

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 3<sup>rd</sup> day of February, two thousand twenty.

Present: GUIDO CALABRESI,  
ROSEMARY S. POOLER,  
SUSAN L. CARNEY,  
*Circuit Judges.*

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ESTATE OF JAMES OSCAR SMITH,

*Plaintiff-Appellant,*

HEBREW HUSTLE, INC.,

*Plaintiff-Counter-Defendant-Appellant,*

v.

19-28

AUBREY DRAKE GRAHAM, personally known as DRAKE,

*Defendant-Counter-Claimant-Appellee,*

CASH MONEY RECORDS, INC., UNIVERSAL REPUBLIC RECORDS,  
an unincorporated division of UMG RECORDINGS, INC., 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.,

*Defendants-Appellees.*<sup>1</sup>

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Appearing for Appellant: Robert W. Clarida, Reitler Kailas & Rosenblatt LLC, New York, N.Y.

Anthony Robert Motta, New York, N.Y. (*on the brief*).

Appearing for Appellees: Christine Lepera, Mitchell Silberberg & Knupp LLP (Jeffrey M. Movit, *on the brief*), New York, N.Y.

Cynthia S. Arato, Shapiro Arato Bach, LLP, New York, N.Y. (*on the brief*).

Gabrielle Levin, Gibson, Dunn & Crutcher LLP, New York, N.Y. (*on the brief*).

Amicus Curiae: Andrew Grimm & Gregory William Keenan, Digital Justice Foundation, Omaha, N.E., *amici curiae in support of Plaintiffs-Appellants Estate of Smith, et al.*

Jonathan Band, *for* Public Knowledge, Organization for Transformative Works, Electronic Frontier Foundation, Washington, D.C., *amici curiae in support of Defendants-Appellees Graham, et al.*

Rebecca Tushnet, Georgetown University Law Center, Washington, D.C., and Jack I. Lerner, UCI Intellectual Property, Arts, and Technology Clinic, Irvine, C.A., *for* Annemarie Bridy, Megan Carpenter, Peter Jaszi, Edward Lee, Jack I. Lerner, Yvette Joy Liebesman, Michael J. Madison, Mark P. McKenna, Betsy Rosenblatt, Zahr Said, Pamela Samuelson, David Shipley, Jessica Silbey, Rebecca Tushnet, *amici curiae in support of Defendants-Appellees Graham, et al.*

Appeal from the United States District Court for the Southern District of New York (Pauley, *J.*).

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of said District Court be and it hereby is **AFFIRMED**.

Appellants Estate of James Oscar Smith and Hebrew Hustle, Inc. appeal from the May 30, 2017 judgment of the United States District Court for the Southern District of New York (Pauley, *J.*) granting Appellees' motion for summary judgment on the ground that the alleged

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<sup>1</sup> The Clerk of Court is directed to amend the caption as above.

copyright infringement was fair use. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

We review a district court's grant of summary judgment de novo. *Blanch v. Koons*, 467 F.3d 244, 249 (2d Cir. 2006). "Summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 250. "Although fair use is a mixed question of law and fact, this court has on a number of occasions resolved fair use determinations at the summary judgment stage where there are no genuine issues of material fact." *Id.* (alterations, internal quotation marks, and citation omitted).

While the law affords copyright protection to promote the progress of science and useful arts, "the law has long recognized that some opportunity for fair use of copyrighted materials is necessary to promote [that] progress." *TCA Television Corp. v. McCollum*, 839 F.3d 168, 177-78 (2d Cir. 2016) (internal quotation marks omitted). The statutory framework for analyzing fair use, codified in 17 U.S.C. § 107, provides four nonexclusive factors that should be considered when deciding if a particular work makes fair use of another:

- (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.
- These factors are analyzed individually but weighed together. *TCA*, 839 F.3d at 179.

We agree with the district court that Defendants' use of the "Jimmy Smith Rap" in "Pound Cake" is fair use. The statutory factors support our conclusion in this case.

