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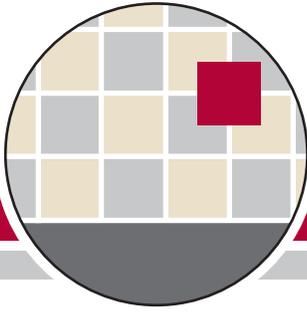
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Are the Courts Singing a Different Tune When it Comes to Music?: What Ever Happened to Fair Use in Music Sampling Cases?

*Michael Landau**

INTRODUCTION

Music is different from other forms of copyrightable subject matter, and the rules that have developed regarding music have taken very different forms from the other copyright rules. For example, in “motion pictures or other audiovisual works,”¹ the accompanying sounds are included in the copyright.² With respect to music copyrights, however, there are two different copyrights. One is for the “musical work[],”³ or the composition itself; another is for the “sound recording[],”⁴ or the specific performance or rendition by the artist that is embodied on the record, tape, or digital file. A “performance” is not a publication.⁵ One could perform an unfixed musical work in twenty cities simultaneously for ten years continually, and it still would not be a publication. While musical compositions were protected under federal copyright law

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1. 17 U.S.C. § 102(a)(6).
2. 17 U.S.C. § 101 (“‘Motion pictures’ are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.”).
3. 17 U.S.C. § 102(a)(2).
4. 17 U.S.C. § 102(a)(7); *see also* 17 U.S.C. § 101 (“‘Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”).
5. *Id.* (“To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”); *see also* *Ferris v. Frohman*, 223 U.S. 424 (1912) (holding that a performance of a spoken drama is not a publication); *Uproar Co. v. Nat’l Broad. Co.*, 81 F.2d 373 (1st Cir. 1936) (holding that a radio broadcast is not a publication); *Nutt v. National Inst., Inc. for the Improv. of Memory*, 31 F.2d 236 (2d Cir. 1929) (holding that the oral delivery of an address is not a publication); *De Mille Co. v. Casey*, 201 N.Y.S. 20 (N.Y. Sup. Ct. 1923) (holding that a performance of a motion picture is not a publication).

from 1831,⁶ the performance of the musical composition was not protected until 1897⁷. The “sound recording” was totally separate from the musical composition and was not protected under federal copyright law until February 15, 1972.⁸ One could not register an album or a tape of a song with the Copyright Office; one had to submit the musical notation of the song as a “copy” for deposit and registration purposes until the 1976 Act became effective.⁹ Owing to a “carve out” in the 1976 Copyright Act, state statutory law or state common law will protect pre-1972 records or mechanical reproductions until 2067.¹⁰

6. See ROBERT A. GORMAN, JANE C. GINSBURG & R. ANTHONY REESE, COPYRIGHT: CASES AND MATERIALS 6 (8th ed. 2011) (citing Act of Feb. 3, 1831, ch. 16, 4 Stat. 436).

7. *Id.* (citing Act of Jan. 6, 1897, ch. 4, § 4966). Interestingly enough, paintings, drawings, sculpture, and models or designs for works of fine arts were not protected until 1870.

8. See Michael Landau, “Publication,” *Musical Compositions, and the Copyright Act of 1909: Still Crazy After All These Years*, 2 VAND. J. ENT. L. & PRAC. 29, 39 (2000) (citing The Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391); see also GORMAN, GINSBURG & REESE, *supra* note 6, at 78; J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELLECOMM. & TECH. L. REV. 407, 418 n.64 (2004) (“It would still be several years before copyright protection would exist for sound recordings, but these too were eventually given protection in 1971 under an amendment to the Copyright Act.”).

9. 17 U.S.C. § 301. The law was settled until the mid-1990s when the Ninth Circuit, in *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950 (9th Cir. 1995), held that the sale of phonograph records was a “publication” under the 1909 Act, thereby going against years of settled precedent. See, e.g., *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183 (S.D.N.Y. 1973), *aff’d per curiam*, (the Second Circuit adopted the lower court’s opinion that the sale of phonograph records does not constitute “publication” under the 1909 Act). Congress quickly amended, or should I say “clarified,” the Copyright Act by passing an amendment to Section 303. Section 303(b) of the Copyright Act of 1976 provides in relevant part: “The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of any musical work, dramatic work, or literary work embodied therein.”

10. 17 U.S.C. § 301 (“Preemption with respect to other laws. . . . (c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.”). The provision was put to a test in 2005 in *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005). Several classical recordings entered the public domain in the United Kingdom by 1990. The recordings were not eligible for federal copyright protection in the United States, so they were in the public domain under federal law. Capitol Records noticed that the recordings had entered the public domain and, in 1996, remastered the old recordings and released them in the United States. In 1999, Naxos remastered the old recordings and released them for sale in the United States, too. Capitol, the copyright holder, filed suit for violation of New York State’s common law copyright. Capitol Records won the suit, despite the fact that the recordings were in the public domain.

The statute was clear and unambiguous. Congress itself endorsed the continuation of state common law and statutory “anti-piracy” protection until February of 2067. Congress could have taken followed [sic] the same path that it did for works that were created but not published or copyrighted prior to January 1, 1978, by providing federal protection that would have begun immediately and could not expired until a certain date. However, they chose to continue to have states protect pre-1972 works.

