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NOTE

HOW TO GET AWAY WITH COPYRIGHT INFRINGEMENT: MUSIC SAMPLING AS FAIR USE

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CONTENTS

[1] I thank Professor Wendy J. Gordon for her immense help with this Note. She played an invaluable role in its development and execution, from start to finish.

I. INTRODUCTION

Music sampling is integral to the genres of hip hop and electronic music. Hip hop and electronic musicians make their art, in part, by repurposing excerpts of other artists' music.[2] Musicians who employ sampling are presently required to obtain consensual licenses for each use of a pre-existing song and to pay all the fees associated with licensing.[3] The present state of the law has thus created a significant barrier to entry and exorbitant creation cost for musicians making sample-based music.[4] This is especially true because sampling can implicate both musical work and sound recording copyrights, meaning that an artist may need to obtain two licenses to legally use a sample.[5] Further, the more affordable compulsory licensing framework that applies to cover songs does not govern sampling.[6] The availability of compulsory licenses for cover songs encourages reusing entire melodies, but the unavailability of compulsory licenses for sampling discourages reusing only partial melodies and sound snippets from existing songs. One should question why an artist can obtain a compulsory license to reuse an entire melody, but cannot obtain a compulsory license to reuse only part of a melody or select sounds from an existing recording.[7] Basic fairness should ensure no musician faces disproportionate barriers from copyright law simply by virtue of her preferred genre. Presently, however, some untold number of fledgling sample-based musicians cannot release their art

[2] *See, e.g.*, Rebecca Haithcoat, *Top 10 EDM/Rap Collaborations of All Time*, BILLBOARD (Aug. 15, 2014), https://www.billboard.com/articles/columns/the-juice/6221465/top-10-edmrap-collaborations-of-all-time [https://perma.cc/WF7Z-ABD3]; *see also Digital Music Sampling: Creativity or Criminality?,* NPR (Jan. 28, 2011, 1:00 PM), https://www.npr.org/2011/01/28/133306353/Digital-Music-Sampling-Creativity-Or-Criminality [https://perma.cc/E5AG-2LMK].

[3] *See* Alex Holz, *How You Can Clear Cover Songs, Samples, and Handle Public Domain Works*, ASCAP (Jan. 26, 2011), https://www.ascap.com/playback/2011/01/features/limelight.aspx.

[4] *See* Jimmy Ness, *The Queen of Sample Clearance: An Interview with Deborah Mannis-Gardner*, FORBES (Feb. 19, 2016, 8:00 AM), https://www.forbes.com/sites/passionoftheweiss/2016/02/19/the-queen-of-sample-clearance-an-interview-with-deborah-mannis-gardner/#60efcbc64e18 [https://perma.cc/4EV7-GEFE].

[5] Holz, *supra* note 3. *But see* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016).

[6] By "cover songs" I refer to the practice of "[r]ecord[ing] or perform[ing] a new version of (a song) originally performed by someone else." *Cover*, LEXICO.COM, https://www.lexico.com/en/definition/cover [https://perma.cc/8W5V-BCTP].

[7] Professor Gordon was instrumental in helping me articulate this idea. *See* Robert M. Vrana, Note, *The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music*, 68 WASH. & LEE L. REV. 811, 828-30 (2011). Using a sample and performing a cover are arguably quite similar from a use-of-intellectual-property standpoint. Nonetheless, the Copyright Act of 1976 carves out a special mechanical-licensing framework for covers that does not apply to samples. *See id.*

without paying licensing fees that only more-established artists can afford.[8] Clearing a single sample can cost hundreds of thousands of dollars.[9] Losing a copyright infringement lawsuit for failing to clear a sample can cost considerably more.[10]

Thankfully, the Copyright Act of 1976 (the "Act")[11] already provides a solution for sample-based music, albeit one that has been woefully underutilized. The fair use exception laid out in § 107 of the Act applies to transformative, socially valuable second uses, and music sampling often seems to be an appropriate example of such use.[12] Yet, despite sampling being an ostensibly suitable fair use candidate, litigants and courts have been reluctant to embrace sampling as fair use.[13] In 2017, the U.S. District Court for the Southern District of New York became the first court to rule in a defendant's favor on a non-parody fair use defense in the music sampling context.[14]

This Note will describe why more courts could, and should, embrace music sampling as a fair use of copyrighted material in the context of both sound recordings and musical works, for which the fair use analyses should be nearly identical.[15] Music sampling is a prime candidate for fair use in many instances, based on both the language of § 107 and fair use jurisprudence.[16] Moreover, a fair use exception for music sampling would not detract from the constitutional goals of U.S. copyright law. On the contrary, such an exception would serve to "promote the Progress of Science and useful Arts"[17] by allowing more musicians to create and share their art. In advancing these arguments, I draw comparisons between fair use in the music-sampling context and the visual-art context—

[8] *See id.* at 849-50.

[9] *See* Ness, *supra* note 4.

[10] *See* Peter Relic, *The 25 Most Notorious Uncleared Samples in Rap History*, COMPLEX (Apr. 22, 2013), http://www.complex.com/music/2013/04/the-25-most-notorious-uncleared-samples-in-rap-history/ [https://perma.cc/WAY8-GK89].

[11] For further discussion of the Copyright Act and a discussion of the fair use doctrine, see *infra* Part II.

[12] 17 U.S.C. § 107 (2012); *see generally* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1602-03 (1982).

[13] Importantly though, no case has expressly foreclosed the possibility that music sampling may fall under fair use. Even in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), in which Judge Guy issued his famous get-a-license-or-do-not-sample edict, the court's rejection of a de minimis exception expressly left the door open for a fair use argument. *Id.* at 801-02.

[14] *See* Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737, 749-52 (S.D.N.Y. 2017).

[15] *See infra* Part IV.

[16] *See id.*

[17] U.S. CONST. art. I, § 8, cl. 8.

where courts have been more accepting of creative borrowing as fair use.[18] Specifically, I compare music sampling to visual appropriation art.

Part II provides a basic introduction to copyright law with respect to music, the fair use doctrine, and the practices of music sampling and appropriation art, the knowledge of which is fundamental to understanding Parts III-V.[19] Part III analyzes a 2017 case that embraced music sampling as a fair use of copyrighted material.[20] Part IV provides a general, model approach to applying the fair use doctrine in music-sampling cases, drawing on Parts I-III.[21] Finally, Part V concludes by summarizing Parts I-IV, circling back to some of the policy arguments that make this topic so important.[22]

II. BACKGROUND

To understand why music sampling should often constitute fair use, one must first understand the fundamentals of copyright law, the historical relationship between copyright law and music sampling, and the basics of the fair use doctrine—including fair use's application to creative borrowing in other contexts. These subjects form the proper analytical framework for applying the fair use doctrine to music sampling.

A. History

i. Foundations of Copyright Law with Respect to Music

The United States Constitution, Article I, Section 8, Clause 8 "empowers Congress to legislate copyright and patent statutes."[23] The aim of this clause, known as the Copyright Clause, is to incentivize authors to create by granting authors limited "monopoly right[s]" over their creations.[24] The underlying goal of this incentive scheme is explicit in the Copyright Clause, namely, to "promote the Progress of Science and the useful Arts."[25] Over time the common law fleshed out the requirements for copyright protection, and now the threshold requirements for copyrightability are spelled out in § 102(a) of the Act: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[26]

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[18] *See, e.g.*, Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

[19] *See infra* Part II.

[20] *See infra* Part III.

[21] *See infra* Part IV.

[22] *See infra* Part V.

[23] MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 6 (6th ed. 2014).

[24] *Id.*

[25] U.S. CONST. art. I, § 8, cl. 8.

[26] 17 U.S.C. § 102(a) (2012).

As far as the music industry is concerned, there are two main forms of copyrightable subject matter: musical works and sound recordings.[27] A musical work includes "both the words of a song and its instrumental component," and might be fixed, for instance, in the medium of "musical notation written on paper."[28] A sound recording, on the other hand "is a captured performance," and might be fixed, for example, in a phonorecord or digital audio file.[29] In the music context, any medium in which a sound recording is embodied will most often contain that sound recording's underlying musical work as well.[30] In other words, when a consumer listens to her favorite song via a digital audio file, both a sound recording copyright *and* its underlying musical work copyright are fixed in that digital audio file.

