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# TRANSFORMATIVE USAGE OF COPYRIGHT: THIN LINE BETWEEN FAIR USE AND INFRINGEMENT

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## I. ABSTRACT

Copyright, while one of the most mundane words in this day and technology, still remains one of the most complicated laws around the globe. While protecting the rights of the owner of an original work, Copyright law aims to reward the creativity of the creator and protect them from being exploited. However, what happens when someone uses copyrighted material to make their own original work, like a painting inspired by a movie? Would it be an infringement or would it be a fair use?

In this article, we will explore what exactly copyright means and whether the product from its transformative usage can have its own copyright. A variety of examples and illustrations will be discussed along with the history behind transformative works and how they came to be. The variety of transformative work and how they developed will also be discussed in detail. Furthermore, this article also discusses the legality behind such transformative usage with some landmark judgements, emphasising scenarios where exactly the transformative works will be protected and where they would be considered as an infringement on the original work. Possible restrictions on such usage of copyrighted works along with the effect of such restrictions will also be explored.

Finally, the article ends with some suggestions from the author on how to tackle the situation with the current copyright laws and how transformative usage of copyrighted work can exist without compromising the integrity or protection of the creator of the original copyrighted work.

II. **KEYWORDS** – Transformative copyright, Copyright, Copyright Infringement, Derivative work and Fair use.

## III. INTRODUCTION

Art, books and music form an integral part of human history and even our day-to-day life – from expressing oneself to reading the fictional story created by someone's imagination. We, in our daily lives, come across a lot of copyrighted subject matters that we aren't even aware of. And yet, the creativity of many of these works inspires and motivates us the same. Many a time, such inspirations lead to more creativity and maybe the creation of more copyrighted work, some of which even directly reference the inspiration itself. This inspired work can be anything, from an art inspired by the famous painting of Mona Lisa to a new film based on the inspiration of the tales of Sherlock Holmes.

The inspired piece can be of similar subject matter as its original work or even a different one. However, in the case of similar mediums or subject matter, the inspired work can be referred to as a derivative work based on the work that has already been copyrighted.<sup>1</sup> This is especially the case if the inspired work has derived numerous copyrightable elements of the original work, like the characters of a book with all their general and specific features. The inspired or rather derivative work, in such a case, often becomes a separate and independent work from the original.

Let us take an example: the series of Sherlock Holmes. Being one of the most popular fictional

<sup>1</sup>Simon Frith, Lee Marshall, 2004, *The History and Philosophy of Copyright*, Music and Copyright, Edinburgh University Press, pp. 21-53

detectives, Sherlock Holmes as a character has been adapted throughout the history of literary and even musical works. Serials and movies like Sherlock BBC, Elementary and even animated ones like The Great Mouse Detective have been derived from the original books of Sherlock Holmes. All these secondary works with the noticeable recognisable characters Sherlock Holmes and John Watson are derivative works of the original book 'Adventures of Sherlock Holmes' written by Sir Authur Conan Doyle. Despite being derivative works of the original, each of these works has its own copyright since they have their own unique plots that give them their originality and thus, protection under the copyright law.

However, what happens if the subject matter of the inspired work is different from the original one? What if a poem or a book is inspired by a painting? Or vice versa? After all, painters in all of history have been quite inspired by poems and there have been quite a few poets who have been inspired by famous paintings as well. Like, the painting 'Landscape with the Fall of Icarus' was painted by Pieter Bruegel the Elder in 1558, inspiring the popular literary piece 'Musée des Beaux Arts' in 1938. It was written by poet W.H. Auden who took direct inspiration from the said art piece and even directly references the same in the poetic work. In such a case, would the poem also be considered a derivative work? Or has it 'transformed' enough to be a completely new work of its own?

Human Imagination is quite like a kaleidoscope, enrapturing different but beautiful images from the same colourful beads inside it. The reflection of these images can be taken as a new work being inspired by the same beads of the copyrighted work already existing. Each bead of work transforms into a new colourful image despite the beads remaining the same and unchanged. And so is the nature of the work transformed from the copyrighted works – works that are inspired and often referencing its inspiration from other copyrighted works and yet being so distinctive that it has its own copyright separate from its inspiration.

