19-0028

United States Court of Appeals for the Second Circuit

ESTATE OF JAMES OSCAR SMITH,
Plaintiff-Appellant,

and

HEBREW HUSTLE, INC.,
Plaintiff-Counter-Defendant-Appellant,

v.

AUBREY DRAKE GRAHAM,
Defendant-Counter-Claimant-Appellant,

and

CASH MONEY RECORDS, INC., UNIVERSAL REPUBLIC RECORDS, UNIVERSAL MUSIC GROUP DISTRIBUTION, CORP., EMI MUSIC PUBLISHING MANAGEMENT, LLC, UNIVERSAL MUSIC-MGB NA, LLC, WARNER/CHAPPELL MUSIC, INC, SONY/ATV MUSIC PUBLISHING, LLC, APPLE, INC., AMAZON DIGITAL SERVICES, INC.,
Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No 1:14-cv-02703-WHP
The Honorable William H. Pauley, III, United States District Judge

AMICUS CURIAE BRIEF OF THE DIGITAL JUSTICE FOUNDATION IN SUPPORT OF NO PARTY AND REVERSAL

Andrew Grimm
DIGITAL JUSTICE FOUNDATION
15287 Pepperwood Drive
Omaha, Nebraska 68154
(531) 210-2381
andrew@digitaljusticefoundation.org

Gregory Keenan
DIGITAL JUSTICE FOUNDATION
81 Stewart Street
Floral Park, New York 11001
(516) 633-2633
gregory@digitaljusticefoundation.org

CORPORATE DISCLOSURE STATEMENT

The Digital Justice Foundation, Inc. ("DJF") [1] is a 501(c)(3)-registered, non-profit corporation that advocates about issues of digital justice.

The DJF has no parent corporation and no publicly held corporation has any ownership stake in it. The DJF issues no shares and no publicly held corporation pays 10% of more of its dues or exercises 10% or more of its voting power.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the DJF certifies that (i) no party or party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person other than the DJF and its counsel contributed money intended to fund the brief's preparation or submission.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Digital Justice Foundation ("DJF") is a 501(c)(3)-registered nonprofit private operating foundation that is dedicated to protecting individual rights in digital spaces.

As part of this mission, the DJF advocates for the advancement of civil liberties, privacy rights, and balanced intellectual-property rights. In addition, the DJF represents and advises musicians whose types of works (and markets) are implicated by the fair use decision below.

That decision should be reversed.

Although there appears to be no precedent directly governing this appeal, the decision below threatens a core licensing market for an entire category of copyrighted works. The decision calls fair a couple-word edit to the use of over a hundred words of lyrics. Even scholars strongly disposed to a robust fair use doctrine have not identified such a use as fair in their scholarly discussion of fair uses.

Neither has this Court. And, importantly, the Copyright Act gives statutory clues that it did not intend for this type of use to be deemed fair—emphatically because Congress crafted a compulsory licensing process that it finetuned as recently as last year.

Moreover, the district court's analysis elides an important distinction in music copyright that reflects how music is often created. In music creation, there is often a division of labor between those who compose the music and those who perform it. (Beethoven wrote his symphonies, but orchestras separately perform them.) Each is an expressive endeavor.

The Copyright Act recognizes each type of creative endeavor—composition and performance—by granting a separate type of copyright protection for each. The district court's decision, however, by granting a fair use for one type, *i.e.*, the composition work, to someone who has a license to only the other type, the performance work, undercut Congress' distinction.

As a result, affirming could invite rampant litigation. For example, suppose a licensee of a performance copyright simply did not want to pay to license the other copyright in the composition. If the district court is affirmed, taking out a few words from the non-licensed composition would provide an easy way to evade the license fee. Maybe, the composer or songwriter would sue creating yet another yet another courtroom semantic debate regarding a few words removed.

Alternatively, affirming the district court's opinion could simply cut one of the two—sing or songwriter—out of the licensing market altogether. Congress, however, certainly did not intend fair use to wreak such havoc in traditional music markets or make word-counting exercises out of federal dockets.

Perhaps, the district court rendered its in part due to certain unsavory facts of this litigation—ambush of a prominent artist by a business associate. There are, however, other ways other ways to account for those bad facts without making bad law.

REPRODUCTION OF THE RELEVANT STATUTORY SECTION

- Section 107 of Title 17 of United States Code reads, in pertinent part:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction 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 the above factors.

ISSUE PRESENTED

1. Whether the use in Drake's "Pound Cake / Paris Morton Music 2" of the musical work in the "Jimmy Smith Rap" is a fair use.