"[T]he owner of a sound recording copyright enjoys different exclusive rights than the copyright owner of the musical . . . work captured in the sound recording."[31] Specifically, "the copyright owner of a sound recording may not control its performance, while the copyright owner of a . . . musical . . . work enjoys a full performance right."[32] This Note focuses on two exclusive rights copyright owners of musical works and sound recordings hold in common: "(1) to reproduce the copyrighted work in copies or phonorecords," and "(2) to prepare derivative works based upon the copyrighted work."[33] The former is self-explanatory, but the phrase "derivative work" is a term of art. The Act defines "derivative work" as "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."[34] The discussion of music sampling and copyright law that follows draws on the above concepts, terminology, and aims of the copyright regime.

ii. Music Sampling and Copyright

Music sampling has been defined as mechanically or digitally using "a portion of a previous sound recording in a new recording."[35] Importantly, sampling also encompasses copying sound in order to use the lyrics or pattern of notes from an underlying musical work.[36] In this Note, "sampling" refers to both of these

[27] *See* LEAFFER, *supra* note 23, at 141-44.

[28] *Id.* at 141.

[29] *Id.* at 142.

[30] *See id.*

[31] *Id.*

[32] *Id.* (citing 17 U.S.C. § 114 (2012)).

[33] 17 U.S.C. § 106 (2012).

[34] *Id.* § 101.

[35] Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 275 (1996) (quoting Robert G. Sugarman & Joseph P. Salvo, *Whose Rights? Sampling Gives Law a New Mix,* NAT'L L.J., Nov. 11, 1991, at 21).

[36] Professor Gordon was instrumental in helping me articulate this thought in this way.

approaches.[37] The used portion of existing copyrighted material, called a "'sample,' is generally short, ranging from less than one second to approximately twenty-five seconds."[38] Sampling empowers "artists to isolate . . . specific aspects, and even particular instruments, [from] an existing musical recording."[39] Once extracted, an artist can "alter" a sample's "sonic characteristics" by, for example, changing its pitch or tempo, or putting it on a continuous loop.[40] The artist can then "cut and paste" the sample into a new song in which the sample may function like an instrument.[41] As one popular example, consider Avicii's 2011 hit "Levels," which incorporates a vocal sample from Etta James's 1962 single, "Something's Got a Hold on Me."[42]

Sampling can "reduce studio and musician costs, and it can relieve the pressure placed on producers and sound engineers to achieve the 'right' sound."[43] That much is true *if* the artist can afford a license. Because sampling amounts to literal copying of a sound recording, and by extension, at least in the music context, often amounts to literal copying of a musical work, sample-based musicians have faced intellectual-property challenges since sampling's inception.[44] One view, exemplified by the Sixth Circuit, is that sampling is clear-cut infringement of a copyright holder's reproduction and derivative work rights, leaving a sample-based musician with no real choice but to clear a sample through licensing.[45]

In the Ninth Circuit, however, courts have recognized at least one limited safe haven for sample-based musicians. In *Newton v. Diamond*, the United States Court of Appeals for the Ninth Circuit held that a de minimis exception applies to claims of infringement of a copyrighted musical work.[46] In that case, the defendants, the Beastie Boys, had sampled a three-note flute sequence for which they obtained a license in the sound recording but not the underlying musical

[37] Note that not all sound recordings that a musician might sample contain underlying musical works. For instance, a musician might sample a sound recording of animal vocalizations recorded in nature. Such a recording may not contain an underlying composition. For purposes of this Note, I refer to the digital sampling of "songs," i.e., sound recordings of popular songs, which *do* contain underlying musical works.

[38] Szymanski, *supra* note 35, at 276 (citing E. Scott Johnson, Note, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 2 J.L. & TECH. 273, 274 (1987)).

[39] *Id.* (alteration in original).

[40] *Id.*

[41] *Id.* at 277.

[42] *See Avicii's 'Levels' Sample of Etta James's 'Something's Got a Hold on Me,'* WHO SAMPLED, https://www.whosampled.com/sample/111866/Avicii-Levels-Etta-James-Something%27s-Got-a-Hold-on-Me/ [https://perma.cc/F4UG-48V9].

[43] Szymanski, *supra* note 35, at 276 (citing Johnson, *supra* note 38, at 275).

[44] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 877 (9th Cir. 2016); *see also* Szymanski, *supra* note 35, at 273.

[45] *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801-02 (6th Cir. 2005).

[46] Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004).

work.[47] Thus, the case concerned alleged infringement of the musical work copyright via digital sampling and did not concern the sound recording copyright.[48] The court reasoned that "if the average audience would not recognize the appropriation" because it is "meager and fragmentary," repurposing of a musical work via sampling can be de minimis, and therefore non-infringing.[49] In 2016, the same court held that the de minimis exception also applies to claims of infringement of a copyrighted sound recording.[50]

A finding of de minimis copying appears to be the only way to absolve an artist who has not obtained the necessary license(s) prior to sampling, and the de minimis exception remains unavailable in the Sixth Circuit, as noted above.[51] But litigants and the courts have neglected an entire section of the Act. Whether the fair use doctrine could similarly absolve sample-based artists remains a more open question.

B. The Fair Use Doctrine

Section 107 of the Act provides that certain "fair" uses of copyrighted material are "not an infringement of copyright."[52] In addition to providing a short, non-exhaustive list of purposes that indicate a use may be "fair," Congress included four factors for courts and the public to consider.[53] In numerical order, the four factors are: (1) the purpose and character of the use, including its commerciality; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used relative to the copyrighted work; and (4) the use's effect on the potential market for or value of the copyrighted work.[54] The Supreme Court has indicated that no single factor is dispositive, and has generally avoided assumption in the fair use context — this is to say that fair use categorically entails a very fact-specific inquiry.[55]

The first factor inquiry asks whether the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is '*transformative*.'"[56] Since its appearance in *Campbell v. Acuff-Rose Music, Inc.*, the transformative use doctrine "has come to dominate fair use

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[47] *Id.* at 1190.

[48] *See id.*

[49] *Salsoul*, 824 F.3d at 878 (describing the court's earlier application of the de minimis exception in *Newton*, 388 F.3d at 1193).

[50] *Salsoul,* 824 F.3d at 887.

[51] *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th Cir. 2005).

[52] 17 U.S.C. § 107 (2012).

[53] *Id.*

[54] *Id.*

[55] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

[56] *Id.* at 579 (emphasis added).

jurisprudence."[57] Paradigmatic examples of transformative use in the major fair use cases include the parodic alteration of lyrics from a famous romantic ballad,[58] and the reprinting, in reduced size, of old Grateful Dead concert posters in a book about the Grateful Dead.[59]

The other prong of the first factor inquiry is commerciality.[60] If a work is commercial, that commerciality cuts against fair use.[61] However, courts "generally give[] little substantive weight" to commerciality—in fact, the "bulk of decisions finding fair use have involved commercial, rather than noncommercial, uses."[62] As transformativeness increases, "the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[63] Transformativeness truly is paramount.

Factor two "directs attention to the nature of the copyrighted work."[64] The second factor "generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."[65] Music is at the core of copyrightable subject matter, meaning factor two will almost invariably cut against the defendant in cases concerning the defendant's use of the plaintiff's music.[66]

The third factor "directs us to examine the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[67] Under factor three, copying may not be excused simply because it is insubstantial with respect to the would-be infringing work; "as Judge Learned Hand cogently remarked, 'no plagiarist can excuse the wrong by showing how much of his work he did not pirate.'"[68] Though section 107 'directs a comparison between the amount taken and the *copyrighted* work as a whole,' courts sometimes do apply factor three to examine the portion used relative to the overall size of the *accused's* work.[69] Because factor three concerns the amount and substantiality of the portion used, it is necessarily a highly fact-specific inquiry.

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[57] PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.2.2, at 12:33 (3d ed. 2005 & Supp. 2019).

[58] *Campbell*, 510 U.S. at 569-71.

[59] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 607 (2d Cir. 2006).

[60] 17 U.S.C. § 107 (2012).

[61] *See Campbell*, 510 U.S. at 579.

[62] GOLDSTEIN, *supra* note 57, at 12:28.

[63] *Campbell*, 510 U.S. at 579.

[64] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985).

[65] *Id.*

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

[67] *Harper & Row*, 471 U.S. at 564.

[68] *Id.* at 565.

[69] GOLDSTEIN, *supra* note 57, at 12:55 (citing *Harper & Row*, 471 U.S. at 565-66) (emphasis added).

