.' In the end, this factor is rarely found to be determinative." (internal citations omitted)); N. Jersey Media Grp., Inc. v. Pirro, 74 F. Supp. 3d 605, 620 (S.D.N.Y. 2015) ("[B]ecause the Work is factual and has been published, this factor favors a finding of fair use . . . .[H]owever, this factor is rarely determinative."); Asay et al., *supra* note 212, at 942 (finding in an empirical study that the second factor had little impact on the overall fair use analysis). *But see* Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM.

Regardless, this factor has influenced some courts and cannot simply be ignored.[258] Indeed, recently in *Google v. Oracle*, the Supreme Court found that the nature of the copyrighted work (in this case, software declaring code) played a formative role in finding fair use.[259]

Unlike the first factor, it is less certain how cultural adaptations would be interpreted under the second factor. While both are fact-specific determinations, the nature of cultural adaptations favors a transformativeness finding. Cultural adaptations vary in their uses of published works, unpublished works, factual works, and creative works. While using a published or factual work favors fair use, unpublished and creative works would likely necessitate a greater degree of transformative use.[260]

3. The Third Factor

The third factor evaluates the amount and substantiality of the use.[261] Courts look at both how much the new work takes from the original and how important these aspects are to the original work.[262] The third factor weighs most heavily in favor of a finding of fair use in cases where the original work is used in only a fleeting or *de minimis* way.[263] However, like the second factor, the first and fourth factors can still override a finding against fair use under the third

J.L. & ARTS 529, 530 (2008) (arguing that the second factor could be reimagined to play a more essential role in the fair use analysis).

[258] *See* Beebe, *supra* note 210, at 31 ("[T]he data suggest that certain findings under both of factor two's subfactors—whether the work is creative or factual and whether the work is published or unpublished—continue to have an at least statistically significant effect on a court's overall determination.").

[259] 141 S. Ct. 1183, 1202 (2021). ("[T]he declaring code is, if copyrightable at all, further than are most computer programs (such as the implementing code) from the core of copyright.").

[260] *See* Liu, *supra* note 212, at 168 (determining that a finding of a transformative use diminishes the impact of the second factor); *see also* Asay et al., *supra* note 212, at 945–46 ("[C]ourts often decide a particular factor is not fair, but note within that discussion that that determination does not matter much because other factors outweigh it.").

[261] *Campbell*, 510 U.S. at 586.

[262] Asay et al., *supra* note 212, at 916 ("[C]ourts consider subfactors relating to both the quantitative and qualitative amount of the borrowing.").

[263] *See* Sandoval v. New Line Cinema Corp., 973 F. Supp. 409, 410–11, 414 (S.D.N.Y. 1997) (finding fair use where photographs only appeared in the background of a particular movie scene for one and a half minutes).

factor. The third factor is weighed against the first, and it is permissible to copy even a substantial part of the original work if it is necessary for a transformative purpose.[264] Therefore, even copying the bulk of another's work is not determinative if there is strong transformative use or lack of market effect.[265]

The third factor's outcome for cultural adaptations would be highly fact specific. Cultural adaptations that merely borrow only a trifling amount and non-essential parts of the original's expression are more likely fair use. In contrast, works that take a substantial part from the original's expression would be less likely to be fair use—especially if that part contains core expressions central to the original work's value. Importantly, taking less from the original and developing more of one's own content is favored under both the third factor and the transformativeness consideration within the first factor.[266]

4. The Fourth Factor

The fourth factor looks at the effect of the use on the potential market for the copyrighted work.[267] It evaluates whether using the original work could act as a substitute within its respective or prospective markets.[268] To prove the market is encroached upon by the second user's creation, the original copyright owner must prove that the user caused a tangible (not merely speculative), detrimental effect on the market for the original work.[269] While licensing the use

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[264] *Campbell*, 510 U.S. at 586–87 ("The third factor asks whether 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole' . . . are reasonable in relation to the purpose of the copying." (internal citations omitted)).

[265] *See* Adjmi v. DLT Ent., Ltd., 97 F. Supp. 3d 512, 535 (S.D.N.Y. 2015) (holding that the "play is a highly transformative parody of the television series that, although it appropriates a substantial amount of Three's Company, is a drastic departure from the original . . . .").

[266] *See supra* Part IV(C)(1), (3).

[267] *See Campbell*, 510 U.S. at 590.