STATEMENT OF THE CASE

A. Musical Works and Sound Recordings

There are *two* categories of copyrighted works to consider in any copyright litigation about music. First, there are "musical works, including any accompanying words." 17 U.S.C. § 102(a)(2). Second, there are "sound recordings[.]" 17 U.S.C. § 102(a)(7).

Congress nowhere defined what a musical work is. See generally 17 U.S.C. § 101. By judicial decisions and historical precedent, musical works consistent of the elements of music—the collection of the melody, harmony, instrumentation, etc. 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2.05[B] (2019). The lyrics of musical verse are expressly included in a musical work by statute. 1 Nimmer on Copyright § 2.05[C].

Although there is no requirement to write out the sheet music for a musical work to exist, it may be helpful to think of the musical work as sheet music. 1 Nimmer on Copyright § 2.05[A]. Like sheet music, a musical work is the abstract *elements* of music.

By contrast, a sound recording is the *sounds*. Congress defined sound recordings as the copyrighted works that "result from the fixation of a series of musical, spoken, or other *sounds*[.]" 17 U.S.C. § 101 (emphasis added).

Thus, there are two different categories of copyright at issue when a song is recorded:

> When a copyrighted song is recorded[…], there are two separate copyrights: one [i]n the musical composition and the other in the sound recording. The sound recording is the aggregation of sounds captured in the recording while the song or tangible medium of expression embodied in the recording is the musical composition. Thus, the rights of an owner of a copyright in a sound recording do not extend to the song itself. A copyright in the recording and in the song are separate and distinct and by statute are treated differently.

Saregama India Ltd. v. Mosley, 635 F.3d 1284, 1289 n.18 (11th Cir. 2011).

These copyrights have different scopes of protection. Imagine a favorite song. It has both an associated musical work and sound recording. If a different performer sings a new version or "cover" of that song without a license and then reproduces that cover, only the original musical work would be infringed. The new recording would be an infringing derivative work of the first musical work. See 17 U.S.C. § 106(2) (derivative right); 17 U.S.C. § 101 (defining derivative works to include "sound recording").[2]

By contrast, the original sound recording would not be infringed. That is because of the scope of protection for sound recordings. They are considered to be

[2] This example is to illustrate the differences between a sound recording and musical work, but infringement would rarely happen in real life. Congress permits different performers to created covers if they pay a compulsory license fee, as discussed below. See 17 U.S.C. § 115.

reproduced only when "duplicate[d]" by copying the "the *actual* sounds fixed." 17 U.S.C. § 114(b). In other words, even if two singers sound quite similar when they sing a song, the second singer does not infringe the first's sound recording.

Moreover, ownership of the two copyrights often diverges. If a composer writes the lyrics to a song or sheet music and another artist records a performance, there are two, separately owned, copyrighted works. Congress' purpose in protecting the works separately was to ensure that both types of creative expressions be incentivized and compensated.

B. Garden Variety Copyright Infringement

This is garden-variety copyright infringement.

James Oscar Smith ("Mr. Smith") authored a musical work[3] and a sound recording when he recorded a track of spoken verse called "Jimmy Smith Rap" on his 1982 album *Off the Top*. Dist. Ct. Op. & Order at 1.[4]

In turn, prominent musician Aubrey Drake Graham ("Drake") used a potion of the sounds and lyrics of Mr. Smith's "Jimmy Smith Rap" in Drake's song "Pound Cake / Paris Mortion Music 2" and edited out a few words. Id. at 3-4.

Drake's representative secured a license to the *sounds* of "Jimmy Smith Rap" but not the *lyrics* themselves. Id. at 4. In other words, he paid the performer but not the composer.

Thus, Drake infringed in the use of the lyrics, as did the companies that distribute and perform his song. And, the rightsholders in the music sued.

---

[3] Some might dispute whether spoken lyrics are a musical work, 17 U.S.C. § 102(a)(2), or a literary work, 17 U.S.C. § 102(a)(1), when there is no independent instruments or song. See Nimmer on Copyright § 2.05[C] (discussing this issue). It does not appear that the issue was raised below and, if there is a tripartite split between (1) a literary work in the lyrics, (2) a musical work in the notices, and (3) a sound recording in the sounds, that bolsters this brief's argument to be careful about granting fair use when only one type of rightsholder is compensated. See Section III, *infra*.

[4] The district court properly found that there is a genuine issue of material fact is Mr. Smith is the author. Dist. Ct. Op. & Order at 9. On appeal of summary judgment, however, he is presumed the author.