Factor four "take[s] account not only of [market] harm to the original but also of harm to the market for derivative works."[70] One method courts use to assess market effect is to ask if the contested use is complementary to the protected work, which is more likely to be fair use, as opposed to a market substitute for the protected work, which is less likely to be fair use.[71] An empirical study of courts' practical approaches to the fourth factor concludes that "courts have very rarely made specific factual findings under the factor. Instead, the vast majority of the opinions simply conducted what amounted to little more than an unstructured and conclusory rule-of-reason analysis."[72]

The Supreme Court has stated that factors one and four are the most integral to fair use analysis, weighing more heavily than factors two or three.[73] Professor Barton Beebe determined that "of the 141 [analyzed] opinions that found that factor four disfavored fair use, 140 found no fair use."[74] Another important aspect of the fair use defense is that "courts have consistently treated fair use as an affirmative defense," which puts the burden of establishing fair use on the alleged infringer.[75] Additionally, courts remain mindful of policy concerns in applying the four factors, and fair use can excuse an otherwise-infringing use if the "social benefit" outweighs the loss to the copyright owner[76] and if some other circumstance, such as market failure, is present.[77]

With respect to music sampling, the Act could be read to suggest that courts would be hostile to a fair use defense in all jurisdictions, at least regarding sound recording copyrights. Section 114 leaves the sound-alike, or "replay"[78] avenue available to musicians who might otherwise choose to sample a sound recording.[79] In other words, an artist who wishes to sample a snippet of a song

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[70] *Campbell*, 510 U.S. at 590 (alteration in original) (quoting *Harper & Row*, 471 U.S. at 568).

[71] Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (citing Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 518 (7th Cir. 2002)).

[72] Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 618 (2008).

[73] *See, e.g.*, *Campbell*, 510 U.S. at 579 (stating that works deemed transformative under factor one "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright"); *Harper & Row*, 471 U.S. at 566 ("Th[e] last factor is undoubtedly the single most important element of fair use"); *see also* Beebe, *supra* note 72, at 584.

[74] Beebe, *supra* note 72, at 617 (alteration in original).

[75] GOLDSTEIN, *supra* note 57, at 12:8.

[76] *Id.* at 12:5.

[77] *See* Gordon, *supra* note 12, at 1615.

[78] *See* Computer Music, *11 Golden Rules if You Want to Replay a Sample*, MUSICRADAR (July 20, 2017), https://www.musicradar.com/tuition/tech/11-sample-replay-tips-555535 [https://perma.cc/V8YA-C8YJ] ("'[R]eplays' are essentially super-accurate cover versions that are practically indistinguishable from the real thing").

[79] 17 U.S.C. § 114(b) (2012) ("The exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that

can instead replay that snippet herself, or hire a session musician to do so, without any risk of infringing on the sound recording copyright for that song.[80] Thus, when a defendant raises a fair use defense to justify her sampling, and the court asks as part of its fair use analysis, "Did the Defendant need to do what she did to achieve her goal/purpose?," the answer would appear to be, "No," cutting against fair use.[81] That example is specific to sound recordings because § 114 does not apply to musical works.[82] If the musical work is the copyright at issue, and the court asks the same question regarding the defendant's alternatives to sampling in order to accomplish her goal, the answer is no longer a clear "No." Any recreation of a copyrighted pattern of notes or lyrics that is sufficiently similar to the original appears infringing of that musical work copyright, regardless of whether the recreation occurred via digital sampling or any other means.[83] In the sound recording-replay example, though, the sampling musician ostensibly has an easy non-infringing alternative to accomplish her artistic vision, namely, the replay or sound-alike.[84] This seems to suggest that it is more difficult to prevail on a fair use defense for a sound recording than a musical work. However, this Note goes on to refute the argument that the Act suggests a general hostility toward sampling as fair use with respect to sound recordings.[85]

To provide further examples of how courts have applied fair use analysis to subject matter closely related to music sampling, and similarly involving creative borrowing, I now turn to notable fair use cases involving the visual arts technique known as appropriation art.

i. Fair Use and Appropriation Art

Having discussed the four factors of fair use in detail, let us now consider an artistic parallel to music sampling in visual art, which courts have deemed on more than one occasion to be fair use.[86] In visual art terms, appropriation art is "the intentional borrowing, copying, and alteration of existing images and objects."[87] One might consider collage, "an abstract form of art in which photographs, pieces of paper, newspaper cuttings, string, etc. are placed in

consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording").

[80] *See* Holz, *supra* note 3; *see also* MUSICRADAR, *supra* note 78.

[81] *See, e.g.*, Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978).

[82] 17 U.S.C. § 114 (titled "Scope of exclusive rights in *sound recordings*") (emphasis added).

[83] *See* 17 U.S.C. § 106 (2012). *But see infra* Section III.B.

[84] *See* Holz, *supra* note 3; *see also* MUSICRADAR, *supra* note 78.

[85] *See infra* Part IV.

[86] *See infra* text accompanying notes 92-103.

[87] *Pop Art: Appropriation*, MOMALEARNING, https://www.moma.org/learn/moma_learning/themes/pop-art/appropriation/ [https://perma.cc/3ZAB-E7WD].

juxtaposition and glued to the pictorial surface,"[88] the archetypal work of appropriation art. Appropriation art is an important and well-respected style of art, counting Andy Warhol, Roy Lichtenstein, and Robert Rauschenberg among its more famous practitioners.[89]

What appropriation art does with physical objects and images is analogous to what music sampling does with music and sound. Both involve intentional appropriation in an artistic medium and aim to create socially valuable secondary uses. One commentator on the Beastie Boys' influential hip hop record, *Paul's Boutique*, opined that the album is "universally recognized as a landmark achievement, a masterpiece of rhyme and *collage* that changes in sampling law had insured could never be repeated."[90] While critics might attempt to distinguish between musical appropriation and visual appropriation for purposes of fair use, one would be hard-pressed to articulate a principled distinction. Because courts have regarded certain instances of appropriation art as fair use,[91] so too should courts regard certain acts of music sampling as fair use. For fair use purposes, there is no principled distinction between the two.

Cariou v. Prince remains perhaps the most well-known, influential, and controversial case of appropriation art in copyright law.[92] In *Cariou*, artist Richard Prince "altered and incorporated several of [Patrick] Cariou's . . . photographs into a series of paintings and collages."[93] Prince never sought permission to use Cariou's photographs.[94] The court reasoned through each of the four fair use factors, but repeatedly emphasized the first-factor transformativeness inquiry and its influence on the remaining factors.[95] Summarizing its central conclusion, the court stated that while "Prince used key portions of certain of Cariou's photographs . . . we determine that in twenty-five of his artworks, Prince transformed those photographs into something new and different."[96] Ultimately, the Court of Appeals for the Second Circuit determined that a majority of Prince's works constituted fair use.[97] "The court found that twenty-five of Prince's images 'g[a]ve Cariou's photographs a new *expression*, and employ[ed] new aesthetics with creative and communicative results distinct from Cariou's.'"[98]

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[88] *Collage*, OXFORD ENG. DICTIONARY (2d ed. 1989).

[89] *See* MOMALEARNING, *supra* note 87.

[90] Julian Azran, *Bring Back the Noise: How* Cariou v. Prince *Will Revitalize Sampling*, 38 COLUM. J.L. & ARTS 69, 85 (2014) (quoting DAN LEROY, THE BEASTIE BOYS' PAUL'S BOUTIQUE (33 1/3) 4 (2006)) (emphasis added).

[91] *See, e.g.*, Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

[92] *See id.*

[93] *Id.* at 698 (alteration in original).

[94] *Id.* at 699.

[95] *See id.* at 705-10.

[96] *Id.* at 710.

[97] *Id.* at 695.

[98] Azran, *supra* note 90, at 97 (quoting *Cariou*, 714 F.3d at 708) (emphasis added).

A similar factual situation to *Cariou* had arisen in *Blanch v. Koons*.[99] In that case, artist Jeff Koons incorporated a version of a photograph he found in a fashion magazine, without obtaining a license, into a collage that superimposed various images over a pastoral landscape.[100] Andrea Blanch, the author and copyright owner of the photograph, accused Koons of copyright infringement.[101] The court determined that Koons' collage made fair use of the photograph, reasoning, importantly, that a finding of transformativeness bled over into the other factors of the fair use analysis.[102] In discussing transformativeness, the majority characterized Koons' work as adapting a fashion photograph from a "lifestyles" magazine "with 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."[103]

Note, however, that not every appropriation art case results in a finding of fair use. In another case involving Jeff Koons, Koons created a sculpture that replicated a postcard photograph which depicted people holding German Shepherd puppies.[104] The court rejected Koons' fair-use parody defense, finding no parody of that particular photograph, and holding market substitution for the postcard was likely.[105]

Nonetheless, *Cariou* and *Blanch* serve as models for music sampling as fair use. Both cases show how a finding of transformativeness can dominate a fair use analysis in the appropriation context.[106] Importantly, while the court in *Blanch* seemed to hold that transformative "purpose" was necessary to find fair use,[107] the *Cariou* court expressly found no such purpose, nonetheless holding that transformative "expression" was sufficient.[108] Just as the appropriation artist may dissect an existing photograph and re-contextualize part of it among other images, one who employs music sampling dissects an existing song and re-contextualizes part of it among other music. Because appropriation art and music sampling are so conceptually similar, the aforementioned cases have paved the way for future courts to find that music sampling can often qualify as fair use. To fully understand what a fair use analysis in a music-sampling case can look like, consider the novel approach the court took in the following case from 2017.