This concept is known as the transformative copyright. As the term suggests, it is a form of copyright that is 'transformed' from (possibly) another copyrighted work but has enough new elements and uniqueness of its own to make it no less than another original work. In this article, we will explore exactly what it means and how it can exist legally alongside its original inspiration.

#### IV. MEANING OF TRANSFORMATIVE WORK

Before diving into the other aspects of transformative work, let us first understand what exactly does transformative use of copyrighted material mean. Transformative use of copyright and the resulting 'transformative work' is a type of fair use based on a different interpretation or expression than the original work. Due to the transformative work being a completely different and original take on the existing copyrighted material, it does not infringe the rights of the copyright owner of the work it is inspired from.

Let us take the same example as earlier: Sherlock Holmes. There have been many movies, serials, musicals and even songs about the great fictional detective. Each of these works has either referenced the character directly from Sir Authur Conan Doyle's book or has completely spun a new take on him. Like, in the animated movie 'The Great Mouse Detective', Sherlock Holmes was adapted and written as a mouse with the same characteristics but a completely different personality and background than how the original work portrayed it. In such cases, these secondary works are deemed to be transformed into original works of their own and don't infringe upon the rights of the copyright owner of the original work.

This transformation is a characteristic that every derivative work possesses, giving it the leeway from being sued for infringement since it comes under the fair use principle. The fair use principle, as one may already know, is the doctrine that allows the use of copyrighted materials even without the permission of its

owners. However, it only allows 'fair' use of the same, which includes usage for research, education, inspiration or even personal usage. Transformative works can come under it as well, given how they only take inspiration from the original work.

However, not all derivative works are transformative works and may need the permission of the original copyright owner before publication or release to the public. In simpler words, while transformative works are works that take inspiration from or interpret the original copyrighted work in a completely new manner, derivative works expand upon the original work and give it a new meaning or continuation.<sup>2</sup> For instance, a sequel to a book, a remix of a song or a snippet of a painting. All these are derivative works with some transformative elements but not as many have their own copyright separate from the original work.

To expand on this, we need to understand that derivative works are works that usually 'supersede' the original work and are often more connected than transformative works. Transformative works give a new meaning and expression to the original work, making it original in its own accord. This protects such works from infringement lawsuits and even the limitations that derivative works usually face.

In simple terms, transformative works are a type of derivative works that have 'transformed' enough with the creativity of their maker that they can be their own copyrighted matter. For example, a fairytale-inspired book or movie that has an original take on the said fairytale. Similar to how Sherlock Holmes was adapted into so many books, comics, series, music, etc. What sets it apart from other derivative works is how transformative copyright has an original take on the existing copyrighted work and is not merely a continuation, adaptation or translation of the same. Derivative works don't necessarily

add a new meaning or interpretation and remain closer to the essence of the original copyrighted work than the transformative work does.<sup>3</sup>

The more unique and different it is from the inspired copyrighted work, the more it would be a transformative work and be protected under the copyright law. There needs to be a completely new perspective, interpretation or expression in the work that should be distinct from the original work if it was inspired from.

Some examples of it would be portraits inspired by the pictures of celebrities or places or even tattoos of paintings and movie characters. All of these are transformative works that have their own copyright distinct from the original work they were inspired from. However, what happens if it is a fanart of the original? Or a fan fiction? What about fan music or even fan theories? All these transformative works have enough original creativity of the creator to be their own copyrighted material, despite having pieces or parts of other copyrighted subject matter but would they still be considered their own copyrightable subject matter?

Since the aim of copyright law is to protect the creator's rights but not smother inspiration or innovation in others, transformative work usually falls under the fair use doctrine. However, the question arises on how far this 'fair' use extends before it is an infringement and how can it be determined what work is 'transformed' enough to be distinct from its original inspiration. Let us discuss it in detail further in the article.

## V. HISTORICAL BACKGROUND OF TRANSFORMATIVE COPYRIGHT

While the concept of copyright existed for more than a few centuries, so is not the case for transformative copyright. It has quite a recent history that was developed first from the concept of fair use.