Under the Uruguay Round Agreements Act (URAA) that brought the United States into the World Trade Organization (WTO), “Congress enacted civil and criminal statutes to protect against the unauthorized recording of live musical performances, and the unauthorized sale and distribution of recordings of live performances.”¹¹ Prior to that time, there absolutely was “no federal protection for live performances, although several states had laws that prevented the unauthorized recording and sale of live musical recordings.”¹²

The anti-bootlegging statutes do not contain any fixation requirement.¹³ Nor do they have any set duration, thereby violating the “limited Times” wording in the United States Constitution.¹⁴ They, however, have been upheld under the Commerce Clause, despite the statute being in Title 17 (Copyrights) instead of in Title 15 (Commerce and Trade) and despite the seeming inconsistency between the Copyright Clause and the Commerce Clause.¹⁵ In the past, if one could not accomplish something under the Copyright Clause, one also could not accomplish it under the Commerce Clause owing to the “inconsistency” between the clauses, even if it would be legal under the Commerce Clause.¹⁶ Will this now lead to “end runs” around the Copyright Clause for material that does not fit within the Copyright Clause but

4 Lindey on Entertainment, Publ. & the Arts § 9:11, at 9-24.1–24.2 (3d ed.).

11. Michael Landau, *What If the Anti-Bootlegging Statutes are Upheld Under the Commerce Clause?*, 2008 MICH. ST. L. REV. 153, 155–56 (2008); *see also* 17 U.S.C. § 1101 (“Unauthorized fixation and trafficking in sound recordings and music videos. (a) Unauthorized acts. Anyone who, without the consent of the performer or performers involved— (1) fixes the sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation, (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States, shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.”)

12. Landau, *What If the Anti-Bootlegging Statutes are Upheld Under the Commerce Clause?*, *supra* note 11; *see also* World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty, Dec. 20 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997), *available at* http://www.wipo.int/treaties/en/text.jsp?file_id=295578.

13. 17 U.S.C. § 102(a) (“Subject matter of copyright: In general. (a) 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.”) (emphasis added).

14. U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”) (emphasis added).

15. *See, e.g.*, *United States v. Martignon*, 492 F.3d 140, 142 (2d Cir. 2007) (upholding a civil anti-bootlegging statute under the Commerce Clause); *United States v. Moghadam*, 175 F.3d 1269, 1282 (11th Cir. 1999) (upholding a criminal anti-bootlegging statute under the Commerce Clause); *KISS Catalog, Ltd. v. Passport Int’l Prods.*, 405 F. Supp. 2d 1169, 1171 (C.D. Cal. 2005) (upholding a civil anti-bootlegging statute under the Commerce Clause).

16. *See* Marybeth Peters, *Constitutional Challenges to Copyright Law*, 30 COLUM. J.L. & ARTS 509, 525 (2007); *see generally* William McGinty, Note, *Not a Copyright Law? United States v. Martignon and Why the Anti-Bootlegging Provisions Are Unconstitutional*, 23 BERKELEY TECH. L.J. 323 (2008).

does fit within the Commerce Clause? Will this lead to legalizing database protection under the Commerce Clause?

The compulsory license under Section 115 applies to all released records, or in this day and age, digital files, without any veto power from the copyright owner, provided that one does not change the “basic melody or fundamental character” of the song.¹⁷ A subsequent user of a song must only comply with the notice requirements of Section 115¹⁸ to be able to use the song for a maximum fee of 9.1 cents per song or download.¹⁹ But, the compulsory license does not apply to “sampling” or to changes in the words of the song.²⁰ There is also the Fairness in Music Licensing Act,²¹ which exempts “small businesses” from the obligation to pay public performance royalties.²² “Small business” does not relate to the revenues of the business; it relates to only the size.²³ A “small business” under the Fairness in Music Licensing Act is any establishment that does not serve food or liquor and has fewer than 2000 square feet or any establishment that does serve food or liquor and has fewer than 3750 square feet.²⁴

There are more interesting laws creating unique situations with respect to music and sound recordings. But, they are not really the subject of this paper. For the remainder of this paper, I will concentrate on the situation of music, sampling, and fair use.

17. 17 U.S.C. § 115(a)(2) (“Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords. . . . (2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the *basic melody or fundamental character of the work*, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.”) (emphasis added).

18. 17 U.S.C. § 115(b)(1) (“Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords. . . . (b) Notice of Intention to Obtain Compulsory License.— (1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.”).

19. See 1 Lindey on Entertainment, Publ. & the Arts § 1:32.80, at 1-354 (3d ed.).

20. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 n.4 (1994); discussion *infra* Part III.B; see also 1 Lindey on Entertainment, Publ. & the Arts § 1:26, at 1-224 n.2 (3d ed.) (Fair use parody—*Campbell v. Acuff-Rose Music, Inc.* (“*Pretty Woman*”)).

21. The Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, § 201, 112 Stat. 2827, 2830 (1998).

22. See 17 U.S.C. § 110(5).

23. *Id.*

24. *Id.* The Irish Music Collection Agency claimed that the arrangement violated the three-step-test, discussed, *infra*, and took the United States to the WTO to decide the matter. After a WTO proceeding, the United States lost. It paid about 1.3 million Euros to settle for *one year* and has done nothing since except send out a monthly notice every month for ten years. See, Michael Landau, *Fitting United States Copyright Law into the International Scheme: Foreign and Domestic Challenges to Recent Legislation*, 23 GA. ST. U. L. REV. 847, 883–87 (2007).

