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"It ain't hard to tell, I'm the new Jean Michel, Surrounded by Warhols . . . I'm the modern day Pablo, Picasso baby."– Jay-Z[1]

INTRODUCTION

"Thou shalt not steal" – so began the court opinion that effectively ended unauthorized digital sampling in the music industry.[2] Since then, digital music sampling has been referred to as theft,[3] pirating,[4] and copyright infringement.[5]

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1. Jay-Z, *Picasso Baby*, *on* MAGNA CARTA HOLY GRAIL (ROC Nation LLC 2013).

2. Grand Upright Music Ltd. v. Warner Bros. Records, 780 F. Supp. 182, 183 (S.D.N.Y. 1991). For purposes of this Article, digital sampling is defined as "the incorporation of short segments of prior sound recordings into a new recording." Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2003); *see also* Jarvis v. A & M Records, 827 F. Supp. 282, 286 (D.N.J. 1993) ("Digital sampling has been described as: the conversion of analog sound waves into a digital code. The digital code that describes the sampled music . . . can then be reused, manipulated or combined with other digitalized or recorded sounds using a machine with digital data processing capabilities, such as a . . . computerized synthesizer." (alterations in original)); TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 593 (S.D.N.Y. 2013) (quoting the Oxford Dictionary's definition of sampling as "the technique of digitally encoding music or sound and reusing it as part of a composition or recording").

3. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 888 (9th Cir. 2016) (Silverman, C.J., dissenting).

4. *Id.* at 890.

5. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005); *see also Jarvis*, 827 F. Supp. at 295 ("[T]here can be no more brazen stealing of music

Even when artists sample two seconds of a song, courts admonish them, "Get a license or do not sample."[6] Yet, somehow, "thou shalt not steal" does not apply in the visual arts world. Instead when visual artists sample whole photographs, courts label it appropriation art, collage, and fair use.[7]

This Article examines the disparate treatment of music and visual arts sampling under copyright law. Not only does this Article argue that the more liberal fair use principles adopted in recent visual arts cases should be applied to digital music sampling,[8] but it also sets forth a preliminary Code of Best Practices in Fair Use for Digital Music Sampling ("Digital Music Sampling Code").[9] Part I of this Article begins by tracing the long history of both musicians and visual artists sampling other artists' works by incorporating them into new pieces, often without permission from the original artists. This Article shows that both digital music sampling and appropriation art are forms of the artistic tradition of collage, and as artistically analogous acts, they deserve to be treated alike under copyright law.

Part II gives a brief overview of the copyright law principles that apply to sampling. Part III then reviews the leading digital sampling and appropriation art cases.[10] Starting with *Blanch v. Koons*,[11] the path of music and visual arts collage cases began to diverge and the courts in visual arts cases started embracing transformative works as fair use. While *Blanch* led to a resurgence of fair use in visual arts cases, such as *Cariou v. Prince*[12] and *Seltzer v. Green Day, Inc.*,[13] the defense of fair use all but disappeared in music cases for many years. Moreover, the decision in *Bridgeport Music, Inc. v. Dimension Films*[14] seemingly eviscerated music sampling's de minimis defense. As one legal

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than digital sampling . . . ."); Toho Co., LTD v. Priority Records, LLC, CV 01-04744SVW(RZx), 2002 WL 33840993, at *3 (Mar. 27, 2002 C.D. Cal.) ("Digital sampling without permission has been held repeatedly to constitute copyright infringement."); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2578 n.285 (2009) ("Courts have been quite hostile to digital sampling of copyrighted music.").

6. *Bridgeport Music*, 410 F.3d at 801.

7. *See* Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013); *see also* Blanch v. Koons, 467 F.3d 244, 255 (2d Cir. 2006).

8. *See* Mark P. McKenna & Katherine J. Strandburg, *Progress and Competition in Design*, 17 STAN. TECH. L. REV. 1, 16 (2013) ("'[A]ppropriation art' is often, though not always, deemed fair use, while even minimal digital sampling (mostly for hip-hop music) generally is not excused." (footnotes omitted)).

9. The preliminary Code of Best Practices in Fair Use for Digital Music Sampling ("Digital Music Sampling Code") is on file with the author and available upon request.

10. For purposes of this Article, appropriation art is defined as "the more or less direct taking over into a work of art a real object or even an existing work of art." *Cariou*, 714 F.3d at 699 (citation omitted) (quotation omitted).

11. 467 F.3d 244, 255 (2d Cir. 2006).

12. 714 F.3d 694 (2d Cir. 2014).

13. 725 F.3d 1170 (9th Cir. 2013).

14. 410 F.3d 792 (6th Cir. 2005).

commentator noted, "the rulings on digital sampling effectively have foreclosed the ability to quote music at all."[15] However, several cases have emerged in recent years that support the unlicensed use of digital music samples under either the de minimis or fair use doctrines. For example, in *VMG Salsoul, LLC v. Ciccone*,[16] the U.S. Court of Appeals for the Ninth Circuit specifically rejected the decision in *Bridgeport*, thereby setting up a circuit split that has yet to be resolved.

Despite the recent case law developments supporting unlicensed digital sampling, the music industry remains stuck in a clearance culture that requires all samples to be licensed. Many legal and music commentators have recognized this problem and proposed solutions. The proposals for reform, however, have focused on either adopting a compulsory licensing system or amending the Copyright Act to expressly address digital sampling.[17] Attempts to implement these solutions have repeatedly failed. Therefore, this Article suggests a different approach.

Part IV proposes the adoption of a Digital Music Sampling Code. This code would be similar to the codes of best practices for fair use adopted in other creative industries. In particular, given the analogy between appropriation art and digital music sampling, this code would borrow heavily from the Code of Best Practices in Fair Use for the Visual Arts ("Visual Arts Code") promulgated by the College Art Association ("CAA") under the guidance of Peter Jaszi and Patricia Aufderheide.[18]

As the first step towards creating a fair use code for digital music sampling and as part of the research for this Article, the author conducted an anonymous online survey ("Survey") of professionals in the music industry in the United States from all musical genres and backgrounds.[19] The Survey included respondents who use digital samples in their work, artists who are sampled, and other stakeholders who have an interest in sampling, such as music label professionals, publishers, and composers. The Survey questioned them about their opinions, experiences, and practices concerning digital music sampling. In particular, the Survey questioned participants about the circumstances, if any, under which they believe sampling of third-party copyrighted material may be unlicensed. Overall, 61.81% of the Survey respondents believed that whether an artist should seek permission or obtain a license to use a sample of

15. JOHN TEHRANIAN, INFRINGEMENT NATION COPYRIGHT 2.0 AND YOU 38 (2011).

16. 824 F.3d 871, 884–86 (9th Cir. 2016).

17. *See, e.g.*, Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441, 488 (2016) (proposing compulsory licensing scheme); *see also* John W. Gregory, *A Necessary Global Discussion for Improvements to U.S. Copyright Law on Music Sampling*, 15 GONZ. J. INT'L L. 4, 109 (2012).

18. COLLEGE ART ASSOCIATION, CODE OF BEST PRACTICES IN FAIR USE FOR THE VISUAL ARTS 3 (2015), http://www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf [hereinafter Visual Arts Code].

19. The Survey questionnaire, including the informed consent form that participants signed, is on file with the author and can be provided upon request.

another artist's work depends on the circumstances. As a result, the author drafted the Digital Music Sampling Code, which attempts to articulate principles for determining under what circumstances permission is needed and when it is not. The Digital Music Sampling Code is also based on broad fair use principles, music case law, and fair use codes from other industries.

I. THE HISTORY OF SAMPLING

Pablo Picasso has been quoted as saying, "Bad artists copy. Great artists steal."[20] Meanwhile, Igor Stravinksy reportedly remarked, "A good composer does not imitate, he steals."[21] No matter who said what first, the sentiment is the same. Both in music and visual arts, the practice of stealing or sampling from predecessors is nothing new. Indeed, in some sense all art is derivative and builds upon past works. As Justice Story explained,

> 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 borrow [sic], and use much which was well known and used before.[22]

One Survey respondent further noted, "[W]e're basically to the point now where almost everything is going to soon be derivative to one extent or another . . . .", while another stated, "[E]verything I create is more or less built on what others have made." This Part will examine the history of both visual and musical artists appropriating – or sampling – from those who came before them, and it will show that digital music sampling is just the modern day version of this practice.

A. History of Sampling in Visual Art

In 1912, Pablo Picasso and Georges Braque coined the term "collage" to refer to their style of art that appropriated existing images, such as magazine

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20. Lucille M. Ponte, *Preserving Creativity from Endless Digital Exploitation: Has the Time Come for the New Concept of Copyright Dilution?*, 15 B.U. J. SCI. & TECH. L. 34, 56 n.111 (2009).

21. Kembrew McLeod & Rudolf E. Kuenzli, *I Collage, Therefore I Am: An Introduction to Cutting Across Media*, *in* CUTTING ACROSS MEDIA: APPROPRIATION ART, INTERVENTIONIST COLLAGE, AND COPYRIGHT LAW 1 (Kembrew McLeod & Rudolf E. Kuenzli eds., 2011); *see also* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 550–51 (2006) ("Musical borrowing is a pervasive aspect of musical creation" and yet the current copyright legal regime is based on "Romantic author assumptions" that envision "musical production as autonomous, independent and in some cases even reflecting genius.").

22. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

illustrations and other "found material" like floral wallpaper, to create new mixed media pieces.[23] By mixing incongruent materials, new meaning was brought to the individual elements.[24] This form of art, which was part of the Cubist movement, also brought attention and criticism to the rise of popular media. Many other art genres – futurists, constructivists, surrealists, and abstract expressionists – would later embrace the technique of collage as a means of expressing their social and political views.[25]

The Dada art movement, which arose from the travesties of World War I, also believed in recycling and reassembling material and rejected the notion of originality in art.[26] For example, Dada artist Marcel Duchamp incorporated what he called "readymades," which were manufactured objects, such as bicycle wheels, into his work.[27] One of his most famous and controversial pieces, *Fountain*, was a white-glazed, ceramic urinal that he placed in an art gallery thus creating "new thought for [the] object."[28] Meanwhile, German Dada artists invented the technique of photomontage, which involved making a collage out of photographs.[29]

The 1950s saw the birth of Pop Art. One landmark piece was Richard Hamilton's collage, *Just What Is It That Makes Today's Homes So Different, So Appealing?*, from 1956.[30] This work commented on the modern consumer world by combining culture images, such as an ad for *The Jazz Singer*, a Tootsie Pop, and a Ford emblem, that were cut-out from magazines and pasted together.[31] Andy Warhol later began taking everyday, banal objects, like Campbell soup cans and Brillo soap-pad boxes, and recasting them as fine art. This, too, caused the viewer to examine these objects in a new light and question the motives of mass production.[32] Warhol also used a silkscreen technique to place

23. Christine Poggi, *In Defiance of Painting: Cubism, Futurism, and the Invention of Collage*, *in* MASHUP: THE BIRTH OF MODERN CULTURE 53 (2016).

24. RUDOLF E. KUENZLI & FRANCIS M. NAUMANN, MARCEL DUCHAMP: ARTIST OF THE CENTURY 76 (1989).

25. DIANE MAURER-MATHISON, COLLAGE, ASSEMBLAGE, AND ALTERED ART: CREATING UNIQUE IMAGES AND OBJECTS 13 (2008).

26. John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 B.Y.U. L. REV. 1237, 1256.

27. Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992); Bruce Grenville, *Mashup: The Birth of Modern Culture*, *in* MASHUP: THE BIRTH OF MODERN CULTURE, *supra* note 23, at 23.

28. Jane C. Ginsburg, *"Courts Have Twisted Themselves into Knots": U.S. Copyright Protection for Applied Art*, 40 COLUM. J. L. & ARTS 1, 43 n.142 (2016).

29. Grenville, *supra* note 27, at 23.

30. KLAUS HONNEF, POP ART 40 (2015).

31. *Id.*

32. DAVID BOLLIER, BRAND NAME BULLIES: THE QUEST TO OWN AND CONTROL CULTURE 49 (2005).

actual newspaper stories and photographs, including those of famous celebrities like Elvis Presley and Elizabeth Taylor, into his works.[33] In doing so, Warhol "was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself."[34] Warhol introduced the photo-silkscreen method to Robert Rauschenberg who would use it to incorporate masterpieces like *Venus at Her Toilet* by Peter Paul Rubens into his paintings.[35]

Later came the "Pictures Generation" – artists who used mass media images to critique contemporary culture.[36] Often this involved re-photographing famous works. For example, in Sherrie Levine's *After Walker Evans* photograph series, she re-photographed well-known Walker Evans' photographs from the Depression era.[37] Richard Prince, whose work and lawsuits will be discussed in further detail in Part III, became famous for re-photographing Marlboro cigarette advertisements and presenting them as fine art.[38] This style of art came to be known as "appropriation art," which has been defined as "the more or less direct taking over into a work of art a real object or even an existing work of art."[39]

Often the goal of appropriation artists is not to present the borrowed images as their own but rather to criticize or comment on society, especially when using popular or highly commercial works. Neither Levine nor Prince made substantive changes to their borrowed imagery. Yet, the effect of placing these images in a different cultural setting was radical and gave new perspective and meaning to the works.[40] In the case of Prince, his Marlboro series caused the viewer to reevaluate the iconic image of the macho cowboy of the American West.[41] And some of the "supposed value" of appropriation art "comes from the very fact that the work was created by someone else."[42]

Today, artists no longer have to rely on physically cutting and pasting images with scissors and glue to make appropriation art and collage. Instead, they can do it digitally with nothing more than a computer and the Internet.

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33. *Id.*

34. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 811 (Cal. 2001).

35. BRANDON TAYLOR, COLLAGE, THE MAKING OF MODERN ART 176 (2004); *see also* Nicholas B. Lewis, Comment, *Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art?*, 55 AM. U. L. REV. 267, 281 n.70 (2005).

36. Grenville, *supra* note 27, at 32.

37. *Id.* at 33.

38. *Id.*

39. Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013).

40. *See* William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 1 (2001) ("[Appropriation] artist's technical skills are less important than his conceptual ability to place images in different settings and, thereby, change their meaning.").

41. *Cowboys*, GUGGENHEIM, https://www.guggenheim.org/arts-curriculum/topic/cowboys (last visited May 24, 2019).

42. Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014).

Moreover, the practice of collage is no longer confined to the rarified air in Manhattan and Paris. Collage has surged in popularity in recent years, especially among amateur artists.[43] "Because of shifts in both art and technology, copying has now become a central subject of art – as well as a basic tool of how people make it."[44] A similar shift occurred in the music world where sampling is now a common practice.

B. History of Sampling in Music

Music sampling has a long history as well. With respect to musical compositions, classical composers like Brahms and Mendelssohn borrowed notes and chords from Beethoven, and Debussy borrowed from Wagner's Tristan.[45] Igor Stravinsky took many of the *The Rite of Spring*'s melodies from Russian folk music while Handel "ruthlessly plagiarized."[46]

Sampling of sound recordings is for obvious reasons a more recent phenomenon. The phonograph was not invented until 1877,[47] and the ability to sample recorded sounds by incorporating parts of an original recording directly into a new one was limited by technology and cost until the 1970s.[48] The first sampling of sound recordings was seen in Paris in the 1940s.[49] There, French composers combined music with everyday noises and sounds to develop sound collages that were called "musique concrete."[50] This costly and laborious technique relied on manipulating magnetic tapes through cutting and splicing.[51] Between 1940 and 1970, sampling was more of an arthouse project like "Collage #1 (Blue Suede)" by James Tenney in 1961 or a novelty gag like Bill Buchanan and Dickie Goodman's "The Flying Saucer," which took famous lines from hit songs to report on the story of an alien visit.[52]

In the 1960s, music producers in Jamaica used portable sound systems to take pre-recorded rhythm tracks and splice in their own powerful vocals,

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43. Danielle Krysa, *Introduction*, *in* COLLAGE: CONTEMPORARY ARTISTS HUNT AND GATHER, CUT AND PASTE, MASH UP AND TRANSFORM 11 (2014).

44. Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 569 (2016).

45. KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 22–25 (2011); *see also* Sherri Carl Hampel, Note, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 583–84 (discussing how musicians have been borrowing musical phrases and themes from other artists since the dawn of Western music).

46. Heim v. Universal Pictures Co., 154 F.2d 480, 488 (2d Cir. 1946).

47. Alan Korn, Comment, *Renaming That Tune: Aural Collage, Parody and Fair Use*, 22 GOLDEN GATE U. L. REV. 321, 321 (1992).

48. E. Scott Johnson, Note, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 2 J. L. & TECH. 273, 274 & n.12 (1987).

49. *Id.* at 289 n.102.

50. *Id.*

51. *Id.*

52. Thomas W. Joo, *Remix Without Romance*, 44 CONN. L. REV. 415, 426 (2011).

chants, growls, and shouts.[53] These were called dub remixes, which was a precursor to rap.[54] Dub showed how one instrumental track could be transformed into many different versions, each reflecting the artist's own vision.

In the 1970s, while the Picture Generation artists like Richard Prince and Sherrie Levine were re-photographing famous images, a different style of sampling was occurring in the South Bronx.[55] DJs like DJ Kool Herc, who was from Jamaica, began pioneering the practice of using two turntables, an audio mixer, and a pile of records to combine songs and extend breakbeats.[56] An MC, or "'Master of Ceremonies or Microphone Controller,' or '[a] rapper who is either the host of an event' or 'someone with enough flow and skill to be considered a master of the art of rap'"[57] would then rhyme or rap over the music.[58] At first, these were strictly public performances occurring at apartment buildings, parks, and community centers.[59] No sound recordings were made of the resulting music.[60]

Sampling in the early days relied on analog technology.[61] As such, it was often a time-consuming project involving hours layering sampled loops and sounds.[62] With the invention of digital synthesizers that had Musical Instrument Digital Interface ("MIDI") keyboard controls, sampling became easier and cheaper.[63] Musicians could now use the samplers to take a portion of an already existing sound recording, incorporate it into a new work, and digitally manipulate and alter it.[64] A digital sampler became like any other instrument used to create music.[65]

Sampling was done for a variety of reasons. Sometimes it was born out of necessity. Artists could not afford the musical instruments they needed to make certain sounds, and even if they could afford it, they did not know how

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53. David Katz, *Scratch the Super Ape: An Embodiment of Dub's Mashup Culture*, *in* MASHUP: THE BIRTH OF MODERN CULTURE, *supra* note 23, at 155–57.

54. *Id.*

55. *Id.*

56. *Id.*

57. TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 593 n.1 (S.D.N.Y. 2013) (quoting *MC*, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=mc (last visited Mar. 18, 2019)).

58. Stephanie Rebick, *The Infinite Archive: Sampling in the Digital Age*, *in* MASHUP: THE BIRTH OF MODERN CULTURE, *supra* note 23, at 279.

59. MCLEOD & DICOLA, *supra* note 45, at 53.

60. *Id.*

61. *Id.*

62. *Id.* at 21.

63. *Id.*

64. *Id.* at 61.

