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Sampled! Revisiting Fair Use and *De Minimus* Copying in Music Sampling

Connie Davis Nichols[*]

ABSTRACT

Could your favorite mash-up be an infringement under Copyright law? At one time, sound recordings featured a simplified copyright infringement analysis under the 2005 *Bridgeport Music* decision, which held that the Copyright Act provided copyright holders an exclusive right to sample their own work and any other sampling constituted infringement, unless it was a fair use. This decision remained intact until the *VMG* decision in 2016, which renewed the availability of the *de minimis* infringement defense in music sampling cases and held that sampling without a license did not constitute infringement so long as the sample was not recognizable by the general public. Since the revival of the *de minimis* defense, other questions have been raised concerning sampling—including whether the *de minimis* defense is an affirmative defense and whether a work, even if not transformative, is not an infringement based on the intent behind the work. The *VMG* decision, as well as other decisions backing away from *Bridgeport Music's* bright-line rule, has resulted in mass confusion regarding whether mash-up songs are infringements of copyright holders' rights or transformative works—a term of art that is not specifically defined. Courts and Congress should define what constitutes a transformative work, disregard the *de minimis* defense and intent argument, and return to the *Bridgeport Music* rule in order to align the law with the Constitution's intent of the Copyright Act.

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I. INTRODUCTION

"Permission was vital, legally."[1]
~Yoko Ono

As creativity continues to flourish and take new forms in society, many artists have become skilled in the art of music sampling. Indeed, the popularity of music sampling has increased with the skills of various sampling artists. These new skills can be attributed to digital technology.[2] Music sampling, as an art form, involves creating a digital copy of a portion of a pre-existing song and reusing/repurposing the "sample" into a new and different piece.[3] In an age of constant technological development, it is no surprise that this type of creativity has experienced tremendous growth. Several artists have shared the spotlight for their use of music samples, including hip-hop artists Jay-Z, Kanye West, and Kendrick Lamar. However, sampling has not been limited to the hip-hop industry.[4] What was once seen as taboo, as exemplified by the 3rd Base's lyrics: "[Y]a boosted the record then ya looped it, ya looped it . . . now ya getting sued kinda stupid . . .",[5] has evolved into music recordings that consist wholly of music samples. For example, the track "This is the Remix" by Gregg Gillis consists of a mix of over 200 music samples.[6] This phenomenon has garnered public attention, much of which centers around Gregg Gillis, also known as "Girl Talk," whose recordings consist of many samples of pre-existing recordings or "mash-ups".[7] To date, Gillis has released five albums made entirely of mash-ups of music to which no licenses have been secured.[8] Gillis, a biomedical engineer from Pittsburgh, has been labeled the "hottest" artist in this emerging music genre and was lauded by Representative Michael Doyle on the House floor for his innovation in this new genre of music.[9]

As Gillis's music sampling has achieved acclaim, the discussions surrounding music sampling and copyright infringement have increased. Many of these discussions are focused on the emergence of artists whose music model is completely based upon music sampling and why the music industry has not sought legal action against the most popular mash-up artist, Girl Talk. Girl Talk steps onto stage to sold-out concerts and followers raving about the music. Nonetheless, many are confused as to why mash-ups are okay and why the 9th Circuit Court of Appeals found the chart topper *Blurred Lines* by Robin Thicke and Pharrell Williams was infringement, while *Stairway to Heaven* by Led Zeppelin did not infringe.[10] While these

1. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 10 (2008).
2. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 306 (4th ed. 2000).
3. *Id.*; LESSIG, *supra* note 1, at 16.
4. Sampling in its early development was used almost exclusively in the hip-hop and rap genres. PASSMAN, *supra* note 2, at 306.
5. 3RD BASE, *Pop Goes the Weasel*, *on* DERELICTS OF DIALECT (Def Jam 1991). Looping is the art of repeating a small sample of music, generally a drum riff over and over again in the new track. Jennifer Martin, *How Do I Make a Song Loop?*, UNIV. OF SILICON VALLEY (Apr. 23, 2021), https://usv.edu/blog/how-do-i-make-a-song-loop.
6. *See* "This is the Remix" available at https://youtu.be/DZu_lLGFDtM (last visited Apr. 13, 2023).
7. LESSIG, *supra* note 1, at 11.
8. *See id.*
9. LESSIG, *supra* note 1, at 11.
10. *See* Williams v. Gaye, 895 F.3d 1106, 1115 (9th Cir. 2018); Skidmore v. Led Zeppelin, 952 F.3d 1051, 1069 (9th Cir. 2020).

conversations are important, what is not discussed is the limited rights of the sound-recording artist under § 114 of the Copyright Act as it relates to the ever-diminishing "copyright" as transformative works continue to be redefined under the doctrine of fair use in sound recordings.

This article will begin by sampling a bit of history and providing a synopsis of the origins of sampling in music and copyright. Part III of this article provides a brief overview of copyright law, fair use, and *de minimus* copying and discusses its early application to music sampling. Part IV of this article comments on the resurgence of music sampling and the new tolerance and approaches taken by rights holders and/or artist towards protection.

II. HISTORY OF MUSIC SAMPLING

"Lesser artists borrow, great artists steal."[11]
~Stravinsky

The origin of music sampling is both interesting and complex. Contrary to popular belief, music sampling can be traced back further than its introduction to the mainstream by the hip-hop and rap genres in the late 1970s and early 1980s.[12] Indeed, sampling can be seen in folk, classical, and jazz music.[13] As early as the 1800s, composers routinely paid homage to folk, regional, and exotic music by imitation.[14] The sampling of recorded music began as early as the 1940s with sound montages.[15] Sound collage artists sought to make artistic statements or political points and were not necessarily a product produced to generate a profit.[16]

One of the earliest precursors to music sampling was demonstrated in the 1950s by Richard "Dickie" Goodman and Bill Buchanan with their album *The Flying Saucer Part 1 and Part 2*.[17] The artists incorporated Orson Welles's *War of the Worlds* radio broadcast into a work, creating their own recorded radio show, telling a story of an alien landing with snippets from popular chart-topping music of the time.[18] The almost five-hour work included samples from Little Richard, Fats Domino, Elvis Presley, Chuck Berry, The Platters, and other artists who were Billboard chart toppers.[19] This technique became known as a "break-in," where artists created works by using clips of other songs to tell a story or perform a skit, usually with