The doctrine of fair use came into existence to protect individuals from being sued for

<sup>2</sup> Murray, Michael, 2012, *What is Transformative? An Explanatory Synthesis of the Convergence of Transformation and Predominant Purpose in Copyright Fair Use Law*, SSRN Electronic Journal.

<sup>3</sup> *Ibid.*

infringement due to using copyrighted work without prior permission of the copyright owners. This can be traced back to the 17th century when English authors used to take inspiration directly from French works without any authorised permission. Since the copyright at the time didn't allow any unauthorised usage of copyright material at all, without exceptions, many such authors were sued for taking inspiration without prior permission.

It wasn't until the case of *Gyles v Wilcox*<sup>4</sup> that the doctrine of 'fair abridgement' was first established, that allowed the usage of copyrighted material without any kind of authorised or prior permission. However, it was restricted for certain circumstances, such as biographical work and research, and could only extend to unauthorised abridgement – nothing beyond that. It was the first version of fair use doctrine that we can find in history, even if it was not directly used as such.

The term 'fair use' was coined for the first time in the USA during the 18th to 19th century, with the doctrine originating through the common law. The reason behind its establishment was to avoid unnecessary litigation and to stop copyright or patent laws from stifling the innovation and creativity of new creators. Too rigid laws could result in a decrease in innovation to foster which laws were made in the first place. The fair use doctrine balances out the dynamic between the individual interest and the public interest by allowing it as a defence from infringement upon using protected materials under copyright or patent laws for non-commercial or bonafide usage.

While starting as a common law practice, the doctrine of fair use was soon established as a statutory law in the USA through Section 107 of the Copyright Act of 1976. It later developed into the doctrine of 'fair dealing', which was a more expanded version of the same to keep up with the times and have more leniency.

Section 107<sup>5</sup> defined fair use doctrine as the actions which can be excused from infringement given, they come under certain circumstances. These circumstances included personal and non-commercial usage as well as usage for education, research, commentary, criticism, news reporting, etc. Alongside these, the Section also included the factors that determine what should be considered fair use, which are given below:

- The nature of the original copyrighted work that is used;
- The purpose of usage and how it is used;
- The amount of the original copyrighted work used, whether it is used partially, wholly or only referenced;
- The effect of such usage on the copyrighted work, especially the financial and moral effect.

The issue with these factors is that while they may seem sound, they are quite vague and leave a lot in the hands of the Court to exercise their discretion. Since the circumstances of each case may vary from another, the law is flexible in its interpretation. However, it also creates the chances of inconsistency and lengthy trials. This Section was based on the landmark judgement of *Folsom v. Marsh*,<sup>6</sup> which was one of the first cases to attempt to give premises for a test to consider what use of copyright is fair and what is not. It still persisted as an enshrined law, despite its vagueness.

Many jurists and legal scholars like Judge Pierre Leval protested against such vague factors. He was of the opinion that the concept of fair use was more shrouded in mystery than any other legal provision and could potentially cause a lot of discrepancies in the cases due to inconsistent application. As he stated in his article 'Toward a Fair Use Standard' published in 1990,<sup>7</sup> there can be many different interpretations of the same legal provision given how precedents were yet to be made.

<sup>5</sup> American Copyright Act 1976, s 107.

<sup>6</sup> *Folsom v. Marsh* [1841] 9 F.Cas. 342 (US).

<sup>7</sup> Pierre N. Leval, 1990, *Toward a Fair Use Standard*, Harvard Law Review, Vol. 103, No. 5, pp. 1105-1136.

<sup>4</sup> *Gyles v Wilcox* [1740] 3 Atk 143; 26 ER 489 (UK).

And with no other guidance than the vague list of factors under Section 107,<sup>8</sup> the consensus as to what entails fair use was not quite yet reached.

However, while he criticised the legal provision of the doctrine quite harshly, Judge Leval was quite optimistic about the doctrine of fair use itself. According to him, the doctrine was an integral part of the copyright law and not an exception to it. The more it was perceived as a rationale that was made to achieve the objectives of copyright law, the more it would be easier to implement and foster creativity among the public. In his article, he emphasised that fair use should have a utilitarian motive that can help foster creativity rather than smother it.<sup>9</sup> In other words, the usage should be in a bonafide manner and not exploit the original owner of the copyrighted work for individual interests.