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[99] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

[100] *Id.* at 246-49.

[101] *Id.* at 246.

[102] *Id.* at 257-59.

[103] *Id.* at 253 (emphasis added).

[104] Rogers v. Koons, 960 F.2d 301, 304-05 (2d Cir. 1992).

[105] *See id.* at 310, 312.

[106] *See generally* Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013); *Blanch*, 467 F.3d at 256.

[107] *Blanch*, 467 F.3d at 251.

[108] *Cariou*, 714 F.3d at 706.

III. A CONTEMPORARY PERSPECTIVE ON MUSIC SAMPLING AND FAIR USE: *ESTATE OF SMITH V. CASH MONEY RECORDS, INC.*

A. Background

On May 30, 2017, the United States District Court for the Southern District of New York found an instance of music sampling to be fair use, issuing what may prove to be a watershed opinion for unlicensed music sampling.[109] In *Estate of Smith v. Cash Money Records, Inc.*, the estate of jazz musician James "Jimmy" Smith sued Grammy Award-winning rapper Aubrey "Drake" Graham, Drake's label, and others, for infringement of Smith's musical work copyright.[110] The suit stemmed from Drake's sampling of about thirty-five seconds from Smith's 1982 song "Jimmy Smith Rap" for use in Drake's own single, "Pound Cake / Paris Morton Music 2."[111] Drake obtained a license for the sound recording of "Jimmy Smith Rap," but not for the underlying composition.[112] The portion Drake sampled, like all of "Jimmy Smith Rap," was entirely spoken-word.[113] Drake rearranged and, importantly, *deleted* some of Smith's original lyrics.[114] Both sets of lyrics are reprinted below. The full lyrics to "Jimmy Smith Rap" are as follows:

> Good God Almighty, like back in the old days
>
> You know, years ago they had the A & R men to tell you what to play, how to play it and you know whether it's disco rock, but we just told Bruce that we want a straight edge jazz so we got the fellas together Grady Tate, Ron Carter, George Benson, Stanley Turrentine.
>
> Stanley was coming off a cool jazz festival, Ron was coming off a cool jazz festival. And we just went in the studio and we did it.
>
> We had the champagne in the studio, of course, you know, compliments of the company and we just laid back and did it.
>
> Also, Grady Tate's wife brought us down some home cooked chicken and we just laid back and we was chomping on chicken and having a ball.
>
> ***Jazz is the only real music that's gonna last.*** All that other bullshit is here today and gone tomorrow. But jazz was, is and always will be.
>
> We may not do this sort of recording again, I may not get with the fellas again. George, Ron, Grady Tate, Stanley Turrentine.

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[109] Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737, 752 (S.D.N.Y. 2017).

[110] *Id.* at 743-44.

[111] *Id.* at 743.

[112] *Id.*

[113] *Id.* at 742-43.

[114] *Id.* at 743.

> So we hope you enjoy listening to this album half as much as we enjoyed playing it for you. Because we had a ball.[115]

The sample Drake used in the intro to "Pound Cake / Paris Morton Music 2" consisted of the following:

> Good God Almighty, like back in the old days.
>
> You know, years ago they had the A & R men to tell you what to play, how to play it and you know whether it's disco rock, but we just went in the studio and we did it.
>
> We had champagne in the studio, of course, you know, compliments of the company, and we just laid back and did it.
>
> So we hope you enjoy listening to this album half as much as we enjoyed playing it for you. Because we had a ball.
>
> ***Only real music is gonna last***, all that other bullshit is here today and gone tomorrow.[116]

Drake abridged or omitted several lines of Smith's original, and reordered others.[117] The most crucial change, in the court's view, was Drake's truncating the original line "Jazz is the only real music that's gonna last," to "Only real music is gonna last."[118] Crediting the transformativeness of Drake's appropriation, the court granted Drake's motion for summary judgment, finding fair use of the unlicensed musical work alongside the licensed sound recording sample.[119]

B. Analysis – An In-Depth Look at the Court's Fair Use Approach in Estate of Smith

What makes *Smith* so significant is that no other case holds that non-parodic music sampling, whether of a musical work or a sound recording, falls under fair use. *Newton* and its Ninth-Circuit progeny found no infringement under a de minimis rationale, so those cases never had occasion to address fair use.[120] Similarly, in *Bridgeport Music, Inc. v. Dimension Films*, the lower court found no infringement under a de minimis rationale, so the Court of Appeals for the

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[115] *Id.* at 742 (emphasis added).

[116] *Id.* at 743 (emphasis added).

[117] *See id.* at 749-50.

[118] *Id* at 749.

[119] *Id.* at 752.

[120] Recall that in *Newton v. Diamond*, 388 F.3d 1189, 1190 (9th Cir. 2004) and *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016), the Ninth Circuit found only de minimis copying, meaning the defendants in those cases were deemed not to have infringed any of the plaintiffs' copyrights, obviating the need to reach any other argument the defendants may have raised, such as fair use.

Sixth Circuit did not consider fair use on appeal.[121] Though the Sixth Circuit explicitly authorized the district court to consider a fair use defense on remand, the case settled, leaving fair-use aficionados to speculate.[122]

To predict whether *Smith* might usher in a new line of cases wherein defendant music-samplers seek refuge under the fair use defense, one should consider the ways in which Judge William H. Pauley III's fair use analysis in the music-sampling context of that case was correct and the ways in which it may have been incorrect. Though *Smith* dealt with a musical work copyright implicated by digital sampling, it is not clear how the court's fair use analysis would have differed had the sound recording been at issue rather than the composition.[123] In finding fair use of the Plaintiffs' musical work, the court first noted that courts should "preclude a finding of infringement where '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.'"[124] The court then systematically applied the four fair use factors.[125]

i. Factor One

Under factor one, which the court referred to as "[t]he heart of the fair use inquiry," the court never explicitly considered whether Drake's use of the sample was for commercial purposes.[126] "Pound Cake / Paris Morton Music 2" was undoubtedly a commercial work, and while courts almost never regard commerciality as dispositive under factor one, it is still odd that the court made no mention of commerciality at all.[127] Even though courts generally give little substantive weight to commerciality, the Act expressly directs courts to consider a work's "commercial nature" in fair use analyses.[128]

The bulk of the court's reasoning under factor one dealt with transformativeness.[129] Drake advanced three arguments supporting

[121] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 805 (6th Cir. 2005). One might consider whether the bright-line approach adopted in *Bridgeport* actually leaves room for a meaningful fair use defense in the Sixth Circuit, despite the court's express statement that the fair use defense remained available.

[122] Agreed Order of Dismissal at 1, Bridgeport Music, Inc. v. 11C Music, No. 3:01-00412 (M.D. Tenn. Jan. 17, 2006), ECF No. 676.

[123] For a more detailed discussion of this idea, see *infra* Part IV.

[124] *Estate of Smith*, 253 F. Supp. 3d at 748 (quoting Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 141 (2d Cir. 1998)).

[125] *Estate of Smith*, 253 F. Supp. 3d at 748-52.

[126] *Id.* at 749-51 (quoting Davis v. The Gap, Inc., 246 F.3d 152, 174 (2d Cir. 2001)).

[127] Drake, *Pound Cake / Paris Morton Music 2*, *on* NOTHING WAS THE SAME (DELUXE) (Cash Money Records 2013) SPOTIFY, https://open.spotify.com/album/2gXTTQ713nCELgPOS0qWyt [https://perma.cc/XH5K-CE4D] (the song has been streamed on Spotify over 129 million times as of Nov. 20, 2019); *see* GOLDSTEIN, *supra* note 57, at 12:28.

[128] 17 U.S.C. § 107 (2012); GOLDSTEIN, *supra* note 57, at 12:28.