I. HOSTILITY TOWARD SAMPLING BEGINS

“Sampling” is the inclusion of a minor excerpt of music or a recording into another song. Sampling has been around for at least forty years. The musical sample may be looped, or repeated numerous times. It may also be changed in key or pitch. For many years, people who made records or tapes just sampled and no one filed suit. Then, in 1991, the first major sampling opinion was issued. In *Grand Upright Music Ltd. v. Warner Bros Records, Inc.*,²⁵ the defendants sampled a few seconds of the Gilbert O’Sullivan song “Alone Again (Naturally)” in the Biz Markie album “I Need A Haircut.”²⁶ A lawsuit ensued.

Instead of looking at the fair use factors or even considering whether the use was a *de minimis* use, Judge Duffy started the opinion with, “Thou shalt not steal,” and cited to Exodus 20:15 of the Old Testament.²⁷ Despite the fact that the defendants argued “that they should be excused because others in the ‘rap music’ business are also engaged in illegal activity,”²⁸ their defense was rejected by the judge. Judge Duffy responded with, “The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.”²⁹

To add insult to injury, Judge Duffy also added, “[t]his matter is respectfully referred to the United States Attorney for the Southern District of New York for consideration of prosecution of these defendants under 17 U.S.C. § 506(a) and 18 U.S.C. § 2319.”³⁰ To put it lightly, Judge Duffy was not amused! There were no other music sampling cases for over a decade.

II. FAIR USE

A. Background and “Transformative Use”

During the major “overhaul” of the U.S. copyright statutes that ultimately resulted in the Copyright Act of 1976, Congress decided to expressly include fair use provisions in the federal copyright statutes.³¹ In many, if not most, situations at both the federal and state levels in which a common law doctrine is codified, the legislature acts with a degree of specificity to create more certainty and guidance in the law. One would have, therefore, thought that by codifying the fair use doctrine, the U.S. Congress wanted to do the same. The legislative history of Section 107, however, indicates just the contrary. Congress decided to add “fair use”

25. 780 F. Supp. 182 (S.D.N.Y. 1991).

26. *Id.* at 183.

27. *Id.*

28. *Id.* at 185, n.2.

29. *Id.* at 183.

30. *Id.* at 185. 18 U.S.C. § 2319 is an accompanying criminal copyright statute.

31. *See* 17 U.S.C. § 107.

to the new Act in a way that would maintain the status quo.³²

Section 107 of the Copyright Act of 1976 provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use as reproductions in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all of the above factors.³³

Transformative use” is not mentioned at all in the statute, but in recent years, it has entered into and has, in fact, dominated the analysis of the first factor, if not the entire fair use analysis. “Transformative use” was advocated in a law review article penned by Judge Pierre Leval, *Toward a Fair Use Standard*.³⁴ In the article, Judge Leval, bothered by the inconsistency of the courts in applying the fair use factors, proposed that the correct standard for finding fair use was whether the new use was “transformative.”³⁵ Judge Leval believed that if one uses another’s copyrighted material in a way that is sufficiently “transformative,” so that the

32. See H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680. With “transformative use,” the courts are hardly maintaining the “status quo.” Transformative use gets stronger as the years go by, and the derivative work right has been reduced to next to nothing. Also, the “potential market” in the fourth factor of the fair use factors seems to be ignored today.

33. 17 U.S.C. § 107. The last sentence of section 107 was added in 1992, largely in response to *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) and its progeny.

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

35. *Id.* at 1111.

resultant new work serves a different purpose from that of the original, and does not supplant the demand for the original, the use should likely be fair.³⁶ The creator of the new work is serving one of the purposes of copyright law: “[t]o promote the Progress of Science and the useful Arts.”³⁷ Much of the logic in Judge Leval’s article is influenced by Justice Story’s 1841 *Folsom v. Marsh*³⁸ decision. It is important to note, however, that at the time that *Folsom v. Marsh* was decided, in 1841, the exclusive rights were limited to the rights of “printing, reprinting, publishing, and vending.”³⁹ There was no exclusive right to prepare “derivative works,” such as adaptations or translations. For example, in *Stowe v. Thomas*,⁴⁰ an 1853 case, the translation of Harriet Beecher Stowe’s famous novel *Uncle Tom’s Cabin* into German was held to not infringe because it was not a “copy” or “reproduction” of the original work.⁴¹ The court held that the German language translation was not a copy of the English language version and, therefore, did not infringe.⁴²

The statutory rights are different today.⁴³ Section 106(2) of the 1976 Act grants copyright holders the exclusive right “to prepare derivative works.”⁴⁴ A “derivative work” is defined in Section 101 as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast,

36. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citing Leval, *supra* note 35, at 1111).

37. U.S. CONST. art. I, § 8, cl. 8.

38. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

39. *See* Copyright Act of 1790, ch. 15, 1 Stat. 124. The Copyright Act of 1831 was an amendment to the Act of 1790. The key changes in the 1831 Act included: extension of the original copyright term from 14 years to 28 years, with an option to renew the copyright for another 14 years; addition of musical compositions to the list of statutorily protected works (though this protection only extended to reproductions of compositions in printed form; the public performance right was not recognized until later); extension of the statute of limitations on copyright actions from one year to two; and changes in copyright formality requirements. The rights of “printing, reprinting, publishing, and vending” remained unchanged.

40. 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514).

41. *See id.* at 208.

42. *See id.* (“A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book.”); *see also* PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* 4–5 (2014).

43. 17 U.S.C. § 106 (“Exclusive rights in copyrighted works. Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”).