C. Proceedings Below

In a careful and thoughtful portion of the opinion below, the district court correctly determined that there were genuine issues of material fact regarding authorship. Dist. Ct. Op. & Order 6-9. It also denied summary judgment on the question of substantial similarity. Id. at 9-12.

Then, it granted summary judgment, concluding Drake use was a fair use. Id. at 12-20. The bulk of its rationale was that editing out a few words of one sentence to change the meaning of that single sentence was somehow transformative of the entirety of the lyrics left unchanged. Id. at 16-17.

SUMMARY OF THE ARGUMENT

1. The district court's fair use analysis below is far outside the mainstream view of fair use. Below, the district court held that a very minor modification to one short sentence from a song's lyrics constituted a transformative fair use justifying the outright appropriation of the entire set of lyrics in that song. This expansive, unbridled understanding of transformative fair use marks a sharp departure from even the most robust understandings of fair use. Moreover, the district court's unbridled understanding of transformative fair use upsets the Copyright Act's compulsory licensing regime, as statutorily codified by Congress in Section 115 of the Copyright Act.

2. If affirmed, the district court's standard of fair use would invite extensive future litigation, and would profoundly disrupt music licensing markets. Congress was highly successful in creating a compulsory licensing regime in Section 115. Congress' legislative efforts in Section 115 have resulted in a relative dearth of fair use litigation in the context of music. The district court's expansive transformative fair use standard would frustrate Congress' efforts in Section 115 and would open the floodgates to future litigation on this issue. Additionally, the district court's understanding of fair use would disproportionately disrupt the intellectual property interests of an entire

category of protected works and would profoundly undermine music licensing markets. In short, the district court's holding, if not corrected, would undermine Congress' largely successful compulsory licensing regime as established in Section 115 and would invite an avalanche of future copyright litigation.

3. This Court could clarify the contours of fair use by adopting an express nexus requirement for transformative fair use. Below the district court found a minor modification to a tiny portion of a song to constitute a transformative fair use justifying the use of that entire song. Establishing a formal nexus requirement for a defense of transformative fair use would elucidate the currently nebulous legal landscape surrounding transformative fair use.

4. The district court's expansion of the transformative fair use doctrine appears to have been motivated by the idiosyncratic, unsavory factual aspects of this case. The district court's understandable concerns would have been better addressed by relying on the already existing, well-established doctrinal provisions of copyright law rather than fashioning a myopic and unprecedented expansion of the doctrine of transformative fair use.

ARGUMENT

I. The district court's fair use analysis is an extreme outlier in fair use decisions.

The district court's point is not hard to understand. The "Jimmy Smith Rap" has the following sentence as one of its lyrics:

> Jazz is the only real music that's gonna last.

Dist. Ct. Op. & Order 2.

Drake's song mildly changes these lyrics:

> Only real music is gonna last[.]

Id. at 3. All Drake did was take out the following three words: "jazz," "the," and "that's." Then, Drake moved the word "is." That's it.

The district court concluded that this word-smithing was transformative. Id. at 16. It viewed Drake's edits as changing an "unequivocal statement on the primacy of jazz" to a statement on artistic longevity generally. Id.

It then held that the entire use of over a hundred words of the "Jimmy Smith Rap" was a fair use with no explanation of how four-word change was transformative as to the remainder of the lyrics taken. See generally id. at 14-20.

Plaintiff-Appellants have already presented a doctrinal analysis in their brief. First, they dispute that this four-word change is transformative. Second, even if this Court finds it transformative in a legal sense, they insightfully point out that a

four-word transformative use by no means justifies uses unrelated to that transformation, *i.e.*, the hundred or so other lyrics at issue. See Appellants' Br. at 17-19, 26-31.

This brief addresses different issues. First, it looks to scholarly works that have examined fair use generally and transformative fair use specifically to see why this appeal is not within the scope of those decisions. Second, it dovetails this scholarly analysis with a focus on statutory clues that this type of use should not be a fair use.

A. Prominent copyright scholars have found that there are patterns to fair use decisions and this four-word edit is not within them.

Prominent copyright scholars, including Paul Goldstein, Pamela Samuelson, Neil Netanel, and Michael Madison, have found that "the massive amount of fair use case law generally divides itself into categories, patterns, or policy clusters which have their own internal coherence." David E. Shipley, A Transformative Use Taxonomy: Making Sense of the Transformative Use Standard, 63 Wayne L. Rev. 267, 267-268 (2018).