[129] *Estate of Smith*, 253 F. Supp. 3d at 749-51.

transformative use.[130] First, he argued that his new song "fundamentally alter[ed] the message of the original work . . . by editing the recording from 'Jazz is the only real music that's gonna last' to 'Only real music is gonna last,'" and that he had thus "transformed Jimmy Smith's dismissive comment into a statement on the relevance and staying power of 'real music,' regardless of genre."[131] Second, Drake argued that by removing references to Smith's record, Drake made the words apply to the making of his own album rather than Smith's.[132] Drake's third transformativeness argument was "that the addition of background music, the rearrangement of some words, and the placement of the recording in a seven-minute hip hop track render[ed] the[] use transformative."[133] The court rejected the latter two arguments as not being sufficiently transformative in purpose, though it acknowledged that these arguments did indicate transformative *form*.[134] The court agreed with Drake's first argument, however, finding that alteration of the "key" phrase "Jazz is the only real music that's gonna last" to "Only real music is gonna last" made the sample's *purpose* transformative, and that the first factor thus supported a finding of fair use.[135]

The court was correct to weigh transformativeness so greatly, in light of Supreme Court and Second Circuit precedent.[136] Thus, its conclusion that Drake's changing the line "Jazz is the only real music that's gonna last" to "Only real music is gonna last" made the sample's purpose transformative comports with precedent and reason.[137] The Second Circuit expressly deemed transformative purpose a means of achieving transformativeness in *Blanch*,[138] and the statement "Only real music is gonna last" clearly differs in meaning from the statement "Jazz is the only real music that's gonna last," evincing Drake's new purpose.[139] While the purpose of Smith's original statement was to extol the supremacy of jazz over other genres, Drake's statement speaks to the lasting power of "real music," irrespective of its genre.[140]

Further, the court was right to reject Drake's second argument for transformative purpose: that by removing references to Smith's album, Drake

[130] *Id.* at 749.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 749-50.

[135] *Id.* at 750-51.

[136] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).

[137] *See Estate of Smith*, 253 F. Supp. 3d at 750-51; *see also* Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006).

[138] *See Blanch*, 467 F.3d at 253.

[139] *See Estate of Smith*, 253 F. Supp. 3d at 750-51.

[140] *See id.* at 749.

made the lyrics apply to the making of Drake's own album rather than Smith's.[141] The court was correct to reject this argument because the sampled lines describing Smith's recording process, if taken to likewise describe Drake's recording process, would serve only to recapitulate Smith's purpose for those lyrics. In short, the purpose of those specific lyrics remained the same: describing a recording process.[142] The court called Drake's appropriation of these lyrics "literally transformative in the sense that [Drake] does not appropriate ['Jimmy Smith Rap'] verbatim."[143] This is odd, though, because the lyrics Drake sampled regarding the recording process *were* sampled verbatim.[144]

The court diverged from proper course under factor one by narrowing the transformativeness doctrine to concern only transformative *purpose* or *message*.[145] Under *Cariou*, appropriation that "'add[s] something new' and present[s] [a plaintiff's work] with a fundamentally different aesthetic" weighs in favor of fair use.[146] In *Cariou*, it did not matter that Richard Prince explicitly stated that he had no intention of "creat[ing] anything with a new meaning or a new message."[147] The *Cariou* court reasoned that some of Prince's appropriation of Cariou's photographs was nonetheless transformative in expression.[148]

In light of *Cariou*, then, Drake's third argument for transformativeness probably should have prevailed as well.[149] Drake's recontextualization of Smith's voice and lyrics with "background music, the rearrangement of some words, and . . . placement . . . in a seven-minute hip hop track"[150] rendered Drake's use "something new . . . with a fundamentally different aesthetic."[151] This recontextualization rationale should hold in other cases of music sampling, mainly because it describes how music sampling is actually practiced and the creativity that music sampling entails.[152] And from a stare decisis standpoint,

[141] *Id.* at 749-50.

[142] *Id.*

[143] *Id.* at 750 (alteration in original).

[144] *See id.* at 742-43.

[145] *See id.* at 749-51; *see also* Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013).

[146] *Cariou*, 714 F.3d at 708 (alteration in original) (quoting Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 114 (2d Cir. 1998)).

[147] *Id.* at 707 (alteration in original).

[148] *Id.* at 706-08.

[149] *See Estate of Smith*, 253 F. Supp. 3d at 749; *see also Cariou*, 714 F.3d at 706-08.

[150] *Estate of Smith*, 253 F. Supp. 3d at 749.

[151] *Cariou*, 714 F.3d at 708 (citing *Leibovitz*, 137 F.3d at 114).

[152] *See generally* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 552 (2006); *compare* CYPRESS HILL, *Hits from the Bong, on* BLACK SUNDAY (Ruffhouse Records 1993), *with* DUSTY SPRINGFIELD, *Son of a Preacher Man, on* DUSTY IN MEMPHIS (Atlantic Records 1968).

Drake's recontextualization rationale in no way contradicts Supreme Court precedent and is entirely in line with the Second Circuit's approach in *Cariou*.[153]

ii. Factor Two

Under factor two, the nature of the copyrighted work, the court reasoned that music falls under the core of creative expression that copyright is meant to protect, but that the second factor is of limited value when the defendant's use is for a transformative purpose.[154] Thus, the court's analysis of factor two conforms with precedent.[155] Factor two remains the least controversial or contested within the fair use doctrine, leaving little if anything to say regarding its application here.[156]

iii. Factor Three

For factor three, the court reasoned that the commentary drawn from "Jimmy Smith Rap," in tandem with the "key phrase" concerning "real music," "serve[d] to drive the point home . . . that many musicians make records in similar ways (e.g. with the help of A & R experts or the stimulating effects of champagne), but that only 'real' music—regardless of creative process or genre—will stand the test of time."[157] The court accordingly found that the amount Drake used was reasonable in proportion to his transformative purpose, and appropriately found that factor three favored fair use.[158]

The court's approach is cogent, but factor three inevitably raises some complexities.[159] Because the third factor has undergone a change over time, from a focus on the amount and substantiality of the copied portion solely with respect to the *copyrighted* work, to an additional emphasis on the copied portion with respect to the *defendant's* work on the whole, the state of the law is somewhat unclear under the third factor.[160] Given this uncertainty, it would appear the court's take in *Smith* was mostly on point.[161] The court focused on "the amount taken by Defendants . . . in proportion to the needs of the intended transformative use," quoting in its analysis *Blanch* and *Cariou*.[162]

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[153] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985); *Cariou*, 714 F.3d at 698-99.

[154] *Estate of Smith*, 253 F. Supp. 3d at 751 (citing Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 611 (2d Cir. 2006)).

[155] *See, e.g.*, *Campbell*, 510 U.S. at 586.

[156] *See generally* GOLDSTEIN, *supra* note 57, at 12:45-54; Beebe, *supra* note 72, at 610-15.

[157] *Estate of Smith*, 253 F. Supp. 3d at 751-52 (alteration in original).

[158] *Id.*

[159] *See id.*; *see also Campbell*, 510 U.S. at 586-589.

[160] *See supra* text accompanying notes 67-69.

[161] *See supra* text accompanying notes 68-69; *see also Estate of Smith*, 253 F. Supp. 3d at 751-52.

[162] *Estate of Smith*, 253 F. Supp. 3d at 751.

One rather puzzling remark is that the court, in its factor-three analysis, refers to Drake's use as "commentary," whereas the court makes no reference to Drake's use as "commentary" under factor one.[163] Given that "comment[ary]" is explicitly referenced in the statutory preamble to § 107 and has been a time-tested haven for fair use in the courts,[164] it is a bit odd that the court would not discuss Drake's use as "commentary" when addressing factor one, the purpose and nature of the use, if the court did consider Drake's use "commentary."[165] The court's opaque reference to the use as "commentary" under factor three raises the question of what exactly it intended by using that descriptor.[166]

iv. Factor Four

The court noted that the fourth factor, the use's effect on the potential market for or value of the copyrighted work, was "undoubtedly the single most important element of fair use."[167] The court also remarked that the "fourth factor is . . . closely linked to the first, in the sense that 'the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original.'"[168] The court then found that the target audience for "Jimmy Smith Rap" was "sharply different" than the target audience for Drake's track and that the plaintiffs had made no efforts to license derivative uses of "Jimmy Smith Rap."[169] Those findings, alongside the "highly transformative" nature of Drake's use and the absence of evidence in the record suggesting market usurpation, prompted the conclusion that factor four favored Drake.[170] The court then concluded that the four factors, considered "in light of the goals of copyright law and the facts in the record," led to a finding of fair use.[171]

Under factor four, the court largely stuck to precedent, punctuating its analysis with the logical conclusion that Drake's use would not substitute in the market for "Jimmy Smith Rap" or its derivatives.[172] One wrinkle is that the court called factor four "undoubtedly the single most important element of fair

[163] *Id.* at 749-52.

[164] *See, e.g.*, *Campbell*, 510 U.S. 569; Katz v. Google, 802 F.3d 1178, 1183 (11th Cir. 2015); Equals Three, LLC v. Jukin Media, Inc., 139 F. Supp. 3d 1094 (C.D. Cal. 2015); *see also* 17 U.S.C. § 107 (2012).

[165] *See Estate of Smith*, 253 F. Supp. 3d at 749-52.

[166] *See id.*

[167] *Id.* at 752 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)).