44. *Id.*

transformed, or adapted.”⁴⁵

B. Campbell v. Acuff-Rose Music, Inc.

In 1994, the Supreme Court heard a “fair use” case, *Campbell v. Acuff-Rose Music, Inc.*,⁴⁶ that would change the law of copyright. The case involved the rap parody of the Roy Orbison song “Oh, Pretty Woman.”⁴⁷ The question for certiorari was “whether 2 Live Crew’s commercial parody of Roy Orbison’s song, ‘Oh, Pretty Woman,’ may be a fair use within the meaning of the Copyright Act of 1976.”⁴⁸ The case was never decided on the merits; the answer was “maybe.”⁴⁹ The case was remanded to the appellate court because the Sixth Circuit committed legal error with respect to the first factor, “the purpose and character of the use”; the third factor, the amount of the taking; and the fourth factor, the effect on the market.⁵⁰ The Sixth Circuit then remanded the case to the district court.⁵¹ Shortly after it was remanded, the case settled.⁵²

However, several things were said in the case that have had profound effects on “fair use” cases in the following twenty years. The main thing that has become the mantra in almost all following “fair use” cases is, “the more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use.”⁵³ The Court rejected the holding of the Sixth Circuit by stating that the presumption of market harm caused by the commercial use of the copyrighted work was “ostensibly culled from *Sony*.”⁵⁴ In *Sony*,⁵⁵ the presumption could not have been clearer. “If the Betamax were used to make copies for a commercial or profitmaking purpose, such use would presumptively be unfair.”⁵⁶ The presumption was not “ostensibly culled from *Sony*.”⁵⁷ The presumption was in *Sony*.⁵⁸ For doctrinal consistency, the Supreme Court should have, instead of dancing around and saying that there never was a presumption, either distinguished parody from non-

45. 17 U.S.C. § 101.

46. 510 U.S. 569 (1994).

47. *Id.* at 569.

48. *Id.* at 571–72. The District Court granted summary judgment for 2 Live Crew. The Court of Appeals for the Sixth Circuit reversed, holding that the defense of fair use was barred by the song’s “commercial character and excessive borrowing.” The Supreme Court granted certiorari.

49. *See id.* at 572.

50. *See id.* at 594.

51. *Acuff-Rose Music, Inc. v. Campbell*, 25 F.3d 297, 297 (6th Cir. 1994).

52. Peter Friedman, *What Happened After the Remand of Campbell v. Acuff-Rose*, WHAT IS FAIR USE? (Mar. 30, 2008, 4:43 PM), <http://whatisfairuse.blogspot.com/2008/03/what-happened-after-remand-of-campbell.html>.

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

54. *Id.* at 583–84.

55. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

56. *Id.* at 449.

57. *Contra Campbell*, 510 U.S. at 583–84.

58. *See Sony*, 464 U.S. at 451.

parody uses or overruled *Sony*.

Although *Campbell* was never decided on the merits, the statement in *Campbell*, “the more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use,”⁵⁹ is now the law. *Campbell* led the way for “transformative use” to take over fair use law. In the last few years, it has.

III. TRANSFORMATIVE USE CASES

Transformative use has played a major part in post-*Campbell* parody cases.⁶⁰ In *Suntrust Bank v. Houghton Mifflin Co.*,⁶¹ the Eleventh Circuit held that a *The Wind Done Gone* parody of the famous Civil War novel *Gone With the Wind* was sufficiently “transformative” to be a fair use, despite acknowledging that the defendant appropriated substantial copyrighted portions of the book.⁶² No harm to the potential market was found because the estate of Margaret Mitchell would never agree at any time to license rights to make a sequel to *Gone With the Wind* that is told from the vantage point of an African-American slave who was the half-sister of Scarlet O’Hara and in which the character of Ashley Wilkes was gay.⁶³

In *Leibovitz v. Paramount Pictures Corp.*,⁶⁴ the Ninth Circuit held that an advertising photograph showing the body of a pregnant woman and the face of actor Leslie Nielsen was a “transformative use” of the photograph.⁶⁵ One might ask, “What is transformative?” Also, it was one of the first cases that used another’s copyrighted material in an advertisement with impunity. In *Mattel, Inc. v. Walking Mountain Productions*,⁶⁶ a series of photographs entitled “Food Chain Barbie,” which depicted a “Barbie” doll posed in various positions while being

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

60. See generally Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. Pa. L. Rev. 549 (2008).

61. 268 F.3d 1257 (11th Cir.), *reh’g denied*, 275 F.3d 58 (11th Cir. 2001).

62. See *id.* at 1271.

63. See *id.* at 1282. The Second Circuit used to be protective of authors’ copyrights. In *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010), the court denied the claim of “transformative,” noting that the novel was merely a sequel. In order for the book to be a transformative work, something other than new expression has to be added. The book had to have been created for a different purpose, such as criticism or comment. In *Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008), the Second Circuit had to rule on whether a *Harry Potter* lexicon was infringing. The court held that parts were transformative but that the extensive copying was not. All in all, it was deemed to be an infringing work. But, in *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012), *aff’d in part, vacated in part*, 755 F.3d 87 (2d Cir. 2014) and *White v. West Publishing Corp.*, No. 12 CIV. 1340 JSR, 2014 WL 3057885 (S.D.N.Y. July 3, 2014), the Second Circuit has shifted to be more pro-fair use by holding that the digitization of millions of books and the inclusion of copyrighted case briefs in Westlaw and LexisNexis were fair use.

64. 137 F.3d 109 (2d Cir. 1998).

65. See *id.* at 111, 114.

66. 353 F.3d 792 (9th Cir. 2003).