Professor David Shipley has extended this analysis of court decisions in the specific area of transformative fair use on the idea that an inductive and empirical analysis of decisions would glean insights. Id. His extensive review of

transformative fair uses identified the following taxonomy of uses found transformative:

- parody, id. at 284;
- direct commentary and criticism of the underlying work, id. at 288;
- news reporting, id. at 292;
- documentaries, compendiums, reference books and other uses out of context, id. at 296;
- appropriation art, id. at 304;
- technological transformation, such as photocopying, reverse engineering, online thumbnails and linking, Google Books, id. at 310-323.

Quite plainly, Drake's four-word edit is not most of these. It's not a parody of Mr. Smith's work, not news reporting, not a new technology, and not appropriation art.

The closest type of transformative use would be what Professor Shipley calls "use out of context." Drake's use, however, is not analogous to these types of uses. These types of works "use a *small amount* of a copyrighted work without permission when the intended purpose, such as a biographical anchor, a historical artifact, or as a jumping off point, is considerably different from the original purpose of the work, such as entertainment or promotion." Id. at 298 (emphasis added).

Applying that analysis here, both Drake and Mr. Smith were purveying entertainment. The broad purpose of producing enjoyable music is the same. And, Drake is not doing a minimal amount to reference Mr. Smith's work. He is incorporating the aesthetic elements of Mr. Smith's lyrics for their compelling and vivid discussion of music creation. Much of Drake's use is not transformative but is "in excess of this benign purpose, and instead are simply rebroadcast for entertainment purposes that Plaintiffs rightfully own." Elvis Presley Enters. v. Passport Video, 357 F.3d 896, 897 (9th Cir. 2004).

Moreover, as Professor Shipley notes, use out of context cases about transformative fair use are highly sensitive to amount taken. Taking a few pictures and reducing them in size to fit a timeline, as in Billy Graham Archives, is fair; taking a "substantial portion" of the underlying work, such as movie plot summaries with still pictures and trivia, are not. Shipley, A Transformative Use Taxonomy, 63 Wayne L. Rev. at 299-301.

Thus, even if this Court thinks that the four-word edit transformed the single sentence by recontextualizing it, the whole verbatim use of lyrical verse should not be deemed fair use.

Professor Neal Netanel sums up the point up nicely: "If the use is transformative and the defendant has *not* copied excessively in light of the transformative purpose, the use will most likely be held to be a fair use." Neil W.

Netanel, Making Sense of Fair Use, 15 Lewis & Clark L. Rev. 715, 717 (2011). Here, by contrast, Drake used a substantial portion of a recording and used significant portions that had nothing to do with a purported transformation of a single line.

As one scholar recently put it, transformative fair use is not "the answer to anything and everything in the universe (of fair use)." Jiarui Liu, An Empirical Study of Transformative Use in Copyright Law, 22 Stan. Tech. L. Rev. 163, 167 (2019). Instead, it is a *threshold* inquiry: "Judge Leval cautioned that transformative use does not guarantee success in claiming fair use; instead, he designed the doctrine as a threshold inquiry to quickly weed out garden-variety infringements[.]" Id.

Drake's use is a garden-variety infringement, however. He changed a few words—because he is not a jazz musician—and otherwise reproduced another's lyrics without securing rights (inadvertently). That's garden-variety infringement, not transformative fair use.

That there may be a small adjustment in the meaning is no matter. Like fair use generally, transformativenes "is not an all-or-nothing matter." Twin Peaks Prods. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1374 (2d Cir. 1993). The doctrine not only turns on whether the use is transformative but also whether it furthers that

transformative purpose "to an insignificant or a substantial extent." Id.; see also 17 U.S.C. § 107 ("the purpose and character of the use").

Even if there was transformation, nothing in the scholarly empirical tracking of all transformative fair use cases suggests that the entire use of Mr. Smith's lyrics was fair. They suggest the contrary.

B. Scholarship on fair use generally by fair-use advocates even suggests that this is not a fair use.

Not only is the decision below an outlier for transformative fair use, it is an outlier for fair use generally.

Pertinent here, Professor Pamela Samuelson, a strong support of a robust reading of Section 107, has conducted a near-exhaustive analysis of the "common patterns" that underlie fair use holdings. Pamela Samuelson, Unbundling Fair Uses, 77 Fordham L. Rev. 2537, 2541 (2009). Professor Samuelson concludes that there are five types of uses, or "policy-relevant clusters," where courts have traditionally found fair use, id. at 2543:

1. Free Speech and Expression Fair Uses: Works that "criticize, comment upon, or offer new insights about those works and the social significance of others' expressions" are often deemed fair uses. Id. at 2549. Examples include parodies, critiques, critical

commentaries, news reporting, and certain appropriation art. Id. at 2549-66.