11. *Igor Stravinsky Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/quotes/i/igorstravi137813.html (last visited Apr. 21, 2023).
12. *See* Sherri Carl Hampel, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 583–84 (1992).
13. *Id.*
14. Vera Golosker, *The Transformative Tribute: How Mash-Up Music Constitutes Fair Use of Copyrights*, 34 HASTINGS COMM. & ENT. L.J. 381, 384 (2012).
15. *See* Jack Needham, *A History of Sampling and a Guide to Getting Them Cleared*, RED BULL, https://www.redbull.com/us-en/sampling-history-and-how-to-not-get-sued (last visited April 25, 2023) (discussing musique concrete a technique developed by Pierre Schaeffer consisting of splicing together bits of recorded material).
16. *See id.*; NEGATIVLAND, FAIR USE: THE STORY OF THE LETTER U AND THE NUMERAL 222–23 (1995). It must be noted that the same emphasis is made often in the works of today, however the product's primary purpose is profit with the messages and artistic nature often times secondary to the primary goal which is profit.
17. BUCHANAN & GOODMAN, THE FLYING SAUCER PART 1 AND PART 2 (Luniverse 1956).
18. *Id.*
19. *Id.*

narration of some sort.[20] Surprisingly, the record was a success, reaching number three on the Billboard chart.[21] The success of the *Flying Saucer* album led to numerous copyright lawsuits filed by those who held the copyright for music sampled on the album.[22] The legal battle that ensued ultimately ended with the court deciding that *Flying Saucer* was a new work in the form of satire and did not constitute copyright infringement under the theory of fair use.[23]

By the 1960s, technology began to evolve allowing for enhanced techniques in music sampling. Bell Labs began to develop ways to digitize sound. "[T]o, in effect, sample a sound wave and slice it into tiny bits that could be broken down into ones and zeroes."[24] This allowed Bell Labs to digitize phone calls, making the entire system of telecommunications far more efficient and cost effective.[25] As a result of research and innovations in telecommunications, advances were made in the music recording industry.[26] Derivations of this technology found its way into music recording, production, and playback, such as the harmonizer and digital delays.[27] This technology is the predecessor of what is used today in the "sampling" process. Advancement in the technology used in the sampling process has allowed individuals to layer portions of the sound recordings and to create a new genre of music that is comprised of layered samples—mash-up music. This new genre of music is becoming more and more popular with listeners and commentators.

III. SAMPLING REMIX-THE RESURGENCE

"Today, the art of transformative sampling has carved out a musical frontier of its own, bringing this legally scrutinized practice to the center-point of the genre's creativity"[28]

~Vera Golosker

In 1845, Justice Joseph Story serving as justice for the Massachusetts Circuit Court commented on the fallacy inherent in the copyright doctrine—original work of authorship. Justice Story observed:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borr[ow], and use much which was well known and used before.[29]

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20. *See Brandon George, Dickie Goodman and the Art of the "Break-in Record*, REBEAT, http://www.rebeatmag.com/dickie-goodman-and-the-art-of-the-break-in-record (last visited Apr. 25, 2023).
21. Carr, P. (2022). Buchanan & Goodman, "The Flying Saucer" Parts 1 & 2 (1956). In S. Hill (Ed.), *One-Hit Wonders: An Oblique History of Popular Music* (pp. 5-13). Bloomsbury Academic. https://doi.org/10.5040/9781501368448, https://doi.org/10.5040/9781501368448.0008
22. *Id.*
23. *Id.*
24. DAVID BYRNE, HOW MUSIC WORKS 122 (2012).
25. *Id.*
26. *Id.* at 124.
27. *Id.*
28. Golosker, *supra* note 14, at 386.
29. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

The concept inherently present in Justice Story's commentary is that of transformative originality. Transformative originality can be defined as the alteration of an original work with new expression, meaning, or message.[30] Greg Gillis, an artist that adheres to the idea of transformative originality, articulates a similar view of the evolution of sampling in his interview with Larry Lessig for the book Remix.[31] According to Gillis: "[w]e're living in this remix culture."[32] Technology has made remixing and sampling, which is the technological process of taking small portions of previously recorded music and combining them into a new work, simple. Consequently, both courts and the music industry struggle to keep up with new technological advancements. This new genre of music is becoming more and more popular with listeners. "Today, the art of transformative sampling has carved out a musical frontier of its own, bringing this legally scrutinized practice to the center-point of the genre's creativity."[33] Proponents of mash-up music have lauded mash-up as transformative, claiming that its "[t]ransformativeness is a result of changing, isolating, and layering segments of songs in a way that evokes a distinct message or sentiment, and has creative value beyond that of its original sampled parts."[34] Opponents of mash-up music argue that sampling is misappropriation.

As a result of these competing views on mash-up music, court decisions regarding infringement in sampling cases are inconsistent and often turn upon the characterization of the music derived from sampling and the copyright act under which the original work was created. If the work is characterized as a progression of creativity, then the sampling is most often upheld. However, if the sampling is characterized as theft of intellectual property rights, then there is an uphill battle to prove that the unauthorized use of the music sample constitutes a fair use. To add to the already complicated determination of infringement, whether the sound recording itself is protected or whether the sheet music is controlling weighs heavily in courts' infringement analysis. While the characteristics of the second work in the copyright infringement analysis in music sampling often controls the outcome, this disregards the nature of the fair use doctrine—an affirmative defense to infringement.

IV. COPYRIGHTS AND FAIR USE

The copyright infringement analysis in music sampling cases was assumingly simplified by the decision issued on June 3, 2005 by the United States Court of Appeals for the Sixth Circuit in *Bridgeport Music, Inc. v. Dimension Films*.[35] In the *Bridgeport Music* opinion, the court held that a sound recording copyright holder possesses the exclusive right to the sound recording regardless of how *de minimis* or how unrecognizable a sample of the work may be.[36] Specifically, the *Bridgeport Music* court opined that § 114(b) of the Copyright Act provides the exclusive right for copyright holders in a sound recording to "sample" their own work.[37] This

30. Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994).
31. LESSIG, *supra* note 1, at 14.
32. *Id.*
33. Golosker, *supra* note 14, at 386.
34. *Id.* at 383.
35. *See generally* Bridgeport Music, Inc., v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).
36. *Id.* at 801.
37. *Id.* at 800–01.

decision did not escape criticism with respect to the protections afforded in sound recordings. Some critics viewed the holding as an expansion of the rights afforded to copyright holders. Nimmer argued "[t]he very process by which *Bridgeport Music* decision expands the rights of copyright owners through construing Section 114 rests on a misapprehension of the statutory structure."[38] While the court in *Bridgeport Music* opined that a bright-line rule was necessary in sampling cases, Nimmer suggests that the *Bridgeport Music* court established a special rule for sampling.[39] Indeed, Nimmer suggests that the traditional substantial similarity test should remain a part of the analysis for music sample infringement with fair use as a defense.[40] To fully understand Nimmer's position and other court opinions addressing music sampling cases after *Bridgeport Music*, it is necessary to provide a sample of copyright history and copyright law status at the time of the *Bridgeport Music* decision.

