

# FAIR USE AVOIDANCE IN MUSIC CASES

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INTRODUCTION.....	1874
I. FAIR USE'S RELEVANCE TO MUSIC COMPOSITION .....	1878
A. <i>Fair Use and the “Borrowing” of Copyrighted Content</i> .....	1879
1. Transformative Works.....	1879
2. Examples of Transformative Works .....	1885
B. <i>Borrowing in Music Composition</i> .....	1890
1. Musicians Have Borrowed Throughout History .....	1890
2. The Nature of Music Produces Similarities .....	1894
II. EMPIRICAL STUDY OF FAIR USE OF MUSICAL WORKS .....	1897
A. <i>Study Design</i> .....	1897
1. Scope of Music Cases.....	1897
2. Study Limitations .....	1899
B. <i>Results from Survey of Musical Works Cases</i> .....	1900
1. Fair Use of Musical Works Is Rarely Discussed in Decisions.....	1900
2. Most Music Defendants Prevail on Other Grounds .....	1902
3. Most Losing Music Defendants Do Not Pursue Fair Use Defenses.....	1904
III. THE THEORY OF FAIR USE AVOIDANCE .....	1904
A. <i>General Theory of Avoidance</i> .....	1905
1. Avoidance by Litigants.....	1905
2. Avoidance by Courts .....	1906
3. Examples of Avoidance in Copyright Law.....	1906
B. <i>Fair Use Avoidance in Music Cases</i> .....	1909
1. Potential Reasons Why Musicians May Elect to Avoid Fair Use Defenses.....	1910
2. Potential Reasons Why Courts Have Avoided Fair Use .....	1916
IV. TRADEOFFS OF FAIR USE AVOIDANCE .....	1922
A. <i>Advantages</i> .....	1922
1. Alternatives Simpler for Courts to Apply Than Fair Use .....	1922
2. Courts Avoid the Difficult Question About Transformative Works Versus Derivative Works .....	1923
3. Courts Avoid Possible Pandora’s Box of Music Appropriation.....	1923
4. Judicial Economy .....	1924
B. <i>Disadvantages</i> .....	1927
1. Possible Chilling Effect.....	1927
2. Copyright Clutter.....	1929
C. <i>Overall Assessment</i> .....	1930
CONCLUSION .....	1931

# FAIR USE AVOIDANCE IN MUSIC CASES

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**Abstract:** This Article provides the first empirical study of fair use in cases involving musical works. The major finding of the study is surprising: despite the relatively high number of music cases decided under the 1976 Copyright Act, no decisions have recognized non-parody fair use of a musical work to create another musical work, except for a 2017 decision involving the copying of a narration that itself contained no music (and therefore might not even constitute a musical work). Thus far, no decision has held that copying musical notes or elements is fair use. Moreover, very few music cases have even considered fair use. This Article attempts to explain this fair use avoidance and to evaluate its costs and benefits. Whether the lack of a clear precedent recognizing music fair use has harmed the creation of music is inconclusive. A potential problem of “copyright clutter” may arise, however, from the buildup of copyrights to older, unutilized, and underutilized musical works. This copyright clutter may subject short combinations of notes contained in older songs to copyright assertions, particularly after the U.S. Supreme Court’s rejection of laches as a defense to copyright infringement. Such a prospect of copyright clutter makes the need for a clear fair use precedent for musical works more pressing.

## INTRODUCTION

Fair use is a common defense in copyright cases involving all sorts of works, ranging from literary works, a category that includes computer programs, to works of visual art.<sup>1</sup> The prevalence of fair use defenses comes as no surprise given that, unlike many copyright exceptions, the fair use provision in the 1976 Copyright Act is written as a general, all-purpose exception

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<sup>1</sup> See generally Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (discussing various types of fair uses).

with no limitation on the circumstances or the types of copyrighted works for which it may be invoked.<sup>2</sup> Fair use's general applicability is buttressed by the tendency of courts to devalue the second factor of fair use, the nature of the copyrighted work in balancing the four fair use factors.<sup>3</sup> As one court recognized, “[t]he second factor has rarely played a significant role in the determination of a fair use dispute,” a conclusion supported by a comprehensive empirical study of fair use.<sup>4</sup> The type of copyrighted work, in other words, does not appear to play much of a role, if any, in the fair use analysis.

Or does it? For at least one type of work, namely musical works, fair use appears to be far less prevalent. In cases involving musical works that allegedly copied portions of other musical works (i.e., specific musical or lyrical elements), fair use is dormant and typically not even raised. Consider the recent high-profile case involving Pharrell Williams and Robin Thicke: the duo filed a lawsuit against Marvin Gaye's estate to establish that their mega-hit song “Blurred Lines” did not infringe the copyright to Gaye's 1977 song “Got to Give It Up.”<sup>5</sup> The case seemed particularly apt for a defense of fair use, given Robin Thicke's admission in a May 2013 *GQ* magazine interview that the “groove” of Gaye's song inspired Pharrell and him to create “Blurred Lines” and that they wanted to “make something like that [song].”<sup>6</sup> Unless one concedes such copying is infringement, this admission cries out for a fair use defense. Drawing on parts of a prior work to create a new work is a standard ingredient in many fair use defenses that are based on so-called transformative uses.<sup>7</sup> If the case involved two novels, paint-

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<sup>2</sup> Compare 17 U.S.C. § 107 (2012) (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright.”) (emphasis added), with *id.* § 110(3) (limiting exclusive rights of copyholders to permit, among other things, “performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature . . . in the course of services at a place of worship”).

<sup>3</sup> See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) (citing WILLIAM F. PATRY, *PATRY ON FAIR USE* § 4.1 (2015)).

<sup>4</sup> *Authors Guild*, 804 F.3d at 220; Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 610–12 (2008) (suggesting “that the outcome of factor two typically has *no significant effect* on the overall outcome of the fair use test,” but also finding greater success of fair use for factual works versus creative works) (emphasis added).

<sup>5</sup> See *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at \*1 (C.D. Cal. July 14, 2015), *aff'd in part, rev'd in part sub nom. Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018).

<sup>6</sup> Stelios Phili, *Robin Thicke on That Banned Video, Collaborating with 2 Chainz and Kendrick Lamar, and His New Film*, GQ (May 6, 2013), <http://www.gq.com/story/robin-thicke-interview-blurred-lines-music-video-collaborating-with-2-chainz-and-kendrick-lamar-mercy> [https://perma.cc/A6BY-4JRV].

<sup>7</sup> See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1267–69 (11th Cir. 2001) (discussing the importance of transformative use in the context of a parody); see also *Samuelson*,

ings, or even computer programs instead of musical works, fair use would be a no-brainer for the defense to raise. But, instead of raising fair use, Pharrell and Thicke asserted that they “did not incorporate or otherwise use the composition ‘Got to Give It Up’ in ‘Blurred Lines.’”<sup>8</sup> Thicke even recanted his explanation of composing “Blurred Lines,” instead maintaining that he was “high on Vicodin and alcohol” and that Pharrell wrote almost all of “Blurred Lines” by himself.<sup>9</sup>

In hindsight, Pharrell and Thicke’s failure to raise a fair use defense may have been costly, given the jury’s ultimate finding that “Blurred Lines” infringed Gaye’s copyright.<sup>10</sup> But their strategy in defending against a claim of music infringement is no anomaly. Indeed, in practice, it is the rule rather than the exception. Except for fair use parody of another song, which is well-established under the U.S. Supreme Court’s seminal 1994 fair use decision in *Campbell v. Acuff-Rose Music*,<sup>11</sup> only one federal case has recognized a songwriter’s fair use in copying or borrowing parts of another composition. That case, decided in 2017, involved Drake’s sampling of 35 seconds of a sound recording by Jimmy Smith, who narrated his “Jimmy Smith Rap” to no music.<sup>12</sup> Even this lone fair use precedent in the context of sampling did not address the fair use factors applied to musical notes, as opposed to words. Moreover, it is debatable whether “Jimmy Smith Rap” even constitutes a musical work, although the district court apparently assumed without deciding that it was based on the plaintiffs’ characterization.<sup>13</sup> The Copyright Office allowed a registration for “Jimmy Smith Rap” apparently as a musical work,<sup>14</sup> but that classification is contrary to the Copyright Office’s own definition of musical work, which requires *music* to be a part of the work.<sup>15</sup>

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<sup>8</sup> *supra* note 1, at 2553 (noting that in addition to criticism, authors also sometimes borrow from existing works as an exercise in transformative artistic expression).