2. Authorship-Promoting Fair Uses: The constitutional purpose to further the development of creative expression leads courts to sometimes allow "second authors to make productive use of earlier works." Id. at 2569. Examples include scholarship, social and cultural commentary, and incidental uses. Id. at 2570-76.
3. Uses That Promote Learning: "Teaching, scholarship, and research" are uses specifically enumerated in the preamble of Section 107 and are seen as uses that promote "public access to knowledge." Id. at 2581.
4. Foreseeable Personal or Noncommercial Uses: Fair use decisions have also authorized uses "for private, noncommercial purposes, for litigation and other legitimate government purposes, and for some commercial advertisements." Id. at 2588.
5. Unforeseen Uses: The last category of fair uses include innovative technologies that facilitate personal uses of copyrighted works and uses of copyrighted works that improve competition or innovation. Id. at 2603-06.

Again, Drake's use clearly did *not* fall into four of these five broad categories of air use. His song makes no critical commentary of Mr. Smith's lyrics; is not meaningfully educational; is not a personal or noncommercial use; and is not akin to innovative technology. The closest would be what Professor Samuelson calls "Authorship-Promoting Uses." Again, however, Drake's use does not fit within that category either as Professor Samuelson sees it in the case law, the use is more than incidental and makes essentially no commentary on the original.

Instead, the infringement here is garden-variety infringement. It advances none of the salutary public policy goals ordinarily associated with fair use. In fact, the infringement here is best characterized as something that Professor Samuelson notes is almost always held *not* to be fair use: interference with a "core licensing market." Samuelson, Unbundling Fair Uses, 77 Fordham L. Rev. at 2560.

Thus, the district court's analysis is a highly anomalous application of fair use. Rather than implicating the traditional categories of fair use that importantly prevent copyright from being overextended in a manner detrimental to the public interest, the district court's decision is a massive extension of fair use to a traditional market for musicians.

The district court's decision is far outside of the mainstream for fair use decisions.

C. Congress' creation of a compulsory licensing regime for musical works is a strong indication that it did not intend for this type of use to be held a fair use .

There is another perspective on fair use and the statute that gives clues that Drake's use was not intended by Congress to be a fair use: Congress' creation of a compulsory licensing regime for musical works like this. See 17 U.S.C. § 115. Plaintiff-Appellant's brief mentions this possibility but did not explore its full meaning and import. See Appellants' Br. at 19-21, 21 n.9.

Professor Paul Goldstein, a prominent treatise-author and copyright expert, characterizes fair use as a "quintessentially pragmatic doctrine, one that proceeds from fact to fact, case to case, with expedience, not theory, as its guiding influence." Paul Goldstein, Fair Use in Context, 31 Colum. J.L. & Arts 433, 438 (2008).

A court confronted with a fair use dispute is simply trying to discern Congressional intent: "What copyright result should obtain when Congress has not spoken?" Id. at 441.

In other words, fair use is an invitation for this Court, and courts generally, to play their natural interstitial role. Congress limited the exclusive rights enumerated in 17 U.S.C. § 106 by enumerated specific exemptions to those rights in 17 U.S.C. §§ 108-122. These exemptions are Congress' attempts to limit copyright in a way that advances certain salutary public policy goals expressly.

Yet Congress quite reasonably did not want to trifle with determining whether each and every possible factual scenario is a fair use. Instead of giving fair use to an administrative agency, it gave it to the federal courts, to wrestle with each cases "pertinent facts - its equities and efficiencies" and its "own morality[.]" Goldstein, Fair Use in Context, 31 Colum. J.L. & Arts at 441. Fair use, on this view, is Congress' delegation to the federal courts the balancing act of copyright where Congress has *not* spoken.

Here, however, Congress has spoken. It's developed a compulsory licensing regime for these kinds of uses of musical works. See 17 U.S.C. § 115. Should Drake have wanted to use this musical work he had two options: (1) license it directly from the rightsholder or (2) comply with Congress' compulsory licensing regime in Section 115.[5]

Granting fair use in this situation, permitting an artist to correct an oversight through fair use, impermissibly steps on Congress' authority to establish compulsory licensing markets by statute. Quite simply, if artists can use musical

[5] Moreover, the compulsory licensing regime is no outdated statutory oversight. Congress updated it in October 2018 with the passage of the Modernization Act, PL 115-251, H.R. 1551, https://www.congress.gov/bill/115th-congress/house-bill/1551. This recent amendment is another reason why fair use decisions should not interfere with this carefully calibrated compulsory licensing market.

works for free on a fair use theory, they won't be paying the compulsory license fees that Congress anticipated.