A. Copyright Primer

The first Copyright Act was formally passed in 1790.[41] The 1790 Act provided for the "encouragement of learning, by securing the copies of maps, chart[s], and book[s], to the authors and proprietors of such copies . . . ."[42] Since 1790 there have been a series of amendments, beginning with the Copyright Act of 1909; the Sound Recording Act of 1971; the Copyright Act of 1976, which forms the basis of our current system of protection for works of authorship; and the Music Modernization Act, the most significant update to music copyright protection since the 1976 Act.[43] The 1976 Act grants protection to original works of authorship fixed in any tangible medium.[44] The 1976 Act seeks to provide rights "designed to assure contributors to the store of knowledge a fair return for their labors."[45] As such, the Copyright Act of 1976 provides authors with the exclusive rights of control over reproduction, creation of derivative works, distribution, public performance, public display, and digital audio transmission.[46] The Music Modernization Act, which updated music copyright protection, addresses music licensing in the digital age and provides limited protections to pre-1972 recordings.[47]

As the updates suggests, the ultimate goal of copyright law is to promote and incentivize the creation of art.[48] The temporary (albeit lengthy) monopoly is the

38. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b] (2013) [hereinafter Nimmer].
39. *Id.*
40. *Id.*
41. Copyright Act of 1790, ch. 15, 1 Stat 124 (1790).
42. *Id.* § 3.
43. Copyright Act of 1909, ch. 320, 35 Stat 1075 (1909); Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391; Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1332); Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. 115-264, 132 Stat. 3676 (2018) (codified as amended at 17 U.S.C. §§ 101–401).
44. 17 U.S.C.S. § 102.
45. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985).
46. 17 U.S.C. § 106; *see* Kenneth M. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J. L. & TECH. 187, 192 (2004).
47. *See* 17 U.S.C. § 1401.
48. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting).

bargain for exchange for creative expression. Indeed, copyright is a Constitutional incentive to create new things and express ideas in new ways. This incentive is particularly strong. Copyright ownership, behind patent ownership, can be one of the most lucrative property rights out there.[49] The ability to license your work for the creation of merchandise, films, sequels, and the like can be worth millions, and, in some cases, billions of dollars.[50] As such, it can easily be said that copyright encourages the creation of the next Harry Potter, Star Wars, or fill in the blank of creativity.

Possessing the exclusive rights to reproduce, distribute, display, perform, and create derivatives of the work creates strict liability for violation of any of the aforementioned rights.[51] Copyright infringement exists if anyone, without authorization, performs one of the exclusive rights granted to the holder of the copyright.[52] As discussed above, § 102(a) of the Copyright Act only extends copyright protection to the creative expression that the author embodies in a fixed medium.[53] Section 102(b) of the Copyright Act specifically excludes a number of works from the Act's purview by providing that: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[54] Once it is determined that a specific work is eligible for copyright protection under § 102(a), § 102(b) defines the parameters for protection granted.[55] Indeed, § 102(b) provides notice to the author of a work, as well as the public at large, of aspects of the work that are not within the scope of copyright protection.[56]

The most common infringement action asserted by copyright holders is reproduction—copying. In order to establish infringement based upon copying, a holder must prove: first, copying has occurred, and second, that said copying is an improper appropriation.[57] Copying can be proven through both direct or circumstantial evidence.[58] This involves showing that the defendant had access to the underlying work and demonstrating that the infringing work is substantially similar.[59] Under our current copyright regime, the second factor, improper appropriation, is essential for establishing liability.[60] As discussed below, every instance of copying does not result in liability for infringement. As such, establishing copying and improper appropriation will most likely result in a finding of infringement, which entitles the copyright holder to damages.

While copyright holders possess the aforementioned exclusive rights, these rights are not all encompassing. Only copying that amount to an appropriation of

49. *Total Harry Potter Franchise Revenue*, STATISTIC BRAIN (Sept. 27, 2016), https://web.archive.org/web/20180627165241/http://www.statisticbrain.com/total-harry-potter-franchise-revenue. Other articles from this institutional author detail the incredible amounts of money copyright can be worth.
50. *Id.*
51. 17 U.S.C. § 501.
52. *Id.*
53. *Id.* at § 102(a).
54. *Id.* at § 102(b).
55. *Id.* at § 102.
56. *Id.* at § 102(b).
57. Laureyssens v. Idea Grp., Inc. 964 F.2d 131, 140 (2d. Cir. 1992), *as amended* (June 24, 1992).
58. *Id.*
59. *Id.*
60. Daniel Gervais, *Improper Appropriation*, 23 LEWIS & CLARK L. REV. 599, 609 (2019).

copyrighted material that is deemed "improper" will support such an action for copyright infringement. Copying unprotectable elements of copyrighted works is not considered "improper" and thus cannot establish a basis for infringement. Without this exclusion of unprotected material,[61] the public domain would be considerably smaller and hinder the creation of new works, which is in contradiction of the goals of copyright law. Indeed, providing relief to the copyright holder for that which is both copying of the expression and improper appropriation allows continued use of ideas (which are not protected) and allows creators to build upon and express the ideas in their own way.[62] This strikes an important balance between copyright law and the protections of the First Amendment.[63]

The second rationale for requiring improper appropriation is limiting the exclusive rights of copyright holders to preserve the public domain.[64] The nature of copyright is such that expressions are constantly produced, and thus more elements of unprotectable ideas become protected expression. If *every* element of a copyrighted work were protected, the world would very quickly run out of ideas to generate entertainment. For example, if we were to protect every element of *Harry Potter*, no works afterward would be able to tell stories about witches and wizards. In fact, *Harry Potter*, would not exist if the very elements were protectible under copyright. Protecting every element of a work including the idea embedded in the expression would create a monopoly on ideas, which is completely contrary to the goal of only protecting creative *expression*.[65] The element of improper appropriation ensures the preservation of the public domain.[66] The result of its imposition is that as each work is created, it restricts many elements from the public domain, protecting them. However, it also adds many elements to public domain by allowing newly created expressive content on themes and ideas that already exist. Indeed, this basic concept of expanding creative works for the sake of the greater good led to the copyright doctrines of merger,[67] *de minimis non curat lex*,[68] and fair use.[69] Each of these doctrines play a role in keeping copyright protection from stifling creativity and instead fostering growth as technology and media of expressions are constantly developed.