[268] Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 21 (1st Cir. 2000) (noting that a publication had a minimal effect on the photography business of the original creator of the work); Ferdman v. CBS Interactive, Inc., 342 F. Supp. 3d 515, 540, 542 (S.D.N.Y. 2018) (stating that market effect weighs against fair use where the "[d]efendant's use of these photographs is a perfect substitute for the intended market." (citing BWP Media USA, Inc. v. Gossip Cop Media, Inc., 196 F. Supp. 3d 395, 407 (S.D.N.Y. 2016))).

[269] *Campbell*, 510 U.S. at 590 (stating that the court must consider "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a

can be influential under the fourth element, it is not determinative.[270] For example, in *Google v. Oracle*, the Supreme Court held that loss of revenue through licensing is not the whole analysis under the fourth factor, finding that Google entered a market that Oracle was not able to enter.[271] Therefore, similarly to the transformative use determination, the fourth factor largely turns on whether the new work was for the same purpose as the original, or for a different and unrelated purpose.[272]

Because cultural adaptations are aimed to serve originally overlooked markets, cultural adaptations affect those markets the original work was unable to exploit. While the existence of a licensing system could shift the fourth factor against a finding of fair use, that factor is not determinative and the infringement upon the original work's market is more important.

The most important aspect of the fourth factor, then, is showing that different cultural markets are sufficiently distinct. The music industry is replete with examples of this differentiation. Different versions of songs were created for white and Black audiences during the first half of the twentieth century.[273] Part of the rationale was the

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substantially adverse impact on the potential market." (quoting NIMMER, *supra* note 146, at § 13.05(A)(4) (1993))); Bell v. Powell, 350 F. Supp. 3d 723, 729 (S.D. Ind. 2018) (dismissing the assertion that there was a market effect where the purported effect was "highly speculative.").

270 *See* Bill Graham Archives v. Dorling Kinderseley, Ltd., 448 F.3d 605, 615 (2d Cir. 2006) (noting that "[a] publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images."); *see also* Dhillon v. Doe, No. C 13–01465, 2014 WL 722592, at *6 (N.D. Cal. Feb. 25, 2014) (noting that a user can show that a market did not exist where a licensing fee was never sought by the copyright owner at any time).

271 141 S. Ct. 1183, 1206–09 (2021). *But see id.* at 1217 (Thomas, J., dissenting) (arguing that Google's actions "eliminated Oracle's opportunity to license its code for that use.").

272 *See Campbell*, 510 U.S. at 590 (1994) (noting that the inquiry "must take account not only of harm to the original but also of harm to the market for derivative works." (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985))); *see also* Barcroft Media, Ltd. V. Coed Media Grp., LLC, 297 F. Supp. 3d 339, 355 (S.D.N.Y. 2017) (noting that using a work for the same purpose shows usurpation of the market); *see also* Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 268 (4th Cir. 2019) (noting that since the heart of the work was copied, the plaintiff "need not demonstrate that the licensing market for his Photo would be depressed should [the defendant's use] became widespread.").

273 *See* Brauneis, *supra* note 11, at 7 (describing the mirror cover phenomenon in which white artists recorded cover versions of songs created by Black artists).

perception that white and Black consumers listened to different genres of music.[274] Indeed, in *Supreme Records, Inc. v. Decca Records, Inc.*, Judge Yankwich held that racial correlations with popular markets were distinct, preventing any significant consumer overlap.[275] The differentiation of markets in the music industry was cultivated by the recording industry, which established specific genres of music for different races, such as music for Black audiences, later relabeled as rhythm and blues ("R&B").[276]

A similar phenomenon has perpetuated with Latin music. Despite Latin music's diversity—including everything from banda to salsa to reggaeton—U.S. music charts usually lump these genres together under a single broad category, "Latin music."[277] The Latinx music market is incredibly diverse, with different songs appealing to different subcultures.[278] But this "nebulous and laughably broad genre construct" illustrates the different music consumption patterns between white and Latinx consumers.[279] Many Latin music artists, such as Ricky Martin and Enrique Iglesias, were initially popular with the Latinx market, only breaking into the pop market (i.e., mainstream white consumers) when they started recording songs in English.[280] Artists who could release songs that simultaneously appealed to Latinx and white consumer markets were exceedingly rare.[281] The language barrier for white listeners has only recently

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274 *See id.* at 8 (describing how major record companies perpetuated this differentiation in listeners through racist and prejudicial practices).