[168] *Id.* (quoting Authors Guild v. Google, Inc., 804 F.3d 202, 223 (2d Cir. 2015)); Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 145 (2d Cir. 1998).

[169] *Estate of Smith*, 253 F. Supp. 3d at 752.

[170] *Id.*

[171] *Id.*

[172] *See id.* (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994)); *Castle Rock*, 150 F.3d at 145).

use," after having referred to factor one as "[t]he heart of the fair use inquiry."[173] Other commentators have remarked on the potential tension where courts prioritize both factor one and factor four.[174] *Harper & Row Publishers, Inc. v. Nation Enters.,* the Supreme Court case that first stressed the importance of factor four, has not been overruled.[175] That said, invoking the near-controlling importance of both the first and fourth factors in the same opinion as the court did in *Smith* seems inadvisable, as the two may not always coincide.[176]

The court grounded its fourth-factor reasoning in the fact that the target audience for "Jimmy Smith Rap" was "sharply different" than the target audience for Drake's track, and that the plaintiffs had made no efforts to license derivative uses of "Jimmy Smith Rap."[177] Even if both those statements are true, one might reasonably question whether the *target* audience is the only population who matters under factor four, and whether plaintiffs' own efforts to license samples should matter under factor four.[178]

IV. MODEL APPLICATION OF FAIR USE FOR MUSIC SAMPLING CASES

Smith was a major milestone on the path to greater acceptance of music sampling as fair use. That being said, the court's analysis may have been deficient in some important respects. Later courts applying the exact same approach would not be utilizing the fair use doctrine and precedent to their full potential in cases of music sampling. Considering the factors in aggregate, music sampling could often be a great candidate for application of the fair use doctrine. This section provides a general, model approach to application of the fair use doctrine in music-sampling cases, drawing particularly on lessons from *Smith*, as well as from valuable precedent in the realm of visual appropriation art.[179] It begins with a look at a possible narrow distinction in the fair use analyses for musical work versus sound recording copyrights.

An important part of a court's overall fair use analysis is the question, "Did the Defendant need to do what she did to achieve her goal/purpose?" with an answer of "Yes" cutting in favor of fair use, and "No" cutting against fair use.[180] Recall also that "replaying" ostensibly provides an alternative to sampling a

[173] *See id.* at 749-52 (first quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985); and then quoting Davis v. The Gap, Inc., 246 F.3d 152, 174 (2d Cir. 2001)).

[174] *See* Beebe, *supra* note 72, at 583; *see also* GOLDSTEIN, *supra* note 57, at 12:32-33, 12:58.

[175] *Harper & Row*, 471 U.S. 539; *see also Campbell*, 510 U.S. at 585.

[176] *See* Beebe, *supra* note 72, at 583.

[177] *Estate of Smith*, 253 F. Supp. 3d at 752.

[178] For a discussion on fourth-factor issues, see *infra* Section IV.D.

[179] Note that any "general, model approach" to fair use will be inherently limited to some extent, because fair use is such a fact-specific inquiry. *See Campbell*, 510 U.S. at 577. Nonetheless, such a model has value as a starting point for courts.

[180] *See supra* text accompanying notes 78-81; *see, e.g.*, Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978).

sound recording, meaning a musician's choice to sample a recording seems to cut against fair use.[181] However, the mere fact that a sample-based musician theoretically could have replayed part of a sound recording rather than sampling it should not vitiate her fair use defense. Sampled artists' voices or instrumental tones may be so unique that even the best studio musician could not replicate them exactly.[182] A sample-based musician's artistic vision may hinge on repurposing those exact, unique sounds in her own track. Further, a sample-based musician may not be proficient vocally, or on the instrument she wishes to sample, and session musicians can be quite expensive.[183] Therefore, when courts ask as part of their fair use analyses in cases wherein the defendant opted to sample a sound recording rather than replay it, "Did the Defendant need to do it this way to achieve her goal/purpose?," the answer may actually be "Yes," weighing in favor of fair use.[184] This argument pertains to both sound recording *and* musical work copyrights. When courts inquire about alternative methods, a defendant's inability to purchase licenses due to limited financial resources[185] indicates that by sampling, the artist achieved her artistic vision the only way she could, weighing in favor of fair use. Ultimately then, it may be no more, or less, difficult to prevail on a fair use defense for a sound recording than a musical work, especially for defendants with limited financial resources.[186]

Having acknowledged an important wrinkle in the model fair uses analyses for sound recordings and musical works, the following subsections walk through the four statutory fair use factors. Importantly, the application of the four fair use factors should be the same regardless of whether a musical work or a sound recording is the copyright at issue, as explained in more detail below.

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[181] *See supra* text accompanying notes 83-84; *see also* Holz, *supra* note 3; MUSICRADAR, *supra* note 78.

[182] *See, e.g.*, David Cox, *Is Your Voice Trustworthy, Engaging or Soothing to Strangers?*, THE GUARDIAN (Apr. 16, 2015), https://www.theguardian.com/science/blog/2015/apr/16/is-your-voice-trustworthy-engaging-or-soothing-to-strangers [https://perma.cc/5CLH-QGAS] (describing "interactions between an array of different features from pitch to energy accumulated over time, which all combine to give each voice its unique fingerprint or signature"); *Five Guitarists Talk Tone Inspiration*, GUITAR.COM (Mar. 21, 2018), https://guitar.com/features/five-guitarists-spill-the-secrets-behind-their-tone/ [https://perma.cc/3STE-YFZ6] (discussing guitarists with "unique" guitar tones).

[183] *See* Szymanski, *supra* note 35, at 276 (citing Johnson, *supra* note 38, at 275) (discussing how sampling can "reduce studio and musician costs," and "relieve the pressure placed on producers and sound engineers to achieve the 'right' sound"); *see also Session Musicians – Know Your Rights*, MUSIC INDUS. INSIDE OUT (Apr. 18, 2015), https://musicindustryinsideout.com.au/session-musicians-know-rights/ [https://perma.cc/DD9B-KXP6] (noting the "standard rate" for session musicians in Australia is approximately 100 Australian dollars per hour, which is equal to about 72 U.S. dollars per hour).

[184] *See supra* Part I; *see, e.g.*, *Disney*, 581 F.2d at 758.

[185] *See supra* Part I.

[186] *See supra* Part I.

A. Factor One: Purpose and Character of the Use

With respect to factor one, sampling can vary in transformativeness based on how much of an existing song a musician samples, the specific elements a musician samples, the extent to which the sampled portion is altered in a new song, and the way in which the sample is accompanied by other music in a new song. Indeed, artists employing samples often make "something new, with a further purpose or different character, altering the [portion of the original work] with new . . . meaning[] or message."[187] This much is true whether the contested copyright is in a musical work, a sound recording, or even if both are contested—when an artist repurposes or manipulates the sounds of a preexisting recording, she likewise repurposes or manipulates the underlying lyrics or pattern of notes in the composition.

Consider a musician who, through sampling, uses the "minimal [amount] necessary to accomplish [her] … purpose;" such minimal use bespeaks transformativeness.[188] If a musician alters a sampled portion of a song by changing the tempo or pitch of the original, this adds to transformativeness.[189] If a new song has a different "theme, mood, [or] tone" than the song it samples,[190] or uses sampled lyrics to convey a different message in a different context than the lyrics did in the original song, the new song makes transformative use of its sample. Further, if a sampled portion of an existing song constitutes an "inconsequential portion" of a new song, the use is more likely to be transformative.[191] Moreover, if the sample fits into a new song among other music, and is played simultaneously with other sounds, the resulting aural "collage" reinforces the argument for transformative use.[192] Transformative use can greatly influence the remaining factors.[193]

If a commercial song incorporates sampling, its commercial nature concededly cuts against sampling as fair use under factor one.[194] However, commerciality is not dispositive, and the commerciality of a work does not render its use of a prior work presumptively unfair.[195] Thus, a sufficiently transformative commercial work may still fall under fair use.[196]

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[187] Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 141-42 (2d Cir. 1998) (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

[188] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 611 (2d Cir. 2006) (alteration in original).

[189] *Id.* (alteration in original).

[190] Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267, 278 (6th Cir. 2009) (alteration in original).

[191] *See Graham*, 448 F.3d at 611.

[192] *See id*.

[193] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994).

[194] GOLDSTEIN, supra note 57, at 12:26.

[195] *See* Campbell, 510 U.S. at 594.

[196] *See id*.