B. Sound Recordings in Copyright

Sound recordings, a then new and developing media, were not protected under the first Copyright Act or the Copyright Act of 1909.[70] Indeed, state common law protected sound recordings prior to the Sound Recording Act of 1971.[71] The passage

61. 17 U.S.C. § 102. The Copyright Act excludes from its protection ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries.
62. Golan v. Holder, 565 U.S. 302, 328 (2012).
63. *Id.* at 328–29.
64. Skidmore v. Led Zeppelin, 952 F.3d 1051, 1069 (9th Cir. 2020).
65. *See* Eldred v. Ashcroft, 537 U.S. 186, 217 (2003).
66. Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003).
67. Lewis R. Clayton, *The Merger Doctrine*, THE NAT'L L. J. (June 6, 2005), https://www.paulweiss.com/media/1851041/mergerdoct.pdf.
68. The de minimis use doctrine is a common law concept that finds a lack of copyright infringement when the use does not amount to improper appropriation. *See* Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004).
69. 17 U.S.C. § 107.
70. Goldstein v. California, 412 U.S. 546, 552 (1973).
71. *Id.*

of the Sound Recording Act of 1971 was born out of the growing concern over music piracy and the disparate protection from state to state.[72] The federal legislature's concern with piracy is evinced by the limitation of the extension of rights for sound recordings to the duplication of the sound recording "in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording."[73]

The Copyright Act of 1976 lists "musical works" and "sound recording" as works of authorship subject to protection.[74] The Copyright Act of 1976 provides an express definition of a sound recording as "works that result from the fixation of a series of musical, spoken, or other sounds."[75] However, § 114 specifies that sound recordings are only protected under copyright law *as recorded*.[76] This is an important distinction because, in the infringement analysis under § 106, similarity (substantial or otherwise) becomes irrelevant with regard to sound recordings since only the duplication of the actual sounds constitutes infringement.[77] Unless the defendant has copied an actual piece of the recording itself, it does not matter how similar their work is to the original.[78] This limitation on the protections for sound recordings was one of the reasons the court in *Bridgeport Music* decided that it made sense to say that *any* unlicensed use of a sound recording, regardless of how minimal, should constitute an improper appropriation.[79]

C. De Minimis Non Curat Lex

"The Law is not concerned with insignificant matters"

Notwithstanding the provisions of § 106, copyright jurisprudence has a notable doctrine that is applied when a third-party's copying of a work is deemed *de minimis*. As discussed below, the *de minimis* doctrine—a common law concept—is traditionally used in a copying analysis to determine whether infringement of a work has occurred. As it relates to music sampling, the *de minimis* doctrine was rejected by the Sixth Circuit in *Bridgeport Music*, which held that any unauthorized use of any portion of a sound recording is infringement.[80] The *Bridgeport Music* holding, ostensibly a bright-line rule, remained intact until the 2016 Ninth Circuit decision in *VMG Salsoul, LLC v. Ciccone,*[81] which affirmed the district court's grant of summary judgement that rejected *Bridgeport Music's* bright-line rule and renewed the availability of *de minimis* use as a defense to infringement in music sampling cases.[82] At the center of the Ninth Circuit's opinion in *VMG* is the hit song *Vogue* by Madonna, which samples a 0.23 second horn segment of the song *Love Break*.[83]

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72. Kihn v. Bill Graham Archives, LLC, 445 F. Supp. 3d 234, 262 (N.D. Cal. 2020) (citing legislative history of URAA).
73. United States v. Moore, 604 F.2d 1228, 1231 n.1 (9th Cir. 1979) (quoting former 17 U.S.C. § 1(f)).
74. 17 U.S.C. § 102.
75. *Id.* at § 101.
76. *Id.* at § 114(b).
77. *Id.* at § 114(b), 106.
78. *Id.* at § 114(b). Note though that this is completely separate from any copyrights which might exist in the song's composition. This only applies to recordings.
79. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005).
80. *See id.*
81. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016).
82. *Id.* at 887.
83. *Id.* at 875.

Agreeing with the district court, the Ninth Circuit found that, even if actual copying was established by VMG, the use was so trivial that it did not give rise to an infringement claim.[84] Writing for the court, Judge Graber wrote, "We hold that the 'de minimis' exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions."[85] This holding addressed VMG's arguments that even if the sample used in *Vogue* is determined to be trivial—the ordinary listener would not identify the source of the sample—the *de minimis* doctrine did not apply to sound recordings and that Congress specifically excluded the application of the *de minimis* standard for determining infringement in sound recordings.[86] VMG urged the court to follow the holding in *Bridgeport Music* and apply the bright-line rule established for copyrighted sound recordings that any unauthorized copying, whether trivial or not, constitutes infringement.[87] The court declined, stating:

> Other than *Bridgeport* and the district courts following that decision, we are aware of no case that has held that the *de minimis* doctrine does not apply in a copyright infringement case. Instead, courts consistently have applied the rule in *all* cases alleging copyright infringement. Indeed, we stated in dictum in *Newton* that the rule "applies *throughout the law of copyright*, including cases of music sampling."[88]

Dissenting from the opinion, Judge Silverman writes:

> The plaintiff alleges that the defendants, without a license or any sort of permission, physically copied a small part of the plaintiff's sound recording–which, to repeat, is property belonging to the plaintiff–and, having appropriated it, inserted into their *own* recording. If the plaintiff's allegations are to be believed, the defendants deemed this maneuver preferable to paying for a license to use the material, or to hiring their own musicians to record it. In any other context, this would be called theft. It is no defense to theft that the thief made off with only a "de minimis" part of the victim's property.[89]

Harkening back to the *Bridgeport Music* concept of theft and the limited and specific rights afforded to the copyright holder in a sound recording under 17 U.S.C. §§ 106 and 114,[90] Judge Silverman notes that the majority rejected a plain reading of the statute and placed its emphasis on a "rhetorical exercise that *Bridgeport's* reading of § 114(b) is a logical fallacy, expanding the rights of copyright holders beyond that allowed under the judicial de minimis rule."[91]

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84. *Id.* at 877.
85. *Id.* at 874.
86. *Id.* at 878–83; 17 U.S.C. § 114(b).
87. *VMG Salsoul, LLC*, 824 F.3d at 880.
88. *Id.* at 881 (first emphasis added) (internal citations omitted).
89. *Id.* at 888 (Silverman, J., dissenting).
90. 17 U.S.C. § 114 (providing that a holder of a copyright in a sound recording the exclusive right to reproduce the work in copies or records "that directly or indirectly recapture the actual sounds fixed in the recording.").
91. *VMG Salsoul, LLC.*, 824 F.3d at 888 (Silverman, J., dissenting).

The *de minimis* rule was recently revisited by the Ninth Circuit in *Bell v. Wilmott Storage Services, LLC*, a case that sought to use the *de minimis* concept as an affirmative defense.[92] While not a music sampling case, the Ninth Circuit took the opportunity to discuss the circuit's holdings in music sampling cases that utilized the *de minimis* doctrine—*VMG* and *Newton v. Diamond*.[93] Both involved alleged copying of protected musical works.