275 90 F. Supp. 904, 912 (S.D. Cal. 1950) (implicitly endorsing the statement that the two recordings were different in style, one a "race or blues and rhythm" recording, the other a "popular" recording). For a thorough examination of this case on the issue of race, see Brauneis, *supra* note 11, at 9–17.

276 *See* Arewa, *supra* note 58, at 595.

277 *See* Gary Suarez, *Urbano Is Breaking U.S. Streaming Records, But English-Language Media Hasn't Caught Up Yet*, REMEZCLA (June 18, 2019), https://remezcla.com/features/music/urbano-breaking-streaming-records [https://perma.cc/3X3K-EUC3].

278 *See* Steven W. Bender, *Will the Wolf Survive?: Latino/a Pop Music in the Cultural Mainstream*, 78 DENV. U. L. REV. 719, 730 (2001) (noting, for example, "that marketing to Cuban Americans in Miami is a different world from marketing to Mexican Americans in Los Angeles.").

279 Suarez, *supra* note 277.

280 Bender, *supra* note 278, at 723.

281 *Id.* at 723–24 (noting that Carlos Santana "stands alone for his history of success with both Latino/a and Anglo pop audiences for recordings in English, Spanish, and Spanglish that have spanned several musical generations.").

begun breaking down, with major pop hits like Luis Fonsi's "Despacito" being sung primarily in Spanish.[282]

While economic analyses might be critical for showing a clear market differentiation between original works and cultural adaptations, this evidence shows that the fourth factor likely weighs in favor of fair use. Appealing to an entirely different market would not encroach upon the existing market and consumer base of the copyright owner. Instead, cultural adaptations would appeal to distinct cultural consumer bases and improve the proliferation of works by appealing to groups left out by the original.

5. The Outcome

Overall, applying the four-factor analysis to cultural adaptations suggests that these adaptations could qualify as fair use. Though frequently commercial, such works have the potential to be transformative in purpose and context and to serve as commentary on the original work. The second factor is generally of little importance in determining fair use; but whether a cultural adaptation draws on published, unpublished, creative, or factual works is a case-specific decision by the artist. As to the third factor, the amount taken from the original work will also vary significantly depending on each artist's use. The fourth factor—market effect—likely weighs in favor of fair use if the cultural market for the adaptation is distinct from the cultural market for the original. Therefore, even if the second and third factors weigh against a finding of fair use, the most important factors—the first and fourth—generally favor recognizing cultural adaptations as fair use.

To see how this would operate in practice, consider the work of Kehinde Wiley, a famous contemporary artist known for his paintings of Black men, including, most notably, the official presidential portrait of Barack Obama.[283] One of Wiley's works, *Napoleon Leading the Army Over the Alps*, is an oil painting of a Black man

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[282] *See* Christian Koch, *13 of the Biggest Spanish Language Crossover Hits*, CULTURE TRIP (July 20, 2017), https://theculturetrip.com/europe/spain/articles/13-of-the-biggest-spanish-language-crossover-hits [https://perma.cc/7AB5-NB95] (describing the unique success of songs like "Despacito").

[283] *See generally About*, KEHINDE WILEY STUDIO, https://kehindewiley.com [https://perma.cc/G4T6-GU3T].

on horseback.[284] The work draws heavily on Jacques-Louis David's 1801 portrait, *Bonaparte Crossing the Alps*, which depicts French general (and later emperor) Napoleon Bonaparte heroically poised on horseback.[285] Wiley's painting features the same horse with the man posed in the same manner as David's Napoleon.[286] However, Wiley is offering an alternative narrative from David's work, featuring a contemporary Black man in place of Napoleon, replete with camouflage fatigues and Timberland boots.[287]

While David's portrait is in the public domain, if it were still under copyright, these two paintings would provide an example of fair use under the culture-conscious approach. While both portraits may appeal to fine art collectors, Wiley's painting seeks to address a different audience and create a different narrative, specifically highlighting the fact that Black and Brown people have, in many cases, been written out of mainstream history.[288] A court would likely consider this purpose transformative, even though it takes a significant amount from David's earlier creative work. Furthermore, the market for both works is at least partially distinct. While art connoisseurs and laymen alike can enjoy both paintings, the earlier work attracts those interested in old world European portraiture, while Wiley's painting appeals to both those who enjoy contemporary art and those who wish to see greater Black representation and perspectives in artwork. This example would likely qualify as fair use.