<sup>9</sup> Complaint for Declaratory Relief at 5, Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx), 2015 WL 13648068 (C.D. Cal. Aug. 15, 2013) [hereinafter Pharrell Williams Complaint].

<sup>10</sup> August Brown, *Robin Thicke on ‘Blurred Lines’: ‘I Was High on Vicodin and Alcohol,’* L.A. TIMES (Sept. 15, 2014), <http://www.latimes.com/entertainment/music/posts/la-et-ms-robin-thicke-blurred-lines-deposition-high-vicodin-alcohol-20140915-story.html> [<https://perma.cc/LY8A-FCXG>].

<sup>11</sup> See *Williams*, 2015 WL 4479500, at \*47.

<sup>12</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>13</sup> Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737, 742–43 (S.D.N.Y. 2017).

<sup>14</sup> *Id.* at 745 (describing the “composition copyright” to “Jimmy Smith Rap” asserted by plaintiffs, but finding a genuine issue of fact as to the authorship of the work).

<sup>15</sup> *Id.* at 744.

<sup>16</sup> See United States Copyright Office, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 802.1 (3d ed. 2017) (“For purposes of copyright registration, musical works (which are also known as musical compositions) are original works of authorship consisting of music and any

The dearth of music fair use is puzzling, especially given the relatively high number of music cases litigated over several decades and the ease of raising a fair use defense. Unlike pantomimes and choreographic works, which have not been the subject of many copyright lawsuits, there are at least four musical work copyright decisions per year on average.<sup>16</sup> Nevertheless, musicians accused of infringement, such as Pharrell and Thicke, typically avoid pursuing fair use defenses to a decision—a pattern that has persisted from the passage of the 1976 Copyright Act to this day. Even when fair use is included as part of a defendant's answer to a claim of infringement of a musical work copyright, fair use is not often litigated. For example, in her case over her allegedly infringing song “Vogue,” Madonna prevailed on a defense of de minimis copying instead of litigating her fair use defense raised in her answer.<sup>17</sup> Similarly, Led Zeppelin succeeded in arguing that its song “Stairway to Heaven” did not infringe the band Spirit’s song “Taurus,” but Led Zeppelin did not press the fair use defense included in its answer.<sup>18</sup>

This avoidance of fair use is especially puzzling given how music is composed of discrete, identifiable combinations of notes, much in the way that literary works contain words that may be quoted for fair use.<sup>19</sup> Of course, fair use is sometimes derided by critics as typically a defense of last resort or a losing argument.<sup>20</sup> But that view proves too much, as the Supreme Court and lower courts have considered fair use defenses of considerable force and merit, including in the context of parody fair use of musical works.<sup>21</sup> The absence of non-parody fair use cases involving musical works thus cannot be explained by the putative lack of merit of the defense.

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accompanying words. Music is a succession of pitches or rhythms, or both, usually in some definite pattern.”). The Copyright Act does not define “musical work.”

<sup>16</sup> See *infra* notes 147–148 and accompanying text; see also *Music Copyright Infringement Resource: Case List*, USC GOULD SCH. L., <http://mcir.usc.edu/cases/Pages/> [https://perma.cc/2VGV-XKZP] (setting out a comprehensive list of music disputes heard in federal court since 1844).

<sup>17</sup> See VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 877–80 (9th Cir. 2016); Answer of Defendants Madonna Louise Ciccone and Webo Girl Publishing, Inc. to the Complaint at 5, VMG Salsoul, LLC v. Ciccone, No. CV 12-5967-SVW(FMOx) (C.D. Cal. Feb. 12, 2013).

<sup>18</sup> See Skidmore v. Led Zeppelin, No. CV 15-03462 RGK (AGRx), 2016 WL 6674985, at \*1 (C.D. Cal. Aug. 8, 2016); Answer of Defendants James Patrick Page, Robert Anthony Plant and John Paul Jones at 28, Skidmore v. Led Zeppelin, No. 2:15-cv-03462 RGK (AGR) (C.D. Cal. 2016 May 20, 2015).

<sup>19</sup> See, e.g., Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564–66 (1985) (discussing fair use for quotations in the context of literary works).

<sup>20</sup> See Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 605 (2001).

<sup>21</sup> See, e.g., *Campbell*, 510 U.S. at 579 (finding that parody is clearly fair use).

This Article examines and attempts to explain this anomaly.<sup>22</sup> Part I explains why fair use, operating as a safety valve, would help spur the creation of music.<sup>23</sup> Part II summarizes a novel empirical study of music infringement cases that indicates that (i) no composer or songwriter has ever prevailed in establishing a non-parody fair use of musical notes in another musical work under the 1976 Copyright Act, and only one recent case has recognized non-parody fair use of spoken words in a putative musical work (because the narration or rap had no accompanying music, it arguably does not even constitute a musical work); and (ii) the defense of fair use is seldom even pursued or resolved in music cases.<sup>24</sup> Part III posits a new theory of “fair use avoidance” to explain this anomaly and describes the various reasons why both musicians and courts may be avoiding the defense of fair use in infringement cases involving two competing musical works.<sup>25</sup> Part IV then evaluates whether fair use avoidance is desirable for creativity in music and the copyright system as a whole.<sup>26</sup> One concern is that a recent Supreme Court decision barring the use of laches in copyright cases may create a potential problem of “copyright clutter” over musical notes contained in older songs, a problem that may create a greater need for a clear precedent recognizing non-parody fair use in music cases.<sup>27</sup>

### I. FAIR USE’S RELEVANCE TO MUSIC COMPOSITION

Part I discusses why fair use should, in theory, be helpful to songwriters and composers of music.<sup>28</sup> Given the pervasiveness of borrowing in music compositions, plus the limited number of notes, chords, and progressions, fair use appears to present a much-needed safeguard for facilitating the creation of new musical works as it commonly does with other types of works.<sup>29</sup>

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<sup>22</sup> See *infra* notes 23–313 and accompanying text.

<sup>23</sup> See *infra* notes 28–138 and accompanying text.

<sup>24</sup> See *infra* notes 139–163 and accompanying text.

<sup>25</sup> See *infra* notes 164–252 and accompanying text.

<sup>26</sup> See *infra* notes 253–313 and accompanying text.

<sup>27</sup> Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1972–77 (2014); see also *infra* notes 306–311 and accompanying text.

<sup>28</sup> See *infra* notes 107–138 and accompanying text.

<sup>29</sup> See generally Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (discussing how fair use is an example of the “speech-protective . . . safeguards” built in to copyright law).

*A. Fair Use and the “Borrowing” of Copyrighted Content*

## 1. Transformative Works

The starting point of fair use is that the defendant used someone else’s copyrighted content without permission.<sup>30</sup> In other words, the defendant copied a work either in whole or in part. What separates fair use from infringement is hard to define, given the case-by-case nature of fair use.<sup>31</sup> At the outset, though, it is important to understand why fair use should be relevant to music composition, given how fair use operates in copyright law in facilitating the creation of transformative works.

In considering fair use, courts balance the four factors set forth in section 107 of the Copyright Act to determine if the defendant’s unauthorized use of the copyrighted content is a fair use.<sup>32</sup> Since the Supreme Court’s decision in *Campbell*, courts often focus their analysis on the first factor of fair use, namely, the purpose and character of the defendant’s use of the copyrighted content, and specifically whether such use is “transformative,” i.e., whether the defendant’s use of the work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>33</sup> As the Court explained in *Campbell*:

Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of *transformative works*. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.<sup>34</sup>

Thus, we might characterize such transformative uses as occupying the “heartland” of fair use: the defendant has copied a copyrighted work only to

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<sup>30</sup> 17 U.S.C. § 107.