The Ninth Circuit explained that the *de minimis* concept does not constitute an affirmative defense to copyright infringement but rather is a determination of whether an allegation of copying is sufficient to establish a cause of action for infringement.[94] The court further clarified that the *de minimis* doctrine "applies to the amount or substantiality of the copying–and not the extent of the defendant's use of the infringing work . . . ."[95] The necessity to clarify the *de minimis* doctrine was born out of the facts presented in *Bell*, particularly the argument by the alleged infringer, Wilmott, that the *de minimis* concept could be used to protect against what could be considered a "technical violation" "so trivial that the law will not impose legal consequences."[96]

The basic facts in *Bell* are well worth recitation here, as it provides some insight for the Ninth Circuit's review of its decisions in music sampling cases. *Bell* involves a photo of the Indianapolis skyline (the "Skyline photo") registered with the U.S. Copyright Office in 2011, that appeared on the plaintiff Richard Bell's law firm's website and was later published on webshots.com and richbellphotos.com under license.[97] While policing the internet for infringing uses of his copyrighted images, Bell found the Skyline photo on a server database associated with a website, visitUSA.com, in 2018.[98] In April 2018, Bell notified Wilmott, the owner of visitUSA.com, that it was displaying the Skyline photo without authorization and requested that the image be removed. Bell filed suit against Wilmott for copyright infringement alleging that Wilmott continued to display a copy of the Skyline photo on its server at a different pinpoint address than the address noted in the original notification and therefore violated his exclusive right to publicly display the copyrighted work.[99]

Both parties filed cross motions for summary judgement.[100] Assuming infringement, Wilmott argued for judgement based upon *de minimis* use, fair use, and statutes of limitations.[101] The district court granted summary judgement to Wilmott solely based upon *de minimis* use without finding on the remaining theories

92. Bell v. Wilmott Storage Servs., 12 F.4th 1065, 1070 (9th Cir. 2021).
93. Newton v. Diamond, 388 F.3d 1189, 1190 (9th Cir. 2004).
94. The Ninth Circuit noted that it and several other circuits including the First, Third, Fourth and Eleventh have held that the *de minimis* doctrine is not a defense to infringement "but rather as an answer to the question of whether the infringing work and the copyrighted work are substantially similar so as to make the copying actionable." *See Bell*, 12 F.4th at 1079–81.
95. *Id.* at 1076.
96. *Id.* at 1078 (quoting Ringgold v. Black Ent. Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997)).
97. *Id.* at 1068–69.
98. *Id.* at 1069–70. It is worth noting that an average internet user was not likely to find or access the photograph. Rather, the photograph could only be found if a user was running a reverse image search or who knew the precise pinpoint address for the image.
99. *Id.* at 1070. It appears a webmaster tasked by Wilmott to remove the photo had apparently changed its file name which moved it to a new pinpoint address. Wilmott removed this copy of the Indianapolis photo as well after receiving a request from Bell.
100. *Id.*
101. *Id.*

advanced by Wilmott.[102] On appeal, Wilmott put forth two arguments in response to the infringement claim. First, Wilmott argued that the defense of *de minimus* use was applicable to the display.[103] Alternatively, relying upon the 1982 Second Circuit decision in *Knickerbocker Toy Co., Inc. v. Azrak-Hamway Int'l Inc.*, Wilmott argued further that *de minimus* use applied because the public display of the Indianapolis photo was unintentional, there had been no volitional act of infringement, and non-volitional conduct does not give rise to infringement.[104] The Ninth Circuit concluded that Wilmott's reliance on *Knickerbocker* was misguided. Indeed, the court indicated that Wilmott's position was a misreading of the *Knickerbocker* decision as well as its decisions specifically addressing the *de minimis* doctrine.[105] The Ninth Circuit found that it was bound by the statutory language of the Copyright Act and there was nothing in the Act that excused "technical violations."[106] Therefore, the court rejected the concept of a *de minimis* use defense based upon minimal use of concededly infringing material and reversed the district court's adoption of Wilmott's "technical violation" theory of a de minimis use defense.[107]

The court indicated that in each of its decisions,[108] *de minimis* "use" referred to whether the "use" at bar substantially copied the copyrighted work or whether minor, or *de minimis*, portions of the work which would not satisfy the infringement requirements for copying were used.[109] The court however, did not seek to clarify whether a straightforward reading of § 114(b) of the Copyright Act, eliminates the use of this concept as it relates to sound recordings. Left intact, the holding in *VMG* essentially allows for sampling of sound recordings without a license if the sample is not recognizable by the general public. This begs the question of the purpose of § 114(b). Specifically, why did Congress find it necessary to write:

> The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.[110]

And, that:

> [t]he exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.[111]

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102. *Id.*
103. *Id.* at 1076.
104. *Id.* at 1077–79 (citing Knickerbocker Toy Co. v. Azrak-Hamway Int'l, Inc., 668 F.2d 699 (2d Cir. 1982)).
105. *Id.* at 1070.
106. *Id.* at 1079.
107. *Id.* at 1082.
108. *Id.* at 1074-75. (The court discussed Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986), Newton v. Diamond, 358 F.3d 1189 (9th Cir. 2004), and VMG Salsoul v. Ciccone, 824 F.3d 871 (9th Cir. 2016)).
109. *Id.* at 1075–76.
110. 17 U.S.C. § 114(b).
111. *Id.*

While the Ninth Circuit sought to clarify that *de minimis* use **is not** an affirmative defense to copyright infringement, the holdings in *Newton and VMG* created a much larger question in music sampling—whether sampling without a license is permissible even without a finding of fair use?

D. Fair Use in Copyright

"As we've seen, our constitutional system requires limits on copyright as a way to assure that copyright holders do not too heavily influence the development and distribution of our culture."
~Lawrence Lessig[112]

Notwithstanding the provisions of § 106 and § 114(b) as they relate to sound recording, copyright law provides a notable defense: fair use.[113] The doctrine of fair use dates back to well before it was codified by statute.[114] Courts have long recognized that not all copying will support a suit of infringement.[115] Indeed, courts as early as the late 1800s discussed fair use as an important affirmative defense to copying.[116] Though it was originally seen as a common law exception to infringement, § 107 of the Copyright Act codifies the common law and details a list of non-exclusive elements courts should weigh in their determination of fair use.[117] Under the statute, a work that copies a protected work does not infringe if it is considered a "fair use" of that work.[118] Fair uses include reproductions, whether authorized or not, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.[119] In determining whether the particular reproduction constitutes a fair use, the factors to be considered include:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[120]

112. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 93 (2004).
113. 17 U.S.C. § 107.
114. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936).
115. *Id.*
116. Lawrence v. Dana, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869).
117. 17 U.S.C. § 107.
118. *Id.*
119. *Id.*
120. *Id.*

The long-held principle underlying copyright law is that it only protects the expression, not the idea.[121] Based upon this premise, there is no infringement where a work is one which copies only the unprotectable elements of the work and thus uses the work "fairly." However, this use is distinct from the "Fair Use Defense" doctrine. Using the unprotected elements of a work does not constitute infringement. The Fair Use doctrine is used as an affirmative defense to use that would normally be an infringing use but for the doctrine.