The first factor supports fair use because the use was transformative. A work is transformative when it "uses the copyrighted material itself for a purpose, or imbues it with a character, different from that for which it was created." *TCA*, 839 F.3d at 180. "Pound Cake" does just that. The message of the "Jimmy Smith Rap" is one about the supremacy of jazz to the derogation of other types of music, which—unlike jazz—will not last. On the other hand, "Pound Cake" sends a counter message—that it is not jazz music that reigns supreme, but rather all "real music," regardless of genre. App'x at 325. Beyond the text of the lyrics themselves, "Pound Cake" situates its sampling of approximately thirty-five seconds of the "Jimmy Smith Rap" at the beginning of an approximately seven-minute-long hip-hop song in which Drake and Shawn Carter, professionally known as Jay-Z, rap about the greatness and authenticity of their work. Through both the alteration of the "Jimmy Smith Rap" and the rest of the rap's lyrics, "Pound Cake" emphasizes that it is not the genre but the authenticity of the music that matters. In this manner, "Pound Cake" criticizes the jazz-elitism that the "Jimmy Smith Rap" espouses. By doing so, it uses the copyrighted work for "a purpose, or imbues it with a character, different from that for which it was created." *TCA*, 839 F.3d at 180.

We need not spend much time on the second factor, the nature of the copyrighted work. This factor "has rarely played a significant role in the determination of a fair use dispute," and when a work is transformative, the factor may nonetheless support fair use. *Authors Guild v.*

*Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015). The district court found that the second factor weighs against a finding of fair use here. This factor is of “limited usefulness,” however, where, as we have determined applies here, “the creative work of art is being used for a transformative purpose.” *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

The third factor too supports fair use. This factor looks at “whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole are reasonable in relation to the purpose of the copying.” *TCA*, 839 F.3d at 185 (alterations, internal quotation marks, and citation omitted). We have been clear, however, that “the law does not require that the secondary artist may take no more than is necessary.” *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013). “The secondary use must be permitted to conjure up *at least* enough of the original to fulfill its transformative purpose.” *Id.* (brackets, internal quotation marks, and citations omitted). Here, the amount used by Defendants is reasonable. While “Pound Cake” borrows language from the “Jimmy Smith Rap” detailing the production process for *Off the Top*, this was necessary to emphasize its own message: that the ultimate attribute of music is its authenticity, not the production process that created it.

Finally, the fourth factor also weighs in favor of fair use. “The final statutory factor considers the effect of the use upon the potential market for or value of the copyrighted work, focusing on whether the secondary use usurps demand for the protected work by serving as a market substitute.” *TCA*, 839 F.3d at 186 (internal quotation marks and citations omitted). In the case at hand, there is no evidence that “Pound Cake” usurps demand for “Jimmy Smith Rap” or otherwise cause a negative market effect. “Pound Cake,” a piece by a hip-hop artist about rap and hip-hop music, appeals to a much different audience than does “Jimmy Smith Rap,” which was a piece by a jazz musician on a jazz album about jazz music. *See Cariou*, 714 F.3d at 709 (emphasizing that “Prince’s work appeals to an entirely different sort of collector than Cariou’s”). Nor is there evidence of the existence of an active market for “Jimmy Smith Rap,” which is vital for defeating Defendants’ fair use defense. *See TCA*, 839 F.3d at 186-87; *Cariou*, 714 F.3d at 709 (weighing in favor of fair use that “Cariou has not aggressively marketed his work”); *Blanch*, 467 F.3d at 258 (noting that Blanch had never published or licensed “Silk Sandals” subsequent to its appearance in *Allure* when holding fair use applied).

We have considered the remainder of Appellants’ arguments and find them to be without merit. Accordingly, the order of the district court hereby is AFFIRMED.

FOR THE COURT:  
Catherine O’Hagan Wolfe, Clerk