Judge Leval's views in his article can be interpreted and applied for transformative copyright as well, given how he talks about fair use and enough transformation with bonafide motifs. However, since he never mentioned the term or explored the concept in detail, the first emergence of transformative use of copyright is credited to the case of *Campbell v. Acuff-Rose Music*<sup>10</sup> in 1994. In the judgement of this case, the Supreme Court not only considered how much of the original copyrighted work was used but also how the new work was transformed into a completely new work.

The disputed copyright work in this case was a song named 'Oh, Pretty Woman', which inspired two parody songs of similar name and lyrics 'Pretty Woman' by the Live Crew. The Supreme Court of America ruled that there was no copyright infringement in the present case since the new songs had their own unique expressions and meanings that were quite distinct from the original song. Not only did the two songs were transformed into their own

copyright, but they also were a clear parody that did not copy the original song and thus, would not impact the original copyright owner.

This was the first case that divulged the concept of transformative copyright. Judge David Souter, while writing his opinion in judgment of the case, heavily referenced Leval's article. He held that the extent of 'transformation' of the new work and the expression, meaning or even the message behind it, should be considered while determining whether it was a fair use of the original copyrighted work. Any work merely expanding or superseding the original work would not amount to protection. However, if the new work is transformative and distinct, the less would other factors matter – even the commercialisation of the new work.

This opinion of Judge Souter was immediately put to test in the case of *Dr Seuss Enterprises, L.P. v. Penguin Books USA*,<sup>11</sup> where a book named 'The Cat Not in the Hat! A Parody by Dr. Juice' was written and narrated in the distinct style of the popular author Dr. Seuss. The book narrated the murder trial of O.J. Simpson and claimed to be a parody, which the Court disagreed with. According to the Ninth Circuit Court of Appeals, the book was not a parody since it did not mock or make fun of Dr Seuss in any manner. Instead, the Court held the book to be a satire since it simply narrated the murder events through the characters rather than adding any new meaning or expression to it. Thus, such usage of the copyrighted work was held non-transformative.

The next significant case that highlighted the journey for transformative work was *Mattel, Inc. v. Walking Mountain Prods.*,<sup>12</sup> in which Mattel had sued the defendant for the usage of dolls similar to its product Barbie in their 'Food Chain Barbie' photo series. They argued that the series infringed on their copyrights and trade dress rights. However, the Court held against the plaintiff stating that trade dress was not

<sup>8</sup> American Copyright Act, 1976, s 107.

<sup>9</sup> Simon Frith, Lee Marshall, *The History and Philosophy of Copyright* (2004).

<sup>10</sup> *Campbell v. Acuff-Rose Music* [1994] U.S. LEXIS 2052 (US).

<sup>11</sup> *Dr Seuss Enterprises, L.P. v. Penguin Books USA* [1997] 109 F.3d 1394 (US).

<sup>12</sup> *Mattel, Inc. v. Walking Mountain Prods.*, [2003] 353 F.3d 792 (US).

violated since the defendant used their own products or 'dolls' that did not look anything like Barbie or even entail that they were sponsored or produced by them. As for the copyright infringement, the Court held that since the picture series was used for non-commercial purposes and was done as a parody that was quite distinct from the copyrighted product, it would be protected under the fair use doctrine.

Another landmark judgement that further defined transformative work was the case of *Warren Publishing Co. v. Spurlock*,<sup>13</sup> in which the defendant had published a biographical book named 'Famous Monster Movie Art of Basil Gogos', which included several of the famous artist Basil Gogo's work throughout his lifetime. This book included several of the cover art that the artists had drawn for the Plaintiff, who had commissioned Gogo for several of their horror-themed magazines. The Court held the case in favour of the defendant, ruling that the use of artwork to illustrate a biography of an artist can be referred to as fair use. Since the premises of the book and the Plaintiff's magazine are distinct, the commercial impact was deemed to not be affected as much.

The Court also held that the use of the artwork in the Defendant's book was transformative in nature since the plaintiff had originally used those cover arts for the sale of magazines while the defendant focused on highlighting the message and work behind the art. Thus, the purpose behind such use was bonafide and had a distinct meaning from that of the original work.