In other sections of the Copyright Act, Congress made clear that a specific exemption to copyright would not limit the application of fair use in analogous situations. In Section 108, for example, Congress grants extensive exemptions to copyright for library and archives. See generally 17 U.S.C. § 108. However, Congress was also clear that "[n]othing in this section […] in any way affects the right of fair use as provided by section 107"—affects fair use. 17 U.S.C. § 108(f), (f)(4); cf. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 94 n.4 (2d Cir. 2014) (rejecting argument that § 108 foreclosed fair use assertions by libraries because of § 108(f)(4)).

By contrast, Section 115 has no such savings provision. It nowhere mentions fair use. See generally 17 U.S.C. § 115. Clearly, Congress intended that artists would make these kinds of uses of musical works, building upon one another's work. But, it intended that they would do so with remuneration and compensation to the rightsholder with the compulsory licensing fee. Drake didn't do that and, therefore, he infringed.

Here, Section 115's purpose, its lack of a savings clause like Section 108, and Professor Goldstein's insight on the interstitial catch-all purpose of fair use

show that Congress did not intend for judicial fair use decisions that would interfere with a core part of its statutory scheme of compulsory licensing in music.

Decades ago, the Supreme Court permitted fair uses in the Sony Betamax case because the Court found it unlikely that Congress would want to make copyright infringers out of millions. Cf. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984) ("One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day[…]").

Section 115 flips the scales. The Copyright Act is strongly indicative that Congress wanted downstream recording artists like Drake to compensate those they borrow from. One can search the Copyright Act in vain for any other indication.

II. If affirmed, the district court's fair use analysis would either invite extensive fair use litigation or disrupt music markets.

As it reviews the corpus of fair use cases, this Court will find that there are not many in the context of music.

For "musical works, fair use appears to be far less prevalent." Edward Lee, Fair Use Avoidance in Music Cases, 59 B.C. L. Rev. 1873, 1875 (2018); see also Liu, An Empriical Study of Transformative Use in Copyright Law, 22 Stan. L. Rev. at 166 ("In terms of subject matter, visual arts, including photographs and fine arts, literary works, and audiovisual works, turn out to be far more susceptible to transformative use than music and software, which are traditionally plagued with piracy problems.").

To some extent, the dearth of fair use cases is the result of litigation strategies by lawyers arguing that there was no incorporation of protectible expression (and failing to allege fair use in the alternative). Lee, Fair Use Avoidance in Music Cases, 59 B.C. L. Rev. at 1876-1878.

However, some of it also stems from Congress' highly successful compulsory licensing regime in Section 115. Artists and their representatives know that they can use a musical work if they pay a "mechanical royalty" to the original rightsholder. For that reason, there simply are not that many copyright cases about musical works at all.

The district court's analysis invites a seachange.

If removing three words and changing the position of one word is enough to use remaining lyrics for free, who would be dumb enough to pay? Even if the rightsholder brings a case, a clever enough lawyer can craft arguments about how the minute change recontextualization in a new song is transformative. Cf. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 600 (1994) (Kennedy, J., concurring) (admonishing that courts "must take care to ensure that not just any commercial takeoff is rationalized *post hoc*" as transformative).

There are only two possible results and neither is in the public interest. One possibility is that the infringed artist actually gets a lawyer and sues. Then, another district court is left to handle yet another case, on a busy docket, with lawyers disputing the meaning of words in a song.

Maybe a district court would see it differently. If there is not a famous or prominent artist in the case, the plaintiff might reasonably hope for a different result. Cf. Andrew Gilden, Raw Materials and the Creative Process, 104 Geo. L.J., 355, 370 (2016) (criticizing this Court, among others, for permitting "world-famous visual and recording artists" but not "lesser known creators" to use existing copyrighted works as raw materials through the doctrine of fair use).

Maybe the district court would apply the fair use doctrine again in favor of a smaller defendant. Either way, the all-or-nothing aspect of fair use invites further

litigation in music. Inadvertently, by deeming this use fair, the district court would invite further recording artists to do the same thing—not pay. If affirmed, even in an unpublished decision, new cases will not be oversights but litigation strategies. (And, nothing in fair use turns on whether the infringement is accidental or intentional.)

There is an alternative. Some smaller rightsholders in musical works won't sue for a variety of reasons: access to lawyers or financial ability to retain them; knowledge of their rights, knowledge of the infringement, concerns that litigation will damage reputation in the music industry, etc.