B. Factor Two: Nature of the Copyrighted Work

Factor two, the nature of the copyrighted work, "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."[197] Music is among those subjects at the core of intended copyright protection, so the creative nature of a sampled musical work and its corresponding sound recording concededly cuts against sampling as fair use.[198] That said, this factor "may be of limited usefulness where the creative work . . . is being used for a transformative purpose."[199] Indeed, in both *Cariou* and *Blanch*, the copied photographs were at the core of intended copyright protection, yet both cases found fair use.[200] Thus, a sufficiently transformative use of a preexisting song can still be fair use.[201]

C. Factor Three: Amount and Substantiality of the Portion Used

The third factor inquiry asks whether the "quantity" and "value" used "are reasonable in relation to the purpose of the copying."[202] With respect to factor three, the link to transformativeness is of the utmost importance.[203] Courts assess the amount and substantiality of the portion used, relative to the original work as a whole, in both quantitative and qualitative terms.[204] This is a highly fact-specific inquiry, and a sliding scale.[205] In the context of recorded music and sampling, the third-factor inquiry should not differ between musical works and sound recordings. When a musician samples more of one or a more substantial part of one, it would appear she samples more of, or a more substantial part of, the other as well.

Samples that use quantitatively more of a prior song, or a qualitatively more significant part of a prior song, are concededly less likely to be fair use.[206] Relatedly, samples that use quantitatively less of a prior song, or a qualitatively less significant part of a prior song, are more likely to be fair use.[207] Given that some courts examine the portion the defendant copied relative to the *defendant's* work as well, samples that form a less quantitatively or qualitatively significant

[197] *Id*. at 586.

[198] *See id*.

[199] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006*); see also* Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998).

[200] *See supra* text accompanying notes 92-103.

[201] *See, e.g.*, *Campbell*, 510 U.S. at 586.

[202] *Id*.

[203] *See id*. at 579.

[204] *See id*. at 587.

[205] *See id*. at 577.

[206] *See id*. at 587-88.

[207] *See id*.

part of the defendant's work are also more likely to be fair use.[208] Thus the fact-dependent nature of this inquiry provides little general guidance, and courts should be careful not to give the third factor too much weight in a multifactorial balancing test that prioritizes the first and fourth factors.[209] However, because transformativeness bears on this factor as well, and because samples may consist of only minuscule and/or obscure parts of prior compositions and recordings, the third factor should not vitiate the sampling-as-fair-use argument in very many cases.

D. Factor Four: Effect on the Market

Under factor four, the proper inquiry is whether a new song will usurp the market for the sampled/existing song, or usurp part of the derivative market for songs sampling the existing song.[210] This much is true of sampled sound recordings *and* their underlying musical works. There are markets for both, and any alleged market usurpation of a recording logically coincides with alleged market usurpation of its corresponding musical work, and vice versa.

Critics of music-sampling-as-fair-use might contend, relying on factor four, that absolving musicians of the need to obtain licenses will deprive sampled artists, or their rights-holders, of profits to which they are entitled.[211] This argument has a superficial appeal. However, it rests on two flawed assumptions. The first is that a plaintiff's lost licensing fee(s) from the defendant should qualify as market harm under factor four.[212] The second is that sampling has an empirically evident negative effect on the market for a sampled/existing song, or on the market for other songs sampling that existing song.[213] Given that the Supreme Court has called the fourth factor "undoubtedly the single most important element of fair use,"[214] let us explore these flawed fourth-factor assumptions in more detail.

Consider the first flawed assumption, that a plaintiff's lost licensing fee(s) from the defendant should qualify as market harm. This contention is not specific to the context of music or music sampling. Commentators and courts have long debated whether a plaintiff's lost licensing fees from the defendant

[208] *See* GOLDSTEIN, *supra* note 57 (citing Wright v. Warner Books Inc., 953 F.2d 731, 739 (2d Cir. 1991)).

[209] *See supra* text accompanying notes 55-73.

[210] *See Campbell*, 510 U.S. at 590-92.

[211] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 589 (1985) (Brennan, J., dissenting).

[212] *See* Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 978 (2007) ("[T]he copyright owner typically argues that he or she suffered harm because the defendant could have paid her a licensing fee for use of the work.").

[213] Mike Schuster et. al., *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 208 (2019).

[214] *Harper & Row*, 471 U.S. at 566.

should qualify as market harm under factor four.[215] This author falls in the camp of commentators who believe lost licensing fees from the defendant should *not* qualify. To hold that they should qualify is circular logic:[216] "It is wrong to measure the detriment to plaintiff by loss of presumed royalty income—a standard which necessarily assumes that plaintiff had a right to issue licenses. . . . [and] that the defendant's practices did not constitute fair use . . . [O]ne cannot assume at the start the merit of the plaintiff's position."[217] In an effort to "avoid the circularity," some scholars have suggested courts should "infer[] harm from foreseeable uses."[218] Because one could argue that an existing market is (or was) a foreseeable one, and because a robust market exists for licensing musical works and sound recordings, the 'foreseeability' approach would appear to weigh in favor of the plaintiff in every case of unlicensed music sampling.

However, this purportedly non-circular approach is similarly flawed. Just because something happened does not mean it was foreseeable. Consider the difference between cause-in-fact and proximate cause in tort law.[219] The mere fact that a market exists for licensing musical works and sound recordings does not necessarily imply such a market was foreseeable.[220] Moreover, if an existing licensing market gives rise to an inference of fourth-factor harm, the implication is that a large-scale occurrence in the world of economics and consumer transactions (i.e., the development of a market for music licensing) swallows what is supposed to be an individualized legal determination and analysis in fair use cases, thereby doing the courts' job for them.

The concept of foreseeable use renders an already difficult, subjective, and abstract fair use analysis even more difficult, subjective, and abstract. This is especially true in a context like music sampling, where the temptation of hindsight bias makes it exceedingly difficult to determine whether the development of the now-existing technology and practice of music sampling, and markets for related licensing, were foreseeable.[221] Thus, the concept of foreseeable use, and the practice of treating a plaintiff's lost licensing fee(s) from the defendant as market harm under fair-use factor four, are ultimately not that

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[215] *See generally* GOLDSTEIN, *supra* note 57, at 12:60-68.

[216] *See id.* at 12:60.

[217] Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1357 n.19 (Ct. Cl. 1973) (alteration in original).

[218] *See, e.g.*, Bohannan, *supra* note 212, at 973-74 (describing one "definition of harm" in the fourth-factor context that attempts to evade a circular argument with respect to lost license fees and market harm).

[219] *See, e.g.*, Charles E. Carpenter, *Workable Rules for Determining Proximate Cause-Part III*, 20 CAL. L. REV. 470, 471-72 (1932) (distinguishing cause in fact from the higher standard of proximate cause, and describing foreseeability as a factor in finding the latter, though both are legal "cause[s]").

[220] *See id.*

[221] *See* Matthew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CAL. L. REV. 1145, 1148 (2000).

helpful. Courts should look to *demonstrable* market harm under the fourth factor. In the context of music sampling, this leads to the second flawed assumption.

The second flawed assumption is that sampling has an empirically evident negative effect on the market for a sampled/existing song, or on the market for other songs sampling that existing song. The reality may be an insurmountable evidentiary hurdle for plaintiffs, and perhaps even a framework that is fundamentally inapplicable in the music-sampling context, pointing toward a finding of fair use.[222] Of the four factors, the fourth-factor inquiry actually provides perhaps the most compelling rationale for music sampling as fair use.

What does it mean for a song to be a market substitute for another song? Presumably, under the conventional economic concept of market substitution,[223] it means that listeners can replace one song with another. Classic examples of market substitutes include butter and margarine.[224] But the concept of market substitution, typically applied in the context of goods,[225] is problematic in the music context. Given the immense levels of subjectivity and individual preference involved in music consumption,[226] the notion that two songs could "replace" one another in the market for music is ultimately unrealistic—it does not take into account how music consumption actually happens.

Certainly, an individual listener will occasionally make a conscious choice to listen to one song over another. But for a vast percentage of listeners, especially those who listen to multiple genres, the songs they consciously choose to listen to over others may bear little-to-no resemblance to the songs they have foregone.[227] For such listeners with eclectic tastes, discussing songs as being similar, or even partially identical in cases of obvious sampling, is unhelpful in a market-substitution inquiry. A choice to listen to one song over another may have little-to-nothing to do with any similar elements the songs share.

To further illustrate the standard fourth-factor inquiry's shortcomings in the music context, consider the substitute-versus-complement test the Seventh

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[222] *See infra* text accompanying notes 236-38.

[223] *See generally* EDGAR K. BROWNING, MICROECONOMIC THEORY & APPLICATIONS 56-57 (6th ed. 1999).

[224] *Id*. at 56-57 (explaining how to measure "the willingness of a consumer to substitute one good for another").

[225] *Id*. at 57.

[226] *See generally* Albert LeBlanc, *An Interactive Theory of Music Preference*, 19 J. MUSIC THERAPY 28, 29-31 (1982).