Meanwhile, in another and more recent case of *Google LLC vs. Oracle America Inc.*,<sup>14</sup> it held that transformative works would be protected even if commercialised. In this case, the Java application as well as its related application programming interfaces (APIs) were developed by a company acquired by Oracle in 2010. However, in the meantime, Google had acquired a company named Android and had

developed its own operating system (OS) for mobiles using the same Java APIs without prior permission.

The Court held in favour of Google, stating that the usage of the Java API by Google was not only transformative but also protected under fair dealing since it used even less than 1% of the entire Java source code currently owned by Oracle. And since such usage had also led to the development of technology and overall improvement of society, Google was protected from any case of infringement for the same.

As one may have noticed by the time of the *Google vs Oracle* case,<sup>15</sup> the term transformative usage of copyright became quite well-defined and consensus, focusing more on the utilitarian motive while also fostering creativity. This legal development took more than a few decades and now is popular enough to both cause confusion and help inspire more creative work on its own accord.

## VI. CURRENT DIVERSITY

To relay it in simple words, transformative works are everywhere. From the music we listen to, to the books we read, to the movies we watch and even the paintings and art we admire – just as how diverse copyright is, so are transformative usage of copyright. Since copyright has a large subject matter pool or many works that subsist under the umbrella of its protection, its transformative usage also has similar diversity. In fact, transformative usage also extends to patents and fair use in patent law as well.

Transformative works include fanfiction, fanart and parody, obviously. But, beyond that, it also includes remixed songs, commentary videos, literary comments, references in research papers and studies, using as a metaphor in poems and songs, remakes, musicals of literary work, poems on paintings, news on reporting, cover of songs, cinematographic interpretations and many more. In fact, many of these works exist primarily as derivative works. Only a few can be transformed enough from the

<sup>13</sup> Warren Publishing Co. v. Spurlock [2009] 645 F. Supp. 2d 402 (US).

<sup>14</sup> Google LLC vs. Oracle America Inc. [2021] 141 S. Ct. 1183 (US).

<sup>15</sup> *Ibid.*

copyrighted work it was inspired from to become its own original work.

The biggest example of a derivative work becoming a transformative work was the book series named 'Fifty Shades of Grey', which started a fanfiction of the Twilight books. It was distinct in its ideology and expression, setting itself in an alternate universe than the original books. The only common thing was apparently the characters, whose name was swapped before the official publication. This resulted in a completely new copyrighted series despite it being transformed from another copyrighted work.

This transformative usage of literary work is not new, given how in Medieval Europe, it was quite popular to directly cite the extracts or verses from other authors and poets without their prior permission.<sup>16</sup> It was a literary genre of its own, where the authors remixed or interpreted the other author's work without putting in too much of their own creativity. The same could be seen in Renaissance Europe regarding art and architecture that was directly copied from the architecture of Ancient and Ancient Greece.<sup>17</sup>

In essence, throughout history, people have actively recreated work from another existing work and enjoyed it as a culture – let it be adding more to the mythological tales during a drunken night or rewriting the folklore with a completely different spin. Transformative work has been a part of our history as long as our culture and so is its diversity. In the current modern world, the widespread access to even more sophisticated technology has made an easier outlet for such transformative usage along with more inspiration and access to copyrighted works from all across the globe.

However, the question still remains on how far the transformation has to go for it to qualify and be protected as a transformative copyright and whether there should be some kind of

remuneration for the original creator of the copyrighted material.

## VII. LEGALITY OF TRANSFORMATIVE USAGE OF COPYRIGHT

While the development of the concept of transformative work took well over a century and its proper application a good few decades, the legality of the same is still questioned due to its vague statutory provision. Most of the cases of transformative copyright depend more on the interpretation given in the precedents than the legal provision itself. And while the factors for the test of fair use are still applied in all the cases, they do not seem to affect the judgement.

What is highlighted in most of these judgments is the meaning of 'transformation' given in the context of the varying circumstances of each case. For instance, portraits inspired by the photographs of celebrities or paintings made from the photographs of beautiful scenery. In both these instances, if the paintings are the same as the photographs except for their medium, would that amount to transformative work or would that be a copyright infringement?