The defense of Fair Use has at least one primary goal: to allow critical commentary and evaluation of copyrighted media.[122] It protects that type of discussion over media which creators would seek to prevent. In doing so, it allows for transformation of a work beyond the artist's original intent.[123] This contribution to critical commentary is the most important piece of Fair Use.[124] The protection of commentary and education is outlined specifically in the preamble of § 107, which enumerates the different purposes "such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, [which are] not an infringement of copyright".[125] Courts have held that works such as reviews, parodies, and satire fall under this protection.[126] Courts have consistently held that, under this defense, even though a work copies protectable elements of a copyrighted work, if it falls under these categories (or the balance of the four factors listed above weighs in favor of fair usage) it can still be a fair use.[127] Fair use allows people to criticize, comment, and otherwise utilize and evaluate various works. This is something that creators likely would not authorize but which is vitally important to evolving culture. Indeed, the House Report for § 107 states that it was drafted so courts would be able to adapt the various factors to different situations, even as technology advances.[128] This piece of fair use is what allows the adaptability and critical nature of social commentary to flourish while also protecting the majority of creative expression.

The four above listed elements are not exclusive, and no one factor is determinative when assessing whether a fair use has occurred.[129] Unlike many defenses in the law, it is possible that a copy could possess all, or none, of the elements in the statute and still constitute a fair use.[130] While it is highly unlikely that the statutory factors are not considered when making a determination, it is nonetheless important to point out that courts are not bound solely to the factors, as they are not exhaustive.

The first element of the affirmative defense of fair use is "the purpose and character of the use."[131] This element asks how the infringer has made use of the copyrighted material.[132] This first inquiry considers whether the use is for profit, educational use, personal use, or social commentary. Use that is personal or educational

121. *Lawrence*, 15 F. Cas. at 61.
122. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 541 (1985).
123. 17 U.S.C. § 107.
124. *Id.*
125. *Id.*
126. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574 (1994); Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 337 (S.D.N.Y. 2000).
127. *See Campbell*, 510 U.S. at 571–72.
128. H.R. REP. NO. 94-1476, at 66 (1976).
129. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).
130. *See id.* at 561.
131. 17 U.S.C. § 107.
132. *Harper & Row, Publishers, Inc.*, 471 U.S. at 562.

will likely tilt the scale in favor of a finding a fair use, while use that is for commercial purposes may do the opposite.[133] This element seeks to balance the exclusive rights provided to the copyright holder against uses that would advance "science and the useful arts."[134] For example, a limited use of copyrighted material in a classroom presentation does not devalue or harm the protected work but would likely be prevented by the copyright holder because it is a loss of potential revenues from a copyright license. However, in keeping with the Constitution's intent of the Copyright Act, the application of the doctrine of fair use in this situation allows educators to use copyrighted material without being liable for infringement.

The second element of Fair Use is "the nature of the copyrighted work".[135] This element seeks to determine the strength of the protection enjoyed by the copyright holder.[136] Works that are fictional, or highly creative, have stronger protections than those works that are based upon facts.[137] A novel that tells a story about a boy wizard will enjoy more protection than a book which recounts the events of the revolutionary war. As such, the second element of the Fair Use inquiry truly seeks to understand the underlying work and avoid over-protecting works that are provided limited protection.[138]

The third element outlined in the Fair Use defense is the "amount and substantiality of the portion used in relation to the copyrighted work as a whole".[139] While no one factor is determinative, this is often the most heavily considered element in the fair use analysis. The inquiry seeks to determine whether the secondary work used the "heart" of the copyrighted work. There is no set percentage as is often quoted by the public, nor is there a defined "acceptable amount".[140] Rather, this element considers whether the amount used is, "reasonable in relation to the purpose of the copying".[141] The inquiry regarding the amount and substantiality of copying is fact specific and will vary from case to case based upon the type of work involved.[142] While this third element may seemingly suggest that it is indeed the most important factor in determining whether a use is a fair use, it should be noted that this factor works in tandem with the weight afforded to each of the preceding factors. Indeed, even a substantial appropriation of a work could be deemed a fair use under the appropriate circumstances.[143]

The fourth and final element of the Fair Use defense is the "effect of the use upon the potential market for or value of the copyrighted work".[144] This inquiry, along with the first factor—character and purpose of use—is often referred to as "transformative use."[145] Ultimately, the inquiry as to whether a work is transformative asks two questions: (1) what did the market for the underlying work look like before the infringement, and (2) what does (or will) it look like if the infringing

133. *Id.*
134. *Id.*
135. 17 U.S.C. § 107.
136. *Harper & Row, Publishers, Inc.*, 471 U.S. at 563.
137. *Id.*
138. *Id.*
139. 17 U.S.C. § 107
140. Williamson v. Pearson Educ., Inc., 2001 U.S. Dist. LEXIS 17062, at *18 (S.D.N.Y. Oct. 19, 2001).
141. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1167 (9th Cir. 2007) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)).
142. *Id.* at 1163.
143. *Id.* at 1167.
144. 17 U.S.C. § 107.
145. Hart v. Elec. Arts, Inc., 717 F.3d 141, 158 (3d Cir. 2013).

work is allowed? The term "transformative use" is merely a way to describe when the market for the original work is largely unaffected by the secondary work because the nature of the original work has been so transformed that the market for it was not contemplated at the original work's inception.[146] Transformative use is only found when the new work and the market for said work is so different from the original that it does not negatively impact the market for the original work. If a court determines that the market would be invaded or reduced by the existence of the new work, or that the new work has not been transformed but rather is a derivative work, the court will find that the use does not constitute a fair use.[147]

Finally, while the above-listed factors for consideration are the only factors expressly listed in the statute, they are not exclusive.[148] A court is permitted to examine all facts and circumstances surrounding the use to determine if the use actually is fair use.[149] Even if *all* the elements point away from fair use, it is still possible that the court in its discretion could determine the use was a fair one.[150] Indeed, the nature of multi-factor tests often create inconsistencies in application from court to court, which can lead to unpredictability, which is the case in the fair use context.[151] It would appear from the case law, that once the fourth element of fair use—"transformative use" —has been established, fair use is established.

V. PRETTY WOMAN, PRINCE AND PURPLE FAME

"It would seem that the pendulum has swung too far in the direction of recognizing an alteration as transformative, such that doctrine now threatens to swallow fair use. It is respectfully submitted that a correction is needed in the law."