65. *See* Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 LOY. L. REV. 879, 882 (1992) ("A digital sampler is an important instrument in the evolving art form of computer-assisted musical composition . . . .").

to play the instrument.[66] A couple of the Survey respondents reported that they did not "know how to recreate the sampled sound." One respondent stated that he or she "lack[ed] the skills resources [sic] to compose," while another noted that samples "give access to sounds that one may not have the equipment to create, i.e. minimoog, Fender Rhodes, French horns, lush realistic strings." Other times, sampling was done for social and political commentary.[67]

By the late 1980s, the price of sequencers and samplers dropped dramatically, enabling more DJs to afford them.[68] It was during this period that sampling entered what some commentators have called "the golden age of sampling."[69] Acts like Public Enemy and The Beastie Boys released innovative records that contained hundreds of aural fragments, thereby creating a rich collage of sounds.[70] The practice of sampling was not isolated to New York City. On the other side of the Atlantic, the electronic band, The Justified Ancients of Mu Mu (The JAMs), later to be known as The KLF, created an album that aggressively sampled everyone from The Beatles to Whitney Houston.[71]

By 1996, "digital sampling ha[d] become so pervasive that many musicians and engineers . . . regard[ed] it as being indispensable in the music industry."[72] The way that music is created also began to change. No longer did a bunch of musicians with instruments have to enter a studio to create a record.[73] Now all those instrumental sounds could be created by one person on a computer. In essence, anyone with a computer could be a musician.

In light of these developments, sampling is now completely digitized. Moreover, artists now can "mashup" works by juxtaposing the melody of one song with the instrumentals of another.[74] Some mashups contain no new sound recorded content at all. The originality is derived from how they are mixed and altered. For example, Danger Mouse created the groundbreaking *Grey Album* that mashed up Jay-Z's vocals from *The Black Album* with The Beatles' music from "The White Album."[75] While sampling was initially mostly confined to the hip-hop and rap genres,[76] it is now a widely accepted practice that is used

66. Julian Azran, *Bring Back the Noise: How* Cariou v. Prince *Will Revitalize Sampling*, 38 COLUM. J. L. & ARTS 69, 84 (2014) ("Sampling was viewed as a necessity to many early hip-hop artists who lacked the resources to purchase musical instruments and lessons").

67. MCLEOD & DICOLA, *supra* note 45, at 53.

68. *See id.* at 61.

69. *See, e.g.*, at 19.

70. Rebick, *supra* note 58, at 279.

71. *Id.*

72. Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 U.C.L.A. ENT. L. REV. 271, 278 (1996) (quotations omitted).

73. MCLEOD & DICOLA, *supra* note 45 at 53.

74. *See* Menell, *supra* note 17, at 453.

75. *Id.*

76. *See, e.g.*, Newton v. Diamond, 388 F.3d 1189, 1191 (9th Cir. 2003).

in many types of music. In other words, sampling is no longer a fringe movement but a mainstream practice.[77]

C. Digital Music Sampling Is Another Form of Collage and Appropriation Art

Music and visual sampling should not be pigeonholed into separate categories. Rather, they are both forms of collage and the long-standing practice of creating something new with found objects.[78] One commentator has noted that "[h]ip-hop stands as the most widely disseminated specific collage practice yet to appear on the stage of history . . . ."[79] Digital sampling and appropriation art share a number of characteristics, including "recycling appropriation rather than unique originative creation, the eclectic mixing of styles, the enthusiastic embracing of the new technology and mass culture, the challenging of modernist notions of aesthetic autonomy and artistic purity."[80]

Courts, too, have noted the link between digital music sampling and collage.[81] The U.S. Court of Appeals for the Ninth Circuit recently opined that musical digital sampling involved a "physical taking" similar to the taking that occurs when a computer program "'sample[s]' a piece of one photograph and insert[s] it into another photograph or work of art."[82] The tools of a visual artist and musician may differ, but the practice is largely the same. Both cut existing works and paste them into new ones.

For many artists, musical or visual, collage is all about the hunt for interesting "found materials."[83] Some musicians describe their practice of "crate digging" – culling through and listening to troves of long-forgotten vinyl records.[84] Similarly, many visual collage artists spend hours searching for the

77. *See* WHO SAMPLED, http://www.whosampled.com/ (last visited May 24, 2019) (documenting over 575,000 samples); *see also* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 803–04 (6th Cir. 2005) ("[D]igital sampling has become so commonplace and rap music has become such a significant part of the record industry.").

78. Twenty Survey respondents reported that they used samples because they "[e]njoy[ed] discovering forgotten music," while twelve respondents stated that they used samples in their music to "create a music collage."

79. Joshua Clover, *Ambiguity and Theft*, *in* CUTTING ACROSS MEDIA: APPROPRIATION ART, INTERVENTIONIST COLLAGE, AND COPYRIGHT LAW, *supra* note 21, at 89.

80. Richard Shusterman, *The Fine Art of Rap*, 22 NEW LITERARY HIST. 613, 614 (1991).

81. Facenda v. N.F.L. Films, Inc., 542 F.3d 1007, 1026 (3d Cir. 2008) (using sound clips, defendant "was 'sampling' itself, making a collage, taking a small piece of an old work and using it in a new work – as when a hip-hop group samples the drum part from James Brown's 'Funky Drummer.'"); *see also* Staggs v. West, No. PJM 08-728, 2009 WL 2579665 (D. Md. Aug. 17, 2009).

82. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 885 (9th Cir. 2016).

83. MCLEOD & DICOLA, *supra* note 45, at 22–25.

84. *Id.*

perfect images.[85] Musicians and artists tend to frequent the same establishments – attics, junk shops, garage sales, swap meets, and thrift shops – looking for old materials to recycle.[86] Many take pride in championing these long-forgotten works and introducing them to new audiences.[87] One Survey respondent noted, "I don't really use anything that is remotely popular. Usually stuff that nobody knows about." This included "[w]eird snippets that one would not really know was in the original song unless they really really listened."[88] Collage artist Jose Romussi works with found objects because "they want to be given a new perspective and a new moment in time."[89] He wants to "make sure that whatever has already been forgotten is kept in the present."[90]

How all of these found materials are then arranged is also an important step in the collage process.[91] Many times, multiple samples are densely layered over original materials to create a richly textured piece.[92] Old images may be juxtaposed against contemporary ones. Bold colors or textures may be added to a canvas. Contrasting vocals or sounds may be combined with a musical snippet.[93] Some samples are altered. Musically, this may involve changing the pitch or tempo.[94] Visually, this may involve cropping or aging materials. Some samples are obscured,[95] while others are prominently featured.[96]

Visual and musical artists sample for similar reasons. Using existing materials is often necessary for political or cultural commentary.[97] For example, in her music video for "Formation," Beyoncé used samples from artist Anthony Barré as a means of political and social commentary about "black Southern

85. Krysa, *supra* note 43, at 145.

86. *Id.* at 261; Anthony Zinonos, *Foreword*, *in* COLLAGE: CONTEMPORARY ARTISTS HUNT AND GATHER, CUT AND PASTE, MASH UP AND TRANSFORM, *supra* note 43, at 320.

87. Daphne Keller, *The Musician as Thief: Digital Culture & Copyright Law, in* SOUND UNBOUND: SAMPLING DIGITAL MUSIC AND CULTURE 143 (Paul D. Miller ed., 2008).

88. *Id.*

89. *José Romussi*, AGORA COLLECTS, http://projects.agoracollective.org/agoracollects/jose-romussi/ (last visited May 24, 2019).

90. Krysa, *supra* note 43, at 161.

91. MCLEOD & DICOLA, *supra* note 45, at 258 ("In many cases, sound collage creates something new and interesting from its constituent parts."). Another Survey respondent noted, "Flipping a sample has a sound to it that it [sic] pure in a way."

92. Another Survey respondent said, "I've sampled myself, to be able to rhythmically chop and paste beats and or layers, beat or sounds."

93. Some Survey respondents stated that samples were used to add "acapellas, vocals" or to add "[w]eird snippets."

94. One respondent noted he had used "rhythmic manipulation."

95. "Samples can be altered to the point when they are unrecognizable. So [sic] it basically becomes a new type of a [sic] original sample from a different artist."

96. P. Diddy used a sample of The Police's *Every Breath You Take* as basically his entire song. *See* Puff Daddy & Faith Evans, *I'll Be Missing You*, *on* NO WAY OUT (Bad Boy Records 1997).

97. Some respondents used samples for "criticism or commentary."

resilience" in New Orleans.[98] Images of political figures are often used in art for the larger purpose of criticizing ideological viewpoints.[99] Collage can be used to comment on culture as well. For example, Barbara Kruger uses found images, often advertisements, paired with slogans, such as "Buy me, I'll change your life," to criticize mass consumerism.[100] The band Negativland creates aural collages from TV advertisements and popular music to comment on mass culture.[101]

By removing a found object from its original context and placing it in a new one, fresh meaning and purpose can be brought to the object. As one Survey respondent noted, "I'm following the example of Girl Talk,[102] where the sample is used to create something entirely different." Sampling, too, can bring attention to overlooked aspects of the original material. For example, some musicians "use a sound like a snare or a kick drum that no one else may even notice in a recording."[103] At the same time, some objects may be used because they are laden with existing meaning and the artist wants to criticize that meaning.[104]

Collage can be used to compare and contrast.[105] Collage artist Bill Zindel is motivated by "the frictions and harmonies that occur when disparate elements – beautiful or dull, suggestive or meaningless – rub up against each other to make something new."[106] On the music side, Jay-Z took the sing-song, sweet child voices singing "It's the Hard Knock Life" from the musical *Annie* and mixed in his rapped harsh lyrics about ghetto life.[107] While at first "Hard Knock Life (Ghetto Anthem)" may seem like a contrast, it ultimately is a comparison between kids growing up in the ghetto and kids living in an orphanage.

Another reason to sample and create appropriation art is to challenge the very idea of originality and the notion of authorship. This is one of the motivations for Sherrie Levine's *After Walker Evans* series in which she re-photographed Depression era photographs that Walker Evans had taken for the Farm

98. Estate of Barré v. Carter, 272 F. Supp. 3d 906, 915–16 (E.D. La. 2017).

99. Rebick, *supra* note 58, at 279.

100. Miwon Kwon, *A Message from Barbara Kruger: Empathy Can Change the World*, *in* MASHUP: THE BIRTH OF MODERN CULTURE, *supra* note 23, at 125.

101. Rebick, *supra* note 58, at 280.

102. Girl Talk is the stage name of disc jockey Gregg Gillis whose works are largely created from the mashups of samples from other artists' music. Rob Walker, *Mash-up Model*, THE N.Y. TIMES MAG., July 20, 2008, at 15.

103. Susan Butler, *Court Ruling Could Chill Sample Use*, BILLBOARD, Sept. 16, 2004, at 1.

104. Grenville, *supra* note 27, at 33.

105. Some Survey respondents reported using samples to "create comparisons of various performances of the same composition for educational ideas and performance practice."

106. Krysa, *supra* note 43, at 309.

107. *See* Jay-Z, *Hard Knock Life (Ghetto Anthem)*, *on* VOL. 2 . . . HARD KNOCK LIFE (Roc-a-Fella 1998); *see also* JAY-Z, DECODED 240 (2010).

Security Administration.[108] "Postmodern art like rap . . . show[s] that borrowing and creation are not at all incompatible. It further suggests that the apparently original work of art is itself always a product of unacknowledged borrowings . . . ."[109] Collage has long been recognized as a legitimate art form in the visual arts, and it should be similarly respected in the music world.

II. SAMPLING AND COPYRIGHT LAW

This Part will explore the copyright law principles that come into play when an artist samples. Sometimes an artist samples his or her own material.[110] Other times, an artist incorporates materials that are in the public domain[111] or are freely usable pursuant to a Creative Commons license.[112] These foregoing situations do not give rise to copyright problems. However, when artists sample materials that are copyrighted, the legal problems begin.

A. Copyrights in Music and Art

Music and visual art, including photographs, drawings, paintings, and sculpture, are all subject to protection under the Copyright Act.[113] With respect to music, there are two separate copyrights.[114] There is a copyright in the musical work, which is the underlying composition that consists of things such as the lyrics, melody, harmony, rhythm, and arrangement of the song but not the audible form.[115] Additionally, there is a copyright in the sound recording, which is the sound that is fixed in the recording whether it be a vinyl record, CD, cassette tape, or digital file.[116] The sound recording copyright protects the

108. Grenville, *supra* note 27, at 33.

109. Shusterman, *supra* note 80, at 617.

110. Some Survey respondents noted self-sampling.

111. Some respondents use samples in the public domain and samples "recorded in 1910."

112. One respondent said, "I choose to only sample work which has been offered under clear Creative Commons licensing by the original artists."

113. In the nomenclature of the Copyright Act, visual art fits into the category of "pictorial graphic, and sculptural" works of authorship. 17 U.S.C. § 102(a)(5) (2018). The Copyright Act defines this category to include "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans." *Id.* §101.

114. *Compare* 17 U.S.C. § 102(a)(2) (2018) (protecting musical works), *with id.* § 102(a)(7) (protecting sound recordings). *See also* Bridgeport Music, Inc. v. Still N the Water Publ'g, 327 F.3d 472, 475 n.3 (6th Cir. 2003) ("Sound recordings and their underlying musical compositions are separate works with their own distinct copyrights").

115. *Still N the Water Publ'g*, 327 F.3d at 475 n.3.

116. *See* Ulloa v. Universal Music & Video Distrib. Corp., 303 F. Supp. 2d 409, 412–13 (S.D.N.Y. 2004).

musical performance and audio sound of the recording of the song.[117] Sound recordings did not receive federal copyright protection until the advent of the Copyright Act of 1976, which protects sound recordings fixed on or after February 15, 1972.[118] Pre-1972 sound recordings had no federal copyright protection until the Orrin G. Hatch-Bob Goodlatte Music Modernization Act went into effect on October 11, 2018.[119]

The copyrights in the musical work and the sound recording are typically owned by different parties. The authors of musical works are generally the songwriters, composers, and lyricists.[120] However, they often assign portions of their copyrights to third-party music publishers who promote and license the compositions.[121] The authors of sound recordings are usually the singers, band members, and producers who are featured in the recording.[122] Generally, either by contract or assignment, the copyrights in the sound recording are owned by the record label, which typically finances, promotes, and arranges for the distribution of the recording.[123]

Copyright holders enjoy certain exclusive rights, such as the right to reproduce and distribute the work, prepare derivative works, and publicly display their copyrighted works.[124] Musical work copyright holders also have the right to perform the musical work publicly.[125] A copyright holder of a sound recording receives rights that are more limited than those of other creators. Notably, the exclusive right of public performance is limited to digital audio transmissions,[126] and the exclusive right of reproduction is limited to the right to duplicate the sounds in a form "that directly or indirectly recaptures the actual sounds fixed in the recording."[127] This means that anyone is free to imitate the sounds in the copyrighted work.[128] While you cannot bootleg or make pirated

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117. *See id.*

118. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 70 N.E.3d 936, 939 (N.Y. 2016).

119. *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (to be codified in scattered sections of 17, 19, and 28 U.S.C.).

120. *In re* Cellco P'ship*,* 663 F. Supp. 2d 363, 369 (S.D.N.Y. 2009).

121. U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 19 (2015).

122. *In re Cellco*, 663 F. Supp. 2d at 369.

123. COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 121, at 22.

124. *See* 17 U.S.C. § 106 (2018); *see also* 17 U.S.C. § 101 ("A 'derivative work' is a work based upon one or more preexisting works, such as a . . . musical arrangement . . . sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.").

125. *Id.* § 106(4).

126. *Id.* § 106(6).

127. *Id.* § 114(b).

128. *See* H. REP. NO. 94-1476 (Sept. 3, 1976); *see also* Lieb v. Topstone Indus., Inc., 788 F.2d 151, 153 (3d Cir. 1986) (recognizing district court's granting of summary judgment because "defendants had not violated the Act because the legislative history makes clear that deliberate imitation does not contravene the limited protection extended to recordings"); Erickson v. Blake, 839 F. Supp. 2d 1132, 1135 n.3 (D. Or. 2012)

copies of the latest Adele CD, you can use your own voice and instruments to try to duplicate the sounds of that CD without permission from the sound recording holder.[129] However, you will need to obtain permission from the musical composition copyright holders.[130]

Based on the foregoing, someone who samples another musical or visual artist potentially violates that person's exclusive rights to reproduce his or her work and to make derivative works.[131] The copyright owner's rights to distribution and display also are potentially implicated.

B. Copyright Infringement and the De Minimis Doctrine

To establish a claim for copyright infringement, a plaintiff must prove "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."[132] "Not all copying . . . is copyright infringement," especially if what is copied is not original or not a protectable element.[133] For example, a single common chord by itself may not be considered original enough to be worthy of copyright protection.[134]

Furthermore, the United States Supreme Court has recognized that "the venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept."[135] As Judge Learned Hand observed, "Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent."[136] In the copyright context, the de minimis doctrine comes

("[A] copyright in a sound recording only protects against a direct duplication of that recording.").

129. *See* Romantics v. Activision Publ'g, Inc., 574 F. Supp. 2d 758, 768 (E.D. Mich. 2008) (explaining that § 144(b) "expressly disallows any recourse for a sound-alike recording of a song"); Griffin v. J-Records, 398 F. Supp. 2d 1137, 1142 n.14 (E.D. Wash. 2005) (stating a sound recording copyright is not violated where a party attempts to imitate the recording).

130. *See* New Old Music Grp., Inc. v. Gottwald, 122 F. Supp. 3d 78, 93 (S.D.N.Y. 2015).

131. Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *2 (S.D.N.Y. Aug. 27, 2001); *see also* Range Road Music, Inc. v. E. Coast Foods, Inc., 668 F.3d 1148, 1153–54 (9th Cir. 2012) (sampling may violate a copyright holder's exclusive right to create derivative works).

132. Feist Pub., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

133. *Id.*

134. Williams v. Bridgeport Music, Inc., No. LA CV13–06004, 2014 WL 7877773, *16 (C.D. Cal. Oct. 30, 2014).

135. Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) (alteration in original).

136. W. Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (E.D.N.Y. 1909).

into play in three different ways: (1) as an "independent defense to infringements of little importance"; (2) as a part of the substantial similarity analysis discussed below; and (3) as a part of the fair use analysis, which is discussed in Section C.[137]

Under the second prong of the test for copyright infringement, the plaintiff also must show that the defendant actually copied the plaintiff's work and that there is substantial similarity between the protectable material in the plaintiff's work and the defendant's work.[138] There are several tests to determine whether substantial similarity exists.[139] Under the ordinary observer test, there is substantial similarity when "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[140] In music copyright infringement cases, the "ordinary observer" is the listener and the test requires proof that the "defendant took from [the] plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such . . . music is composed, [and] that [the] defendant wrongfully appropriated something which belongs to the plaintiff."[141]

In digital sampling cases, the "fragmented literal similarity test" often comes into play because there is a high degree of similarity between the works but the copying is limited.[142] The Ninth Circuit in *Newton v. Diamond* explained this doctrine:

> Fragmented literal similarity exists where the defendant copies a portion of the plaintiff's work exactly or nearly exactly, without appropriating the work's overall essence or structure. Because the degree of similarity is high in such cases, the dispositive question is whether the copying goes to trivial or substantial elements. Substantiality is measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole.[143]

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137. Andrew Inesi, *A Theory of De Minimis and a Proposal for Its Application in Copyright*, 21 BERKELEY TECH. L. J. 945, 960 (2006); *see also* Sandoval v. New Line Cinema Corp., 147 F.3d 215, 216 (2d Cir. 1998) (affirming grant of summary judgment to the defendant because the defendant's use of the plaintiff's photographs in a movie was de minimis because it fell "below the quantitative threshold of substantial similarity").

138. Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 137 (2d Cir. 1998).

139. *Id.* at 139–40.

140. Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992) (citing Ideal Toy Corp. v. Fab–Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966)).

141. TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 596 (S.D.N.Y. 2013) (first alteration in original).

142. Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2003) ("The practice of music sampling will often present cases where the degree of similarity is high. Indeed, unless the sample has been altered or digitally manipulated, it will be identical to the sampled portion of the original recording.").

143. *Id.* (footnotes omitted).

"[A] use is de minimis only if the average audience would not recognize the appropriation."[144]

In sampling cases, actual copying is rarely an issue.[145] Most samplers readily concede to taking the material and in many instances the copying is "blatantly apparent."[146] Instead, the focus in most sampling cases is on whether (1) the copying is de minimis, meaning that it is "a technical violation of a right so trivial that the law will not impose legal consequences";[147] (2) the "copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity";[148] or (3) the copying is fair use.

C. Fair Use

Fair use is a defense to copyright infringement that permits the use of copyrighted work without authorization in certain instances.[149] The doctrine of fair use is necessary to fulfill copyright's very purpose, which is "[t]o promote the Progress of Science and useful Arts . . . ."[150] Under the fair use doctrine, which is codified in § 107 of the Copyright Act, use of a copyrighted work is permitted for such purposes as criticism, comment, teaching, news reporting, scholarship, and research.[151] Section 107 balances "the interest of authors in the control and exploitation of their [works], and society's competing interest in the free flow of ideas, information, and commerce . . . ."[152]

Section 107 "provides an illustrative – but not exhaustive – list of factors"[153] for determining fair use:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;

144. *Id.* at 1193.

145. *See, e.g.*, Jarvis v. A & M Records, 827 F. Supp. 282, 289 (D.N.J. 1993) ("The instant case is one of those rare cases in which such indirect proof is not necessary. In this case, the defendants actually took a sample of plaintiff's recording and incorporated into their recordings. Indeed, they admit as much and admit that it was without authorization.").

146. *See* Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992).

147. Ringgold v. Black Ent. Television, 126 F.3d 70, 74 (2d Cir. 1997).

148. *Id.*

149. *See* Lewis Galoob Toys, Inc. v. Nintendo of Am., 964 F.2d 965, 969–70 (9th Cir. 1992).

150. U.S. CONST. art. I, § 8, cl. 8.

151. 17 U.S.C. § 107 (2018).

152. Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984).

153. Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992).

> (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.[154]

In each fair use case, all four statutory factors must be examined and the results evaluated together in light of the purposes of copyright.[155] "Because the defense of fair use is considered in its totality, the moving party is not required to prevail on every factor . . . ."[156] The four statutory fair use factors are non-exclusive, and the "ultimate test of fair use . . . is whether the copyright law's goal of 'promoting the Progress of Science and useful Arts' . . . would be better served by allowing the use than by preventing it."[157] Likewise, the examples of fair use enumerated in the preamble – criticism, comment, news reporting, teaching, scholarship, and research – are meant only to provide "general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses."[158] They are not a restrictive list of permissible uses.

The fair use test is meant to be a fluid and flexible approach with no bright-line rules.[159] Instead, each case is analyzed on its own facts; therefore, the test is "context-sensitive."[160] This can lead to different judges construing and applying the statutory factors differently and coming up with disparate results in seemingly similar cases. As a result, the fair use test is infamously unpredictable, which in turn leads to uncertainty and a fear of asserting it as a defense. "For an artist engaged in remixing, each and every work used involves a high-stakes legal gamble."[161]

1. The First Factor: The Purpose and Character of the Use

The Supreme Court's landmark decision in *Campbell v. Acuff-Rose Music, Inc.*[162] shaped many of the modern-day principles of fair use and adopted the concept of transformative use, which comes into play under the first factor. At issue in *Campbell* was whether the rap group 2 Live Crew's raunchy and unlicensed parody of Roy Orbison's song "Oh, Pretty Woman" was copyright infringement or fair use.[163] Although the district court had found it to be fair

154. 17 U.S.C. § 107.
155. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).
156. Norse v. Henry Holt & Co., 847 F. Supp. 142, 145 (N.D. Cal. 1994).
157. Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 141 (2d Cir. 1998) (citations omitted).
158. *Campbell*, 510 U.S. at 577–78.
159. *Id.* at 577.
160. Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006).
161. MCLEOD & DICOLA, *supra* note 45, at 22–25.
162. 510 U.S. 569 (1994).
163. *Id.* at 572–73.

use and granted summary judgment, the U.S. Court of Appeals for the Sixth Circuit reversed and held that the "commercial nature" of the parody "rendered it presumptively unfair."[164] In reversing the Sixth Circuit, the Supreme Court noted that whether the purpose of the work was commercial was just one element under the first factor.[165]

Although there is no specific mention of the "transformative" test in the language of § 107 itself,[166] the Supreme Court in *Campbell* stated that determining "whether and to what extent the new work is transformative" is the "central purpose" of the first factor.[167] This is a critical issue because "[t]he more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives . . . ."[168] The Supreme Court adopted the concept of transformative use from the seminal law review article, *Toward a Fair Use Standard*, written by Judge Pierre N. Leval.[169] As will be discussed below, "whether a work is transformative is a[n] often highly contentious topic."[170]

A new work is considered transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[171] If the new work merely seeks to supersede the original, it is not considered transformative.[172] If

> the secondary use adds value to the original – if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[173]

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164. *Id.* at 594.

165. *Id.*

166. Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (noting that the transformative test is "not one of the statutory factors, though the Supreme Court mentioned it in *Campbell*" (citation omitted)).

167. *Campbell*, 510 U.S. at 579.

168. Authors Guild v. Google, Inc., 804 F.3d 202, 214 (2d Cir. 2015).

169. *See generally* Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

170. Seltzer v. Green Day, Inc., 725 F.3d 1170, 1176 (9th Cir. 2013).

171. *Campbell*, 510 U.S. at 579; *see also* Wall Data Inc. v. L.A. Cty. Sheriff's Dep't, 447 F.3d 769, 778 (9th Cir. 2006) ("A use is considered transformative only where a defendant changes a plaintiff's copyrighted work or uses the plaintiff's copyrighted work in a different context such that the plaintiff's work is transformed into a new creation").

172. *Campbell*, 510 U.S. at 579.

173. Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998) (alteration in original).

The more a new work comments on or critically refers back to an original work, the more likely it will be deemed transformative.[174] There are no bright line rules for determining when something is transformative.[175] Instead, it is determined on a case-by-case basis.[176]

Whether the defendant's use was for a nonprofit educational purpose, as opposed to a commercial purpose, is also relevant under the first factor. The crux of this commercial/nonprofit distinction is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[177] The fact that a use is for commercial purposes as opposed to nonprofit ones weighs against a finding of fair use.[178] However, the more transformative the new work, the less significant the commercialism.[179]

Finally, under the first factor, some courts examine the defendant's justification for the use.[180] Courts often take into account whether the use is for one of the preamble reasons, such as criticism, news reporting, or teaching.[181] However, uses other than those enumerated in the preamble can be deemed fair.[182] For example, many parodies are deemed fair use because the parody must be able to "'conjure up'" enough of the original to "make the object of its critical wit recognizable."[183]

2. The Second Factor: The Nature of the Copyrighted Work

The second statutory factor "calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."[184] Under this factor, creative works, such as visual arts, sound recordings, and musical compositions, merit stronger protection than informational or factual works.[185] This means that this factor will generally weigh against fair use in a sampling case.[186] However, "the second factor may be of limited

174. *Campbell*, 510 U.S. at 583.

175. *See Seltzer*, 725 F.3d at 1175.

176. *See id.*

177. Harper & Row, Publ'rs., Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

178. Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013).

179. *Id.* at 710 (finding the commercialism of the use to "'be of limited usefulness where,' as here, 'the creative work of art is being used for a transformative purpose.'").

180. Blanch v. Koons, 467 F.3d 244, 254–55 (2d Cir. 2006).

181. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994).

182. *Cariou*, 714 F.3d at 706.

183. *Campbell*, 510 U.S. at 588.

184. *Id.* at 586.

185. *See, e.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003) (photographs are creative); Estate of Smith v. Cash Money Records, 253 F. Supp. 3d 737, 751 (S.D.N.Y. 2017) (musical compositions are creative).

186. *See Estate of Smith*, 253 F. Supp. 3d at 751.

usefulness where the creative work of art is being used for a transformative purpose."[187]

Also, the second factor considers whether a work has been published.[188] Use of an unpublished work is less likely to be considered fair because it is believed that the law tends to favor allowing artists to control the first public appearance of their work.[189]

3. The Third Factor: Amount and Substantiality

The third statutory factor explores "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[190] The question is whether "the quantity and value of the materials used, . . . are reasonable in relation to the purpose of the copying."[191] In certain cases, use of the entire work may be necessary and thus justified as fair use.[192] In other cases, just taking a small percentage of the work may be deemed infringing if what is taken goes to the heart of the work.[193]

4. The Fourth Factor: The Effect Upon the Market

The fourth and final statutory factor is "the effect of the use upon the potential market for or value of the copyrighted work."[194] As a result of *Campbell*, the emphasis started to shift away from the fourth factor, which was traditionally considered the most important,[195] and towards the first factor and whether the new work was transformative.[196] Recently, in some cases, the pendulum has swung again towards considering the fourth factor to be "the single

187. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006); *see also Cariou*, 714 F.3d at 710.

188. Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006).

189. *Id.*

190. 17 U.S.C. § 107(3) (2018).

191. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994) (citation omitted).

192. *See* Seltzer v. Green Day, Inc., 725 F.3d 1170, 1178–79 (9th Cir. 2013) (finding use of an entire illustration in the video backdrop of its stage show was fair use because the work was not "meaningfully divisible" and "the entire work was necessary to achieve Green Day's 'new expression, meaning or message.'"); Kelly v. Arriba Soft Corp., 336 F.3d 811, 821 (9th Cir. 2003) (copying an entire photographic image was fair use in light of the purpose of a search engine).

193. *See* Harper & Row, Publ'rs. v. Nation Enters., 471 U.S. 539, 564–65 (1985). (no fair use where "the words actually quoted were an insubstantial portion" but were "essentially the heart of the book").

194. 17 U.S.C. § 107(4).

195. Stewart v. Abend, 495 U.S. 207, 238 (1990) ("[The fourth factor] is the 'most important, and indeed, central fair use factor.'").

196. *Campbell*, 510 U.S. at 578; *see also* Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 145 (2d Cir. 1998) ("The Supreme Court has recently retreated

most important element of fair use."[197] Under this factor, the court should consider "the extent of market harm caused by the particular actions of the alleged infringer [and] also whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original."[198] This factor weighs in favor of fair use when the allegedly infringing use does not substitute for the original and serves a different market function.[199] Market harm may be presumed if the copying is done for commercial gain. By their very nature, transformative works are less likely to have a negative impact on the potential market of the copyrighted work,[200] and thus, market harm cannot be presumed.

Also, under the fourth factor, the harm to the market for derivative works must be considered. The emphasis should be on whether the secondary work usurps the market for the original work or its potential derivatives and not on whether it suppresses or destroys the market.[201] "The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."[202]

III. DIGITAL MUSIC AND VISUAL ARTS SAMPLING COURT CASES

This Part reviews the leading cases involving digital sampling and appropriation art. The cases are broken into three time periods: (1) pre-*Campbell v. Acuff-Rose Music, Inc.*,[203] which is the Supreme Court's seminal case on fair use; (2) post-*Campbell* and before the pivotal decision in *Cariou v. Prince*,[204] which expanded the definition of transformative in fair use cases; and (3) post-*Cariou*, where courts are now grappling with how to apply this expanded doctrine of transformative use.

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from its earlier cases suggesting that the fourth statutory factor is the most important element of fair use . . . .").

197. Estate of Smith v. Cash Money Records, 253 F. Supp. 3d 737, 752 (S.D.N.Y. 2017) (quoting Harper & Row, Publ'rs., Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)); *see also* Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 176 (2d Cir. 2018); Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) ("We think it best to stick with the statutory list, of which the most important usually is the fourth (market effect).").

198. *Campbell*, 510 U.S. at 590 (second alternation in original).

199. Sofa Ent., Inc. v. Dodger Prods., 709 F.3d 1273, 1280 (9th Cir. 2013).

200. Kelly v. Arriba Soft Corp., 336 F.3d 811, 821 (9th Cir. 2003); *Castle Rock*, 150 F.3d at 145 ("The more transformative the secondary use, the less likelihood that the secondary use substitutes for the original.").

201. *See* Cariou v. Prince, 714 F.3d 694, 708–09 (2d Cir. 2013).

202. *Campbell*, 510 U.S. at 592.

203. *Id.* at 569.

204. 714 F.3d 694.

*A. The Early Years – Pre-*Campbell

The public at large was introduced to sampling in 1980 when "Rapper's Delight" by Sugarhill Gang became a top forty hit on the Billboard Hot 100 chart.[205] The song sampled the instrumental introduction of Chic's "Good Times," which was composed by Bernard Edwards and Nile Rodgers.[206] "Rapper's Delight" was the first song that contained a sample to hit the Billboard chart.[207] It also resulted in a legal dispute. After Edwards and Rodgers threatened a lawsuit, the issue was resolved by granting them a complete copyright in "Rapper's Delight."[208]

As hip-hop grew in popularity in the 1980's, additional lawsuits ensued, but the cases were settled before any legal judgments were issued.[209] Legal commentators, too, began questioning the legality of sampling.[210] In the absence of judicial guidance, cautious and prudent record companies and artists sought licenses for their samples.[211] Others chose to forego permission.[212] There was neither a uniform business practice for sampling nor any clear legal authority on the issue.[213] Then came *Grand Upright Music Limited v. Warner Brothers Records, Inc.*[214]

1. The First Digital Sampling Judicial Decision – *Grand Upright Music Limited v. Warner Brothers Records, Inc.*

With this 1991 decision concerning the rapper Biz Markie's song "Alone Again," the music industry seemingly got an answer to the question of the legality of sampling: "'Thou shalt not steal.'"[215] Those were the opening words in Judge Duffy's opinion.[216] Citing no authority other than the Bible, Judge Duffy stated that the defendants' unauthorized sampling constituted copyright

205. Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 843, 855 (2011).

206. Joo, *supra* note 52, at 427–28.

207. *See id.*

208. *Id.*

209. MCLEOD & DICOLA, *supra* note 45, at 130–31.

210. *See, e.g.*, Johnson Okpaluba, *Digital Sampling and Music Industry Practices, Re-Spun*, *in* LAW AND CREATIVITY IN THE AGE OF THE ENTERTAINMENT FRANCHISE 75 n.2 (2014).

211. *See* Joo, *supra* note 52, at 428–30; *see also* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 804 (6th Cir. 2005) ("[M]any artists and record companies have sought licenses as a matter of course.").

212. MCLEOD & DICOLA, *supra* note 45, at 132.

213. SIVA VAIDHYANATHAN, COPYRIGHTS & COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 134, 140–41 (2001).

214. 780 F. Supp. 182 (S.D.N.Y. 1991).

215. *Id.* at 183.

216. *See id.*

infringement.[217] Not only did Judge Duffy then grant the plaintiff's motion for a preliminary injunction but he also referred the matter to the United States Attorney for the Southern District of New York for criminal prosecution.[218] The legal analysis behind Judge Duffy's opinion was scant. There was no discussion of whether the defendants' copying was an unlawful appropriation or whether it was fair use.[219] After Judge Duffy's scathing decision, the defendants settled the case for a "substantial" sum.[220] Biz Markie's album was recalled, and later versions deleted the song "Alone Again."[221]

The *Grand Upright* decision put the fear of God and copyright laws into sampling artists. Many misunderstood the judge's decision and took it to mean that any use of a sample required permission from the copyright holder.[222] However, that interpretation is legally wrong. A closer inspection of the *Grand Upright* opinion and the background of the case shows that it is often cited out of context. The issue in *Grand Upright* was Biz Markie's unauthorized sample of the easy listening ballad "Alone Again (Naturally)," which was recorded and composed by Gilbert O'Sullivan.[223] The sample consisted of three words from the song and eight bars of the music.[224] Prior to the release of Biz Markie's record, his attorney contacted O'Sullivan's agent to obtain a license for the sample.[225] While the request was pending, Cold Chillin' Records, Inc. released Biz Markie's album.[226] O'Sullivan objected to the sampling and Grand Upright, of which O'Sullivan was the principal shareholder, sought a preliminary injunction against the defendants.[227]

What is often missed in the legal commentary regarding this opinion is that the defendants seemed to have conceded that they needed a license.[228] There is no record that they asserted that the sampling was fair use. Instead, the defendants argued that Grand Upright failed to prove that it owned the cop-

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217. *See id.*

218. *Id.* at 185.

219. *See* at 183–85.

220. Carl A. Falstrom, *Thou Shalt Not Steal:* Grand Upright Music Ltd. v. Warner Bros. Records, Inc. *and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L. J. 359, 365–66 (1994).

221. Stephen Carlisle, *Sounds Great! But It Sounds Very Familiar . . . Where to Draw the Line on Digital Sampling of Sound Recordings?*, LANDSLIDE, May/June 2017, at 14.

222. *See* Ryan C. Grelecki, Comment, *Can Law and Economics Bring the Funk . . . or Efficiency?: A Law and Economics Analysis of Digital Sampling*, 33 FLA. ST. U.L. REV. 297, 318 (2005).

223. *Grand Upright Music Ltd.*, 780 F. Supp. at 183.

224. Sheila Rule, *Record Companies Are Challenging 'Sampling' in Rap*, N.Y. TIMES, April 21, 1992, at C1.

225. *Grand Upright Music Ltd.*, 780 F. Supp. at 184.