In that case, however, the Courts would be using fair use as a weapon to dry up an important part of songwriters' compensation. Ordinarily, a compulsory licensing regime is a huge win-win. Someone like Drake has more opportunity to express himself and a smaller artist can receive some portion of the proceeds for a much more prominent artist. This fair use decision, however, undoes that. It undoes Congress' will about how licensing markets in music should be structured.

Given the precarious economic situation of many songwriters, it is not unfathomable that more would find ongoing music careers unworkable if there is a serious diminishing value to their mechanical royalties.

In all likelihood, the results of affirming would be a mix of both results. Some rightsholders in musical works would sue and some would suffer the

resulting loss in remuneration. Neither result is in the public interest and neither is what Congress sought when it established a compulsory licensing regime that has been working well.

III. Adopting an express nexus requirement for transformative fair use would help to clarify the law.

What seems to be the trouble here is that transformativeness is often seen as outcome determinative. The district court's decision highlights that issue. It deemed a tiny *portion* of the use transformative, so then it held the *entire* use to be fair.

Guidance to the district courts through a formal doctrine of nexus would be helpful. On such a doctrine, the transformation must be directly connected and associated with the portions of the underlying work.

Then this case would be doctrinally easy: the transformation of a single line might very well be a fair use, but the remaining lyrical appropriation from Mr. Smith is not. That's because the remaining appropriation has little to do with the transformation. Instead, the remaining use is "verbatim or near-verbatim copies" of Mr. Smith's work. See Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 35, 60 (1st Cir. 2012) (finding no fair use).

A next requirement, as a formal doctrine with a name, would help lawyers to advise clients in a nebulous field of case law: use as little as necessary to accomplish your transformative purpose and be sure what you do use has some meaningful artistic connection to that purpose.

IV. There are doctrinal ways, other than misapplying fair use, to address what may have concerned the district court about this case.

It is possible that the district court's decision on fair use was partially animated by certain other facts of the litigation that do not directly bear on fair use. It had other, doctrinally appropriate ways it could limit remedies here, however. Fair use is not the only tool available to ensure a fair and reasonable outcomes here.

Some of these facts truly should not affect a court's decision. For example, this litigation is by Mr. Smith's *Estate*. Congress protects copyrighted works authored by a natural person for 70 years after the author's death. 17 U.S.C. § 302(a). To some, this is controversial. But, term-length is not implicated here and, regardless, affirming would affect *all* copyrights, no matter whether the author is alive or dead.[6]

[6] Fair use's four factors are illustrative. See 17 U.S.C. § 107 ("[F]actors to be considered shall *include* […]" (emphasis added)). Therefore, if a court feels that the author's death should affect fair use, it should say so. There are situations where considering the author's death might make sense for fair use, but such considerations are not relevant here because of the possibility of a compulsory license. See 17 U.S.C. § 115. Moreover, post-mortem copyright terms might best be viewed as Congress' pragmatic concession to the fact that many artists die young; that art is not often a lucrative career so post-mortem royalties help sustain families; and that art created on the eve of death should still be incentivized by copyright. Artistic talent often flourishes even into old age.

Alternatively, the district court might have been troubled by the sense of betrayal and ambush in this litigation. It noted that Hebrew Hustle's principal, Stephen Hacker, "had ongoing business relationships with many of the Defendants." Dist. Ct. Op. & Order at 4. Despite this relationship, he was looking for ways to sue Drake. Id. In that sense, Drake seems sympathetic. He was ambushed by a former business associate, maybe a former friend.

Of course, one way to avoid lawsuits from one-time friends is attention to detail and proper copyright clearance.

Mistakes do happen, however. And, the district court may have thought it somewhat unfair to punish Drake when his representatives had an oversight but had not intentionally infringed. Moreover, they had properly licensed the sound recording, just not the composition. Id.

These concerns are not irrelevant. They simply do not bear on fair use, however. Instead, the Copyright Act and the procedures of litigation give district courts broad discretion to fashion *remedies*.

First, the Copyright Act expressly gives district courts discretion to deny attorney's fees. 17 U.S.C. § 505 ("the court *in its discretion* may" (emphasis added)). Although objective reasonableness of litigation positions is the central factor for fee-shifting in copyright, district courts "*must* take into account a range

of considerations beyond the reasonableness of litigating positions." Kirtsaeng v. John Wiley & Sons, Inc., 136 S. Ct. 1979, 1988 (2016) (emphasis added).