On the other hand, consider the 2002 Hollywood movie *Phone Booth* and the 2010 Bollywood film *Knock Out*, which an Indian court held likely infringed the former and accordingly issued an injunction.[289] Both works center on a person being held hostage in a telephone booth while speaking with their captor on the

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[284] *Napoleon Leading the Army Over the Alps*, BROOKLYN MUSEUM, https://www.brooklynmuseum.org/opencollection/objects/169803 [https://perma.cc/CD2H-FA6U].

[285] *See id.*

[286] *See id.*

[287] *See id.*

[288] *See id.*

[289] *See generally* Twentieth Century Fox Film Corp. v. Sohail Maklai Ent. Priv., Ltd., (2010) 44 PTC 647, paras. 1, 34 (India).

telephone.[290] The broad plots of the movies are clearly the same, but Bollywood has a long tradition of relying on outside films for their inspiration.[291] *Knock Out* adds several distinctly Indian elements, such as quintessential song-and-dance sequences.

The Indian court did not address fair dealing, but a U.S. court would likely find that *Knock Out* was not a fair use. There were undoubtedly some new elements in *Knock Out* that uniquely spoke to Indian audiences, but it was largely the same plot as *Phone Booth*. Under the first factor, the original work was not substantially transformed into a new work by the mere addition of Bollywood songs and a political conspiracy element. *Knock Out* was also a commercial work, weighing the first factor against a finding of fair use. *Phone Booth* was published, but it was also a creative work, rendering the second factor neutral. Large parts of the expression in *Phone Booth* were used in *Knock Out*, causing the third factor to weigh against a finding of fair use, especially as the use was not particularly transformative. Finally, while the Indian and U.S. film markets are distinct, the works substantially overlapped, suggesting that *Knock Out* affected the potential market for *Phone Booth*, at least in part.

While *Knock Out*, as it was produced, was likely not fair use, incorporating more Indian-specific mores and issues could have favored a different outcome.[292] For example, if the male lead faced a circumstance in the phone booth that would speak to an Indian audience but not a U.S. one, the work may have been sufficiently transformative to constitute fair use. Further cultural modifications to *Phone Booth* would again increase the transformativeness of the work, and thus the likelihood of a court finding fair use.

This example underscores that not all adaptations would qualify under a culturally conscious consideration of fair use; the heart of the work must be changed rather than a few peripheral details. This approach to cultural adaptations permits new adaptations for diverse

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290 *Id.* at paras. 9, 12.

291 *Id.* at para. 29; Goodyear, *supra* note 16, at 522–23.

292 *See* Goodyear, *supra* note 16, at 542 (describing Indian filmmakers' approach to borrowing content from U.S. films).

audiences while still blocking works that largely freeride on the creative works of others.

V. THE BENEFITS OF CULTURAL ADAPTATION IN THE UNITED STATES

Permitting cultural adaptations under fair use not only serves the policy goals of U.S. copyright,[293] but provides tangible benefits to society. In particular, legitimizing certain versions of cultural adaptations under fair use would, within the confines of societal norms, lead to the creation of more works, by and for cultural and racial minorities, which would generate greater economic output and provide more opportunities for artists of color.

As a preliminary matter, while some lawful cultural adaptations under fair use could perpetuate harmful appropriation of minority cultures, two important considerations limit the extent of this risk. First, as explained earlier in this Article, negative cultural appropriations by white Americans of Black, Native American, and other non-white cultures have long been a fixture of U.S. society, notwithstanding the protections of copyright.[294] Therefore, the inclusion of cultural adaptations inside fair use would help balance the scales for minority creators, as white artists have long capitalized on appropriative adaptations. Secondly, while copyright would endorse at least some cultural adaptations, popular opinion would dictate the market, restricting adaptations to those that are viable and likely to be successful. Social pressures would likely act to condemn more prejudicial or harmful cultural adaptations, much like how insensitive Halloween costumes incorporating Native American headdresses or turbans have recently been strongly rejected in popular discourse.[295]

Allowing cultural adaptations to be created through fair use would almost certainly increase the number of works created. The

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293 *See supra* Part III.

294 *See supra* notes 130–138 and accompanying text.