226. *Id.*

227. Joo, *supra* note 52, at 431–32.

228. *See Grand Upright Music Ltd.*, 780 F. Supp. at 184.

yright to the composition and master recording of "Alone Again (Naturally)."[229] As the court saw it, ownership of the copyright was the only issue at stake because the defendants had admitted guilt as to the copyright infringement.[230]

Had the defendants asserted a fair use defense, they probably would have had a strong case. It could be argued that Biz Markie's song was transformative because it added a new message and meaning to O'Sullivan's introspective ballad about suicide, the loss of family, and being jilted at the altar.[231] In contrast, "Markie's song was about how the rapper received no respect as a performer back when he played in combos with old friends, but since he had become a solo performer his career had been satisfying."[232] It is unlikely that Markie's rap song would have had any impact on the potential market for O'Sullivan's easy listening ballad. As the court in *Jarvis v. A & M Records* [233] noted, "The two songs were utterly unlike and reached completely different markets. Certainly nobody would have confused the songs. Few would have bought the rap song because it contained a portion of the original song." O'Sullivan did not license his songs for samples, so Markie was not usurping a derivative market either.[234]

Arguably this case should have little precedential value beyond its limited and unique facts, i.e., defendants who testified that they needed a license to sample and did not assert fair use in a preliminary injunction case. Unfortunately, probably because it was the first reported judicial decision dealing with music sampling, the opinion is rarely confined to this context and has resulted in the entrenched view that licenses are required for all music samples. It is often reported that, as a result of this case, record companies adopted strict licensing requirements and demanded that all samples be cleared.[235]

In any event, *Grand Upright* was the first step in setting the music industry on a different path than the art world. Subsequent judges would follow Judge Duffy's lead[236] and proclaim, "There can be no more brazen stealing of music than digital sampling."[237]

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229. *Id.* at 183–84.

230. *Id.*

231. Gilbert O'Sullivan, *Alone Again (Naturally)* (MAM Music 1972); *see also* VAIDHYANATHAN, *supra* note 213, at 141.

232. *Id.*

233. 827 F. Supp. 282, 295 (D.N.J. 1993).

234. VAIDHYANATHAN, *supra* note 213, at 142.

235. Okpaluba, *supra* note 210, at 76.

236. Toho Co., LTD v. Priority Records, LLC, No. CV 01-04744-SVW, 2002 WL 33840993, at *3 (C.D. Cal. Mar. 27, 2002) ("Digital sampling without permission has been held repeatedly to constitute copyright infringement").

237. Jarvis v. A & M Records, 827 F. Supp. 282, 295 (D.N.J. 1993).

2. The First Visual Arts Sampling Judicial Decision – The Jeff Koons "Banality" Cases

The first visual arts sampling case to go to court[238] was also met with righteous indignation and outrage.[239] In 1988, appropriation artist Jeff Koons' "Banality Show" at the Sonnabend Gallery in New York resulted in a series of copyright infringement lawsuits being filed against him in the U.S. District Court for the Southern District of New York.[240] The theme of the exhibit was "banality," and Koons focused on "popular attitudes toward objects and facts of everyday life which were commonplace."[241] For the exhibition, Koons took images that he had collected, such as note cards[242] and a Garfield comic strip,[243] and re-contextualized them into sculptures.[244] While many of these images were copyrighted, Koons did not seek permission to use them.[245]

On the one hand, the show was a success, with many of the sculptures selling in excess of $100,000.[246] On the other hand, the show also resulted in three lawsuits being filed against Koons, which were not successful for him. In all three of the cases, the plaintiffs filed summary judgment motions on their copyright infringement claims against Koons, and Koons contended that the sculptures were protected under the fair use doctrine as parodies. In all three cases, Koons lost.

The first of the lawsuits to result in a judicial opinion was *Rogers v. Koons*,[247] and the district court's grant of summary judgment was later upheld on appeal by the U.S. Court of Appeals for the Second Circuit, which called Koons' actions "piracy" and plagiarism.[248] The case stemmed from Koons' appropriation of Art Rogers' black and white photograph called "Puppies,"

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238. Prior to this, Andy Warhol also had been sued for copyright infringement for using other artists' works in his pieces. However, he chose to settle those lawsuits before judicial opinions were reached. Thereafter, Warhol sought licenses when using copyrighted materials. BOLLIER, *supra* note 32, at 48–55.

239. *See* Rogers v. Koons, 960 F.2d 301, 311 (2d Cir. 1992) ("In short, it is not really the parody flag that appellants are sailing under, but rather the flag of piracy.").

240. *Id.* at 304–05; United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 372 (S.D.N.Y. 1993); Campbell v. Koons, No. 91 Civ. 6055, 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993).

241. *United Feature Syndicate, Inc.*, 817 F. Supp. at 372.

242. *See* Campbell v. Koons, 1993 WL 97381, at *2 (where Koons used a note card containing a photograph of boys and a pig).

243. *United Feature Syndicate, Inc.*, 817 F. Supp. at 375.

244. *Id.* at 372.

245. *Id.* at 373.

246. *Campbell*, 1993 WL 97381, at *5 (the four pieces sold for a total of $323,466.25); *United Feature Syndicate, Inc.*, 817 F. Supp. at 379 (two of the four sculptures sold for $125,000 a piece); *see also* VILIS R. INDE, ART IN THE COURTROOM 11 (1998) (show generated almost seven million dollars).

247. 960 F.2d 301 (2d Cir. 1992).

248. *Id.* at 311.

which depicted a couple sitting on a bench and holding eight German Shepherd puppies.[249] There really was no issue that Koons had directly set out to copy "Puppies" when creating his "String of Puppies" sculpture.[250] The small changes that Koons had made – adding flowers to the hair of the couple and giving the puppies bulbous noses – did not alter the finding of substantial similarity.[251]

The main issue was whether Koons' copying of "Puppies" constituted fair use.[252] The court went through each of the statutory factors and found none of them favored Koons.[253] Most of the discussion was devoted to the first factor, the purpose and character of the use, and whether Koons' use was a parody.[254] Koons argued that his sculpture was a parody of "society at large" as opposed to the "Puppies" sculpture itself.[255] The court held that in order for a new work to be considered a parody, the "copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work."[256] Since materialistic society, as opposed to the "Puppies" photograph, was the object of Koons' parody, the copying of "Puppies" was not fair use.[257] The court also rejected Koons' argument that his copying was fair use because he was "acting within an artistic tradition of commenting upon the commonplace."[258]

The court had other reasons for finding against Koons under the first factor. The court held that Koons acted in bad faith when he tore off the copyright notice on the "Puppies" notecard before sending it to his artisans to use as a model for the sculpture.[259] Under the first factor, "Knowing exploitation of a copyrighted work for personal gain militates against a finding of fair use."[260] The court also noted Koons' hefty profit from the sales of the sculpture.[261] While Koons' profit-making motive was not controlling by itself, it cut against a finding of fair use when considered with the other factors.[262]

The other statutory factors did not support a finding of fair use by Koons. The nature of the copyrighted work "Puppies" was creative and imaginative, which favored Rogers.[263] Under the third factor, the court held that Koons'

249. *Id.* at 304.
250. *Id.* at 305.
251. *Id.* at 308.
252. *Id.*
253. *Id.* at 309–12.
254. *See id.* at 309–10.
255. *Id.* at 309.
256. *Id.* at 310.
257. *Id.* at 309.
258. *Id.* at 310.
259. *Id.*
260. *Id.* at 309.
261. *Id.*
262. *Id.*
263. *Id.* at 310.

"nearly in toto" copying exceeded the permissible level under fair use especially because Koons' sculpture was not a parody.[264] Finally, because Koons' use of "Puppies" was commercial in nature, the court presumed there would be future harm to the market for "Puppies."[265] In particular, Rogers would be unable to sell the derivative right to make a sculpture.[266] Also, photographs of the "String of Puppies" sculpture would compete against the "Puppies" notecards.[267]

After finding Koons liable for copyright infringement, the court awarded Rogers damages and ordered Koons to turn over the infringing sculptures.[268] At least Koons can be thankful that the court did not refer the matter to the district attorney for criminal prosecution.[269]

The decision in *Rogers* then set off a domino effect. The judges in the other "Banality" cases largely followed the court's reasoning in *Rogers* and held that Koons' "Banality" sculptures did not constitute fair use because they were not parodies.[270] For example, the court in *Campbell v. Koons*[271] held that the "Second Circuit's decision in *Rogers v. Koons* also forecloses, as a matter of law, Koons' asserted affirmative defenses of Fair Use and Parody and therefore they need not hardly be discussed . . . ."[272]

After the decisions in *Grand Upright* and the Koons' "Banality" cases, unlicensed art and digital music sampling both seemed doomed to fail under

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264. *Id.* at 311.

265. *Id.* at 312.

266. *Id.*

267. *Id.*

268. *Id.* at 312–13.

269. However, the Second Circuit did admonish Koons for his "willful and egregious behavior" and advised Rogers that he was "a good candidate for enhanced statutory damages pursuant to 17 U.S.C. § 504(c)(2)" because of Koons' conduct. *Id.* at 313.

270. In rejecting Koons' fair use defense in *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 387–83 (S.D.N.Y. 1993), the court under both the first and fourth factors largely focused on the commercial nature of Koons' "high-priced art" and the fact that Koons intended to profit from the sale of the "Wild Boy and Puppy" sculptures. *Id.* The second fair use factor also did not favor Koons because the fictional cartoon "Odie" clearly was a creative character. *Id.* at 380. The third factor, too, worked against Koons because he had copied "Odie" in its entirety. *Id.* at 381. Finally, under the fourth factor, which the court considered to be the most important, the court held that market harm to the "Odie" character could be presumed because of the primarily commercial nature of Koons' work and UFS frequently licensed the character "Odie." *Id.* at 382.

271. No. 91 Civ. 6055, 1993 WL 97381, *7 (S.D.N.Y. Apr. 1, 1993). The only issue left for the court to decide was whether it mattered that Koons did not copy certain elements from the photograph. The court quickly dispensed with that argument noting that Koons had taken the heart of the photograph which was the boy pushing the pig. *Id.* at *8.

272. *Id.* at *3.

the fair use test. But, in 1994, the Supreme Court issued its opinion in *Campbell v. Acuff-Rose Music, Inc.*[273] adopting Judge Leval's transformative use doctrine. As explained in Part II, this would change how courts analyze fair use and more emphasis would be placed on whether the allegedly infringing work "add[ed] something new, with a further purpose or different character, altering the first with new expression, meaning, or message"[274] rather than whether the allegedly infringing work was of a commercial nature.[275]

B. The Post-Campbell *Cases*

Given that *Campbell* involved a rap parody, it might be expected that the music world would embrace *Campbell*'s concept of transformativeness as a means to find digital sampling fair use.[276] Not so. By 2005, the paths of digital and art sampling cases firmly diverged. The Sixth Circuit in *Bridgeport Music, Inc. v. Dimension Films*[277] took music in a different direction as to the de minimis doctrine, and it frightened musical artists away from unauthorized sampling. In contrast, in *Blanch v. Koons*,[278] which again involved the appropriation artist Jeff Koons, the Second Circuit seized upon *Campbell*'s definition of transformativeness to find fair use in a non-parody collage case, which emboldened other appropriation artists such as Richard Prince.

1. The De Minimis Doctrine and *Bridgeport Music, Inc. v. Dimension Films*

The applicability of the de minimis doctrine to musical compositions was first recognized in 2003 in *Newton v. Diamond*,[279] wherein the jazz flutist and composer James W. Newton sued the rap group the Beastie Boys. The Ninth Circuit held that the Beastie Boy's use of a three-note segment of Newton's composition was de minimis and did not infringe his copyright.[280] The three-note sequence appeared only once in Newton's composition, and therefore, a reasonable juror could not find it to be quantitatively or qualitatively significant

273. 510 U.S. 569 (1994).

274. *Id.* at 579.

275. *See* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 734 (2011) ("[T]he transformative use paradigm, as adopted in *Campbell v. Acuff-Rose* overwhelmingly drives fair use analysis in the courts today.").

276. It should be noted the United States Supreme Court ultimately did not decide whether 2 Live Crew's parody was fair use. Instead, the Supreme Court reversed the Sixth Circuit's decision, which had held that the "commercial nature" of the parody "rendered it presumptively unfair," and remanded the case to the district court "for further proceedings consistent with [its] opinion." *Campbell*, 510 U.S. at 594.

277. *See* 410 F.3d 792, 801 (6th Cir. 2005).

278. 467 F.3d 244 (2d Cir. 2006).

279. 388 F.3d 1189, 1195 (9th Cir. 2003).

280. *Id.* at 1196–97.

to the composition as a whole.[281] However, because the defendants had obtained a license to sample the sound recording in *Newton*, the case left open the issue of whether the de minimis doctrine also applied to sound recordings.[282]

Two years later, in *Bridgeport Music, Inc. v. Dimension Films*,[283] the Sixth Circuit took a bold stance on this issue by adopting a "bright-line" rule as to sound recordings: "Get a license or do not sample."[284] The Sixth Circuit admittedly was creating a new rule that the de minimis doctrine does not apply to sound recordings, and in effect it rejected the substantial similarity test as to sound recordings.[285] Instead, the court held that all copying of sound recordings, no matter how quantitatively or qualitatively trivial, are actionable.[286] This included the two-second snippet at issue in the case.[287] The court premised its new theory on its reading of the copyright statute itself and on public policy grounds.[288]

The court's analysis began with examining the statutory text of § 114(b) of the Copyright Act, which applies solely to sound recordings and is intended to clarify and limit the scope of protection for sound recordings found in § 106.[289] Section 114(b) states:

> The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.[290]

The purpose of § 114(b) is to shield certain conduct from infringement.[291] As discussed in Part II, § 114(b) permits tribute bands to recreate and imitate their favorite songs without permission from the copyright holder in the sound recording as long as the tribute band uses its own instruments and vocals to do so.[292] These type of recordings are known as "sound-alikes."[293] By protecting

281. *Id*. at 1195.
282. *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 877–78 (9th Cir. 2016).
283. 410 F.3d 792, 801–02 (6th Cir. 2005).
284. *Id.* at 801.
285. *Id*. at 801–02.
286. *Id.* at 797–98.
287. *Id.* at 796.
288. *Id.*
289. 17 U.S.C. § 114(b) (2018).
290. *Id.*
291. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 807–08 (9th Cir. 2016).
292. *See supra* text accompanying notes 127–30.
293. *In re* Simitar Ent., Inc., 275 B.R. 331, 337 n.2 (D. Minn. 2002)) (defining a sound-alike as "being recorded via an intentionally-close mimicking of the vocal and instrumental style of the releasing artist" generally by "performers as-yet unblessed with fame").

sound-alike recordings from liability, § 114(b) in effect serves as a limitation on the exclusive rights of sound recording copyright holders.

The Sixth Circuit, however, treats § 114(b) as actually expanding the rights of a sound recording copyright holder. Since there is no liability when the sounds are entirely original, the court surmised that the reverse must be true, i.e., liability must automatically exist whenever some of the sounds are not independently fixed but rather are copied. Based on § 114(b)'s phrase "*entirely* of an independent fixation of other sounds," the court inferred that copyright holders have the exclusive right to sample their own recordings.[294] It then surmised that with respect to sound recordings, there is "no de minimis taking" and "substantial similarity [does] not enter the equation" when analyzing the sampling.[295]

By eliminating the de minimis exception as to sound recordings, the Sixth Circuit granted broader rights to sound recording copyright holders than other types of copyright owners. Yet, when Congress first provided sound recordings with copyright protection in 1971,[296] Congress made crystal clear that "this limited copyright [does] not grant any broader rights than are accorded to other copyright proprietors under the existing title 17."[297] Even though the Supreme Court has cautioned courts to be "reluctan[t] to expand the protections afforded by the copyright without explicit legislative guidance,"[298] the Sixth Circuit nonetheless carved out a class of copyright holders who would receive greater protection with immunity from the de minimis doctrine. If Congress did intend to grant broader exclusive rights for sound recordings, then seemingly it should have done this through the "'copyright-granting' statutory provisions of . . . § 106," not through the limitation section in § 114(b).[299]

Moreover, the Sixth Circuit did not bother with the legislative history of § 114 because digital musical sampling was not being done when the Copyright Act was drafted.[300] Yet, Professor David Nimmer, the leading commentator on copyright law, has stated,

> Congress explicitly noted in that context that "infringement takes place whenever all or any *substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method

294. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005) (emphasis in original).

295. *Id*. at 801.

296. Sound Recordings Act of 1971, Pub. L. No. 92-140, 3, 85 Stat. 391, 391 (1971) (codified as amended at 17 U.S.C. § 5(n) (2018)).

297. H.R. REP. NO. 92-487 (1971)*; see also* S. REP. NO. 92-72 at 3 (1971) ("The purpose of the new [statutory language] is to extend to the owners of copyrighted music used in the making of recordings the same remedies available for other copyright infringements . . . .").

298. Sony Corp., v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984).

299. Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1339 (S.D. Fla. 2009).

300. *Bridgeport Music*, 410 F.3d at 805.

> . . . ." That excerpt debunks the court's imputation that Congress, when adopting section 114, intended to dispense with traditional notions of substantial similarity.[301]

Notably, Congress did not express an intent to find infringement where an insubstantial or de minimis portion of the actual sounds are reproduced.[302]

The Sixth Circuit also set forth a number of policy justifications for its interpretation, including ease of enforcement of a bright-line rule[303] and judicial economy.[304] The court was not concerned about stifling creativity because it reasoned that musicians could always duplicate the sounds of the sample by playing their own instruments and this factor would keep the cost of the license under control.[305] The court also rationalized that sampling of a sound recording is always done intentionally and is always taking "something of value" because it is a physical taking.[306]

The Sixth Circuit's pronouncement that its rule would not stifle creativity[307] has been proven wrong. It has been shown that post-*Bridgeport*, songs lack densely-layered samples.[308] This is because it would be too costly to clear all of the samples used in albums such as *Paul's Boutique* and *Fear of a Black Planet*.[309] Additionally, the Sixth Circuit wrongfully assumed that artists sample in order to reduce costs and avoid the labor of having to create their own music.[310] For many artists, the whole purpose of sampling is to use the original sound recording, whether it be for commentary or to bring attention to old music.[311] In some instances, it is necessary for musicians to use the original sound recording because the sounds cannot be recreated for "a variety of reasons: recording studios were set up differently in the old days, the machines used were different and gave a particular characteristic, the sample contains the

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301. 4 NIMMER ON COPYRIGHT § 13.03[A][2][b] (2018) (footnotes omitted) (quoting H.R. REP. NO. 94-1476, at 106 (1976)); *see also* EMI Records Ltd. v. Premise Media Corp., No. 601209, 2008 WL 5027245, at *6–8 (N.Y. Sup. Ct. Aug. 8, 2008) (quoting and expressly rejecting *Bridgeport*'s analysis).

302. *Id.* at *5.

303. *Bridgeport Music*, 410 F.3d at 799.

304. *Id.* at 802.

305. *Id.* at 801.

306. *Id.* at 801–02.

307. *See id.* at 801.

308. MCLEOD & DICOLA, *supra* note 45, at 188; *see also* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES 13–16 (2008).

309. MCLEOD & DICOLA, *supra* note 45, at 207–08 (showing that re-releasing *Paul's Boutique* would result in a loss of almost $20 million to the record label and re-releasing Public Enemy's *Fear of a Black Planet* would result in a loss of over $6 million).

310. *See Bridgeport Music*, 410 F.3d at 799 n.7.