“attacked” by vintage household appliances, was sufficiently “transformative” because it parodied the character Barbie and did not supplant the demand for the original doll.⁶⁷ Mattel lost another lawsuit in *Mattel, Inc. v. MCA Records, Inc.* over the Danish rock group Aqua’s song “Barbie Girl”⁶⁸ and lost yet again when it brought a case against the maker of an “S & M” Barbie in *Mattel, Inc. v. Pitt*⁶⁹. The cases were replete with criticism and commentary.

“Transformative use” does not only apply to parody. A use may be classified as “transformative” if it serves a purpose or function that is different from that of the original copyrighted work. In *Bill Graham Archives v. Dorling Kindersley Ltd.*,⁷⁰ the reproduction and inclusion of seven Grateful Dead concert posters in a book about the band titled *Grateful Dead: The Illustrated Trip* was held to be “transformative” because of both the differences in size and purpose of the graphics.⁷¹ The purpose of the defendant’s use was to help to illustrate and document the progression of concerts that took place during the book’s timeline, while the purpose and character of the use of the original posters themselves was “artistic expression and promotion.”⁷² The use of the posters was held to be fair, despite the existence of a market for reproductions in art books.⁷³ It is interesting to note Dorling Kindersley had cleared permission for the bulk of the visual material to be included in *Trip* but could not reach agreement with the Graham Archives.⁷⁴ Nonetheless, they published the posters anyway.⁷⁵

In *Blanche v. Koons*,⁷⁶ Jeff Koons’s use of an advertising photograph was held to be sufficiently “transformative” and therefore fair.⁷⁷ The plaintiff, a fashion photographer, had produced the photograph at issue in the case, “Silk Sandals by Gucci,” for a display advertisement in *Allure* magazine, a lifestyle magazine, as part of an article about “metallic cosmetics.”⁷⁸ Koons on the other hand had included the photograph, along with other fashion shots and pictures of donuts, in his mural titled “Niagara,” which was for the Berlin Guggenheim Museum.⁷⁹ The Court cited *Bill Graham Archives* and stated, “[w]hen, as here, the copyrighted work is used as ‘raw material’ . . . in furtherance of a distinct creative or communicative objectives, the

67. *See id.* at 806.

68. 296 F.3d 894, 894, 908 (9th Cir. 2002). Judge Kozinski was so fed up with Mattel’s arguments that, in the last line of the opinion, he stated, “The parties are advised to chill.”

69. 229 F. Supp. 2d 315, 325 (S.D.N.Y. 2002).

70. 448 F.3d 605 (9th Cir. 2006).

71. *See id.* at 612–13.

72. *Id.* at 609.

73. *See id.* at 614.

74. *See* *Bill Graham Archives v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324, 326 (S.D.N.Y. 2005), *aff’d*, 448 F.3d 605 (9th Cir. 2006).

75. *Id.*

76. 467 F.3d 244 (2d Cir. 2006).

77. *Id.* at 253.

78. *Id.* at 247–48.

79. *Id.* at 247. Koons was paid \$126,877 for the mural.

use is transformative.”⁸⁰ The court found that Koons’s use had “entirely different purpose and meaning” from the original Blanch photograph.⁸¹

In other cases—many involving verbatim copying put to another purpose—the courts have been exceedingly pro-fair use. In dealing with the Internet, the courts have been even more pro-fair use. In *Kelly v. Arriba Soft Corp.*,⁸² the plaintiff was a professional photographer whose primary market was photographic images of the American West.⁸³ He sued a search engine company Arriba Soft⁸⁴ for copyright infringement for displaying reproductions of photographs from his website as small “thumbnails” in its image search results.⁸⁵ The court held that the display of the thumbnail images was transformative and therefore “fair use” because it primarily served a purpose other than that of the original photographs.⁸⁶ The use of the copyrighted images by the search engine functioned primarily as a utilitarian tool to locate and facilitate easier access to images on Internet websites, not as a medium for displaying photographs.⁸⁷ There was, therefore, no overlap or substitution in the marketplace.⁸⁸ The same result was found in *Perfect 10, Inc. v. Amazon, Inc.*,⁸⁹ wherein the Ninth Circuit held that the transformativeness of the use—finding material on the original web pages—was more important than the normal market use, which was the uploading of “adult photographs” onto cellular telephones.⁹⁰ If the use is transformative, the fourth factor is less important.⁹¹

In *Authors Guild, Inc. v. HathiTrust*,⁹² several universities made an arrangement with Google to digitize their entire libraries.⁹³ As per the arrangement, after digitization, Google retained a copy of the digital book to be available through Google Books, an online system that allows Google users to search the content and view “snippets” of the books.⁹⁴ Google also provided a digital copy of each scanned work to the universities, which includes scanned

80. *Id.* at 253 (citation omitted).

81. *Id.* Koons lost three pre-*Campbell* cases. He had presented almost the same arguments in those cases. *See Rogers v. Koons*, 960 F.2d 301 (2d Cir.), *cert. denied*, 506 U.S. 934 (1992); *Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993); *United Feature Syndicate v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

82. 336 F.3d 811 (9th Cir. 2003).

83. *Id.* at 815.

84. *Id.* at 815 n.1 (“Arriba Soft has changed its name since the start of this litigation. It is . . . known as ‘Ditto.com’” as of the date of the litigation.)

85. *Id.* at 816–17.

86. *See id.* at 818, 822.

87. *See id.* at 818, 821.

88. *See id.* at 821–22.