295 Austa Somvichian-Clausen, *The History of Racist Halloween Costumes, and the Progress We've Made in Saying Goodbye to Them*, CHANGING AM. (Oct. 30, 2020), https://thehill.com/changing-america/respect/diversity-inclusion/523694-the-history-of-racist-halloween-costumes-and-the [https://perma.cc/Q6LZ-2XSS] (describing how Halloween costumes and attitudes toward them have changed since the start of the twentieth century).

copyright holder's exclusive derivative work right can create a chilling effect on secondary creation.[296] Allowing a carve out from the derivative work right under fair use would reduce this chilling effect, allowing artists of color to create cultural adaptations with less concern about infringement liability. These works would include perspectives on existing works from different races and cultures, enabling the very commentary fair use seeks to encourage.[297]

While not all works appeal to all audiences, recontextualization in a cultural adaptation can place a theme or plot inside a different cultural setting that appeals to cultural minorities.[298] Since one's tastes are significantly influenced by race, among other social groups, cultural adaptations would be principally aimed at appealing to minority cultural experiences.[299] Individuals also respond well to seeing people of their own cultural background represented in arts and media.[300] In particular, children of color benefit from seeing those who look like them depicted in art because it builds self-esteem and confidence in their identities.[301] Artists from those cultures

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296 *See* Tushnet, *supra* note 154, at 133–34 (explaining the chilling effects of copyright on minority groups).

297 *See* Tania Inniss, *Black Art Matters: Why Our Creative Visual Contributions Should Be Valued and Represented More Widely*, BLAVITY (Aug. 14, 2018, 6:43 PM), https://blavity.com/black-art-matters-why-our-creative-visual-contributions-should-be-valued-and-represented-more-widely? [https://perma.cc/78UV-E8VM] (providing examples of how Black artists provide different perspectives through art, such as "Titus Kaphar [who] addresses erasure by amending paintings and sculptures of prominent figures from American history and revealing their morally questionable legacies.").

298 *See* Pager, *supra* note 4, at 403.

299 *See* Ludy & Mattes, *supra* note 109, at 19, 25 (describing food taste as influenced by race and culture); *see also* Sonnett, *supra* note 114, at 53–61 (describing how one's music tastes are influenced by their race and culture).

300 Jennifer N. Gutsell & Michael Inzlicht, *Empathy Constrained: Prejudice Predicts Reduced Mental Stimulation of Actions During Observation of Outgroups*, 46 J. EXPERIMENTAL SOC. PSYCH. 841, 844 (2010) (finding that the brain reacts differently when responding to one's own race); Ellithorpe & Bleakley, *supra* note 121, at 1434–35 (finding that Black adolescents preferred television shows where diverse—and particularly Black—characters were represented).

301 Julie Dobrow et al., *Why It's So Important for Kids to See Diverse TV and Movie Characters*, CONVERSATION (Mar. 7, 2018, 9:08 AM), https://theconversation.com/why-its-so-important-for-kids-to-see-diverse-tv-and-movie-characters-92576 [https://perma.cc/M6MZ-CF5J] ("There's a relationship between low self-esteem and negative media portrayals of racial groups, in addition to an association between poor self-esteem and the paucity of portrayals of a particular group.").

are particularly well positioned to create cultural adaptations that speak to those communities' experiences, norms, and mores.[302] They can also offer essential perspectives on lived experiences and the diversity of cultures that are often overlooked by mainstream art establishments.[303] As Black painter Amy Sherald eloquently put it, "I always want the work to be a resting place for [B]lack people, one where you can let your guard down among figures you understand."[304]

Creating new works that appeal to neglected consumer bases would also increase economic production. For example, in India, U.S. films adapted into Bollywood movies fulfill a neglected niche and are lucrative enough to generate (sometimes substantial) revenues and employ large numbers of people, from actors to crew to caterers.[305] An increased production in arts, especially for minorities, could improve prospects for artists financially supporting themselves and finding regular employment. In the United States, five million people are employed in the arts and cultural industries,[306] with this number on the rise.[307] Increasing economic possibilities in the arts benefits the U.S. workforce—especially minority workers—and, by extension, the U.S. economy overall.

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302 *See* John Singleton, *Can a White Director Make a Great Black Movie?*, HOLLYWOOD REP. (Sept. 19, 2013, 6:00 AM), https://www.hollywoodreporter.com/news/john-singleton-can-a-white-630127 [https://perma.cc/L875-EG7X] (stressing the importance of having Black involvement in creating movies about Black historical figures and Black culture).