311. *See supra* discussion in Section II.C.

voice of a particular person."[312] The court also failed to recognize that other types of artistic sampling also are done intentionally and take something of value and yet are not subject to bright-line prohibition rules.[313]

Legal scholars[314] and district courts in other circuits [315] were quick to criticize the decision in *Bridgeport*. However, the decision caused record labels to demand that all samples, no matter how small, be cleared.[316] Although the Sixth Circuit asserted that the music industry would "work out guidelines, including a fixed schedule of license fees," to deal with samples, this did not happen.[317] Licensing fees can be exorbitant and negotiations for licenses can often be complex and time-consuming, especially with respect to musical compositions, which usually have multiple owners.[318] If an artist cannot afford the license or the original artist denies the use of the sample, the song or the sample must be aborted. In response, some artists choose to forgo all sampling. Others

312. Shun-Ling Chen, *Sampling as a Secondary Orality Practice and Copyright's Technological Biases*, 17 J. HIGH TECH. L. 206, 257 (2017).

313. Sandoval v. New Line Cinema Corp., 147 F.3d 215, 218 (2d Cir. 1998) (holding that the defendants' deliberate use of the plaintiff's photographs in the background of a movie fell below the quantitative threshold of substantial similarity and was de minimis); *see also* Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013) (describing the defendant artist Richard Prince who tore out photographs from the plaintiff's book to create his collage works).

314. 4 NIMMER ON COPYRIGHT *supra* note 301, § 13.03[A][2][b]; *see also* Jennifer R.R. Mueller, *All Mixed Up:* Bridgeport Music v. Dimension Films *and De Minimis Digital Sampling*, 81 IND. L. J. 435, 442 (2006) ("The *Bridgeport* court's fundamental misinterpretation of the law is contrary to all relevant case law, statutory language, and legislative history . . . ."); Mike Suppappola, *Confusion in the Digital Age: Why the De Minimis Use Test Should be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L. J. 93, 117 (2006) (finding the *Bridgeport* decision was illogical and contrary to § 114's legislative history); 3 PATRY ON COPYRIGHT § 9:61 (2011) (describing *Bridgeport Music* as "disturbing," "inexplicable," and a misunderstanding of the U.S. Copyright Act's structure).

315. *See, e.g.*, Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1330–40 (S.D. Fla. 2009) (rejecting *Bridgeport*'s rule); Steward v. West, No. 13-02449, No. 179, 2014 WL 12591933, at *8 n.8 (C.D. Cal. 2014) ("declin[ing] to follow the per se infringement analysis from *Bridgeport*" because *Bridgeport* "has been criticized by courts and commentators alike"); Batiste v. Najm, 28 F. Supp. 3d 595, 625 (E.D. La. 2014) (finding "it is far from clear" that *Bridgeport*'s rule should apply in the face of harsh judicial criticism); Pryor v. Warner/Chappell Music, Inc., No. CV13-04344, 2014 WL 2812309, at *7 n.3 (C.D. Cal. June 20, 2014) (declining to apply *Bridgeport*'s rule); EMI Records Ltd. v. Premise Media Corp., No. 601209, 2008 WL 5027245, at *6–8 (N.Y. Sup. Ct. Aug. 8, 2008) (declining "to follow the statutory interpretation of section 114 relied upon by the court in *Bridgeport Music*"); VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 885–87 (9th Cir. 2016) (rejecting *Bridgeport*'s holding).

316. MCLEOD & DICOLA, *supra* note 45, at 192.

317. 410 F.3d 792, 804 (6th Cir. 2005).

318. MCLEOD & DICOLA, *supra* note 45, at 207–08; *see also* Brown v. Columbia Recording Corp., 03 Civ. 6570 (DAB)(KNF), 2006 WL 3616966, at *5 (S.D.N.Y. July 24, 2006) (describing licensing process and rates).

choose to use fewer samples. Thus, creativity is stifled, the progress of arts is stunted, and society as a whole loses cultural resources.

2. *Blanch v. Koons*

After a string of losses in the Southern District of New York and the Second Circuit, Koons finally won one in *Blanch v. Koons*.[319] In that case, Koons appropriated a photograph by the professional fashion photographer Andrea Blanch to create his collage painting "Niagara."[320] "Niagara" was a part of the "Easyfun-Ethereal" paintings series, all of which were collages consisting of fragmentary images that Koons had collected from fashion magazines and advertisements.[321] "Niagara" was the only one that sparked a lawsuit. The photograph at issue, "Silk Sandals by Gucci," was part of a six-page feature in Allure magazine.[322] Koons scanned the image into his computer and then altered parts of it to incorporate into "Niagara" along with a number of other images.[323] Upon being sued for copyright infringement, Koons once again argued fair use.[324] This time the defense worked. The district court granted Koons and the other defendants summary judgment because it found Koons' new work to be transformative and thus fair use.[325] The Second Circuit affirmed on appeal.[326]

Why was the outcome in *Blanch* different than the outcomes in *Rogers* and the other "Banality" cases? There are a variety of reasons. However, the different outcome can largely be ascribed to the Supreme Court's watershed decision in *Campbell* that had come down in 1994 in-between the decisions of *Rogers* and *Blanch*. *Campbell* changed the Second Circuit's fair use analysis in *Rogers* and *Blanch* in several ways. To begin, the most important of the statutory factors was no longer the fourth factor like it was in *Rogers*.[327] Instead, in *Blanch*, the focus shifted to the first factor, which – according to the Supreme Court in *Campbell* – was now the heart of the fair use inquiry.[328] The analysis of the sub-factors (i.e., transformativeness, commercial use, bad faith, and justification for the use) under the first factor also changed.[329] No longer was commercial use the starting point. In *Blanch*, the court first looked at

319. 467 F.3d 244 (2d Cir. 2006).
320. *Id.* at 247.
321. *Id.*
322. *Id.* at 247–48.
323. *Id.* at 248.
324. *Id.* at 249.
325. Blanch v. Koons, 396 F. Supp. 2d 476, 480–82 (S.D.N.Y. 2005).
326. *Blanch*, 467 F.3d at 259.
327. *See* Campbell v. Koons, No. 91 Civ. 6055, 1993 WL 97381, *7 (S.D.N.Y. Apr. 1, 1993); *see* Rogers v. Koons, 960 F.2d 301, 311 (2d Cir. 1992).
328. *Blanch*, 467 F.3d at 259.
329. *See Blanch*, 467 F.3d at 251–56.

whether Koons' use was transformative.[330] It then examined whether Koons' use was commercial.[331]

By far, the examination of whether Koons' work was transformative was the biggest change. Although Judge Leval had articulated his transformative test at the time *Rogers* was decided, the Supreme Court had not yet embraced it. Therefore, there was no discussion as to whether the "String of Puppies" transformed "Puppies." If Koons wanted the first factor to go his way in *Rogers*, he had to categorize his work as a parody.[332] In *Blanch*, this was no longer necessary. A work did not have to be parody to be transformative.[333] Instead, the court deemed "Niagara" to be transformative because Koons' "purposes in using Blanch's image are sharply different from Blanch's goals in creating it."[334] While Blanch "wanted to show some sort of erotic sense,"[335] Koons used the image for "fodder for his commentary on the social and aesthetic consequences of mass media."[336]

As to the commercial nature of "Niagara," Koons made a significant profit from its sale just like Koons made a substantial profit from the sales of his sculptures in *Rogers*.[337] However, creation and exhibition of "Niagara" could not be "described as commercial exploitation."[338] Meanwhile, the court in *Rogers* did not appreciate that Koons' work could have benefits beyond his own profits.[339]

The propriety of Koons' actions in using the copyrighted images also made a difference in the outcomes of *Blanch* and *Rogers*. In *Rogers*, the court found bad faith because Koons had torn off the copyright notice on Rogers' image.[340] There was no such bad faith conduct in *Blanch*.[341] Just using a copyrighted image without permission did not constitute bad faith by itself.[342]

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330. *Id.* at 251.

331. *Id.* at 253.

332. *Rogers*, 960 F.2d at 310.

333. *Blanch*, 467 F.3d at 255 ("We have applied *Campbell* in too many non-parody cases to require citation for the proposition that the broad principles of *Campbell* are not limited to cases involving parody.").

334. *Id.* at 252.

335. *Id.*

336. *Id.* at 253. In determining that Koons' use of "Silk Sandals" was transformative, the court also noted the "changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects' details and, crucially, their entirely different purpose and meaning – as part of a massive painting commissioned for exhibition in a German art-gallery space." *Id.*

337. *Id.*

338. *Id.* at 256.

339. *See* Rogers v. Koons, 960 F.2d 301, 311–12 (2d Cir. 1992).

340. *Id.* at 309.

341. *See Blanch*, 467 F.3d at 255–56.

342. *Id.*

The amount that Koons copied under the third factor also affected the decisions in *Rogers* and *Blanch*. In *Rogers*, Koons "slavishly recreated" Rogers' image.[343] In contrast, in *Blanch*, Koons took the legs, feet, and sandals from "Silk Sandals," ignoring many of the other key features of the photograph including the airplane cabin setting.[344] The court deemed this to be a reasonable amount in relation to his purpose of evoking "a certain style of mass communication."[345]

Finally, the fourth factor made a difference to the outcome in *Blanch*. Unlike Rogers, who derived a part of his income from licensing his photographs, including "Puppies," Blanch never licensed any of her photographs for use in visual art.[346] Thus, Koons' use of "Silk Sandals" did not affect the potential market for or value of that work.[347]

An argument could be made that the outcome in *Rogers* would have been different if the court had analyzed Koons' use under the transformative test. Koons' purpose in using "Puppies" was to provide a "fair social criticism" and to show that "the mass production of commodities and media images has caused a deterioration in the equality of society."[348] This seems no different than the purpose he had in using Blanch's image. It was also certainly not Rogers' purpose in creating "Puppies," which was to satisfy his commission to photograph his friend's eight new German Shepherd puppies.[349]

In addition to changing the purpose and meaning of Blanch's photograph, the court also found it relevant that Koons had changed its colors, the medium, the size of the objects pictured, and the objects' details.[350] Likewise, Koons changed the colors, medium, size, and certain details of Rogers' photograph.[351] This fact also lends support for the argument that Koons' "String of Puppies" was transformative. Finally, if Koons' use of Rogers' photograph had been deemed transformative, then the other statutory factors – such as the creative nature of Rogers' work – would have carried less weight.

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343. *Id.* at 262 (Katzmann, J., concurring).

344. *Id.* at 248 (majority).

345. *Id.* at 258.

346. *Id.*

347. *Id.*

348. Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992); *see id*. at 304 (noting that Koons worked in the tradition of art where once "the artist finishes his work, the meaning of the original object has been extracted and an entirely new meaning set in its place").

349. *Id.* at 304.

350. *Blanch*, 467 F.3d at 253.

351. *Rogers*, 960 F.2d at 308.

3. *Cariou v. Prince*

Cariou v. Prince[352] was a game-changer, and to some it reshaped the definition of transformative and elevated its importance among the fair use factors. In the case, Patrick Cariou, a professional photographer, brought a copyright infringement lawsuit against celebrity appropriation artist Richard Prince for using several of his photographs without permission.[353] The photographs came from Cariou's book, *Yes Rasta*, which consisted of classical portraits and landscape photographs taken when Cariou lived among Rastafarians in Jamaica.[354]

After Prince discovered *Yes Rasta*, he tore out thirty-five photographs from the book and pinned them to a piece of plywood to create a collage, titled *Canal Zone (2007)*.[355] "Prince altered those photographs significantly, by among other things painting 'lozenges' over their subjects' facial features."[356] Some of the other photographs were only partially used.[357] Later, Prince purchased additional copies of *Yes Rasta* so that he could create thirty additional artworks in the Canal Zone series.[358] Twenty-nine of those appropriated partial or whole images from *Yes Rasta*.[359] The amount of the Cariou photographs used and the alteration to the images varied depending on the work.[360] In some works, Cariou's original photograph was hardly recognizable because it was greatly obscured.[361] In other works, Prince left Cariou's work relatively untouched and just painted blue lozenges over the Rastafarian's eyes and mouth and a guitar over his body.[362]

After Cariou sued, Prince argued that his works were transformative and should be considered fair use.[363] Both parties moved for summary judgment, and the Southern District of New York held that in order to qualify for a fair use defense under § 107, Prince's work had to "comment on Cariou, on Cariou's Photos, or on aspects of popular culture closely associated with Cariou or the Photos."[364] Not only did the district court then grant summary judgment to Cariou, but it also ordered all infringing copies of Cariou's photographs to be delivered up for "impounding, destruction, or other disposition."[365]

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352. 714 F.3d 694 (2d Cir. 2013). *See generally*, Brian Sites, *Fair Use and the New Transformative*, 39 COLUM. J. L. & ARTS 513 (2016).
353. *Cariou*, 714 F.3d at 698.
354. *Id.*
355. *Id.* at 699.
356. *Id*.
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.* at 699–700.
361. *Id.* at 700.
362. *Id.* at 701.
363. *Id.* at 704.
364. *Id.*
365. *Id*.

The art world was initially rocked by the lower court's decision, and it quickly split into two camps. "Team Prince" consisted of elite art museums such as The Metropolitan Museum of Art, The Art Institute of Chicago and, several famous artists' estates, including The Andy Warhol Foundation for the Visual Arts, Inc. and the Robert Rauschenberg Foundation.[366] On the other side, representing "Team Cariou," were organizations that represented "day-to-day working visual artists and authors," including the American Society of Media Photographers, Picture Archive Association of America, The Digital Media Licensing Association, Professional Photographers of America, National Press Photographers Association, Graphic Artists Guild, American Photographic Artists, and the American Society of Journalists and Authors. All of these organizations filed amici briefs.[367]

On appeal, the Second Circuit concluded that the district court applied the incorrect standard to determine whether Prince's artworks made fair use of Cariou's copyrighted photographs.[368] Chastising the lower court, it stated that there was no legal requirement "that a secondary use comment on the original artist or work, or popular culture."[369] Instead, for a work to be transformative it merely needed to "alter the original with 'new expression, meaning, or message.'"[370]

Applying that standard, the Second Circuit then took the unusual step of using its own artistic judgment to analyze the works. Specifically, it held that twenty-five of the artworks were transformative as a matter of law because Prince's "hectic and provocative" works manifested an entirely different aesthetic from Cariou's "serene and deliberately composed" photographs – even

366. *E.g.*, Brief of Amicus Curiae the Andy Warhol Foundation for the Visual Arts, Inc. in Support of Defendant-Appellants and Urging Reversal, *Cariou*, 714 F.3d 694 (No. 11-1197-cv), 2011 WL 5517867; Brief for Amici Curiae the Association of Art Museum Directors, The Art Institute of Chicago, The Indianapolis Museum of Art, The Metropolitan Museum of Art, The Museum of Modern Art, Museum Associates, dba Los Angeles County Museum of Art, The New Museum, The Solomon R. Guggenheim Foundation, The Walker Art Center, and The Whitney Museum of American Art in Support of Appellants and Reversal, *Cariou*, 714 F.3d 694 (No. 11-1197-cv), 2011 WL 5517864; *see* Cat Weaver, *Will Round Two of Cariou v. Prince Change Art Law Forever?* HYPOALLERGIC (Jan. 13, 2012), https://hyperallergic.com/44938/cariou-v-prince-change-art-law-part-1/.

367. *E.g.*, Brief of Amici Curiae American Society of Media Photographers, Inc. and Picture Archive Council of America, Inc. in Support of Plaintiff-Appellee and Affirmance, *Cariou*, 714 F.3d 694 (No. 11-1197-cv), 2012 WL 435237; Brief Amici Curiae of the American Photographic Artists, American Society of Journalists and Authors, American Society of Media Photographers, Graphic Artists Guild, Jeremy Sparig, National Press Photographers Association, Picture Archive Council of America, and Professional Photographers of America in Support of Plaintiff Patrick Cariou, *Cariou*, 714 F.3d 694 (No. 08 CIV 11327 (DAB)).

368. *Cariou*, 714 F.3d at 712.

369. *Id.* at 698.

370. *Id.* at 706 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

though some of Prince's work used Cariou's photographs in their entirety.[371] Further, the Second Circuit was influenced by the fact that Prince's "composition, presentation, scale, color palette, and media [were] fundamentally different and new compared to the photographs, as [was] the expressive nature of Prince's work."[372]

The Second Circuit disregarded the fact that Prince testified during his deposition that "he 'do[es]n't really have a message,' that he was not 'trying to create anything with a new meaning or a new message,' and that he 'do[es]n't have any . . . interest in [Cariou's] original intent'" as meaningless.[373] The court stated that "Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so."[374] Instead, the court said the focus should be on how "the work in question appears to the reasonable observer."[375]

As to the fourth factor, while the court recognized the commercial nature of Prince's artwork, it discounted that fact in light of the transformative nature of his works.[376] The court contrasted the audience for Prince's work – the performing artists and business moguls Jay-Z and Beyoncé, the professional football player Tom Brady, the model Giselle Bundchen, the Vogue editor Anna Wintour, among others – with that of Cariou's – mostly personal acquaintances and family members.[377] The court also compared Prince's earnings from the exhibition – he sold eight artworks from the series for a total of $10,480,000 – to the paltry $8,000 Cariou made in royalties.[378]

In creating the *Canal Zone* series, Prince reproduced and manipulated Cariou's photographs and layered other visual elements over them.[379] Similarly, musical artists like N.W.A. reproduce and manipulate samples and layer other aural elements over them. Just as Richard Prince's visual collages resulted in new expression being created, so too can aural collages result in new expression being added to the samples.[380]

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371. *Id*. at 706–07.
372. *Id*. at 706.
373. *Id.* at 707 (alterations in original).
374. *Id.*
375. *Id*.
376. *See id.*
377. *Id.* at 709.
378. *Id*.
379. *See id.* at 706.
380. Although *Cariou* was a triumphant victory for Prince, he subsequently was sued in four other lawsuits arising out of his *New Portraits* exhibition, where he appropriated Instagram shots from various users' accounts and made minor alterations to them. *See* Graham v. Prince, 265 F. Supp. 3d 366 (S.D.N.Y. 2017); Complaint for Copyright Infringement and Demand for Jury Trial, Dennis Morris, LLC v. Prince, No. 2:16-cv-03924 (C.D. Cal. June 3, 2016); Complaint for Copyright Infringement and Demand for Jury Trial, Salazar v. Prince, No. 2:16-cv-04282 (C.D. Cal. June 15, 2016); Complaint and Jury Trial Demanded, McNatt v. Prince, No. 1:16-cv-08896 (S.D.N.Y. Nov. 16, 2016). *Dennis Morris* and *Salazar* subsequently settled, and *McNatt* is still

4. *Seltzer v. Green Day, Inc.*

While many criticized the holding in *Cariou* that an artistic work need not comment on the original work to be transformative, the U.S. Court of Appeals for the Ninth Circuit reaffirmed this principle in *Seltzer v. Green Day, Inc*.[381] That case involved the band Green Day's unauthorized use of an image of a "screaming, contorted face" created by Seltzer and titled *Scream Icon*.[382] Green Day used *Scream Icon* in a four-minute video that served as a prominent visual backdrop during their live concert performances.[383] Although defendants used the entire image of *Scream Icon*, they modified the work "by adding a large red 'spray-painted cross over the middle of the screaming face" and by "chang[ing] the contrast and color and add[ing] black streaks running down the right side of the face."[384]

On appeal, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the defendants and held that Green Day's use was transformative because it "alter[ed] . . . the expressive content or message of the original work."[385] Green Day used *Scream Icon* as "a street-art focused music video" whose message was about religious hypocrisy and Christianity.[386] In contrast, Seltzer admitted that *Scream Icon*'s message was something different that had nothing to do with religion.[387] Accordingly, the Ninth Circuit held that Green Day's use "convey[ed] new information, new aesthetics, new insights and understandings that are plainly distinct from those of the original piece" even though the video made few physical changes to *Scream Icon* and did not comment on it.[388]

Nothing in *Blanch*, *Cariou*, or *Seltzer* limits their holdings to visual arts cases. The expanded definition of transformative found in these cases should be applied in digital sampling cases, too. This Article's proposed Digital Music Sampling Code will incorporate the principles derived from those cases to determine what should be considered fair use in digital sampling.