~Nimmer on Copyright[152]

Whether a work meets the requirements of a "transformative use," a work that is a permitted fair use, or is a derivative work, a work that infringes the rights of the copyright holder, is a recurring question in copyright jurisprudence. Indeed, the lines between the two have been blurred by case law and commentary alike. While these "blurred lines" exist and continue to be obfuscated,[153] the Supreme Court held over a quarter of a century ago that a transformative work is one that alters the original creation with "new expression, meaning, or message."[154] Notwithstanding this precedent, assessing transformative use continues to dominate scholarly articles on fair use.[155]

As discussed in section IV(D), the fourth factor of fair use—the effect of the use upon the potential market for or value of the copyrighted work combined with

146. *Id.* at 159.
147. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 567 (1985).
148. *Id.* at 549.
149. Google LLC v. Oracle Am., Inc., 141 S. Ct 1183, 1200 (2021).
150. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (finding time-shifting as fair use).
151. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1094 (2007) (noting that the fair use doctrine's application is so case/fact specific, that little guidance is afford to those seeking to undertake an analysis of their use of a work).
152. NIMMER, *supra* note 40, at § 13.05[B][6].
153. The use of "blurred lines" is intended to bring to mind the Estate of Marvin Gay.
154. Campbell v Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
155. *See, e.g.*, Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 734 (noting that transformative use has become the dominate discussion within fair use articles).

the first factor, the purpose and character of use—has been deemed the "transformative use" inquiry. But where did this notion of transformation begin? The Supreme Court in *Campbell v. Acruff-Rose Music, Inc.*, was the first court to explicitly use the concept of transformative use in a fair use analysis.[156] In discussing how parody fits within the fair use paradigm, the Supreme Court commented that the extent to which a work is "transformative," or alters the original work with "new expression, meaning, or message" plays a significant role in a finding of fair use when there is a commercialization of the secondary work.[157] The discussion of transformative work was in view of each of the four factors of fair use, with commentary that, when a work is transformative, it "is at least less certain, and market harm may not be so readily inferred" when analyzing the fourth factor.[158]

In 2013, the Second Circuit had the opportunity to discuss the concept of transformative works in the fair use analysis for "appropriation art,"[159] in *Cariou v. Prince.*[160] This case involved the use of images from Patrick Cariou's book *Yes Rasta*—a book of portraits and landscape photographs taken in Jamaica—by appropriation artist Richard Prince.[161] Prince altered and incorporated several of Cariou's photographs into a series of paintings and collages called *Canal Zone* that were exhibited at New York gallery and in the gallery's exhibition catalog.[162] Cariou filed an infringement claim, and the district court ruled in his favor, stating that to qualify as fair use, a secondary work must "comment on, relate to the historical context of, or critically refer back to the original works."[163] Richard Prince appealed the district court's ruling.[164] The question presented to the Second Circuit on appeal was whether appropriation artwork, which incorporated pre-existing photographs, must comment on, relate to the historical context of, or critically refer back to the plaintiff's original work to qualify for a fair use defense.[165] In finding twenty-five of the images "transformative", the Second Circuit held that the law does not impose a requirement that a work comment on the original or its author in order be considered transformative.[166] The court found that twenty-five of the works at issue were transformative because the "composition, presentation, scale, color palette, and media [were] fundamentally different and new compared to the photographs, [which is] the expressive nature of [defendant's] work."[167] The court also found no evidence that defendant's work usurped either the primary or derivative market for plaintiff's photographs.[168] As to the other five works at issue, the court remanded for further consideration using the appropriate standard to evaluate.[169]

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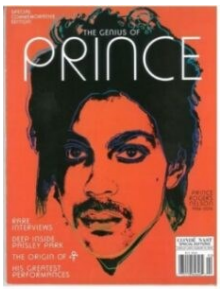
156. *Campbell*, 510 U.S. at 578–79.
157. *Id.* at 579.
158. *Id.* at 591.
159. Appropriation art refers to the utilization of pre-existing objects or imagery without alterations in creating new works.
160. Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).
161. *Id.* at 698.
162. *Id.* at 699-703 (noting the gallery exhibit produced a significant amount of fan fair and generated more revenue than the sales of the original work).
163. *Id.* at 704 (quoting Cariou v. Prince, 784 F. Supp. 2d 337, 348–49 (S.D.N.Y. 2011)).
164. *Id.*
165. *Id.* at 698.
166. *Id.* at 706.
167. *Id.*
168. *Id.* at 709.
169. *Id.* at 712.

So, what is the standard? Well, in March of 2021, the Second Circuit sought to clarify and correct the misapplication of the transformative work standard in *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*.[170] *Warhol* involves a licensing deal between Vanity Fair magazine and photographer Lynn Goldsmith that led to the production of an authorized derivative work by Andy Warhol of a photograph of Prince as reproduced below, which was featured in a 1984 Vanity Fair article.[171]

Unbeknownst to Goldsmith and Vanity Fair, Warhol produced 16 different works based on the Goldsmith photograph, which became part of his estate when he died in 1987.[172] It wasn't until 2016 when Condé Nast, Vanity Fair's parent company, issued a commemorative magazine in the wake of Prince's death that Goldsmith learned of the additional works created by Warhol.[173] Condé Nast ran the "Orange Prince" featured below on the cover of their commemorative issue, with no attribution to Goldsmith. [174]



Upon learning of the multiple works created by Warhol, Goldsmith registered the copyright for the original Prince photograph featured below.[175]

The Andy Warhol Foundation, which controls the estate of Andy Warhol, preemptively filed for a declaratory judgement of noninfringement, which was

170. *See* Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir 2021).
171. *Id.* at 32.
172. *Id.*
173. *Id.* at 35.
174. *Id.*
175. *Id.*

granted by the district court.[176] The Second Circuit reversed the holding of noninfringement on appeal.[177]

The opinion of the Second Circuit in *Warhol* ostensibly provided the much needed guidance on how to analyze the distinction between a derivative work (an infringing work) and a work that is transformative. In addition, the court found that subsequent decisions have misapplied the standard by employing a subjective test when analyzing whether a work is transformative.[178] This, according to the Second Circuit, is inapposite to the standard that it articulated in *Cariou*.[179] Specifically, the court commented that despite its and the Supreme Court's emphasis that "fair use is a context-sensitive inquiry that does not lend itself to simple bright-line rules," the district court in *Warhol* nonetheless interpreted the holding in *Cariou* as creating a bright line rule "that any secondary work is necessarily transformative as a matter of law."[180] The Second Circuit admitted that "a literal construction of certain passages of *Cariou* may support that proposition," but "such a reading stretches the decision too far."[181] As such, the district court's finding of fair use was reversed by the Second Circuit.[182]

So, what is the standard for a transformative work? Well, The Andy Warhol Foundation petitioned the Supreme Court for *cert* which was granted and argued on October 12, 2022, with the following question presented:

> Whether a work of art is "transformative" when it conveys a different meaning or message from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it "recognizably deriv[es] from" its source material (as the Second Circuit has held).[183]

Amici, along with The Andy Warhol Foundation, argue that failure to consider the meaning behind the expression when it is similar to the source material is a violation of the First Amendment.[184] However, much like the considerations necessary in *VMG*, one must ask if such a holding diminishes the exclusive right to create derivative works granted to a copyright holder. A derivative work is defined by the Copyright Act as a work based on or derived from one or more already existing works.[185] In order for a derivative work to be entitled to copyright protection, the derivative work must add new original copyrightable authorship to the sourced work.[186] Again, a plain reading of the statutory language suggests that a work that does not depart from the original work in a way that is transformative is a derivative work, regardless of the intent behind the work.