<sup>31</sup> See *Campbell*, 510 U.S. at 577 (noting that because the statute defining fair use calls for a case-by-case approach, the task of evaluating a given fair use cannot be reduced to simple bright-line rules).

<sup>32</sup> See 17 U.S.C. § 107. Perhaps Lloyd Weinreb encapsulated fair use the best when he stated that “fair use has historically been and ought to remain what its name suggests: an exemption from copyright infringement for uses that are *fair*.” Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138 (1990). Of course, fair use is often justified as serving utilitarian goals to spur criticism, the creation of new works, and other purposes. See Frank P. Darr, *Testing an Economic Theory of Copyright: Historical Materials and Fair Use*, 32 B.C. L. REV. 1027, 1028–30 (1991).

<sup>33</sup> *Campbell*, 510 U.S. at 579.

<sup>34</sup> *Id.* (emphasis added) (internal citations omitted).

create a new work, one that alters the first work in a way that is transformative in expression, meaning, or message.<sup>35</sup> In this heartland, fair use facilitates the creation of new works, consistent with the overall goal of the Copyright Clause in the U.S. Constitution, “to promote the Progress of Science and useful Arts.”<sup>36</sup>

The Supreme Court calls these new works that are based on fair uses “transformative works.” In *Campbell*, the transformative work was a new song that parodied an old song, “Oh, Pretty Woman.”<sup>37</sup> Except for one line, the lyrics in the parody were different and the music of the parody was reminiscent of the old song but added jarring, hip-hop elements to it, making the sounds of the music different from the original.<sup>38</sup> As the facts in *Campbell* show, a basic fact pattern is common to these heartland fair use cases where the creation of a new transformative work is involved: (1) a defendant copies a portion of an existing work without permission (i.e., copying) but (2) alters the copied work by adding new expression, meaning, or message (i.e., to create something new).<sup>39</sup> In short, a transformative work involves the defendant copying parts of an existing work to create a new work.

The category of transformative works sounds easy to define. But one difficulty with the category is its elusive relationship with derivative works, which are defined to include “any . . . form in which a work may be recast, *transformed*, or adapted.”<sup>40</sup> Because applying fair use to musical compositions that borrow from prior works raises this very issue, it is worth analyzing the complexity of the problem.

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<sup>35</sup> See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (“If . . . the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”).

<sup>36</sup> See U.S. CONST. art. I, § 8, cl. 8.

<sup>37</sup> *Campbell*, 510 U.S. at 572. Recognizing the value of a fair use defense, the *Campbell* Court noted that “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts.’” *Id.* at 575.

<sup>38</sup> See *id.* at 582. Some fair uses do not involve the creation of new transformative works at all, but instead transformative *purposes* in utilizing existing works, such as in *Authors Guild* that involved verbatim copies of works for use in a search database to identify the works by content. See, e.g., *Authors Guild*, 804 F.3d at 216–20. As discussed in Part III, courts have not fully addressed the complexities between transformative character and transformative purpose—which, in turn, may be a reason why courts have shied away from fair use in deciding music cases. See *infra* notes 241–252 and accompanying text.

<sup>39</sup> See generally *Campbell*, 510 U.S. 569 (discussing fair use in the context of a modern rap parody of a popular 1960s song).

<sup>40</sup> 17 U.S.C. § 101 (2012) (emphasis added).

When a copyrighted work is used in a way that recasts, transforms, or adapts the work into a new work, the new work is considered a derivative work that falls within the existing copyright.<sup>41</sup> Similar to transformative works under fair use, a derivative work contains a portion of an existing work and at least some element that is different from the existing work, such as a change in medium or format (for example, a toy or sculpture made from a fictional character) or a new story or sequel involving existing characters. The Copyright Act gives several examples of derivative works: “a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, [and] condensation.”<sup>42</sup> An unauthorized derivative work would be infringing, but an unauthorized transformative work could be a fair use. So how is transforming a work into a derivative work different from using a work to create a transformative work under fair use?

This is a thorny question. As Part III, *infra*, suggests, the courts’ collective ambivalence in resolving this question may be one reason why courts have shied away from the fair use doctrine in deciding music cases.<sup>43</sup> Thus far, courts have treated “transform” under derivative works and “transformative works” under fair use as separate, seemingly unrelated inquiries.<sup>44</sup> According to a survey of fair use decisions up to 2008 addressing “transformative” use, “courts generally emphasize the transformativeness of the defendant’s *purpose* in using the underlying work, rather than any transformation (or lack thereof) by the defendant of the *content* of the underlying work.”<sup>45</sup> For example, in 2015, in *Authors Guild, Inc. v. Google, Inc.*, the U.S. Court of Appeals for the Second Circuit explained the difference between fair uses and derivative works by focusing on the *purpose* of use:

The statute defines derivative works largely by example, rather than explanation . . . . As we noted in *Authors Guild, Inc. v. Ha-*

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *infra* notes 241–252 and accompanying text.

<sup>44</sup> See, e.g., *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 143 (2d Cir. 1998) (“Although derivative works that are subject to the author’s copyright transform an original work into a new mode of presentation, such works—unlike works of fair use—take expression for purposes that are not ‘transformative.’”).

<sup>45</sup> R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008); see also Michael D. Murray, *What Is Transformative? An Explanatory Synthesis of the Convergence of Transformation and Predominant Purpose in Copyright Fair Use Law*, 11 CHI.-KENT J. INTELL. PROP. 260, 273–92 (2012) (concluding, on the basis of a survey of federal appellate decisions, that with respect to the transformative factor of the test, the courts focus on transformative purpose because each and every approved fair use involved a change in the predominant purpose for the use of the work and not simply a change in the character (the form or contents) of the work).

*thiTrust*, “[p]aradigmatic examples of derivative works include the translation of a novel into another language, the adaptation of a novel into a movie or play, or the recasting of a novel as an e-book or an audiobook.” While such changes can be described as transformations, they do not involve the kind of transformative purpose that favors a fair use finding. The statutory definition suggests that derivative works generally involve transformations in the nature of changes of form. By contrast, copying from an original for the purpose of criticism or commentary on the original or provision of information about it, tends most clearly to satisfy *Campbell*’s notion of the “transformative” purpose involved in the analysis of Factor One.<sup>46</sup>

Tony Reese, writing before the *Authors Guild* decision, questions whether focusing exclusively on purpose in the transformativeness inquiry makes complete sense: “Transformativeness obviously could involve the extent to which the content of the plaintiff’s copyrighted work has been transformed or altered. *Campbell* itself involved a defendant’s use that had altered the plaintiff’s copyrighted original work by changing much of both the lyrics and the music of the song.”<sup>47</sup>

Indeed, a close reading of *Campbell* supports this view. The *Campbell* Court explained the concept of transformative use as follows: the use “instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>48</sup> Purpose is one of the ways in which the Court recognizes that a use of a work can add something new, but another way is by giving a different character to the work, which tracks the language of the first factor in the fair use provision.<sup>49</sup> Character is different than purpose and relates to the actual composition or content of the use of a work.<sup>50</sup> It would be odd and against an accepted canon of construction for the Court to use both terms “further purpose” or “different character” and reduce one to mere surplusage.<sup>51</sup>

This understanding of transformative also is consistent with Judge Pierre Leval’s first elaboration of the concept in his *Harvard Law Review*

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<sup>46</sup> *Authors Guild*, 804 F.3d at 215–16 (emphasis added) (internal citations omitted).

<sup>47</sup> Reese, *supra* note 45, at 485 (emphasis added).

<sup>48</sup> *Campbell*, 510 U.S. at 579 (emphasis added).

<sup>49</sup> *Id.*; see 17 U.S.C. § 107.

<sup>50</sup> See *Character*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/character> [https://perma.cc/KV6G-D3BC] (defining character as “the aggregate of distinctive qualities characteristic of a breed, strain, or type”).