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pending as of the date this Article was written. In *Graham*, Prince tested the boundaries of fair use and the *Cariou* decision by bringing a Rule 12(b)(6) motion to dismiss on the grounds of fair use. *Graham*, 265 F. Supp. 3d at 376. The court denied this motion because it could not "conclude that *any* of the four fair use factors favor[ed] defendants" and it was "evident that Prince's work does *not* belong to a class of secondary works that are so aesthetically different from the originals that they can pass the Second Circuit's 'reasonable viewer' test as a matter of law" and thus were not transformative. *Id.* at 380 (alterations in original).

381. 725 F.3d 1170 (9th Cir. 2013).

382. *Id*. at 1173.

383. *Id.* at 1174.

384. *Id.*

385. *Id.* at 1177 (emphasis omitted).

386. *Id.* at 1176–77.

387. *Id.* at 1177.

388. *Id.* (quotations omitted).

C. A New Hope for Digital Music Sampling

1. *VMG Salsoul, LLC v. Ciccone*

While *Bridgeport* was followed in the Sixth Circuit, which encompasses the country music capital Nashville, Tennessee, district courts in other circuits declined to follow its holding.[389] Then in *VMG Salsoul, LLC v. Ciccone*,[390] the Ninth Circuit threw down the gauntlet and declared a circuit split by refusing to follow *Bridgeport*.[391] As of the time this Article was written, the United States Supreme Court has not taken up the issue.

VMG Salsoul involved a 0.23 second segment of horns from the song "Love Break," which was sampled in pop star Madonna's popular hit "Vogue."[392] The district court held that the copying was de minimis and did not constitute copyright infringement.[393] Therefore, on appeal, the Ninth Circuit was forced to directly confront the issue of whether to follow or reject the Sixth Circuit's bright-line rule that there is no de minimis exception for sound recordings.[394]

The court began its analysis by noting that the de minimis doctrine is well-established in the law and dates back to the mid-1800s.[395] It also recognized the public policy reason behind the rule: "If the public does not recognize the appropriation, then the copier has not benefitted from the original artist's expressive content."[396]

The court properly framed the issue as follows: did "Congress intend[] to eliminate the longstanding de minimis exception for sound recordings in all circumstances even where, as here, the new sound recording as a whole sounds nothing like the original[?]"[397] The court then debunked the Sixth Circuit's interpretation of the statute.[398] Looking at several provisions, including §§ 102 and 106, the court found no express evidence of intent on the part of Congress to treat sound recordings differently than other protected works except as to public performance.[399] Moreover, nothing on the face of the statute expressly stated that Congress intended to eliminate the de minimis doctrine with respect to sound recordings.[400]

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389. *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016) ("Since the Sixth Circuit decided *Bridgeport*, almost every district court not bound by that decision has declined to apply Bridgeport's rule."); *see also supra* notes 314–15.

390. 824 F.3d at 886.

391. *Id.*

392. *Id.* at 887.

393. *Id.* at 874.

394. *See id.*

395. *Id.* at 880.

396. *Id.* at 881.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

The Ninth Circuit recognized that § 114(b) imposes "an express limitation on the rights of a copyright holder" because the holder cannot prevent others from duplicating the sounds of his or her recording in a new recording.[401] The court then declined to follow the Sixth Circuit's interpretation of this statute as giving the copyright holder the exclusive right to sample his or her own recording.[402] To do so would be to read "an implicit expansion of rights into Congress' statement of an express limitation on right" and did not make sense in light of the longstanding acceptance of the de minimis doctrine.[403] The Ninth Circuit also criticized the Sixth Circuit for failing to take into consideration the legislative history that supported the Ninth Circuit's view that Congress did not intend to expand the rights of sound recording copyright holders by eliminating the de minimis exception as to sound recordings.[404]

It is too early to tell whether *VMG Salsoul* has had any effect on music industry sampling practices. Because of the circuit split, it remains unsettled whether de minimis sampling will result in liability. Until the United States Supreme Court or Congress clarifies the matter, risk-averse music companies fearing litigation in the Sixth Circuit or elsewhere may still demand that all samples be licensed.

2. *Estate of Smith v. Cash Money Records*

In 2017, *Estate of Smith v. Cash Money Records*[405] became the first case to apply the fair use principles from *Cariou* and *Blanch* to digital music sampling. In *Estate of Smith*, the plaintiffs sued the defendants for copyright infringement for using a sample from a spoken-word sound recording entitled "Jimmy Smith Rap" by the late jazz musician Jimmy Smith.[406] Specifically, the hip-hop recording artist Drake sampled about thirty-five seconds of the "Jimmy Smith Rap" ("JSR") on the track "Pound Cake/Paris Morton Music 2" ("Pound Cake"), including Smith's spoken statement that "Jazz is the only real music that's gonna last."[407] However, only the copyright to the musical composition was at issue because the defendants had obtained a license to use the sound recording.[408]

Citing to *Blanch* and *Cariou*, the Southern District of New York held that Pound Cake transformed JSR because it fundamentally altered the message of JSR; thus, the fair use doctrine barred the plaintiffs' claims.[409] The court noted that "the key phrase" of JSR was "Jazz is the only real music that's gonna last.

401. *Id.* (italics omitted).
402. *Id.*
403. *Id.* at 883 (italics omitted).
404. *Id.* at 883–84.
405. 253 F. Supp. 3d 737 (S.D.N.Y. 2017).
406. *Id.* at 742.
407. *Id.* at 743.
408. *Id.*
409. *Id.* at 750–51.

All that other bullshit is here today and gone tomorrow. But jazz was, is and always will be."[410] Smith's message was that jazz trumped all other popular music.[411] Meanwhile, in Pound Cake, Drake edited JSR to say, "Only real music is gonna last."[412] In so doing, Drake transformed JSR by changing the message to one that "real music," regardless of genre, has staying power.[413] The court further found that the defendants used a reasonable amount of the original work and that Pound Cake did not usurp any market for JSR or its derivatives.[414]

While the altering of words was at issue in this case, nothing in the court's decision suggests that only words, as opposed to instrumental sounds, can be transformative.[415] This case provides a ray of hope that the more liberal fair use principles from *Cariou* and *Blanch* can be applied in digital sampling cases to find fair use.

3. *Oyewole v. Ora*

Oyewole v. Ora[416] is another case involving the alleged sampling of a musical composition that was found to be transformative and dismissed on a Federal Rule of Civil Procedure ("Rule") 12(b)(6) motion. The plaintiff, Abiodun Oyewole, a founding member of one of the first American hip-hop groups, The Last Poets, alleged that rap artist The Notorious B.I.G. sampled "When the Revolution Comes" and remixed the refrain "party and bullshit" without authorization in B.I.G.'s song "Party and Bullshit."[417] In addition, Oyewole alleged that defendant Rita Ora infringed "When the Revolution Comes" in her song "Party" by "borrow[ing] the refrain, punch line, crescendo, and text hook 'Party and Bullshit' . . . ."[418]

Citing to *Cariou*, the district court granted a Rule 12(b)(6) dismissal because Oyewole had admitted in his complaint that the defendants had used the phrase "party and bullshit" for a different "purpose."[419] While Oyewole's original purpose was to "encourage[ ] people to NOT waste time with 'party and

410. *Id.* at 750.
411. *Id.*
412. *Id.* (alteration in original).
413. *Id.* at 750–51.
414. *Id.* at 752.
415. *See generally id.*
416. 291 F. Supp. 3d 422 (S.D.N.Y. 2018), *appeal filed*, No. 18-1311, 2018 WL 6734771 (2d Cir. 2018).
417. *Id.* at 425–26.
418. *Id.* at 427.
419. *Id.* at 434 ("Indeed, Oyewole acknowledges that the B.I.G. and Rita Ora Defendants use the phrase 'party and bullshit' 'in contravention' of Oyewole's original purpose . . . .").

bullshit,'" the defendants sought to glorify the partying lifestyle.[420] By changing the "the meaning and purpose of the phrase 'party and bullshit,'" defendants transformed it.[421]

The district court also held that under the fourth fair use factor, the "[d]efendants' songs [we]re unlikely to 'usurp' the market for 'When the Revolution Comes'" because the defendants' works were "different in character and purpose from the original work."[422] Despite that The Last Poets were musical grandfathers to hip-hop artists like B.I.G., the court also held that the defendants and the plaintiff likely had different target audiences.[423] Accordingly, the court held that the defendants' sampling was fair use.[424]

This case demonstrates that even the literal sampling of words can be transformative because often those words can be used to have a very different meaning. Moreover, it shows that even within the broad category of hip-hop music, there can be different target audiences.

4. *Estate of Barré v. Carter*

A final recent music sampling case worth noting is *Estate of Barré v. Carter*,[425] which reaffirmed the principle that defendants may assert a fair use defense in cases of digital sampling of a sound recording. After *Bridgeport Music, Inc. v. Dimension Films*, many people in the music industry wrongfully believed that the rule of law was "[g]et a license or do not sample."[426] This included the plaintiff in *Barré* who argued that "the fair use doctrine does not apply to instances of digital sampling of a sound recording."[427] The U.S. District Court for the Eastern District of Louisiana corrected this misunderstanding and emphasized that "the fair use doctrine is a statutory exception under the Copyright Act . . . and [the p]laintiffs have not pointed to any language in section 107 of the Copyright Act that excludes the fair use affirmative defense in instances of digital sampling."[428] Nonetheless, the court denied the defendants' Rule 12(b)(6) motion to dismiss because it was required to accept all well-pleaded facts as true and found that the plaintiffs plausibly alleged that the defendants did not add "new expression, meaning or message" to the unmodified Barré clips.[429]

420. *Id.* at 434.
421. *Id.*
422. *Id.* at 436.
423. *Id.*
424. *Id.*
425. 272 F. Supp. 3d 906, 917 (E.D. La. 2017).
426. *See id.* at 929.
427. *Id.* at 930.
428. *Id.*
429. *Id.* at 932–33.

The takeaway from this case is that there is no blanket rule that all music samples must be licensed. Therefore, the music industry should stop acting like there is.[430]

IV. A PROPOSAL FOR A CODE OF BEST PRACTICES IN FAIR USE FOR DIGITAL MUSIC SAMPLING

Cases such *Oyewole*, *Barré*, and *Estate of Smith* show that artists are becoming emboldened to assert their right to fair use of digital sampling in light of the decisions in *Cariou* and *Seltzer*. The Ninth Circuit's blatant defiance of *Bridgeport* may lead to greater assertion of the right to use unlicensed samples. Taken together, these recent cases involving famous artists like Beyoncé, Madonna, Notorious B.I.G., and Drake have the potential to open the floodgates for unlicensed samples. The other thing that these cases demonstrate is that sampling is no longer a marginalized practice just done by young, African-American male rappers.[431] Now, big name musicians from all genres of music use digital samples in their works, and the big record company labels are the ones asserting the fair use defense.

Since the controversial *Grand Upright* decision in 1991, numerous solutions have been proposed to enable the practice of digital sampling.[432] Many have called for a compulsory licensing system similar to the one under § 115 for mechanical licenses for cover songs.[433] This solution has been repeatedly

430. Unfortunately, *Barré* settled in February 2018 before the court ruled on the scope of the fair use defense in a sound recording digital sampling case.

431. Some scholars have argued that digital sampling is treated differently than other art forms and more often labeled theft because of the fact that it started as a largely African-American practice limited to the genres of rap and hip-hop. *See, e.g.*, Arewa, *supra* note 21, at 580.

432. *See* Ponte, *supra* note 20, at 57 & n.118.

433. *See, e.g.*, 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, 200–04 (2004); Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L. J. SCI. & TECH. 261, 263–64 (2009); Menell, *supra* note 17, at 488.

criticized and rejected.[434] Others have advocated for the reform of the Copyright Act to accommodate digital sampling,[435] but these efforts have gone nowhere. Meanwhile, some have called for all parties in the music industry to come together to develop guidelines for fair use in sampling.[436] It seems that now more than ever, the music industry may be ready for a change. By developing a code of best practices, stakeholders in the music industry can begin the dialogue of what constitutes fair use and what needs to be licensed. These guidelines would be similar to the statements and codes of best practices in fair use that other creative communities have created, which will be examined below.

A. History of Statements of Best Practices in Fair Use

In 2005, Peter Jaszi, a professor at American University's Washington College of Law, and Patricia Aufderheide, a Professor in the School of Communication at American University and Director of the Center for Social Media, worked with the community of documentary filmmakers to produce the Documentary Filmmakers' Statement of Best Practices in Fair Use ("Filmmakers' Statement").[437] The Filmmakers' Statement was intended to clarify the

434. *See, e.g.*, Dina LaPolt & Steven Tyler, Comment Letter on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy (Feb. 10, 2014), http://www.ntia.doc.gov/files/ntia/lapolt_and_tyler_comment_paper_02-10-14.pdf (representing the views of Steven Tyler and appending comments by Don Henley, Joe Walsh, Andre Young (Dr. Dre), Gordon Sumner (Sting), Joel Zimmerman (deadmau5), Ozzy Osbourne, Mick Fleetwood, Britney Spears, and Billy Joel); Chris Johnstone, Note, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 426–30 (2004) ("The benefits of simplification afforded by a compulsory scheme along the lines of section 115 are purely illusory."); *see also* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L. J. 535, 569–70 (2004).

435. John S. Ehrett, Comment, *Fair Use and an Attribution-Oriented Approach to Music Sampling*, 33 YALE J. ON REG. 655, 659 (2016) (proposing a "sampling-focused amendment to the Copyright Act").

436. USPTO, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES 28 (2016), http://www.uspto.gov/learning-and-resources/ip-policy/copyright/white-paper-remixes-first-sale-and-statutory-damages ("[T]he Task Force encourages stakeholders to develop guidelines and best practices for remixing . . . . While such an exercise is likely to focus on fair use as the principal doctrine governing remixes, other copyright doctrines may also inform the discussion, such as the idea-expression dichotomy and the doctrine of de minimis taking."); *see also* MCLEOD & DICOLA, *supra* note 45, at 217, 243.

437. ASS'N OF INDEP. VIDEO & FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), http://www.centerforsocialmedia.org/rock/backgrounddocs/bestpractices.pdf.

doctrine of fair use and to help filmmakers confidently determine when to employ the doctrine.[438] Since its release, the statement has had a major impact on business practices in the community.[439] For example, it was once almost impossible to obtain errors and omissions ("E&O") insurance for films that contained unlicensed copyrighted materials.[440] Without this insurance, a film had little hope of being distributed.[441] Now, E&O insurers are willing to accept fair use claims and insure films as long as a lawyer asserts that the fair use claims are supported by the Filmmakers' Statement.[442] This, in turn, has led to more documentary filmmakers asserting their right to fair use.[443]

After the success of the Filmmakers' Statement, Professors Jaszi and Aufderheide continued to champion the best practices movement. In their book, *Reclaiming Fair Use: How to Put Balance Back in Copyright*, ("*Reclaiming Fair Use*"), Aufderheide and Jaszi urged communities of copyright users to develop their own best practices and provided a template for doing so.[444] This resulted in a number of other creative communities producing their own versions of best practices statements. To date, at least fifteen codes and statements of best practices have been generated using the framework from *Reclaiming Fair Use*.[445] These codes have been drafted for everything from journalism to poetry and dance.

The CAA adopted its Visual Arts Code in 2015.[446] The Visual Arts Code was based on a consensus of visual arts professionals, such as artists, art educators, designers, curators, and museum directors, who use copyrighted materials in their work.[447] The Visual Arts Code explains fair use principles in more understandable terms that are related to the activities of visual artists.[448] The Visual Arts Code describes five situations where there was consensus that the

438. *Id*.

439. *See* Patricia Aufderheide & Peter Jaszi, *Documentarians, Fair Use and Best Practices: Surprising Successes*, INTELL. PROP. TODAY, Oct. 2007, at 8.

440. Michael C. Donaldson, *Fair Use: What a Difference a Decade Makes*, 57 J. COPYRIGHT SOC'Y U.S.A. 331, 332 (2010).

441. *Id*.

442. *Documentarians, Fair Use, and Best Practices*, CTR. FOR MEDIA & SOC. IMPACT, https://cmsimpact.org/resource/documentarians-fair-use-and-best-practices/ (last visited May 28, 2019) ("Over half of those surveyed (60%) reported that they had recently employed fair use in a production, and almost all reported having no difficulty with insurance (99%) or broadcasters (95%) accepting fair use . . . .").

443. *See id.*

444. PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011).

445. *See Codes for Best Practices*, CTR. FOR MEDIA & SOC. IMPACT, http://cmsimpact.org/codes-of-best-practices/ (last visited May 28, 2019); *see also* BRIANNA L. SCHOFIELD & ROBERT KIRK WALKER, FAIR USE FOR NONFICTION AUTHORS (2017), https://www.authorsalliance.org/wp-content/uploads/2017/11/AuthorsAllianceFairUseNonfictionAuthors.pdf.

446. Visual Arts Code, *supra* note 18.

447. *Id.* at 2.

448. *Id.* at 6–7.

fair use doctrine should apply.[449] For each situation, it then sets forth a guiding principle for application of the fair use doctrine, subject to certain limitations.[450] Although the Visual Arts Code is relatively young, it has already been successful in teaching artists about their right to fair use and in changing industry practices.[451]

There are a number of benefits to the codes of best practices, but education is by far the greatest. The codes provide a framework, written in plain English instead of legalese, that teaches people how to analyze fair use situations. The Visual Arts Code includes supporting materials that provide concrete examples of how fair use principles are applied.[452] By educating people about their right to fair use in language that they understand, they become empowered to assert their rights.[453] The codes also provide guidance to rights holders so that they, too, understand when fair use is and is not appropriate.[454] In addition, codes may help educate courts as to best practices in a professional community in "cases where there are legal gaps . . . or where there is a need to interpret open standards."[455]

Fair use codes are not without criticism, and the Survey attempted to address and work around some of these criticisms. For example, the Visual Arts Code and other fair use codes have been criticized for ignoring the copyright holders whose works are being used without permission.[456] These parties should be stakeholders in the process of developing fair use guidelines. Seeking input from the rights holders will help minimize later dissent from the codes and will illuminate the areas where there is agreement as to fair use. Therefore, the Survey recruited not only performers who sample but also songwriters, producers, publishers, and music label professionals who generally are the copyright owners of sampled content. Also, a number of respondents reported that

449. *Id.* at 8.