What if instead of paintings, they are tattoos? Tattoos of celebrities, scenery or even fictional characters from copyrighted works; especially if they are made to look exactly like the said copyrighted material with little to no other changes. In such cases, will the tattoos still be considered transformative work? This question becomes especially relevant for realistic tattoo portraits many clients ask of their tattoo artists. And since copyright law aims to protect the creator's rights but not smother inspiration or innovation in others, would the transformative copyright still apply here?

In the recent case of *Jeffrey B. Sedlik vs. Katherine Von Drachenberg*,<sup>18</sup> the Court held in favour of the defendant, who is a popular tattoo artist known for their realistic tattoos. In this case, the defendant had made a tattoo of Miles

<sup>16</sup> Guilda Rostama, 2015, *Remix Culture and Amateur Creativity: A Copyright Dilemma*, WIPO Magazine, available at: [https://www.wipo.int/wipo\\_magazine/en/2015/03/article\\_0006.html](https://www.wipo.int/wipo_magazine/en/2015/03/article_0006.html).

<sup>17</sup> *Ibid*.

<sup>18</sup> Jeffrey B. Sedlik vs. Katherine Von Drachenberg [2024] 2:21-cv-01102-DSF-MRW (US).

Davis and posted it on her social media. The tattoo she made was from a photograph that the plaintiff was the copyright owner of, hence the present suit. The Court ruled that the tattoo and its pictures shared on her social media were protected under fair use as a transformative work and were 'substantially different' than the original copyrighted work. According to the Court, it was not a mere replication and had substantial creativity from the tattoo artist.

Since the test of transformative work focuses on the distinct interpretation and meaning behind the new work compared to the original, the Court deemed that the tattoo made by the defendant had a completely different purpose and meaning than the photograph clicked by the plaintiff. It provided a fresh expression distinct from the original photograph and the images of the said tattoo on social media do not quite impact the value or financial aspect of the copyrighted photograph.

Thus, the only reason it did not amount to copyright infringement in this case was because the purpose and meaning behind the tattoo differed from that of the copyrighted photograph, despite how the two looked almost identical. This opens up a lot of questions regarding what exactly 'purpose' means here and how it should be interpreted in future cases.

On the other hand, in the case of *North Jersey Media Group Inc. v. Jeanine Pirro and Fox News Network, LLC.*,<sup>19</sup> the same argument of purpose was brought by the defendant. In this case, the defendant Fox News had posted a popular photograph of firefighters hoisting the American flag in the aftermath of 9/11, called the 'Raising the Flag at Ground Zero'. It was not edited or modified in any manner and the caption only relayed to the public to 'never forget.' Upon being sued by the plaintiff, the defendant argued that posting the copyrighted photograph on social media was

transformative since its purpose was to promote engagement through commentary.

The Court held the judgment against the Defendant, stating that posting copyrighted content on social media does not amount to transformative work. If it was accompanied by a related article or anything that added or transformed the original photograph, then it would have been a sound argument. However, since that was not the case, it was held as a non-transformative use of the copyrighted photograph.

As seen through these two judgements, transformative use is a very crucial part of the fair use doctrine and yet, still varies from case to case, given the circumstances. Each unique element of the case is interpreted accordingly with the legal provision, which is quite necessary for the current technological advancement that allows easier transformation of copyrighted materials.

#### VIII. EFFECTS OF RESTRICTION

As mentioned earlier in the article, the interpretation of what is transformative and what is not can be quite varying and often inconsistent. This puts a lot of the work on the Court's hands who have to use their own discretion to deal with the same. Thus, to somewhat relieve the Court from this dilemma and to protect the rights of the copyright owners, many people have suggested bringing in stricter or, at least, more defined legal provisions.

While this suggestion is quite sound, the issue it possesses is that more concrete provisions can lead to rigidity in copyright law. In addition to that, excessive protection granted to copyright owners especially when the advancement of technology has led to the blurring of lines in such a field can lead to prioritising individual interests over public interests. This would lead to defeating the purpose of why copyright law was made in the first place.