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176. *Id.*
177. *Id.* at 54.
178. *Id.* at 39.
179. *Id.* at 38.
180. *Id.*
181. *Id.*
182. *Id.* at 54.
183. Petition for a Writ of Certiorari at i, Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith, 142 S. Ct. 1412 (2022) (No. 21-869).
184. *Id.* at 32.
185. 17 U.S.C. § 101.
186. *Id.*

VI. PUSHING FAIR AND DE MINIMIS USE TO THE LIMITS?

"People are going to be forced—lawyers and...older politicians—to face this reality: that everyone is making this music and that most music is derived from previous ideas. And that almost all pop music is made from other people's source material. And that it's not a bad thing. It doesn't mean you can't make original content."

~Gregg Gillis[187]

A notable trend in music, mashups, hit the scene in the late 90s and early 2000s. Mashups are considered a category of "appropriation art" in which music is sampled to create a musical collage consisting entirely of sampled music. The record label Illegal Art pushed the limits of sample-based music from 1998 to 2012 with songs such as Girl Talk, Junk Culture, Touch People, Okapi, People Like Us, The Bran Flakes, Steinksi, and more. The record label garnered attention in 1998 with its release of *Deconstructing Beck*, (a CD composed entirely of tracks sampling music recorded by Beck), and its subsequent responses to cease and desist letters from Beck's record label, Geffen Records and BMG Entertainment.[188] In a series of emails (accessible through the link provided in footnote 189), the parties exchanged "pleasantries" regarding their positions on whether the mashups created by Illegal Art are copyright infringement.[189] From Illegal Art's perspective, the works created are novel and not anticipated by copyright law.[190] As a result, when conflict arises "the contest should be resolved on a level playing field - one that takes the imperatives, [prerogatives], and creative impetus of the art practice involved fully into account."[191] Indeed, Illegal Art argues that their use, while appropriation, is one that the copyright law did not anticipate but nonetheless falls squarely within the purpose of copyright protection—incentivizing and encouraging creative arts.[192] Illegal Art references multiple times the concepts of "free appropriation" which can be likened to the concept of *de minimis* use.[193] Indeed, the email exchange also references the idea of a musical collage and transformative works.[194] Each of these concepts are at the heart of whether mashups as a whole are permissible under the Copyright Act. In order to truly analyze Illegal Art's position, it is necessary to understand the ways in which mashup artists utilize music sampling.

Generally, mashup artists utilize component song samples in three ways: accessory, secondary, and primary. "Accessory" song sampling includes use where it is almost impossible for a user to realize the precise song being used, or includes merely a word, chord, or something extremely brief from a song, similarly unrecognizable by a user.[195] A "secondary" sample use takes place when the portion of the song used is only a small portion of the component song as a whole. Although

187. LESSIG, *supra* note 1, at 15.
188. *A Letter From the Recording Industry*, WORLD TRADE ORG., https://web.archive.org/web/20150831232101/http://www.gatt.org/lawletters.html (last updated Feb. 10, 2001).
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. Girl Talk, *Play Your Part (Part 1)*, on FEED THE ANIMALS (2008) (with the use of "Big Pimpin" by Jay-Z).

use of these songs will often be recognizable, the small or trivial amount of the sampled song lands in this category.[196] Finally, primary use includes taking portions of songs such as a lengthy chorus or portion of a song. This use allows the listener to easily identify the sampled song.[197] The question that is at the heart of this section of the article and generally in sampling cases is whether the fair use doctrine is only necessary when there is a primary music sample. This question was easily answered prior to the Ninth Circuit's opinion in *VMG* and its subsequent revisit in *Bell.*

Based upon these holdings, if a court determines that the copying is *de minimis*, there is no further inquiry necessary—the copying does not amount to improper appropriation and cannot serve as the basis for infringement.[198] According to the Ninth Circuit, it is only when the sample used is recognizable by the consuming public that further inquiry is necessary.[199] Indeed, pushing fair use to its limits, if the Supreme Court overturns the Second Circuit's opinion in Warhol, the intent of the artist at the time of creation would render a work transformative even if the sample use is a primary sample.

VII. CONCLUSION

"The absolute transformation of everything that we ever thought about music will take place within 10 years, and nothing is going to be able to stop it. I see absolutely no point in pretending that it's not going to happen. I'm fully confident that copyright, for instance, will no longer exist in 10 years."
~David Bowie [200]

While protection of, and exclusive rights in, sound recordings are limited under § 114(b), the abandonment of the bright-line rule in *Bridgeport Music* by the Ninth Circuit has truly obfuscated how sound recordings are infringed and has created a split in the circuits on the matter.[201] Contrary to much commentary, the issue is not when a sampled piece is a fair use, or whether *de minimis* use is an affirmative defense or a part of the infringement analysis in sound recordings. The inquiry is far less cumbersome. The inquiry is what are the exclusive rights Congress granted in sound recordings in § 114(b). Similarly, the derivative right granted in § 114(b) is further diminished if the Supreme Court overturns the appellate decision in *Warhol*. It is time for Congress to act. Article I, Section 8, Clause 8 of the Constitution grants Congress the right to "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."[202] Congress should specifically define the parameters of a work that is transformative and should more explicitly provide the distinction between a work that is derivative and one that is transformative. Moreover, Congress should adopt the bright-line rule of *Bridgeport Music* that any

196. *Id.* (with the use of "What You Know" by T.I.).
197. *Id.* (with the use of "Walk It Out" by DJ Unk).
198. Bell v. Wilmott Storage Services, LLC., 12 F.4th 1065, 1074 (9th Cir. 2021).
199. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 881 (9th Cir. 2016).
200. Jon Pareles, *David Bowie, 21st-Century Entrepreneur*, N.Y. TIMES (June 9, 2002), https://www.nytimes.com/2002/06/09/arts/david-bowie-21st-century-entrepreneur.html.
201. *VMG Salsoul, LLC*, 823 F.3d at 886 (stating that the court is taking an unusual step in the knowing creation of a split on the matter relying not on the statute's plain reading but rather on the writings of Nimmer).
202. U.S. CONST. art. I, § 8, cl. 8.

sample whether recognizable by the consuming public is infringement unless it is a fair use.