[227] *See, e.g.*, Angela Balakrishnan, *Presidential Playlist: Obama Opens Up His iPod*, THE GUARDIAN (June 25, 2008), https://www.theguardian.com/world/2008/jun/25/barackobama.uselections2008 [https://perma.cc/8Z2W-LANL]; Alex Marshall, *Donald Trump's Unexpected Thoughts on Music – Revealed*, BBC MUSIC (Nov. 9, 2016), https://www.bbc.co.uk/music/articles/e5e4572a-0676-4120-9eb3-d34bbea34836 [https://perma.cc/4EAS-8BAQ] (noting an individual listener may be a fan of disparate musical genres).

Circuit has applied.[228] In that test, the court asks "whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited)."[229] Nails are the quintessential complements to hammers, whereas nails are substitutes for screws or pegs.[230] Using that analogy, is the relationship between two similar songs more like that of hammer and nail, or that of a screw and nail? Consider that the relationship, even between two songs that are markedly similar, may more closely resemble the former: exposure to a song of a certain style may ignite a passion in a listener for songs of that style, prompting that listener to seek out other songs similar to the first.[231] Thus, appreciation for a song does not preclude consumption of similar songs; instead, it may actually *promote* consumption of similar songs.[232] This effect is well-documented in the sampling context specifically, with research showing that listeners of a song containing a sample are more likely to seek out the sampled song.[233]

The difficulties of applying § 107's fourth factor in the music context may reach even broader. Indeed, the concept of market substitution is problematic across the entire entertainment sector. Imagine an individual consumer decides to spend her afternoon watching a film. While perusing the films available to her, that user may very well mull over several films, each of a different genre, starring different actors, and the product of a different creative team. Does the consumer's choice to watch one film over the others she was considering mean all the films she considered are market substitutes for each other, despite any stark differences between them? Now, imagine that same individual consumer decides she no longer wishes to watch a film at all, and instead chooses to listen to some of her favorite records, or even to go outside and fly a kite. Might music, kite-flying, and film each usurp the entertainment market for one another?[234] The difficulty of the market-substitution framework is evident for such dissimilar activities which, despite their differences, can and do serve as replacement activities for one another.[235]

Thus, it is difficult to meaningfully apply the market-substitution framework within the realm of music, and music sampling in particular. Not only might two

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[228] Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (citing Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512 (7th Cir. 2002)).

[229] *Id*.

[230] *Ty*, 292 F.3d at 517.

[231] *See, e.g.*, Confusion, *Watch Kanye West Talk About Early Influences and Meeting Michael Jackson*, COMPLEX (Nov. 26, 2013), https://www.complex.com/pigeons-and-planes/2013/11/kanye-west-michael-jackson [https://perma.cc/KRE9-L5T5].

[232] *See id*.

[233] *See* Mike Schuster et al., *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 178 (2019); Szymanski, *supra* note 35, at 321.

[234] *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994) (stating that courts should look for usurpation of market demand under factor four).

[235] *Cf*. Rajendra K. Srivastava et al., *Market Structure Analysis: Hierarchical Clustering of Products Based on Substitution-in-Use*, 45 J. MARKETING 38, 38-48 (1981) (examining the boundaries for substitution and competition of product).

songs containing the same sample differ significantly,[236] but, even among admittedly similar songs, highly subjective and individualized user preferences do not lend themselves to market-substitution analysis.[237] Under factor four, asking whether a song that includes a sample may substitute in the market for the sampled/existing song or for other songs sampling the existing song may be a fruitless inquiry.

Consequently, the difficulties of applying the market-substitution framework in the music-sampling context present an evidentiary problem for plaintiffs. In fair use cases, the plaintiff typically must establish "with reasonable probability the existence of a causal connection between the infringement and a [speculative] loss of revenue," shifting the burden "to the infringer to show that th[e] [alleged] damage would have occurred had there been no taking of copyrighted expression."[238] Given the arguments above, how exactly would plaintiffs demonstrate a causal connection between lost revenue and a song that has sampled their song? Because of the problem the market-substitution inquiry poses in the music-sampling context, plaintiffs cannot easily establish market usurpation.

Precisely defining the markets for the plaintiff's work and for derivative works is yet another difficulty with the fourth-factor inquiry in cases of music sampling.[239] This author found no cases that address this problem head-on. One might argue that the consumers in the relevant markets consist of, most broadly, people who pay money to listen to music generally. Under this broad conception, would every song be in competition with every other song? Such a conception of the market is likely over-inclusive for purposes of the fair use doctrine. But might a focus instead on target audience, however it is defined or determined, be too limited? Narrowing markets for purposes of a fair use inquiry, without being overly restrictive, is no easy feat.

In light of all the above difficulties that plaintiffs will encounter, it seems the fourth factor will weigh in favor of fair use in many instances of unlicensed music sampling. That is to say nothing of the fact that a finding of sufficient transformativeness under factor one can itself seemingly dictate the outcome of factor four in the defendant's favor.[240] Given the importance of the fourth factor in fair use analysis on the whole, what emerges is an understanding that music sampling can often be fair use.

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[236] *Compare*, *e.g.*, PRETTY LIGHTS, FINALLY MOVING (Pretty Lights Music 2006), *with* AVICII, LEVELS (Interscope Records 2011).

[237] *See generally* LeBlanc, *supra* note 226, at 29-31; *see also supra* text accompanying notes 226-27.

[238] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566-67 (1985) (alteration in original).

[239] *See generally Campbell*, 510 U.S. at 590-93 (explaining the importance of analyzing the effect on the market for derivative works in fair use cases).

[240] *See id*. at 569; Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737, 752 (S.D.N.Y. 2017).

However, one narrow hypothetical example of sampling may call into question the above critique of the fourth factor inquiry in music-sampling cases. Imagine a musician samples a song in its entirety with no changes or additions, then she releases her "new" song, which is really an exact replica of the old sound recording, under a new name and with a claim to authorship over the "new" song. Is this "new" song not a market substitute for the original? It would seem that market confusion very well could result. What should happen in such a scenario, then? Market confusion is actionable under the Lanham Act,[241] in the realm of those limited moral ownership rights afforded under United States law, as opposed to the Copyright Act.[242] Conceding that market substitution likely could result from this example of two virtually identical songs, one should also recognize that copying exists on a spectrum.[243] The difficult question is, at exactly what point down the line of similarity does market substitution surely not exist?

Thankfully, even though the above hypothetical is perhaps thorny from a fourth-factor standpoint, another dimension of fair use analysis renders it an easy case. A court would surely deem such a blatant instance of total, literal copying in an effort to pass the song off as one's own to be insufficiently transformative under factor one to warrant a finding of fair use. Thus, any wise guy attempting to pass off someone else's song as his own via "sampling" would be an unsuccessful defendant in an infringement action, because a court would view the character of such a use as not falling within the scope of § 107.[244]

CONCLUSION

Copyright law has for too long unjustly discriminated against musicians who make music via sampling.[245] Artists are stifled because their art cannot exist without licenses, but they cannot afford licensing fees.[246] Would-be musicians of limited means are silenced.[247] Courts should consider this policy argument in their fair use analyses.[248] The fair use defense provides hope for sample-based

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[241] Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2012).

[242] *See* 3 NIMMER ON COPYRIGHT § 8D.02, Lexis (database updated Aug. 2019); Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976).

[243] *Compare* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874-77 (9th Cir. 2016) (involving literal copying), *with* Selle v. Gibb, 741 F.2d 896, 905 (7th Cir. 1984) (holding that plaintiff's evidence of "striking similarity" was not sufficiently compelling to prove access so as to support element of copying).

[244] *See supra* text accompanying notes 56-63.

[245] *See supra* Part I.

[246] *See generally Vrana*, *supra* note 7 (discussing how the law's treatment of sampling as copyright infringement is a barrier for legitimate artists).

[247] *See supra* Part I.

[248] *See* GOLDSTEIN, *supra* note 57, at 12:5 (describing how courts remain mindful of policy concerns in applying the four factors, and how fair use can excuse an otherwise-infringing use if the "social benefit" outweighs the loss to the copyright owner).

musicians. Music sampling is transformative.[249] Music sampling does not harm the incentives or the economic livelihood of the copyright owners of sampled works.[250] Music sampling is akin to appropriation art, a creative approach courts have deemed fair use.[251] Music sampling adds to the pool of creative works.[252] Music sampling as fair use is better for musicians, and better for music fans. Music sampling as fair use is better for music.

[249] *See supra* text accompanying notes 187-93.

[250] *See supra* text accompanying notes 215-21.

[251] *See supra* Section II.B.1.

[252] *See supra* Section II.B.