89. 508 F.3d 1146 (9th Cir. 2007).

90. *See id.* at 1166.

91. *See id.* at 1168.

92. 902 F. Supp. 2d 445 (S.D.N.Y. 2012), *aff’d in part, vacated in part*, 755 F.3d 87 (2d Cir. 2014).

93. *Id.* at 448.

94. *Id.*

image files of the pages and a text file from the printed work.⁹⁵ After Google provided the universities with digital copies of their library holdings, the universities then “contribute” these digital copies to the HathiTrust Digital Library (“HDL”).⁹⁶ The HathiTrust partnership is in the process of creating “a shared digital repository that already contains almost 10 million digital volumes.”⁹⁷ The Authors Guild sued HathiTrust and several university personnel.⁹⁸

The court, on summary judgment, ruled that the uses to which the books were put were transformative based upon their “text searching” and “text mining.”⁹⁹

A transformative use may be one that actually changes the original work. However, a transformative use can also be one that serves an entirely different purpose. The use to which the works in the HDL are put is transformative because the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material. The search capabilities of the HDL have already given rise to new methods of academic inquiry such as text mining.¹⁰⁰

The court also held:

The use of digital copies to facilitate access for print-disabled persons is also transformative. Print-disabled individuals are not considered to be a significant market or potential market to publishers and authors. As a result, the provision of access for them was not the intended use of the original work (enjoyment and use by sighted persons) and this use is transformative.¹⁰¹

The Second Circuit later affirmed the decision in relevant part.¹⁰² The same result was reached in *Authors Guild, Inc. v. Google Inc.*¹⁰³

In *White v. West Publishing Corp.*,¹⁰⁴ legal publishers’ inclusion in their databases of briefs

95. *Id.*

96. *Id.*

97. *Id.* at 448.

98. *Id.* at 447. An action against Google is the subject of another lawsuit.

99. *See id.* at 460.

100. *Id.* (citation omitted).

101. *Id.* at 461 (citation omitted).

102. *See Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014).

103. *See* 954 F. Supp. 2d 282, 294 (S.D.N.Y. 2013). It is interesting to note that the same judge, Judge Chin, who rejected the Google Books settlement because it was unfair to authors, granted summary judgment to Google two years later, leaving the authors with nothing

104. No. 12 CIV. 1340 JSR, 2014 WL 3057885 (S.D.N.Y. July 3, 2014).

for which an attorney had registered copyrights was held to be a fair use.¹⁰⁵ The publishers' use of the briefs was transformative because they used the briefs for forming an interactive legal research tool and reviewed, selected, converted, coded, linked, and identified the documents.¹⁰⁶ The publishers' usage of briefs was also not economically a substitute for their use in their original market.¹⁰⁷

There was even a music fair use case, albeit in another medium—film. In *Lennon v. Premise Media Corp.*,¹⁰⁸ the producers of “Expelled,” a feature-length nationally released theatrical motion picture that addressed what it characterized as a “debate between proponents of intelligent design and the scientific theory of evolution,” used fifteen seconds from the John Lennon song “Imagine” in the film.¹⁰⁹ One of the executive producers of “Expelled” said that the movie “examines the scientific community’s academic suppression of those who ask provocative questions about the origin and development of life.”¹¹⁰ While the fifteen seconds of music play, the lyrics appear on screen in subtitles, as follows:

Nothing to kill or die for/

And no religion too.¹¹¹

The song was immanently recognizable as being from John Lennon.¹¹² The district court held, however, that “[d]efendants’ use [was] transformative because the movie incorporate[d] an excerpt of ‘Imagine’ for purposes of criticism and commentary.”¹¹³

IV. SAMPLING CASES

A. *Grand Upright v. Warner Bros.*

As we mentioned before, in *Grand Upright*, Judge Duffy was amazingly hostile to

105. *Id.* at *1.

106. *Id.* at *3.

107. *Id.* at *4.

108. 556 F. Supp. 2d 310 (S.D.N.Y. 2008).

109. *Id.* at 316–17.

110. *Id.* at 317 (citation omitted).

111. *Id.*

112. *Id.* at 318. (“In a voiceover, Ben Stein then intones, ‘Dr. Myers would like you to think he’s being original but he’s merely lifting a page out of John Lennon’s songbook.’ The excerpt of ‘Imagine’—virtually ‘a page out of John Lennon’s songbook’—then plays.”) (citation omitted). Plaintiffs’ expert musicologist, Dr. Lawrence Ferrara, concluded that the portion of the song defendants used is immediately recognizable as being from “Imagine.” *Id.* at 326.

113. *Id.* at 322.

sampling.¹¹⁴ Not only did he invoke the Seventh Commandment, “Thou Shalt Not Steal,” but he referred the matter to the United States Attorney for consideration of filing a criminal complaint.¹¹⁵

Grand Upright was a pre-*Campbell v. Acuff-Rose Music, Inc.* case. Just as many other cases changed, giving users much more latitude after *Campbell* and “transformative use,”¹¹⁶ one would have expected that the sampling cases would have changed. They did not.

B. *Bridgeport Music v. Dimension Films*

In *Bridgeport Music, Inc. v. Dimension Films*,¹¹⁷ the plaintiffs originally asserted approximately 500 counts of infringement against approximately 800 defendants for copyright infringement and various state law claims relating to defendants’ unauthorized use of samples in their rap recordings.¹¹⁸ The district judge severed the complaint into 476 separate actions and heard one of the cases.¹¹⁹ The district court granted summary judgment in favor of the producer.¹²⁰ The district court held that the use did not “rise to the level of a legally cognizable appropriation.”¹²¹ This appeal followed.