It is true that copyrighted work needs protection but so do transformative works since it also

<sup>19</sup> *North Jersey Media Group Inc. v. Jeanine Pirro and Fox News Network, LLC.*, [2015] 74 F. Supp. 3d 605 (US).

holds just as much significance and creativity as its original source work. Transformative works such as fanarts, fanfictions and other fan works help in increasing engagement about the original work while also promoting creativity and innovation among the audiences. Through practising by building on existing copyrighted work, they are often able to learn the basics which they later apply to their own original works separate from the previously existing works. Even when that is not the case, such usage helps in promoting a culture that is based on both old and new concepts, giving birth to something unique in the end.

This fusion of old and new concepts can lead to enriching culture as we have already seen in history. It can help build communities around common interests and a culture that finds depth in art and music through interpretation and imagination. This can also bring diversity in works that didn't previously include such representations, helping to reflect the new values and societal norms that change the most with time.

In essence, transformative works help copyrighted materials stand the test of time and not stay lost and forgotten, let it be through sampling a 1980s song to make a new one or remaking a movie from the early 20th century with a modern twist. It also brings more scope for creativity and financial investment in the market.

In the context of transformative works used for educational purposes like scanned books, abridged notes and literary comments, such works play a crucial role for many students as well as teachers. The same is true for social purposes where transformative works like skits, parodies, satires and critiques can help a lot in spreading awareness about situations and issues still persisting in society.

In a nutshell, transformative copyright is just as an integral part of copyright as any other. It is an ever-evolving concept that not only keeps up with the time but can also be used to show the differences between time periods and their

effects. Like the adaptation of Sherlock Holmes into a series in 1984 and the adaptation in 2010 through Sherlock BBC, which spun it in a more modern setting. However, with stricter laws for the same, such transformative works may be hindered since many media platforms would attempt to remove them to avoid any copyright infringement.

As already seen through the platform of YouTube, where the number of transformative works is the highest due to commentaries, skits, parody videos, etc., being as wide and popular as they are. The infamous Content ID software used by YouTube analyses the samples of music to recognise in which videos it is being used and swiftly blocks them or mutes the music once a match is made. While it may sound impressive and sound to many people, the issue arises when it is muted even in those videos where the music is nothing but a low hum in the background. Even videos with one to ten seconds of music or other copyrighted work can lead to the whole video being blocked or taken down by YouTube, leading to the hours of hardwork by the content creator being wasted. In many cases, if the video is not taken down, it completely shuts down the ad revenue which leads to the creator getting no money from the video at all.<sup>20</sup>

This is a big issue for those who make commentary on events that may contain copyrighted materials, like an award ceremony, a sports match or even an internet feud. Repeated removal of their videos that even lead to the deletion of the YouTube channel of the creator, leading to even more loss especially if they have created a significant number of followers on the said account or channel. While the concept of transformative work exists in reality, YouTube's Content ID software completely forgoes any such concept to avoid inconsistency. This leads to a rigid system that

<sup>20</sup> Casey Fiesler, Joshua Paup, Corian Zacher, 2023, *Chilling Tales: Understanding the Impact of Copyright Takedowns on Transformative Content Creators*, Proceedings of the ACM on Human-Computer Interaction, CSCW2, Vol 2, available at: <https://dl.acm.org/doi/10.1145/3610095>.

many people fear would extend to the legal provisions in the future.

As observed in the case of *Stephanie Lenz v. Universal Music Corporation*,<sup>21</sup> the plaintiff had made a YouTube video of her and her children dancing and performing to the music of one of the artists working under the defendant. It was a clear transformative work since the dance was the main focus and yet it was later removed by a copyright strike manually filed by the defendant. The software behind YouTube gives complete control over the copyright owner on whether to remove the impugned video or claim it completely for their own.

Little to no proper chance was given to the creators of the video to defend themselves in such a situation and the only way to resolve this issue comes from a lawsuit in the Court. In this case, the Court held that copyright owners should not take down videos without doing a proper legal analysis on whether the said content is a transformative work falling under the doctrine of fair use or not.

This makes the YouTube software one of the more unpopular systems not quite liked by the members on the platform. Since it also allows all the ad revenue from a claimed video to be sent to the copyright owner if the impugned video is not taken down, it becomes even more painful to a lot of content creators on the platform.<sup>22</sup> The abuse of such a system by copyright owners for less than a 10-second clip of their copyrighted material on another video has led to a lot of fear that in case of stricter copyright laws, the platform will not let 'potentially' infringing videos like the aforementioned be uploaded at all.