303 *See* Nicquel Terry Ellis, *Art So White: Black Artists Want Representation (Beyond Slavery) in the Met, National Gallery*, USA TODAY (May 8, 2019, 10:32 AM), https://www.usatoday.com/story/news/nation/2019/05/05/black-artists-african-american-art-museums-galleries-collections-painting/3483422002/ [https://perma.cc/C8CJ-CE76] (describing "a movement of Black artists and curators from New York to Atlanta who are hosting exhibits, teaching classes and creating work that shines a light on Black culture," compared to the monolithic presentation of Black art available at major museums such as the Met).

304 Noor Brara, *Nine Black Artists and Cultural Leaders on Seeing and Being Seen*, N.Y. TIMES STYLE MAG. (June 23, 2020), https://www.nytimes.com/2020/06/23/t-magazine/black-artists-white-gaze.html [https://perma.cc/N6Y5-QCDK].

305 *See* Goodyear, *supra* note 16, at 544, nn.193–96.

306 *See* NAT'L ENDOWMENT FOR THE ARTS, ARTISTS AND OTHER CULTURAL WORKERS: A STATISTICAL PORTRAIT iii (Apr. 2019), https://www.arts.gov/sites/default/files/Artists_and_Other_Cultural_Workers.pdf [https://perma.cc/EN63-G5A7].

307 *See id.*

Artists of color have been historically underrepresented in practically every sector of the arts.[308] In Hollywood, lack of racial diversity on the screen and behind the scenes has been increasingly highlighted in the past few years, and underrepresentation for Black, Asian, and other minority populations continues despite notable successes such as Ryan Coogler's *Black Panther* and Jon M. Chu's *Crazy Rich Asians*.[309] Black artists have been similarly underrepresented at art auctions, in galleries, and in museums.[310] Increasing representation of artists of color facilitates the U.S. population's exposure to diversity, and should ultimately lead to greater acceptance and understanding of cultural diversity.[311] While white perspectives have largely dominated U.S. art and media, artists of color can change the narrative, providing their own cultural perceptions and experiences.[312] Allowing cultural adaptations through the fair use doctrine provides a new path to a more diverse and understanding art world.

CONCLUSION

The tension between race and copyright is deep-seated and needs greater attention in legal scholarship. This Article offers but one potential approach to help make copyright law more equitable for artists of all races and cultures. Unlike India and other countries with rigid exceptions to the rights held by copyright owners, the United States has the flexible fair use exception. So far, cultural

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308 *See* TOBIE S. STEIN, RACIAL AND ETHNIC DIVERSITY IN THE PERFORMING ARTS WORKFORCE 5 (2020) ("There is statistical evidence that the majority of artists, managers, and board members do not reflect the racial and ethnic diversity of the U.S. population."); *see generally* Stacy L. Smith et al., *Inclusion in the Music Business: Gender & Race/Ethnicity Across Executives, Artists & Talent Teams*, UNIV. OF S. CAL. ANNENBERG INCLUSION INITIATIVE 1 (June 2021), https://assets.uscannenberg.org/docs/aii-inclusion-music-industry-2021-06-14.pdf [https://perma.cc/5ESA-UBLD] (finding a continuing lack of diversity in the music industry, especially at the upper echelons of music businesses).

309 *See* Piya Sinha-Roy, *Filmmakers of Color Struggle Despite Sundance Success: "A White Guy Would Always Land the Job*," HOLLYWOOD REP. (Feb. 13, 2020, 6:30 AM), https://www.hollywoodreporter.com/news/indie-directors-color-pushed-sundance-success-1278720 [https://perma.cc/76JU-FC67].

310 *See* Inniss, *supra* note 297.

311 *See* Vanderbilt, *supra* note 129.

312 *See* Brara, *supra* note 304 (interviewing artists "about making work that captures the richness and variety of Black life.").

adaptations have been discouraged by the exclusive derivative work right. However, certain cultural adaptations could—and should—fit within the confines of fair use. Permitting cultural adaptations under fair use promises to further the purpose of copyright in addition to benefiting minority artists and society as a whole.

While this Article focuses on cultural adaptations, this is just the beginning of the conversation concerning diversity and fair use. Judges should approach the four-factor fair use analysis with an understanding of the challenges, realities, and possibilities for increasing diverse works. Courts can consider the cultural impact of not only works by artists of color, but also artists of different genders, sexualities, and socioeconomic backgrounds, as well as other axes of difference. Incorporating an understanding of diversity into fair use can foster more creative works from diverse authors and, ultimately, increase accessibility to and understanding of a more diverse palate of artistic works.