Bridgeport Music and Westbound Records own the musical composition and sound recording copyrights in “Get Off Your Ass and Jam” by George Clinton, Jr. and the Funkadelics.¹²² The defendants sampled from “Get Off Your Ass and Jam” and put it in the song “100 Miles and Runnin’,” which was included in the soundtrack of the motion picture *I Got the Hook Up*.¹²³ Specifically, *two seconds* from the beginning of the George Clinton, Jr. song were sampled.¹²⁴ The pitch was then lowered, and the sample was then “looped” and extended to 16 beats.¹²⁵ The sampled segment occurs in five places in the new song.¹²⁶ Each sample lasts for

114. *See supra* Part I.

115. *Id.*

116. *See, e.g.,* Authors Guild Inc. v. HathiTrust, 755 F.3d 87, 105 (2d Cir. 2014); Blanch v. Koons, 467 F.3d 244, 259 (2d Cir. 2006); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 615 (9th Cir. 2006); Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1283 (11th Cir.), *reh’g denied*, 275 F.3d 58 (11th Cir. 2001); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 117 (2d Cir. 1998).

117. 410 F.3d 792 (6th Cir. 2005).

118. *Id.* at 795.

119. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 830 n.1 (M.D. Tenn. 2002), *aff’d in part, rev’d in part*, 401 F.3d 647 (6th Cir. 2004), *amended on reh’g*, 410 F.3d 792 (6th Cir. 2005).

120. *Id.* at 830.

121. *Id.* at 841.

122. *Bridgeport Music*, 410 F.3d at 796.

123. *Id.* at 795.

124. *Id.* at 796

125. *Id.*

126. *Id.*

approximately seven seconds.¹²⁷ The Sixth Circuit’s holding was based on the unauthorized sampling of the master sound recording.

In reversing the district court, the Sixth Circuit made a new rule for sampled sound recordings. It held, “[t]he analysis that is appropriate for determining infringement of a musical composition copyright, is not the analysis that is to be applied to determine infringement of a sound recording. We address this issue only as it pertains to sound recording copyrights.”¹²⁸ Then the court went on to say, “Get a license or do not sample.”¹²⁹

The basis for the holding this way was the different copyrights for “musical compositions” and for “sound recordings.” The copyright for a musical composition falls under Section 106 and includes all of the rights of the copyright holder.¹³⁰ The copyright for a sound recording falls under Section 114 and does not include all of the rights, most notably the right of public performance.¹³¹ The court held that the language in Section 114(b) meant that, “a sound recording owner has the exclusive right to ‘sample’ his own recording.”¹³²

127. *Id.*

128. *Id.* at 798.

129. *Id.* at 801. The original appellate opinion makes no mention of fair use at all. *See* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390 (6th Cir. 2004). When the rehearing was granted, the earlier opinion was republished and, *inter alia*, the following paragraph was added: “These conclusions require us to reverse the entry of summary judgment entered in favor of No Limit Films on Westbound’s claims of copyright infringement. Since the district judge found no infringement, there was no necessity to consider the affirmative defense of ‘fair use.’ On remand, the trial judge is free to consider this defense and we express no opinion on its applicability to these facts.” Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 647, 651 (6th Cir. 2004), *amended on reh’g*, 410 F.3d 792 (6th Cir. 2005).

130. *See* 17 U.S.C. § 106.

131. *See* 17 U.S.C. § 114 (“Scope of exclusive rights in sound recordings. (a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4). (b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. 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. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(f)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.”). In 1995, 17 U.S.C. § 106(6) was added to the bundle of rights for copyright holders. In the case of sound recordings, a copyright holder was given the right “to perform the copyrighted work publicly by means of a digital audio transmission.” This right, however, only applies to digital transmissions, and would not include the right to sample.

132. *Bridgeport Music*, 410 F.3d at 800–01.

That is a ridiculous holding. It only means that the sound recording copyright holder may not bring a cause of action against someone who does a “cover” of his song because of the compulsory license. It does not mean that the only one who may sample a song is the owner of that song.

But, strangely enough, *Bridgeport Music* is the law. It has not been challenged in other circuits. Nor has there been a string of other sampling cases.

C. Newton v. Diamond

In *Newton v. Diamond*,¹³³ the Beastie Boys sampled several seconds of a James Newton song for flute and voice.¹³⁴ The case is very different from *Bridgeport Music* because the Beastie Boys had negotiated a license for the sound recording for \$1000.¹³⁵ They did not have a musical composition license.¹³⁶ The Beastie Boys used three notes, “C—D flat—C, sung over a background C note” without authorization.¹³⁷ James Newton sued them for copyright infringement of the musical composition.¹³⁸

The court held that “[f]or an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement.”¹³⁹ Because of the short portion used and the fact that the actual performance was licensed under the sound recording license, the court found that the use was a *de minimis* use.¹⁴⁰

The *Newton* case can be distinguished from the *Bridgeport Music* case very easily. In *Bridgeport Music*, the defendants did not have any musical composition licenses or sound recording licenses. They had no licenses at all. In *Newton*, the defendants did have a sound recording license but no musical composition license. The law still says, if you are going to use a sound recording for sampling—in any amount—get a license.¹⁴¹

V. WHY HASN’T TRANSFORMATIVE USE BEEN APPLIED TO MUSIC SAMPLING CASES?

The unanswered question is: Why has transformative use not been applied to sampling cases? Since the Supreme Court adopted “transformative use” in *Campbell v. Acuff-Rose*

133. 388 F.3d 1189 (9th Cir. 2004).