<sup>51</sup> See *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (noting that it is the Court’s duty “to give effect, if possible, to every clause and word of a statute” (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955))).

article upon which the *Campbell* Court relied (although, as discussed above, Judge Leval's discussion of transformative in *Authors Guild* focused on purpose of use).<sup>52</sup> Leval explained transformative as follows: "The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original."<sup>53</sup> Presumably, the manner in which a work is used could involve use of the work, for example, "as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings."<sup>54</sup> Such uses go beyond mere purpose, they involve additions or changes to the underlying content or raw material, producing "new aesthetics" in some instances.<sup>55</sup> The copied portion is not "merely repackag[e]d or republish[e]d," but rather it is "transformed in the creation of [something] new."<sup>56</sup>

This second kind of transformative use—focusing on the content of the use instead of the purpose of use—was analyzed in *Cariou v. Prince*, a 2013 Second Circuit decision that came out before the *Authors Guild* decision.<sup>57</sup> In finding most of the contested works of Richard Prince's appropriation art (consisting largely of his unauthorized copies of copyrighted photographs taken by others) to be fair uses, the Second Circuit focused on the *content* of Prince's art, which juxtaposed images of Rastafarians, especially their faces (though, with some color splotches he added), with images of partially naked women.<sup>58</sup> The court explained: "[T]o qualify as a fair use, a new work generally must alter the original with 'new expression, meaning, or message.'"<sup>59</sup> Applying this approach, the court readily found that Prince had made transformative uses of the photographs based on the content of Prince's creations: "*Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the [original] photographs, as is the expressive nature of Prince's work.*"<sup>60</sup> The court emphasized that Prince's use transformed the content or *character* of the photographs, not the purpose of use, in finding fair use: "[L]ooking at the artworks and the photographs side-by-side, we conclude that Prince's images . . . have a different character, give Cariou's photographs a new expression,

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<sup>52</sup> See Leval, *supra* note 35, at 1111.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).

<sup>58</sup> See *id.* at 705–12.

<sup>59</sup> *Id.* at 706.

<sup>60</sup> *Id.* (emphasis added).

and employ *new aesthetics* with creative and communicative results distinct from Cariou's.”<sup>61</sup>

As far as the purpose of Prince’s use goes, the court discounted Prince’s deposition testimony “that he was not ‘trying to create anything with a new meaning or a new message.’”<sup>62</sup> The court expressed skepticism about a defendant’s ability to give non-self-serving testimony about his transformative purpose to support a fair use claim.<sup>63</sup> The defendant’s subjective intent did not matter much, if at all.<sup>64</sup> Instead, “[w]hat is critical is *how the work in question appears* to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”<sup>65</sup> The Second Circuit focused on content, the end product of the defendant’s use.<sup>66</sup>

Thus, the Second Circuit’s treatment of transformative fair use presents an ambivalent view. *Authors Guild* focused on *purpose* of use, in part, because the defendant’s use did not involve a transformation of the underlying content that it copied for use in its search database.<sup>67</sup> By contrast, the *Prince* case focused on *character* of use.<sup>68</sup> Courts have predominantly focused on purpose of use.<sup>69</sup> But the *Prince* case illuminates how the character of use may also be pivotal in determining fair use.<sup>70</sup>

Professor Reese provides a helpful typology of how “transformative” might be categorized in terms of purpose and content.<sup>71</sup> I have recast the typology in Table 1 below.<sup>72</sup>

Table 1. Uses of Works Categorized by Transformative Content and Purpose

Type of Use	Transformative Content	Transformative Purpose	Example
1	Yes	Yes	<i>Campbell v. Acuff-Rose</i>
2	Yes	No	<i>Cariou v. Prince</i>
3	No	Yes	<i>Authors Guild</i>
4	No	No	Likely no fair use

<sup>61</sup> *Id.* at 707–08. (emphasis added).

<sup>62</sup> *Id.* at 707.

<sup>63</sup> *Id.* (“It is not surprising that, when transformative use is at issue, the alleged infringer would go to great lengths to explain and defend his use as transformative.”).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> *Id.* (“The focus of our infringement analysis is primarily on the Prince artworks themselves . . .”).

<sup>67</sup> *Authors Guild*, 804 F.3d at 208–10.

<sup>68</sup> *Cariou*, 714 F.3d at 705–12.

<sup>69</sup> Reese, *supra* note 45, at 485.

<sup>70</sup> *Cariou*, 714 F.3d at 705–12.

<sup>71</sup> Reese, *supra* note 45, at 486.

<sup>72</sup> This graphic is also available at <http://www.bc.edu/content/dam/bcl/schools/law/pdf/law-review-content/BCLR/59-6/lee-graphics.pdf> [<https://perma.cc/D876-7ZVU>].

The easier cases to decide are ones in which both content and purpose are transformative (first type) or not transformative (fourth type), i.e. “double or nothing” transformativeness.<sup>73</sup> Courts have recognized fair uses for the first type (although often emphasizing the transformative purpose) and have typically rejected fair uses for the fourth type.<sup>74</sup> The more difficult cases tend to be the ones in which there is transformativeness either in content or purpose (second and third types), but not in both.

*Authors Guild* is an example of a case with a transformative purpose, but without alteration of the content, which Google copied verbatim.<sup>75</sup> By contrast, the *Prince* case seems more aptly categorized as the second type because the Second Circuit found that Prince had transformed the content of the underlying photographs, but the court stopped short of identifying a specific transformative purpose in Prince’s work.<sup>76</sup> Moreover, one could argue that photographs have the same general purpose of visual depiction or representation of whatever they capture, which would be the same general purpose of Prince’s artwork.

Because fair use must be decided on a case-by-case basis, these categories do not present hard-and-fast rules. But they are helpful in understanding how courts have analyzed fair use in terms of transformativeness.<sup>77</sup> We will return to them in Part III when we consider potential reasons why courts have not considered non-parody fair use of musical works.<sup>78</sup> For now, it suffices to understand that musical works that borrow from other musical works might fall within the first or second type of transformative uses.

## 2. Examples of Transformative Works

Transformative works can be further categorized depending on whether the new work is in the same category of work as the work that it copies. As explained below, some transformative works draw from different types of works, while other transformative works draw from works of the same type. For our purposes, the latter category of transformative work is more relevant, but both categories are explained in the sections below. The point of this discussion is not to suggest that whether the two works in a copyright dispute are of the same or different type affects the fair use analysis, though perhaps in some cases, it may. Instead, the ensuing discussion is intended to highlight

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<sup>73</sup> Reese, *supra* note 45, at 486.

<sup>74</sup> *Id.*

<sup>75</sup> See generally *Authors Guild*, 804 F.3d 202 (discussing fair use in the context of Google’s copying and providing online access to millions of copyrighted books).

<sup>76</sup> See *Cariou*, 714 F.3d at 707.

<sup>77</sup> See, e.g., *Campbell*, 510 U.S. at 577.

<sup>78</sup> See *infra* notes 220–252 and accompanying text.

how the two categories of transformative works might illuminate which industries or creative activities may depend on fair use. The music cases analyzed in the survey in Part II fall within the *same-type* category.