This is the exact scenario many people envisioned as a potential aftermath of passing of the Article 13 of the European Union Directive on Copyright in the Digital Single Market, 2019. The Directive acts as a regulator of content shared on online platforms for all the countries

in the European Union and Article 13,<sup>23</sup> in particular, was framed to hold online platforms responsible for copyright infringement. Since up until now social media platforms have been recognised as third-party websites and could take that defence against any such case, this Article removes that defence and directly holds them liable.

This Article was framed so since social media platforms are known for getting a lot of revenue from the ads on the content uploaded by its members. Since they seem to be benefiting from infringing content, they should be liable for it as well – especially since a lot of the copyright owners do not get paid properly for the usage of their work, let alone be asked for prior permission.

The reason why many people were quite worried about Article 13<sup>24</sup> was because once the liability fell on platforms with user-generated content like YouTube and Instagram, there was a high chance such platforms would train their software to delete any 'potentially' infringing content as well, even if it can be recognised as transformative work or any other fair usage. Since the current system already removed transformative work even without cross-checking whether it was an actual infringement, the passing of this Article heightened people's paranoia.

Article 11<sup>25</sup> also led to some panic due to its vague wording. This Article talks about the 'link tax', which states that appropriate remuneration should be paid by aggregator sites and platforms to original publishers if they are linking in their work. This is specifically for news and press publications with its vague wordings on its 'payment' and lack of clarity on how it would work has left many people on the edge of their seats.

The lack of clarity on how much of the article needs to be referenced for such payment to

<sup>21</sup> *Stephanie Lenz v. Universal Music Corporation* [2015] 801 F.3d 1126 (US).

<sup>22</sup> Casey Fiesler, Joshua Paup, Corian Zacher, *Chilling Tales: Understanding the Impact of Copyright Takedowns on Transformative Content Creators* (2023).

<sup>23</sup> European Union Directive on Copyright in the Digital Single Market 2019, art 13.

<sup>24</sup> *Ibid.*

<sup>25</sup> European Union Directive on Copyright in the Digital Single Market 2019, art 11.

happen and whether 'mere hyperlinks accompanied with words' would also mean other blogs and writing also stands to be concerning. While the EU Directives did mention any exemption for private and/or non-commercial use, a new question arises on whether that would still apply to content creators with a huge following since their content may generate money for them.

With such discrepancies and queries, it makes one wonder how to navigate through this thin line between fair use and copyright infringement without stepping into the other.

#### **IX. CONCLUSION AND SUGGESTIONS**

In essence, it can be concluded that while original work may stand as the creative inspiration, its transformative work should be a new and fresh spin or expression of it – not a mere replication or superseding material. There should be a significant amount of creative content added to the transformative work beyond the reference to the original work.

Thus, to ensure that one's work is actually transformative and not a mere derivative of the existing copyrighted work, it is crucial to see how much they have added their own meaning, view or interpretation to the transformative work. While it should touch the source work, it should not be a mere replication or retelling of the same. The core ideology of both works should be distinct from one another, while still being connected if they so wish to make it so.

Just as one may do while trying out a new recipe, substitute food and spices for those they currently have in their kitchen along with adding the ingredients they like or prefer instead of those they are allergic to. This can be done the same with the transformative work where they put a twist to the original work with their own writing style and interpretation. The more they put in their own interpretation, while still respecting the copyright owner's ideology, the more chance it would have to be recognised as a transformative work.

The aim should be to put out a fresh interpretation that is distinct and not existing in the copyrighted work that is used for inspiration. It can also be a further exploration of the source material while engaging with topics maybe the original work didn't engage with. For instance, a more religious interpretation of a story or a modern retelling of folklore. Even the cover of a copyrighted song can be taken as an example since while they may originate from the same lyrics, the essence and narrative of both can be worlds apart.

In the end, the transformative work should be new and distinct from the copyrighted work it was inspired from, offering the audiences a new and distinct experience from the source material while not disrespecting the same. After all, the transformative work should be inspired by the source material without diminishing its value.