134. *Id.* at 1190–91.

135. *Id.* at 1191.

136. *See id.* Whether the Beastie Boys overlooked the musical composition license or thought that the sound recording license included the musical composition is not in the opinion.

137. *Id.*

138. *Id.* at 1189.

139. *Id.* at 1192–93 (citing *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74–75 (2d Cir. 1997)).

140. *See id.* at 1196.

141. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (“Get a license or do not sample.”).

Music, Inc.,¹⁴² transformative use has been gaining strength in both its use and scope in copyright cases.¹⁴³ In the beginning, meaning in the 1990s, transformative use had only applied to parody or “criticism and comment” cases.¹⁴⁴ Now transformative use is applied to exact, literal images taken from the World Wide Web,¹⁴⁵ reduced posters inserted in books,¹⁴⁶ Google mass digitizing millions and millions of books,¹⁴⁷ and Westlaw and LexisNexis reprinting exact copies of court briefs.¹⁴⁸ Transformative use is applied almost everywhere. Cases that would clearly have been copyright infringement prior to Judge Leval’s article and *Campbell* are exempted under fair use.¹⁴⁹

However, transformative use is not used in sampling cases, despite the excerpts being only a few seconds in duration. Transformative use is not used in sampling cases where the excerpt is changed in pitch. Transformative use is not used where the sample cannot be recognized. If one follows the law with respect to other copyrightable subject matter, what a producer does with a music sample is quite transformative. It creates a different form than the original. It does not compete with the market for the original. Yet, a “different rule” was created for music

142. See 510 U.S. 569, 579 (1994).

143. See, e.g., *Authors Guild Inc. v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014); *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (9th Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1283 (11th Cir.), *reh’g denied*, 275 F.3d 58 (11th Cir. 2001); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 117 (2d Cir. 1998); see generally *Beebe*, *supra* note 61. Transformative use has also been borrowed and used in right of publicity cases. See, e.g., *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166–67 (3d Cir. 2013) (borrowing transformative use from copyright law and applying it to the right of publicity), *cert. dismissed*, 135 S. Ct. 43 (2014); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 934–35 (6th Cir. 2003) (borrowing transformative use from copyright law and applying it to the right of publicity); *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 349–50 (S.D.N.Y. 2002) (borrowing transformative use from copyright law and applying it to the right of publicity).

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

145. See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003); see also *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1177 (9th Cir. 2007).

146. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (9th Cir. 2006).

147. See *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 294 (S.D.N.Y. 2013); see also *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 465–66 (S.D.N.Y. 2012), *aff’d in part, vacated in part*, 755 F.3d 87 (2d Cir. 2014).

148. See *White v. West Publ’g Corp.*, No. 12 CIV. 1340 JSR, 2014 WL 3057885, at *4 (S.D.N.Y. July 3, 2014).

149. See, e.g., *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 292–93 (S.D.N.Y. 2013); *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324 (S.D.N.Y. 2005), *aff’d*, 448 F.3d 605, 615 (9th Cir. 2006); see also *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012), *aff’d in part, vacated in part*, 755 F.3d 87, 105 (2d Cir. 2014). The author objects to the enlargement of fair use. He believes that the derivative work right is being swallowed up by fair use and that the mass digitization of books without authorization should be copyright infringement. But, the law is the law, and until Congress or the Supreme Court cuts back on fair use, it appears as though any new use of a work will be judged as fair.

sampling.¹⁵⁰ This “different rule” is very different from copyright rules in other areas and for sound recordings themselves.

VI. ENLARGE THE COMPULSORY LICENSE IN SECTION 115

If fair use is not applied to sampling, then the compulsory license in Section 115 should be expanded to cover sampling.¹⁵¹ The compulsory license does not apply if the user of the song “change[s] the basic melody or fundamental character of the work.”¹⁵² The way that the compulsory license has been applied is to only deny one if the words have been changed, if less than the entire song has been included in another song, or if the song is sampled.¹⁵³ It makes no economic sense for someone to pay the royalty if he or she records the song as it is yet gets to use the song for free if a court deems the changes to be transformative or a fair use. The second song would not exist but for the original song. It makes complete sense to have the compulsory license apply to the original song or changes in the song.¹⁵⁴

CONCLUSION

As transformative use and fair use have grown over the years to cover all kinds of copyrightable subject matter, one kind of use has been exempt from any form of transformative use analysis—sampling a “sound recording” to use in another sound recording. As the law stands, as a doctrinal matter, it makes no sense to have a “different rule” for sound recordings. If the courts are going to apply transformative fair use to everything else in all other media, then they should apply transformative fair use to sound recordings.

Congress can create exemptions and can draft amendments to the Copyright Act. If Congress so wishes, it can create an exemption for sound recordings from the fair use provisions. Congress can also expand the compulsory license to cover changes to the “basic melody or fundamental nature” of a song. Congress can also create a proportional rate that can be paid for sampling. But, to have a court simply create a “new law” for music sampling is not the way to do it.

150. *See supra* Part IV. B.

151. *See* 17 U.S.C. § 115.

152. *Id.*

153. Including less than the entire song would be taking a verse or part of a verse; sampling would be just taking a few notes and looping them so that they repeat.

154. Jazz musicians have been flying under the radar by quoting or inserting “homages” to other jazz musicians for ages.