*a. Fair Use of a Different Type of Work*

The first category of transformative work involves a fair use of a portion of one type of work to create a new work of a different type. I will call these works “different-type” transformative works. For example, in 2000, in *Nunez v. Caribbean International News Corp.*, a newspaper’s copying of a photograph, a pictorial work, for reporting of a controversy in the newspaper, primarily a literary work, was deemed to be a transformative fair use by the First Circuit.<sup>79</sup> A similar use was recognized as transformative in the Second Circuit’s 2006 decision in *Bill Graham Archives v. Dorling Kindersley Ltd.*, where a book about the Grateful Dead copied the band’s various concert posters (pictorial works) for historical reference.<sup>80</sup> Of course, not every defense of fair use is successful. A trivia book (a literary work) of the TV show *Seinfeld* (an audiovisual work and/or a dramatic work) was found not to be a fair use of the show.<sup>81</sup>

*b. Fair Use of the Same Type of Work*

The second category of transformative work involves a fair use of a portion of one type of work to create a new work of the same type. These “same-type” transformative works involve at least two works of the same kind. The music cases studied in this Article fall within this category. Before discussing the music cases, this section discusses some common examples of fair use related to same-type transformative works.<sup>82</sup>

i. Quotation of Literary Works

A paradigmatic example of this kind of transformative work, where one work borrows from the same type of work, is a book review. A book review often quotes portions of a copyrighted book, but in the context of the reviewer’s own critique of the book. As Justice Story said in the Circuit Court of Massachusetts’ seminal fair use opinion in 1841, in *Folsom v. Marsh*:

[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of

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<sup>79</sup> See *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000).

<sup>80</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006).

<sup>81</sup> *Castle Rock Entm’t, Inc.*, 150 F.3d at 141.

<sup>82</sup> See *infra* notes 83–106 and accompanying text.

fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.<sup>83</sup>

Of course, one could write a book review without quoting parts of the book. But the review probably would be more convincing if it supported its analysis with some quotations. For example, let's say the review praises the poetic language of a book. Quotation of a sentence or two to substantiate such praise would make the review more persuasive. And requiring a copyright license for such quotation would potentially stifle criticisms of a book because the author could just refuse to license, particularly if the requested license is for a negative review.<sup>84</sup>

Justice Story's example explains a crucial difference between quoting a work to critique it and quoting a work to be a substitute for the work.<sup>85</sup> In the Supreme Court's 1990 case, *Harper & Row Publishers v. Nation Enterprises*, the Nation Magazine quoted key passages of an unpublished memoir by President Ford, thus "scooping" and substituting for the book.<sup>86</sup> One could read the magazine article and get the juiciest parts of the memoir, all without reading the book. The Court easily found no fair use.<sup>87</sup>

In sum, the use of quotations of literary works for criticism or comment are paradigmatic examples of same-type transformative works. If the quotations were "for the purposes of fair and reasonable criticism," they are treated as fair uses unless too much was copied.<sup>88</sup> Quotation shows how fair use can facilitate the creation of same-type transformative works. The concept of quotation originated with text, but it is possible to use the term for visual works<sup>89</sup> and music,<sup>90</sup> as discussed below.

## ii. Copying to Create Appropriation Art

Pictorial works are another type of work that lends itself to the same-type category of transformative works. Indeed, history is replete with examples of painters and other pictorial artists (1) copying elements of other pictorial works but (2) adding new expression to them in creating their own works.

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<sup>83</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4901).

<sup>84</sup> See *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002) (noting the harm that would result for book reviews generally if quotations were deemed to be copyright infringement).

<sup>85</sup> See *Folsom*, 9 F. Cas. at 344–45.

<sup>86</sup> *Harper & Row Publishers*, 471 U.S. at 562.

<sup>87</sup> *Jd.* at 569.

<sup>88</sup> See *Folsom*, 9 F. Cas. 344–45.

<sup>89</sup> See *infra* notes 91–98 and accompanying text.

<sup>90</sup> See *infra* notes 107–138 and accompanying text.

Picasso was (in)famous for borrowing from the works of other artists, including Delacroix, Velazquez, Manet, Matisse, African artists, and others.<sup>91</sup> Throughout history, some of our greatest artists drew inspiration, ideas, and even expression from prior works and the works of their contemporary rivals in creating their own paintings.<sup>92</sup> Today, “appropriation art” has become a recognized art form. Andy Warhol, Sherrie Levine, Jeff Koons, Robert Rauschenberg, Richard Prince, and other appropriation artists have pushed the boundaries of creating art sometimes by copying the entirety of other works.<sup>93</sup> Several lawsuits have been brought against Koons and Prince, who both raised fair use defenses. In some cases, fair use was successful.<sup>94</sup> In other cases, the defense failed.<sup>95</sup>

Even when the appropriation artist copies the entirety of another work, such as by photographing a photograph, the copying or appropriation is defended as an act of criticism, subversion, or transformation. As one commentator explains, “[t]he artist removed the original work from its original context and by doing so tries to force the viewer to see the image differently; they transformed the original work.”<sup>96</sup> Moreover, “in the process of creating appropriation art, which uses another’s work as a keystone, the appropriation artist challenges ‘ideas about ownership and originality.’”<sup>97</sup> Originality, a basic requirement for copyrighted works, itself is the subject of the appropriation artist’s critique. Copyright law, however, has taken an ambivalent stance to appropriation art, with a mixed result under fair use. Nevertheless, the *Car-*

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<sup>91</sup> See ROBERT W. WEISBERG, CREATIVITY: BEYOND THE MYTH OF GENIUS 199–209 (1993); Timothy Anglin Burgard, *Picasso and Appropriation*, 73 ART BULL. 479, 479 (1991); Rachel Isabelle Butt, *Appropriation Art and Fair Use*, 25 OHIO ST. J. ON DISP. RESOL. 1055, 1060 (2010); Stephen Bevan, *Picasso ‘Stole the Work of African Artists,’* TELEGRAPH (Mar. 12, 2006), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/1512804/Picasso-stole-the-work-of-African-artists.html> [<https://perma.cc/TWL8-V5HH>]; Andrew Meldrum, *Stealing Beauty*, GUARDIAN (Mar. 15, 2006), <https://www.theguardian.com/artanddesign/2006/mar/15/art> [<https://perma.cc/F4D3-4J83>].

<sup>92</sup> See generally SEBASTIAN SMEE, THE ART OF RIVALRY: FOUR FRIENDSHIPS, BETRAYALS, AND BREAKTHROUGHS IN MODERN ART (2016) (describing the fierce competition between four pairs of famous artists that drove each to new heights).

<sup>93</sup> See Jason D. Sanders, *Appropriating Artists Face Uncertainty in Interplay Between First Sale and Fair Use Doctrines*, N.Y. ST. B.J., July–Aug. 2005, at 18–19.

<sup>94</sup> *Cariou*, 714 F.3d at 712 (court finding Prince’s artworks were fair use of Cariou’s photographs); *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006) (court finding Koons’ use of “Silk Sandals” to be fair use and therefore non-infringing).

<sup>95</sup> See *Rogers v. Koons*, 960 F.2d 301, 310–12 (2d Cir. 1992) (court rejecting fair use after finding each of the statutory four factors militated against it); *Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381, at \*1, \*3 (S.D.N.Y. Apr. 1, 1993) (court finding Koons liable for copyright infringement based on Koons’ copying of Campbell’s photograph).

<sup>96</sup> Butt, *supra* note 91, at 1061.

<sup>97</sup> *Id.* at 1062.

*iou* decision recognizes that some works of appropriation art are fair uses as transformative works (here, same-type transformative works).<sup>98</sup>

### iii. Copying to Create Computer Programs

One final type of work is worth considering before examining musical works. Computer programs, which are classified as literary works under the Copyright Act, are also the subject of fair use in the creation of other computer programs.<sup>99</sup> Courts have recognized a fair use in the making of “intermediate copies” of a computer program to identify the unprotected functional elements to make a new program that is interoperable with an operating system, where the new program did not incorporate any copyrighted element of the first program.<sup>100</sup> The recent controversy between Oracle and Google involved a new program created by Google for its Android phone that incorporates some of Oracle’s copyrighted Java program (i.e., declarations and the structure, sequence, and organization or SSO of Oracle’s Java program) to create a new program for Google’s Android phone.<sup>101</sup> A jury found that such copying of Java by Google was a fair use.<sup>102</sup> On appeal, however, the Federal Circuit overturned the jury verdict and ruled that Google’s copying of Java to create the Android program was not transformative or fair use as a matter of law.<sup>103</sup> The Federal Circuit appeared to take a dim view that same-type works can constitute fair use without a showing of a different purpose: “Where the use ‘is for the same intrinsic purpose as [the

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<sup>98</sup> See *Cariou*, 714 F.3d at 706 (finding twenty-five of Prince’s artworks transformative in nature and therefore fair uses).