450. *Id.*

451. The CAA conducted its first survey on the results of the CAA Visual Arts Code in 2016, and it reported "significant change in the field's practice." *A Fair Use Code Changes Practice in the Visual Arts: The Numbers*, CAA NEWS TODAY (Aug. 4, 2016), http://www.collegeart.org/news/2016/08/04/a-fair-use-code-changes-practice-in-the-visual-arts-the-numbers/. This included a rise in the number of artists asserting fair use for the first time and a large percentage of institutions revising their fair use policies based on the code. *Id.*

452. *See Classroom Discussion: Teaching Script About Fair Use in Making Art*, CTR. FOR MEDIA & SOC. IMPACT, http://cmsimpact.org/fair-use/related-materials/codes/fair-use-codes-best-practices (last visited May 28, 2019).

453. Jennifer E. Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC'Y 371, 386 (2010) [hereinafter Rothman, *Best Intentions*].

454. Visual Arts Code, *supra* note 18, at 5.

455. Niva Elkin-Koren & Orit Fischman-Afori, *Taking Users' Rights to the Next Level: A Pragmatist Approach to Fair Use*, 33 CARDOZO ARTS & ENT L. J. 1, 27 (2015).

456. Rothman, *Best Intentions*, *supra* note 453, at 372. *See generally* Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007).

other musicians had sampled their work. Moreover, with respect to the sampling of sound recordings, the owners of those copyrights – frequently the record labels – have dual interests.[457] While some of the artists signed to their label may use samples – the "samplers" – other artists on their label may be the ones being sampled – the "samplees." Sometimes, the same artist may be both a sampler and a samplee.[458] Record labels who have an interest in both sides may help generate fairer solutions for all stakeholders.

Another criticism of the codes is that they allegedly "state what the drafters wish fair use was."[459] This is not necessarily a fair criticism, especially with respect to the Visual Arts Code, which conversely has been criticized as merely restating the statutory fair use factors in different language.[460] The Digital Music Sampling Code, like the other codes, attempts to distill what the relevant fair use principles are and how they would apply in music cases using illustrative examples. It does not attempt to create bright-line rules that do not exist, such as a rule that two-seconds of a song is automatically fair use. One frequent critic of fair use codes has suggested that they should "be reconfigured to analyze current fair use precedents and give more specific legal guidance."[461] This is exactly what the Digital Music Sampling Code seeks to do.

As previously mentioned, a specific criticism of the Visual Arts Code is that it admittedly "recapitulate[s] the law of fair use,"[462] as set forth in the statutory factors. As a result, some claim that it does not really clarify the doctrine.[463] However, this narrow view of the Visual Arts Code ignores the supporting materials that are meant to be used in conjunction with the Visual Arts Code, which include, among other things, a PowerPoint presentation,[464] a "You Be the Judge" test with illustrative examples,[465] a video,[466] and frequently-asked-questions.[467]

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457. *See supra* notes 120–23.

458. For example, artist Jay-Z frequently samples and is sampled himself. *See Jay-Z*, WHO SAMPLED, http://www.whosampled.com/Jay-Z/ (last visited May 28, 2019).

459. Rothman, *Best Intentions*, *supra* note 453, at 377.

460. Rosemary Chandler, *Putting Fair Use on Display: Ending the Permissions Culture in the Museum Community*, 15 DUKE L. & TECH. REV. 60, 80 (2016).

461. Rothman, *Best Intentions*, *supra* note 453, at 386.

462. *See Classroom Discussion: Teaching Script About Fair Use in Making Art*, *supra* note 452.

463. *See* Chandler, *supra* note 460, at 80.

464. *See supra* Section II.B.

465. *See Fair Use in Visual Arts: You Be The Judge!*, CTR. FOR MEDIA & SOC. IMPACT http://cmsimpact.org/resource/you-be-the-judge/ (last visited May 28, 2019).

466. *See* Center for Media & Social Impact, *Fair Use at Work in the Visual Arts*, YOUTUBE (Feb. 6, 2015), https://www.youtube.com/watch?v=wC-wfVfIXiw&feature=youtu.be.

467. *See Fair Use Frequently Asked Questions*, CTR. FOR MEDIA & SOC. IMPACT, http://cmsimpact.org/resource/fair-use-frequently-asked-questions/ (last visited May 28, 2019).

A final criticism of the Visual Artists Code and other similar fair use statements is that they impose a requirement of attribution to the original author. The response to this criticism will be discussed in greater detail below. While fair use codes may have garnered criticism, they still represent a significant step towards correcting the clearance culture problems.

B. Developing a Code of Best Practices in Fair Use for Digital Music Sampling

In their book, *Reclaiming Fair Use*, Professors Aufderheide and Jaszi provide a template for creating a code of best practices:

> • Find networks and organizations in the community of practice (not the gatekeepers, but the creators/users).
>
> • Document the kinds of problems the community has with using copyrighted material; get good stories!
>
> • Circulate the results of this documentation to the community; tell the stories.
>
> • Host or cohost small-group conversations on interpreting fair use; use the stories to locate the problem areas and discuss how to apply fair use to those problem areas.
>
> • Draft a code of best practices, using templates to the extent they are helpful.
>
> • Have an advisory board of supportive lawyers review and revise the draft, to ensure that the code of best practices conforms to the law.
>
> • Get endorsements from community organizations for the code.
>
> • Circulate news through community networks and organizations.
>
> • Document your successes.
>
> • Publicize your successes.[468]

Following the template from start to finish is beyond the scope of this Article. However, the first four steps of this framework have been accomplished through the Survey as well as through the research of Professors Kembrew McLeod, Peter DiCola, and others.[469] The groundbreaking work of Pro-

468. AUFDERHEIDE & JASZI, *supra* note 444, at 128 (bullet points added).
469. *See* MCLEOD & DICOLA, *supra* note 45, at 217.

fessor McLeod has been influential in exposing the problems the hip-hop community has in using copyrighted samples. He has written numerous books[470] on the subject and even produced a documentary.[471] Numerous law review articles also have chronicled the frustrations of artists who seek to sample.[472] The lawsuits cited in this Article further demonstrate the legal risks that musicians encounter when they sample.

The Survey has also exposed problems artists face in sampling. For example, a number of respondents reported that they had to either remove a track or not record a track because they could not get permission or a license to use a sample or it was too difficult to get permission or a license. Some had to substitute one sample for another because of difficulties in licensing. Others had to recreate the music in a sample or hire musicians to do so because they could not get permission or a license. The stifling of creativity is obvious. The majority of respondents stated that if permission was not needed to use samples, they would use more samples than they do now. Another respondent noted that he or she only uses samples offered under "clear Creative Commons licensing by the original artists." A different respondent stated that "the current legal framework benefits no one but large media companies." Meanwhile, another complained, "The amount of money wasted in the court systems by one ridiculous ongoing lawsuit after another in the cases of sampling and copyright infringement is completely out of control."[473] In light of these problems, a new approach to sampling – one that does not revolve around the licensing of every snippet – is needed.

C. Survey Methodology and Results

This Section explains the methods used to conduct the Survey and shares some of the notable results.

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470. *See, e.g.*, KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 69 (2005); Kembrew McLeod, *How Copyright Law Changed Hip-Hop*, *in* CUTTING ACROSS MEDIA: APPROPRIATION ART, INTERVENTIONIST COLLAGE, AND COPYRIGHT LAW, *supra* note 21, at 155; *see also* KEMBREW MCLEOD, FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY (2007).

471. *See Sampling: An Overview*, INDEPENDENT LENS, http://www.pbs.org/independentlens/copyright-criminals/sampling.html (last visited May 28, 2019).

472. *E.g.*, Josh Norek, Comment, "*You Can't Sing Without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 91 (2004); Ashtar, *supra* note 433; John W. Gregory, *A Necessary Global Discussion for Improvements to U.S. Copyright Law on Music Sampling*, 15 GONZ. J. INT'L L. 4 (2012).

473. It should be noted that no respondents actually reported having been sued or threatened with a lawsuit because of sampling.

1. Methodology

The Survey questioned music professionals about their opinions, experiences, and practices concerning digital music sampling.[474] In particular, the Survey questioned participants about the circumstances, if any, under which they believe sampling of third-party copyrighted material should be allowed without permission from the copyright owner. The survey instrument was based in part on the questionnaire developed by the CAA in support of its Visual Arts Code.[475] The Survey was approved by the Committee for the Protection of Human Subjects at the University of California, Berkeley.

2. Recruitment

The Survey participants were required to be at least eighteen years old, reside in the United States, and be professionals in the music industry. Information about the study and a request for Survey participants was posted through a variety of means, including music industry group websites and listservs, Facebook group pages relating to music, Craigslist websites across the country, and chat boards. The Survey also relied on a snowball strategy for recruitment. Specifically, emails were sent to colleagues in the music industry asking them to consider taking the Survey and to distribute it to others who might be interested.

3. Respondents

Recruitment occurred from March 22, 2018, to May 6, 2018, and resulted in eighty-eight respondents.[476] They included performers, songwriters, producers, deejays, publishers, technicians, and independent and major record label professionals. They came from all genres of music including R&B/hip-

474. No personally identifiable information was collected as part of the Survey and all data was kept secure. The Survey was also configured so that researchers were not given the participants' Internet Portal (IP) address, and therefore, it was nearly impossible to link Survey results with the participants.

475. *See* PATRICIA AUFERHEIDE ET AL., COPYRIGHT, PERMISSIONS, AND FAIR USE AMONG VISUAL ARTISTS AND THE ACADEMIC AND MUSEUM VISUAL ARTS COMMUNITIES, AN ISSUES REPORT (2014), http://www.collegeart.org/pdf/FairUseIssuesReport.pdf.

476. However, six responses were not usable because those respondents were under the age of eighteen or resided outside of the United States. Also, it should be noted that not all respondents answered every question.

hop/rap, country, Christian/gospel and classical, and no one genre predominated.[477] Respondents came from sixteen states with California and Texas being the most represented.[478] Respondents spanned all age groups from eighteen to twenty-nine years old to over sixty-five years old,[479] and 61.82% identified as male.[480]

4. Overall Results

Of respondents who answered the question, 56.92% reported having taken a piece of an existing sound recording and using it in a new musical work.[481] 61.81% believed that whether an artist should seek permission or obtain a license to use a sample of another artist's work depended on the circumstances,[482] and 36.36% stated that permission or a license for sampling should always be sought. Approximately 55% of respondents believed that no permission was required when the owners of the sample could not be found, and 49% believed that permission was not needed when the sample was not recognizable. The other top reasons respondents felt justified using a sample without permission or a license included heavy alteration of the sample (41%), the short length of the sample (31%), and the sample was being used for criticism or commentary (33%). Notably, all respondents who answered the question believed that artists should at least under some circumstances receive attribution when their work is sampled.[483]

D. A Draft Code of Best Practices in Fair Use for Digital Music Sampling

The next step in the *Reclaiming Fair Use* framework and the ending point for this Article is the drafting of a preliminary Digital Music Sampling Code. It is based on the Survey results, copyright caselaw, and the other fair use codes. Continuing with the analogy between digital sampling and the visual arts, the Digital Music Sampling Code draws largely on the Visual Arts Code.

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477. Participants also included musical professionals working in pop/adult, rock, Latin, dance/electronic, jazz, heavy metal, folk, and other genres.

478. Twenty-four respondents lived in California and twenty lived in Texas.

479. 48.78% respondents fell into the thirty to forty-nine year-old age group.

480. Only fifty-five respondents answered this question; 32.73% identified as female and 5.45% preferred not to answer.

481. Only sixty-five respondents chose to answer this question.

482. Fifty-five respondents answered this question. 36.36% of them thought that permission or a license should "usually, with some exceptions" be sought for samples, and 25.45% thought that "sometimes depending on the circumstances" permission or a license for samples should be sought.

483. 45.45% believed that artists should always receive attribution, 32.73% believed that artists "usually, with some exceptions" should receive attribution, and 21.82% believed that artists "sometimes depending on the circumstances" should receive attribution.

While that code was specifically created for visual artists, musical artists should have the same right to incorporate copyrighted materials into their works as visual artists.

The situation in the Visual Arts Code that is most analogous to digital sampling is *Making Art*. This Section begins with a "description" of the history and current practice of artists making art by incorporating the work of others. Next, it sets forth the fundamental principle that fair use is available as a defense when incorporating the copyrighted material of others. Finally, it concludes with proposed limitations on the application of the fair use doctrine. The Digital Music Sampling Code will follow a similar framework.

As discussed previously in this Article, digital sampling is a form of the artistic practice of collage, and therefore, the description of artists incorporating the works of others applies equally to musical artists. Indeed, the Visual Arts Code refers to the making of new art that incorporates existing sounds of sound.[484] With a few minor modifications as noted below in brackets, the *Making Art* description is also used as the description for the Digital Music Sampling Code.

1. Proposed Description

> DESCRIPTION: For centuries, artists have incorporated the work of others as part of their creative practice. Today, many artists occasionally or routinely reference and incorporate [music, whether sound recordings or musical compositions] in their own creations. Such quotation is part of the construction of new culture, which necessarily builds on existing culture. It often provides a new interpretation of existing works, and may (or may not) be deliberately confrontational. Increasingly, artists employ digital tools to incorporate existing (including digital) works into their own, making uses that range from pastiche and collage (remix), to the creation of new soundscapes . . . [and recordings.] Sometimes this copying is of a kind that might infringe copyright, and sometimes not. But whatever the technique, and whatever may be used (from motifs or themes to specific . . . sounds), new art can be generated.[485]

2. Proposed Principle

Next, the Visual Arts Code articulates a "principle" for the application of the fair use doctrine when making art, which is subject to several limitations.[486] Just like the Visual Arts Code, the Digital Music Sampling Code cannot define bright-line rules as to which works qualify as fair use. As the Department of Commerce Internet Policy noted, "Best practices and guidelines cannot be comprehensive codes enumerating everything that can be done in a particular

484. Visual Arts Code, *supra* note 18, at 11.
485. *Id.*
486. *Id.*

realm of activity."[487] Rather, the Digital Music Sampling Code describes a principle and several limitations to guide artists in determining whether fair use applies. The main goal of the Digital Music Sampling Code is to teach artists how to analyze situations and apply fair use principles.

Although a few minor revisions were needed – which also are noted in brackets – the *Making Art* principle is also used for the Digital Music Sampling Code:

> PRINCIPLE: Artists may invoke fair use to incorporate copyrighted material into new [music, whether sound recordings or musical compositions,] subject to certain limitations.[488]

The application of this principle to digital sampling should not be controversial. The court in *Estate of Barré v. Carter*[489] specifically held that musical artists may assert the fair use doctrine in cases involving the digital sampling of a sound recording. Moreover, *Estate of Smith v. Cash Money Records*,[490] demonstrates this principle in action. In that case, the musical artist Drake successfully invoked the fair use defense when incorporating an unauthorized musical composition sample into his song.

3. Proposed Limitations

Finally, the Digital Music Sampling Code, like the Visual Arts Code, recognizes that fair use has limitations. These limitations arise from § 107 of the Copyright Act, fair use caselaw, and community ideals.[491] The limitations in the Digital Music Sampling Code parallel those found in the Visual Arts Code and include the need for new artistic meaning, a justifiable artistic objective, and attribution.

a. New Artistic Meaning Needed

The first limitation, with some minor rewording, is:

> LIMITATION. Artists should seek licenses for uses of existing copyrighted material that do not generate new artistic meaning.[492]

This limitation recognizes the principle that "to qualify as a fair use, a new work generally must alter the original with 'new expression, meaning, or

487. USPTO, *supra* note 436, at 28.
488. Visual Arts Code, *supra* note 18, at 11.
489. 272 F. Supp. 3d 906, 917 (E.D. La. 2017).
490. 253 F. Supp. 3d 737, 750 (S.D.N.Y. 2017).
491. *See* Visual Arts Code, *supra* note 18, at 8, 14–15.
492. *Id.* at 11 ("Artists should avoid uses of existing copyrighted material that do not generate new artistic meaning, being aware that a change of medium, without more, may not meet this standard.").

message.'"[493] It also recognizes the principle from *Blanch* that when a sampler uses the original work as "raw material . . . in furtherance of distinct creative or communicative objectives," the result is transformative and thus fair use.[494] Therefore, when applying this limitation, one factor that may be considered is whether the sampler's purpose in using the copyrighted work is different than the original artist's purpose in creating that work.[495]

Digital sampling can result in new artistic meaning being given to the original work in several ways. New artistic meaning can occur when the message of the original work is fundamentally altered, as was the case in *Estate of Smith v. Cash Money Records* described above, where the rapper Drake had a different purpose in using the sample than the jazz musician Jimmy Smith had in creating the original track.[496] In some cases, a work can be transformed when it is broadcasted to a different audience, although merely using the sample in a different genre than the original song may not be enough by itself.[497]

Digital sampling also may be transformative where it results in new expression being given to the original work. Songs that use richly-layered samples could result in new artistic meaning and aesthetics from the multiple musical quotations.[498] Songs that alter the original work or render it unrecognizable may be deemed as adding new expression.[499] Just as the visual artist Koons

493. Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

494. Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006).

495. *Estate of Smith*, 253 F. Supp. 3d at 750 (finding use was transformative, and thus, a fair use where the defendant's purpose in using a key phrase from original composition was vastly different than original artist's goal).

496. *Id*.

497. Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 85 (2d Cir. 2014) (finding use transformative where "Bloomberg's purpose … was to publish this factual information to an audience from which Swatch Group's purpose was to withhold it"); *see also* Abilene Music, Inc. v. Sony Music Ent, Inc., 320 F. Supp. 2d 84, 93–94 (S.D.N.Y. 2003) ("[A] parodic work [that] goes beyond simple parody and also transposes the original work into a new genre, . . . could have an effect on potential markets for derivative works that recreate the work in the new genre without parodying it [and therefore may not be fair use.]"). *But see* Jarvis v. A & M Records, 827 F. Supp. 282, 290 (D.N.J. 1993) (rejecting the notion that "a work could be immune from infringement so long as the infringing work reaches a substantially different audience than the infringed work. In such a situation, a rap song, for instance, could never be held to have infringed an easy listening song or a pop song.").

498. Barcroft Media, Ltd. v. Coed Media Grp., 297 D. Supp. 3d 399, 353 (S.D.N.Y. Nov. 2, 2017) ("Original works clearly may be transformed through the addition of text or other forms of expression."); *Cariou*, 714 F.3d at 708 (finding fair use where artist altered copyrighted photographs into a collage which had "a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's.").