Thus, the district court could consider a broader set of facts, including those that do no bear on fair use, in denying a fee award. In any event, it is not even clear that a prevailing plaintiff would be eligible for fee-shifting here. See 17 U.S.C. § 412 (eligibility for fees requires that a work generally be registered before infringement began).

Second, the district court could deny an injunction. What is the irreparable harm of Drake's use when a compulsory license could have been obtained? Don't the balance of equities weigh in his favor? Doesn't the public interest as well, insofar as the public has a strong interest in hearing his music? Indeed, the Supreme Court recognized in Campbell v. Acuff-Rose Music, Inc. that artistic infringements of a work are not often appropriate for an injunction. 510 U.S. 569, 578 n.10 (1994).

There is no basis for an injunction here. In turn, that means plaintiffs cannot hold up Drake's distribution and public performance of his song. He simply has to pay the rightsholders.

Third, the question is how much Drake and other defendants might have to pay. And, the district court also has significant power and discretion over that aspect of remedies too.

Copyright has two types of potential measures of damages. There are actual damages and infringer's profits, 17 U.S.C. § 504(b), and there are statutory damages, 17 U.S.C. § 504(c). Ordinarily, plaintiffs can choose between the two. 17 U.S.C. § 504(a).

Statutory damages, however, are not a real consideration. As with attorney's fees, statutory damages may not be available here. 17 U.S.C. § 412. Even if they were, this was accidental infringement, not willful infringement. Thus, statutory damages would be, at most, $30,000. 17 U.S.C. § 504(c)(1). Even if statutory damages were available, plaintiffs would not want them.

Instead, plaintiffs are after an award of Drake's profits. The Copyright Act permits Drake to dramatically limit even that award. He can deduct from the money damages "elements of profit attributable to factors other than the copyrighted work." 17 U.S.C. § 504(b).

These factors are numerous. Drake only uses Mr. Smith's musical work for an introduction to a much longer song by Drake. Perhaps then only a small portion of Drake's profits in this song would be attributable. Also, Drake had a proper license to the *sounds* of Mr. Smith's voice, so the only damages would flow from the profits attributable to the *words* spoken by Mr. Smith. An award of Drake's profits would be further constrained.

What is more, Drake is famous. His fans listen to his music because it is *his*. And, that matters in determining the causes of a song's profits:

> Given that many factors are involved in creating a hit song—promotion, production, distribution, and, in the video age, being "telegenic"—[lyrics] may actually play only a minor role in the success of a hit.

Jeffrey H. Brown, Comment: "They Don't Make Music the Way They Use To": The Legal Implications of "Sampling" in Contemporary Music, 1992 Wis. L. Rev. 1941, 1977 (1992).

This Court should be clear that all of this is relevant evidence in determining the appropriate award of profits. If a runaway jury gives far too much, the district court could even use remittitur to make the award reasonable.

Indeed, if the minute prospect of windfall profits seems to be deterring settlement, defendants could even seek partial summary judgment on damages. Drake's entire album did not find its worth and value through the lyrics of an introduction of *one* of its tracks and that only a small proportional amount of profits for one song is at issue here.

In short, the Estate should certainly be entitled to some remedies. Drake infringed. But, in reversing, this Court might give the district court some guidance about how it can make sure those remedies are appropriate and proportional.

Affirming would *encourage* some potential licensees to try their chances in court because fair use is an all-or-nothing doctrine. By contrast, reversing with

clear guidance on how to ensure damages are not a windfall encourages settlement, both for this case and for others before they reach the courtroom.

There are lots of ways, beyond fair use, to ensure equitable and fair outcomes in copyright litigation.

CONCLUSION

This Court should reverse the decision below and remand for further proceedings.

April 19, 2019

Respectfully submitted
/s/ Andrew Grimm
Andrew Grimm
DIGITAL JUSTICE FOUNDATION
15287 Pepperwood Drive
Omaha, Nebraska 68154
(531) 210-2381
andrew@digitaljusticefoundation.org

Counsel for the DJF

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Excluding the parts of the document exempted by Rule 32(f) and local rule, this brief contains 6631 words.

This brief has been prepared in Microsoft word using Times New Roman, size 14-point font.

/s/ Andrew Grimm
Andrew Grimm

CERTIFICATE OF SERVICE

I hereby certify that, on April 19, 2019, I electronically filed the foregoing with the Clerk of this Court using this Court's CM/ECF system. Participants in this case who are CM/ECF users, or represented by CM/ECF users, are hereby served by CM/ECF.

/s/ Andrew Grimm
Andrew Grimm