<sup>99</sup> 17 U.S.C. § 101.

<sup>100</sup> See *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527–28 (9th Cir. 1992) (“We conclude that where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law.”).

<sup>101</sup> See *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2016 WL 3181206, at \*1 (N.D. Cal. June 8, 2016), *rev’d* 886 F.3d 1179 (Fed. Cir. 2018).

<sup>102</sup> *Id.*

<sup>103</sup> *Oracle Am., Inc. v. Google LLC (Oracle II)*, 886 F.3d 1179, 1201 (Fed. Cir. 2018) (noting that Google and Oracle differ in their conclusions as to whether a reasonable jury could find transformative use). Compare Opening Brief and Addendum for Oracle Am., Inc. at 32, *Oracle II*, 886 F.3d 1179 (Nos. 17-1118, 17-1202), 2017 WL 679347, at \*32 (arguing that Google’s program was not transformative owing to the fact that it used the same expression to achieve the same purpose, despite doing so in a different medium), with Brief of Defendant-Appellee/Cross-Appellant Google Inc. at 28, *Oracle II*, 886 F.3d 1179 (Nos. 17-1118, 17-1202), 2017 WL 2305681, at \*28 (arguing that Google’s use was transformative because “it integrated selected elements, namely declarations from 37 packages to interface with all new implementing code optimized for mobile smartphones and added entirely new Java packages written by Google itself, which enabled a purpose distinct from the desktop purpose of the copyrighted works”) (internal quotations omitted).

copyright holder's] . . . such use seriously weakens a claimed fair use.”<sup>104</sup> In Google's case, the court concluded that “[t]he fact that Google created exact copies of the declaring code and SSO and used those copies for the same purpose as the original material ‘seriously weakens [the] claimed fair use.’”<sup>105</sup> Although the Federal Circuit also recognized the possibility that copying computer code into a new context could create new expression that is transformative, the court rejected Google's argument of a new context for smartphones because Oracle had already licensed its Java code for use in smartphones of Danger and Nokia.<sup>106</sup>

### *B. Borrowing in Music Composition*

Now that we have a basic understanding of how fair use facilitates the creation of transformative works, we can turn to the main subject of this Article: musical works. Similar to literary and pictorial works, musical works sometimes, if not often, involve a composer's copying—or “borrowing”—elements from other musical works to create a new work. Borrowing may consist of a range of copying, including “transcription, variations, quotation, paraphrase, parody, modeling, allusion, sampling, and many other ways to rework existing music, from troping and organum to collage and electronic manipulation.”<sup>107</sup> This Article focuses on a composer's borrowing of an element of a musical work to use in the creation of a new work. To the extent a musical work borrows or copies elements of a prior musical work to create a new work, it fits within the pattern for a transformative work.

#### 1. Musicians Have Borrowed Throughout History

Musical works are amenable to fair use given the long history of borrowing in music dating at least back to seventeenth century classical music<sup>108</sup> and extending to today's music.<sup>109</sup> Musicologists have documented the pervasive borrowing of prior music by even the most famous composers, including Bach, Beethoven, Brahms, Handel, Mozart, Rachmaninoff, and Wagner, to

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<sup>104</sup> *Oracle II*, 886 F.3d at 1198 (quoting *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir. 2000)).

<sup>105</sup> *Id.* at 1200.

<sup>106</sup> *Id.* at 1201–02.

<sup>107</sup> *Musical Borrowing & Reworking*, IND. UNIV. JACOBS SCH. MUSIC CTR. FOR HIST. MUSIC THEORY & LITERATURE, <http://chmtd.indiana.edu/borrowing/> [<https://perma.cc/XW7K-7H6P>].

<sup>108</sup> See J. Michael Keyes, *Musical Musings: The Case of Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 426–30 (2004).

<sup>109</sup> Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 615–18 (2006); Keyes, *supra* note 108, at 426–30.

name a few.<sup>110</sup> The extent of borrowing in music is so large that it has spawned an entire field of research among musicologists and other scholars, who have produced an extensive body of scholarship analyzing the phenomenon of music borrowing.<sup>111</sup> In the law academy, Olufunmilayo Arewa's scholarship has chronicled musical borrowing in a variety of genres.<sup>112</sup>

Borrowing aspects of prior works in composing new music was not limited to classical music. Early to modern American music, including colonial music, the works of Aaron Copeland and George Gershwin, jazz, pop, rock and roll, and hip-hop have all routinely involved some form of borrowing of prior works.<sup>113</sup> As one commentator aptly put it, “[m]usical stealing is probably as old as music . . . No one, in this advanced age, is particularly horrified when he encounters it, and no one expects musical composition to continue without it.”<sup>114</sup> Indeed, many popular songs in the U.S. have contained apparent borrowing of elements of prior musical works, as summarized in Table 2 below:<sup>115</sup>

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<sup>110</sup> See J. Peter Burkholder, *The Uses of Existing Music: Musical Borrowing as a Field*, 50 NOTES 851, 851 (1994); E. DeMatt Henderson, *The Law of Copyright Especially Musical*, 1 COPYRIGHT L. SYMP. 125, 150 (1938); Keyes, *supra* note 108, at 427; see also ALFRED M. SHAFTER, *MUSICAL COPYRIGHT* 187 (1932).

<sup>111</sup> See *Musical Borrowing & Reworking*, *supra* note 107; *supra* note 110.

<sup>112</sup> See generally Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573 (2010); Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 351 (2006); Arewa, *supra* note 109; Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477 (2007).

<sup>113</sup> See Arewa, *supra* note 109, at 612–19; Keyes, *supra* note 108, at 427–30.

<sup>114</sup> SHAFTER, *supra* note 110, at 148–49.

<sup>115</sup> This graphic is also available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/lee-graphics.pdf> [<https://perma.cc/D876-7ZVU>].

Table 2. Examples of Apparent Borrowing in Popular Musical Works

Borrowing Song	From Prior Song
The Beach Boys, “Surfin’ U.S.A.” (1963)	Chuck Berry, “Sweet Little Sixteen” (1958)
The Doors, “Hello, I Love You” (1968)	The Kinks, “All Day and All of the Night” (1964)
Led Zeppelin, “Whole Lotta Love” (1969)	Willie Dixon (performed by Muddy Waters), “You Need Love” (1962)
Led Zeppelin, “Bring It On Home” (1969)	Willie Dixon (performed by Sonny Boy Williamson), “Bring It On Home” (1966)
George Harrison, “My Sweet Lord” (1970)	Ronald Mack (performed by the Chiffons), “He’s So Fine” (1962)
Ray Parker, “Ghostbusters” (1984)	Huey Lewis and the News, “I Want a New Drug” (1984)
Metallica, “Master of Puppets” (1986)	David Bowie, “Andy Warhol” (1971)
Ice-T, “6 ’N the Mornin’” (1986)	Schoolly D, “P.S.K. What Does it Mean” (1985)
Nirvana, “Come as You Are” (1991)	Killing Joke, “Eighties” (1985)
Green Day, “Warning” (2000) and Other Garden, “Never Got the Chance” (1992)	The Kinks, “Picture Book” (1968)
Coldplay, “Shiver” (2000)	Jeff Buckley, “So Real” (1994)
The Strokes, “Last Nite” (2001)	Tom Petty and the Heartbreakers, “American Girl” (1977)
Coldplay, “God Put A Smile Upon Your Face” (2002)	Radiohead, “2+2=5” (2003)
Red Hot Chili Peppers, “Dani California” (2006)	Tom Petty and the Heartbreakers, “Mary Jane’s Last Dance” (1993)
Coldplay, “Vida La Vida” (2008)	Joe Satriani, “If I Could Fly” (2004)
Lady Gaga, “Born This Way” (2011)	Madonna, “Express Yourself” (1989)
Pharrell, Robin Thicke, “Blurred Lines” (2014)	Marvin Gaye, “Got to Give It Up” (1977)
Green Day, “Warning” (2000) and Other Garden, “Never Got the Chance” (1992)	The Kinks, “Picture Book” (1968)
David Banner, “Elvis” (2017)	Lil Wayne, “A Milli” (2008)

Likewise, one popular video on YouTube compiles numerous hit songs that all use the same four chords in their harmonies.<sup>116</sup>

Each instance of borrowing raises a question of infringement that must be determined based on the facts of each case. Some similarities in musical works may be due to independent creation by songwriters—which does not constitute infringement.<sup>117</sup> On the other hand, some borrowing may be due to cryptomnesia, or what copyright law calls “subconscious copying”: people may recall an arresting tune they heard from the past but believe they

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<sup>116</sup> See *The Axis of Awesomeness*, YOUTUBE (July 20, 2011), <https://www.youtube.com/watch?v=oOlDewpCfZQ>.