499. *Cf. Cariou*, 714 F.3d at 700 (deeming defendant's work transformative in some instances where the original photographer's work was almost entirely obscured).

was held to have transformed the plaintiff's photograph in *Blanch* by "chang[ing] . . . its colors, the background against which it is portrayed, the medium, the size of the objects pictured, [and] the objects' details," a musical artist could transform a sound recording by changing its tempo or pitch or transposing it to a different key and layering in other vocals, musical instruments, or sonic elements.[500] Similarly, using such techniques, a musical artist could transform the mood, character, and aural aesthetics of a song just as Richard Prince transformed Cariou's "serene and deliberately composed portraits and landscape photographs" into "crude and jarring," "hectic and provocative" works.[501]

Conversely, songs that make "no alteration to the expressive content or message of the original work" that they sample would not be fair use.[502] New artistic meaning would not be generated where an artist samples a key hook from a song and loops it throughout a new track with no alteration.[503] Many artists agree that this would require a license.[504] A license would also be required if an artist samples a popular song with the hope that the audience will recognize it and turn the new song into a hit.

b. Artistic Objective Needed for Sampling

The second limitation, which is identical to the one in the Visual Arts Code, is:

> The use of a preexisting work, whether in part or in whole, should be justified by the artistic objective, and artists who deliberately repurpose copyrighted works should be prepared to explain their rationales both for doing so and for the extent of their uses.[505]

Further, 49% of Survey respondents felt that samples that were not recognizable did not require permission or a license to be used.

500. Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006); *see also Cariou*, 714 F.3d at 706 (finding the defendant's works transformative where the "composition, presentation, scale, color palette, and media [were] fundamentally different and new compared to the photographs").

501. *Cariou*, 714 F.3d at 706.

502. Seltzer v. Green Day, Inc., 725 F.3d 1170, 1177 (9th Cir. 2013) (stating that these types of cases are typically non-transformative).

503. *See* MC Hammer, *U Can't Touch This*, *on* DON'T HURT 'EM (Capitol 1990); *see also* L.A. News Serv. v. CBS Broad., Inc., 305 F.3d 924, 938–939 (9th Cir. 2002) ("Merely plucking the most visually arresting excerpt from LANS's nine minutes of footage cannot be said to have added anything new.").

504. One Survey respondent said, "Conversely, if you have an artist like Diddy using a sample of The Police's Every Breath You Take as his entire song, then that should definitely require clearance and payment because a new artistic work hasn't really been created."

505. *See also* Visual Arts Code, *supra* note 18, at 11.

This limitation arises in part out of the first factor of the fair use doctrine and from the pronouncement in *Blanch* that an "artist must provide a sufficient justification for using another's copyrighted material in effecting the artist's vision."[506]

One well-accepted justification for sampling is parody.[507] Parody is "a recognized category of criticism or comment authorized by section 107."[508] The Supreme Court defined parody as a

> literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule or as a composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.[509]

The Supreme Court recognized in *Campbell v. Acuff-Rose Music Inc.* that parody "'has an obvious claim to transformative value,' . . . and deciding that the new work is a parody necessarily entails finding that the new work is transformative" and thus fair use.[510]

Another example of an artistic objection that justifies using someone else's copyrighted music is political or social commentary or criticism.[511]

506. Morris v. Guetta, LA CV12-00684 JAK (RZx), 2013 WL 440127, at *8 (C.D. Ca. Feb. 4, 2013). *But see Cariou*, 714 F.3d at 707 (2d Cir. 2013) ("What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.").

507. *See, e.g.*, Abilene Music, Inc. v. Sony Music Ent., Inc., 320 F. Supp. 2d 84 (S.D.N.Y. 2003) (finding that rapper Ghostface Killah's use of the melody of "What a Wonderful World" in his sarcastic song "The Forest" was a transformative parody and a fair use because he portrayed a "world [that] is corrupted and ridden with crime and drugs" in contrast to the "unrealistically uplifting" message of the original song); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582 (1994) (holding that a 2 Live Crew song that parodied the Roy Orbison song "Pretty Woman" was transformative and fair use because it "was clearly intended to ridicule the white-bread original" by "substituting predictable lyrics with shocking ones . . . [that] derisively demonstrat[e] how bland and banal the Orbison song seems to them"); Elsmere Music, Inc. v. Nat'l Broad. Co., 482 F. Supp. 741 (S.D.N.Y.) ("I Love Sodom," a "Saturday Night Live" television parody of "I Love New York," is fair use). Thirty-one percent (31%) of Survey respondents believed that sampling for parody purposes does not require permission or a license.

508. Adjmi v. DLT Ent. Ltd., 97 F. Supp. 3d 512, 530 (S.D.N.Y. 2015).

509. *Campbell*, 510 U.S. at 580.

510. *Abilene Music, Inc.*, 320 F. Supp. 2d at 89 (quoting *Campbell*, 510 U.S. at 579).

511. NXIVM Corp. v. Ross Inst., 364 F.3d 471, 477 (2d Cir. 2004) ("Where the [alleged infringer's] use is for the purposes of 'criticism, comment . . . scholarship, or research,' 17 U.S.C. § 107," the first factor "will normally tilt in the [alleged infringer's] favor"); *see also* Authors Guild v. Google, Inc., 804 F.3d 202, 215 (2d Cir. 2015) ("Among the best recognized justifications for copying from another's work is to provide comment on it or criticism of it."); Wright v. Warner Books, Inc., 953 F.2d

"'[C]riticism' and 'comment' are classic examples of fair use,"[512] and, like parody, they have "an obvious claim to transformative value."[513] For instance, on the records, *It Takes a Nation* and *Fear of a Black Planet*, Public Enemy sampled political speeches and news broadcasts as a means of political commentary and to invoke "the black power era of the late 1960s and early 1970s."[514] Political commentary raises First Amendment and free speech issues and justifies the use of the samples. As has been noted in another code, "Comment and critique are at the very core of the fair use doctrine as a safeguard for freedom of expression."[515] Also, it should be noted that the commentary does not need to be directed at the original work or author.[516] Instead, the sample can be used for commentary about society at large.[517]

In addition, under this limitation, the artist must be prepared to justify the amount of the preexisting work that is used. This limitation arises out of the third factor of the fair use doctrine that assesses the "amount and substantiality of the portion used in relation to the copyrighted work as a whole."[518] It also takes into consideration whether the use is de minimis and whether the sample

731, 736 (2d Cir. 1991) ("[T]here is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in section 107," including "criticism" and "comment"); *see also* Samuelson, *supra* note 5, at 2571 (noting that using copyrighted works for social or cultural commentary in documentary films may be fair use but the "more substantial the use and the more prominently the prior work's expression is featured, the less likely a use is to be fair"). Thirty-three percent (33%) of Survey respondents believed that sampling for criticism or commentary purposes does not require permission or a license.

512. Hosseinzadeh v. Klein, 276 F. Supp.3d 34, 43, 45 (S.D.N.Y. 2017) (holding that YouTube "reaction video" mocking another YouTube video-maker was fair use).

513. Louis Vuitton Malletier, S.A. v. My Other Bag, Inc., 156 F. Supp.3d 425, 444–45 (S.D.N.Y.), *aff'd*, 674 Fed. App'x 16 (2d Cir. 2016).

514. MCLEOD & DICOLA, *supra* note 45, at 238.

515. *See Code of Best Practices in Fair Use for Online Video*, CTR. FOR MEDIA & SOC. IMPACT, http://cmsimpact.org/code/code-best-practices-fair-use-online-video/ (last visited Apr. 26, 2019) [Hereinafter Online Video Code].

516. Seltzer v. Green Day, Inc., 725 F.3d 1170, 1177 (9th Cir. 2013) ("[E]ven where . . . the allegedly infringing work makes few physical changes to the original or fails to comment on the original" it can still be transformative); Cariou v. Prince, 714 F.3d 694, 698 (2d Cir. 2013) (finding no requirement that the copied work comment on the original work or its author in order to be transformative).

517. *But see* Abilene Music, Inc. v. Sony Music Entm't, Inc., 320 F. Supp. 2d 84, 92 (S.D.N.Y. 2003) (hypothesizing that cases "where the original song itself is used (essentially in its entirety) to comment on negative aspects of the real or imagined world[]" rather than commenting on the song itself, would "typically require[] licensing"). However, this dictum may be overruled in light of the holdings in *Cariou*. *See supra* Section III.B.3.; *see also* Lennon v. Premise Media Corp., 556 F. Supp. 2d 310 (S.D.N.Y. 2008) (where a filmmaker's use of fifteen seconds of a John Lennon song for social commentary was deemed fair even though he was not commenting on the original song).

518. 17 U.S.C. § 107(3) (2018). Thirty-one percent (31%) of respondents believed that sampling without permission or a license is justified when a sample is short.

is quantitatively or qualitatively sufficient to support copyright infringement.[519]

There are no bright-line rules when it comes to how much of the original work a sample can take.[520] There are many cases where a sample that takes less than four seconds of the original work has been deemed fair use or de minimis.[521] Courts also have held that the sampling of a single note "is de minimis and cannot support a claim of copyright infringement" in many cases because one note is not by itself copyrightable.[522] Similarly, a court may find a sample to be de minimis when it is barely discernable in the song[523] or has been heavily distorted.[524]

However, when the sample represents the heart of the work, permission may be required even if the sample constitutes a few words or seconds.[525] For

519. TufAmerica, Inc. v. WB Music Corp., 67 F. Supp. 3d 590, 598 (S.D.N.Y. 2014).

520. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 98 (2d Cir. 2014) ("There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use").

521. *See, e.g.*, TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 605 (S.D.N.Y. 2013) (finding a three-second drum sequence not quantitatively significant to a six-minute song); Newton v. Diamond, 388 F.3d 1189, 1191 (9th Cir. 2003) (finding de minimis copying where the average audience would not recognize the composition sample that consisted of three notes, C-D flat-C sung over a background C note played on the flute); VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 875–76 (9th Cir. 2016) (finding de minimis copying of musical composition where only one instrument group was copied and it was only a single horn hit comprised of four notes – E-flat, A, D, and F – and a double-horn hit consisting of an eighth-note chord of those same notes followed by a quarter-note chord of the same notes).

522. Poindexter v. EMI Record Grp., Inc., No. 11 Civ. 559 (LTS)(JLC), 2012 U.S. Dist. LEXIS 42174, at *12 (S.D.N.Y. Mar. 27, 2012) (citing Swirsky v. Carey, 376 F.3d 841, 851 (9th Cir. 2004) ("[A] single musical note would be too small a unit to attract copyright protection (one would not want to give the first author a monopoly over the note of B-flat for example)"); McDonald v. Multimedia Entm't, Inc., No. 90 Civ. 6356(KC), 1991 U.S. Dist. LEXIS 10649, 1991 WL 311921, at *4 (S.D.N.Y. July 19, 1991) ("[I]t is extremely doubtful that [a] single note and its placement in the composition is copyrightable.").

523. *WB Music Corp.*, 67 F. Supp. 3d at 598 ("the fact of the matter is that the samples appear only faintly in the background . . . and are, at best, only barely perceptible to the average listener").

524. Steward v. West, No. 13-02449, No. 179, 2014 WL 12591933, at *8 n.8 (C.D. Cal. 2014) (holding the sample was de minimis where "the result of these distortions and the short length of the samples is that the average audience would not recognize Plaintiffs' Song in any of Defendants' songs without actively searching for it").

525. Elsmere Music, Inc. v. Nat'l Broad. Co., 482 F. Supp. 741, 744 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (finding that copying was not de minimis where the copied musical phrase went to "the heart of the [original] composition"); 4 NIMMER ON COPYRIGHT, *supra* note 301, § 13.03[A][2][a] ("[E]ven if the similar material is quantitatively small, if it is qualitatively important, the trier of fact may properly find substantial similarity."); *see also* Menell, *supra* note 17 at 498–99.

example, in *Bridgeport Music, Inc. v. UMG Recordings, Inc.*,[526] the Sixth Circuit upheld a jury verdict that the defendant had committed copyright infringement by sampling the phrase, "Bow wow wow, yippie yo, yippie yea," which was the refrain from the song, "Atomic Dog." The court found that this phrase was "the most well-known aspect of the song – in terms of iconology, perhaps the functional equivalent of 'E.T., phone home,'" and therefore, the court upheld the jury's rejection of the defendant's fair use defense.[527]

When determining whether the amount taken was justifiable, courts will consider whether it was necessary to take such amount to accomplish the sampler's purpose in using the music.[528] This means that a parodist may be justified in taking the heart of the work without permission because parodies "must be able to 'conjure up' at least enough of [the original work] to make the object of its critical wit recognizable."[529]

Another factor that must be considered is whether the new work usurps the market for the original work or its derivatives.[530] This limitation derives from the fourth factor of the fair use doctrine.[531] As one best practices code notes, "The use [of the preexisting material] should not be so extensive or pervasive that it ceases to function as critique and becomes, instead, a way of satisfying the audience's taste for the thing (or the kind of thing) that is being quoted."[532] In other words, the new song should not become a market substitute for the original work from where the sample is derived.[533] This is rarely a problem for parodies that tend to poke fun at the original work.[534] And works that sample from different genres of music or target different listening audiences are unlikely to become a market substitute for the original work.[535]

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526. Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267, 272 (6th Cir. 2009).

527. *Id.* at 276.

528. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 588 (1994); *see also* Estate of Smith v. Cash Money Records, 253 F. Supp. 3d 737, 751–52 (S.D.N.Y. 2017) (finding thirty-five seconds of one-minute track was reasonable amount for purpose of making point that "only 'real' music – regardless of creative process or genre – will stand the test of time").

529. *Campbell*, 510 U.S. at 588.

530. *Estate of Smith*, 253 F. Supp. 3d at 752.

531. *See* 17 U.S.C. § 107(4) (2018).

532. *See* Online Video Code, *supra* note 515.

533. *Campbell*, 510 U.S. at 588.

534. Abilene Music, Inc. v. Sony Music Ent., Inc., 320 F. Supp. 2d 84, 93 (S.D.N.Y. 2003) ("[N]o reasonable jury could find that *The Forest* would cause substantial harm to the market for *Wonderful World*; anyone interested in purchasing a recording of *Wonderful World* would not turn to the three-line, off-key rendition used in *The Forest* instead."); Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986) ("We do not believe that consumers desirous of hearing a romantic and nostalgic ballad such as the composers' song would be satisfied to purchase the parody instead. Nor are those fond of parody likely to consider [the original] a source of satisfaction.").

535. *Estate of Smith*, 253 F. Supp. 3d at 752 (finding no evidence that "Pound Cake usurps any potential market for JSR or its derivatives. JSR, a spoken-word criticism of

There are a number of common reasons that artists use samples that would not be deemed justifiable and thus fair use. If an artist is sampling just to save the time and expense of creating those sounds, that would not be fair use.[536] If an artist lacks the instruments or talent to re-create the sound, that would not be justifiable. It has also been suggested that using a sample to "create the tone, mood, setting and location" of the song alone is not transformative.[537]

c. Attribution

The third limitation, which is virtually identical to the one in the Visual Arts Code, is:

> When copying another's work, an artist should cite the source . . . unless there is an articulable aesthetic basis for not doing so.[538]

While attribution is not legally required in the United States, the results of the Survey showed that respondents were universally in support of some form of attribution depending on the circumstances. The United States recognizes very limited moral rights for authors. The Visual Artists Rights Act of 1990 ("VARA") provides a limited right of attribution to authors of photographs created for exhibition, paintings, drawings, prints, and sculptures existing in a single copy or a limited edition of 200 or less.[539] Beyond this, there are no requirements of attribution under U.S. law, and there are no requirements under VARA that authors of musical compositions or sound recordings be given attribution.[540] Therefore, several commentators have expressed concern with codes that contain an attribution limitation because it is not a legal

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non-jazz music at the end of an improvisational jazz album, targets a sharply different primary market than Pound Cake, a hip-hop track."), *appeal filed*, No. 18-1311, 2018 WL 6734771 (2d Cir. 2018); *see also* Cariou v. Prince, 714 F.3d 694, 709 (2d Cir. 2013) (holding the defendant's art appealed to a different art collector audience than plaintiff's weighed in favor of fair use).

536. *Abilene Music, Inc.*, 320 F. Supp. 2d at 91 (suggesting that it would not be fair use to merely take "the melody of a popular song purely for the sake of convenience"); *see also Campbell*, 510 U.S. at 580 ("[When] the alleged infringer merely uses [the copied work] to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.").

537. *See* Estate of Barré v. Carter, 272 F. Supp. 3d 906, 916 (E.D. La. 2017) (holding that the plaintiff had alleged sufficient facts to avoid dismissal of case under Rule 12(b)(6) where the plaintiff argued that the defendants' use of the sample was not transformative because it was done to "create the tone, mood, setting and location of the New Orleans-theme 'Formation'").

538. Visual Arts Code, *supra* note 18, at 11.

539. 17 U.S.C. § 101 (2018).

540. *But see* Jane Ginsburg, *The Most Moral of Rights: The Right to be Recognized as the Author of One's Work*, 8 GEO. MASON J. OF INT'L COM. L. 44, 45 (2016); Jane

requirement but instead one of etiquette.[541] Because this is an important issue to the community, the Digital Music Sampling Code includes a limitation recognizing the need for attribution. However, the code also acknowledges that there may be certain situations in which attribution would not be appropriate or desirable.

Finally, the limitation from the Visual Arts Code stating that "[a]rtists should avoid suggesting that incorporated elements are original to them, unless that suggestion is integral to the meaning of the new work" was deleted from the Digital Music Sampling Code.[542] This limitation is somewhat inapplicable because, for most digital samplers, there "never [is] any attempt to conceal the fact that they [are] working from prerecorded sounds rather than composing their own original music. On the contrary, they openly celebrate[] their method of sampling."[543]

E. Next Steps

The Survey, which was conducted in a rather limited time period, is not a substitute for the type of expansive survey done by the CAA in support of its Visual Arts Code. Over 2,000 members of the CAA participated in its survey.[544] Rather, the Survey sought to preliminarily ascertain the musical community's opinions and practices regarding digital sampling and to determine whether there was an appetite for a fair use code. Given that 61.81% of respondents believed that sampling should be allowed under certain circumstances with no permission, the question then becomes what are those circumstances?[545] The next step is to hold focus groups and perhaps further surveys to define those circumstances. Also, the usefulness of the Visual Arts Code is enhanced by its supporting materials, including a PowerPoint presentation, illustrative examples, a video, and frequently-asked-questions – all of which further flesh out how fair use principles should be applied in certain situations.[546] Similar documents should be created to accompany the Digital Music Sampling Code.

C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademark Laws*, 41 HOUS. L. REV. 263, 284–85 (2004).

541. Visual Arts Code, *supra* note 18, at 17 (admitting that the Visual Arts Code incorporates "widely and strongly held community values not tied to language of the Copyright Act"); *see also* Rothman, *Best Intentions*, *supra* note 453.

542. Visual Arts Code, *supra* note 18, at 11.

543. Shusterman, *supra* note 80, at 617.

544. *See generally* AUFERHEIDE ET AL., *supra* note 475.

545. *See supra* text accompanying note 482.

546. *See supra* notes 464–67.

CONCLUSION

Recent cases have shown that courts are starting to move past the rule, "Get a license or do not sample."[547] Perhaps now more than ever the music industry is ready for a change. This Article hopes to prompt the industry to come together to adopt fair use guidelines. This Article does not advocate for bright-line rules classifying all sampling as per se fair use. Just as some appropriation art is copyright infringement, some digital sampling will require a license, too. While this Article sets forth draft principles, the next steps are up to the stakeholders in the music industry. The point is that it is time for musical artists to reclaim their right to fair use, and it is time to put digital music sampling on the same legal par as other artistic collage practices.

547. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005).