<sup>117</sup> See *Watt v. Butler*, 744 F. Supp. 2d 1315, 1321 (N.D. Ga. 2010) (“Proof of independent creation . . . fully negates a claim of infringement unless the plaintiff can show actual copying.”).

are creating something new.<sup>118</sup> Copyright law treats subconscious copying as potentially infringing. The doctrine of subconscious copying dates back to *Fred Fisher, Inc. v. Dillingham*, an early musical work infringement case from 1924.<sup>119</sup> In finding infringement, Judge Learned Hand explained:

Whether he unconsciously copied the figure, he cannot say, and does not try to. Everything registers somewhere in our memories, and no one can tell what may evoke it. On the whole, my belief is that, in composing the accompaniment to the refrain of ‘Kalua,’ Mr. Kern must have followed, *probably unconsciously*, what he had certainly often heard only a short time before. I cannot really see how else to account for a similarity, which amounts to identity. So to hold I need not reject his testimony that he was unaware of such a borrowing . . . It is no excuse that in so doing his memory has played him a trick.<sup>120</sup>

Thus, even when songwriters believe they are independently creating a new song, it could be that they are recalling bits and pieces of songs they heard in the past. It may therefore be difficult for any composer to distinguish with certainty independent creation from subconscious copying.

Songwriters sometimes openly admit to borrowing from other works. In their celebrated case against the estate of Marvin Gaye, both Pharrell Williams and Robin Thicke admitted, in separate interviews, to drawing from Gaye’s music, although they denied that what they did constituted infringement.<sup>121</sup> In response to repeated allegations of plagiarism, especially in the lyrics of some of his songs, Bob Dylan replied: “[I]n folk and jazz, quotation is a rich and enriching tradition.”<sup>122</sup> Likewise, Paul McCartney said that John

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<sup>118</sup> See Carissa L. Alden, Note, *A Proposal to Replace the Subconscious Copying Doctrine*, 29 CARDozo L. REV. 1729, 1750–51 (2008).

<sup>119</sup> *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147–48 (S.D.N.Y. 1924).

<sup>120</sup> *Id.* (emphasis added).

<sup>121</sup> See Pharrell Williams ‘You Can’t Trademark a Groove,’ ALL ACCESS (Mar. 5, 2014), <https://www.allaccess.com/net-news/archive/story/127456/pharrell-williams-you-can-t-trademark-a-groove> [https://perma.cc/B7G7-NVUA] (“We are dealing with the idea that someone feels like a groove is proprietary and it is not. Music is, and the notes are, and when you look at sheet music, then you’d know. And just for a bit of humor, the percussion that I used on ‘Blurred Lines’ aside from the music notation being completely different, completely different . . . but the percussion, I was trying to pretend that I was MARVIN GAYE and what he would do had he went down to NASHVILLE and did a record with pentatonic harmonies and more of a bluegrass chord structure. So unfortunately, there is no comparison between the minor bluesy chords he was playing and my major bluegrass-y chords and that’s very plain to see for anyone who can read music.”); Phil, *supra* note 6.

<sup>122</sup> Mikal Gilmore, *Bob Dylan Unleashed*, ROLLING STONE (Sept. 27, 2012), <http://www.rollingstone.com/music/news/bob-dylan-unleashed-a-wild-ride-on-his-new-lp-and-striking-back-at-critics-20120927> [https://perma.cc/G79L-29QE].

Lennon incorporated elements from Bob Dylan's 1964 album, "Another Side of Dylan," on the 1965 Beatles song, "You've Got to Hide Your Love Away."<sup>123</sup> Metallica guitar player Kirk Hammett gave David Bowie credit after the artist's death, including admitting to the band's borrowing the main riff of Bowie's "Andy Warhol" for the metal band's iconic 1986 track, "Master of Puppets."<sup>124</sup> Chris Martin of Coldplay has indicated borrowing from Jeff Buckley and Radiohead,<sup>125</sup> and Coldplay has been accused of other copying. Rap pioneer Ice-T admits that he borrowed Schoology D's "syncopation" and "vocal delivery" from Schoology D's 1985 song "P.S.K. What Does It Mean" for use on Ice-T's track, "6 'N the Mornin."<sup>126</sup> The Strokes' Julian Casablancas admits that the band incorporated Tom Petty and the Heartbreakers' 1977 song "American Girl" into their chart-topping rock single "Last Nite" in 2001.<sup>127</sup> When sampling of sound recordings is considered, the extent of borrowing of music becomes even greater.<sup>128</sup>

These examples show that music borrowing is a practice not limited to amateurs, wannabe artists, or "pirates." Prominent, successful, and established musicians have engaged in music borrowing in creating their own music.

## 2. The Nature of Music Produces Similarities

What might explain the practice of borrowing in music? Are composers who borrow just lazy or unethical? Perhaps. But a more plausible explanation relates to the limits of combining musical notes. The limited number of musical notes that exist, and the limited number of musical notes that

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<sup>123</sup> See WILLIAM J. DOWLDING, BEATLESONGS 98–99 (1989).

<sup>124</sup> See Kirk Hammett: David Bowie 'Was a Pretty Huge Influence on Me and Other People' in Metallica, BLABBERMOUTH.NET (Jan. 21, 2016), <http://www.blabbermouth.net/news/kirk-hammett-david-bowie-was-a-pretty-huge-influence-on-me-and-other-people-in-metallica/> [https://perma.cc/V7LZ-AASH].

<sup>125</sup> See Albert Costill, *6 Reasons Why Coldplay Are Guilty of Plagiarism*, EVOLVOR.COM (Dec. 19, 2008), <http://evolvor.com/2008/12/19/6-reasons-why-coldplay-are-guilty-of-plagiarism> [https://perma.cc/KQG8-EDVR].

<sup>126</sup> See Hao Nguyen, *Hip-Hop Gem: Ice-T's "6 in the Mornin'" Was Inspired by Schoology D's "P.S.K. What Does It Mean?"*, STOP THE BREAKS (Dec. 18, 2014), <http://www.stopthebreaks.com/gems/ice-t-6-in-the-mornin-inspired-by-schoology-d-psk/> [https://perma.cc/XWB7-HXJS].

<sup>127</sup> See Garin Pirnia, *Last Nite*, ROLLING STONE (May 7, 2012), <http://www.rollingstone.com/music/news/last-nite-the-strokes> [https://perma.cc/MR97-4PFN] (quoting Julian Casablancas as saying "Yeah, we ripped it off. Where you been?" in reference to Tom Petty's song, "American Girl").

<sup>128</sup> See generally Jeremy Beck, *Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1 (2005) (discussing the relevant legal issues and current music industry practices with respect to digital sampling).

sound harmonious together, make similarities in compositions common, if not inevitable. As the Second Circuit recognized:

Musical signs available for combinations are about 13 in number. They are tones produced by striking in succession the white and black keys as they are found on the keyboard of the piano. It is called the chromatic scale. In a popular song, the composer must write a composition arranging combinations of these tones limited by the range of the ordinary voice and by the skill of the ordinary player. To be successful, it must be a combination of tones that can be played as well as sung by almost any one. Necessarily, within these limits, there will be found some similarity of tone succession.<sup>129</sup>

Or, as one commentator described:

The average composer who indulges in songs has a limited number of tones at his disposal. The combinations and permutations of thirteen tones gives the amazing total of 6,227,020,800 combinations, of which only a small fraction may be used ordinarily. Popular songs, particularly, lie within a very small radius. In a confined space, similarity of tone construction is inevitable. Practically every original idea the composer can think of has appeared somewhere before; it is a matter of probabilities, and every day the number of new possibilities grows less.<sup>130</sup>

Thus, another reason why we might expect fair use to surface in music cases is the very nature of music. Music possesses distinct qualities that make it common for two or more songwriters to create, intentionally or otherwise, songs that have some elements that sound similar, but not an exact copy of each other. Fair use, among other doctrines such as *scenes a faire*, would provide a safety valve in copyright law to allow such unavoidable similarities in the composition of music.

Even more provocative is the possibility that humans are, in essence, hard-wired to produce certain patterns in music. Musicologists, neuroscientists, psychologists, and cognitive biologists have made important strides in identifying potential universal patterns in music that may derive from how humans think. As Steven Brown and Joseph Jordania put it:

In a world of more than 4,500 singing species, only one species—*Homo sapiens*—lives on the ground, and only one species—

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<sup>129</sup> Marks v. Leo Feist, Inc., 290 F. 959, 960 (2d Cir. 1923).

<sup>130</sup> SHAFTER, *supra* note 110, at 155.

*Homo sapiens*—has the ability to follow precise rhythmic patterns so as to permit group singing, drumming, and dancing. What explains the unique place of humans among singing species?<sup>131</sup>

Building on Bruno Nettl's work, Brown and Jordania propose an elaborate list of seventy possible “universals” or common music patterns that bridge cultures.<sup>132</sup> Their theory includes comparable lists of universals for the range of components of music, including rhythm, melodic structure and texture, form, vocal style, expressive devices, and instruments.<sup>133</sup>

Recent studies appear to validate the theory of music universals, although more study is needed. One experiment asked non-musicians to repeat a pattern of beats by replaying them on an electronic drum pad.<sup>134</sup> Forty-eight students participated in the study, divided into six chains of eight students.<sup>135</sup> Instead of recreating the beats exactly as the original, each chain ended up recreating a beat similar to a universal of rhythm, including:

- A regularly spaced (isochronous) underlying beat, akin to an implicit metronome.
- Hierarchical organization of beats of unequal strength, so that some events in time are marked with respect to others.
- Grouping of beats in two (for example, marches) or three (for example, waltzes).
- A preference of binary (2-beat) groupings.
- Clustering of beat durations around a few values distributed in less than five durational categories.
- The use of durations from different categories to construct riffs, that is, rhythmic motifs or tunes.<sup>136</sup>

Likewise, psychologists have conducted studies that indicate infants possess universal preferences for certain music patterns, such as consonance over dissonance.<sup>137</sup>

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<sup>131</sup> Steven Brown & Joseph Jordania, *Universals in the World's Musics*, 41 PSYCHOL. MUSIC 229, 230 (2013).

<sup>132</sup> *Id.* at 238–41.

<sup>133</sup> *Id.*

<sup>134</sup> See generally Andrea Ravignani et al., *Musical Evolution in the Lab Exhibits Rhythmic Universals*, 1 NATURE HUM. BEHAV. 1 (2016).

<sup>135</sup> *Id.* at 5.

<sup>136</sup> *Id.* at 1.

<sup>137</sup> Laurel J. Trainor & Becky M. Heinmiller, *The Development of Evaluative Responses to Music: Infants Prefer to Listen to Consonance Over Dissonance*, 21 INFANT BEHAV. & DEV. 77, 85 (1998); see also Sandra E. Trehub, *The Developmental Origins of Musicality*, 6 NATURE NEUROSCIENCE 669, 670 (2003) (describing one study that found that infants listened longer to consonant interval sequences than dissonant intervals).

Another factor that may be at play is that today's "hit songs" are often being created by the same producers, who use similar electronic and computing technology to manufacture hits that people like.<sup>138</sup> Once a producer figures out how to make a hit, the same producer may use the same or similar method in turning out other hits. Granted, new music still has to sound fresh. But each decade has been known for certain styles of music that dominated in popularity.

In sum, music often reflects similar composition, which may be due to a variety of factors, including conscious or subconscious borrowing among composers and the very nature and limitations of music as well as universal preferences among humans. In such a field of creative activity, where patterns are common and perhaps, in some instances, universal, we would expect fair use to provide a safety valve for composers to borrow elements of prior songs to create new, transformative works. As explained next, however, it has not.

## II. EMPIRICAL STUDY OF FAIR USE OF MUSICAL WORKS

This Part summarizes the empirical study conducted to determine the prevalence of fair use defenses in cases involving a musical work alleged to have copied portions of another musical work.<sup>139</sup> The major findings are: (i) in nearly forty years of decisions under the 1976 Copyright Act, only one decision has ever recognized a non-parody fair use of a musical work despite the prevalence of music infringement cases (and the one decision may not have even involved a musical work given the absence of music in the underlying work); (ii) very few defendants have pursued a fair use defense in music cases; and (iii) nonetheless, music defendants have prevailed in the majority of cases on grounds other than fair use.

### A. Study Design

#### 1. Scope of Music Cases

The study examined all musical work infringement cases that involved a decision of some kind contained in the Westlaw database from 1978 (the effective date of the 1976 Copyright Act) to January 15, 2018.<sup>140</sup> The cases

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<sup>138</sup> See JOHN SEABROOK, THE SONG MACHINE: INSIDE THE HIT FACTORY 5 (2015); cf. Jon Pareles, *They Have an Ear for Success*, N.Y. TIMES, Jan. 25, 2018, at C2 (noting the wide variety of musical work that earned producer Blake Mills a Grammy nomination).

<sup>139</sup> See *infra* notes 139–163 and accompanying text.

<sup>140</sup> A broad search was first used on Westlaw in the federal cases database: copyright /p song or (music! /2 work or composition). False positives were winnowed from the results. Also considered were listings of cases from the Music Infringement Resource, an online database sponsored

identified involved (i) a musical work that was alleged to have infringed (ii) the copyright of another musical work. Such cases will be referred to as “music cases” for short. The survey was meant to identify disputes that could plausibly contain fair use claims for same-type transformative musical works as discussed in Part I.<sup>141</sup>

The focus of the study was on two works in the same category of copyright subject matter; here, two musical works.<sup>142</sup> One would expect this fact pattern to produce fair use defenses for same-type transformative works, as discussed above, based on the precedent recognizing fair uses within other categories of copyright subject matter, such as quotation of a literary work for use in another literary work, or copying of parts of a pictorial work for use in another pictorial work.<sup>143</sup>

Cases asserting claims involving only sound recording copyrights were also excluded.<sup>144</sup> Although one could examine copying of parts of a sound recording as possible same-type transformative works, the issue has produced considerable controversy for reasons other than fair use. The Copyright Act treats the sound recording copyright, which was recognized in 1972, differently and more narrowly in some respects.<sup>145</sup> Also, the circuits have split over whether de minimis copying is allowed as a defense to the

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by Columbia Law School and the USC Gould School of Law, available at *Music Copyright Infringement Resource*, *supra* note 16.

<sup>141</sup> See *supra* notes 82–138 and accompanying text.

<sup>142</sup> Sometimes, the defendant incorporated what might arguably be classified as a musical work into an audio-visual work, such as a commercial. These cases were generally included in the survey, as long as the defendant’s putative musical work was not simply the exact same work as the plaintiff’s musical work. Excluded from this survey were a few cases involving uses of a copyright holder’s musical work without any change in the musical work or, in one case, uses of a copyright holder’s audiovisual work recorded on YouTube videos. See, e.g., *Estate of Barré v. Carter*, 272 F. Supp. 3d 906, 912 (E.D. La. 2017) (defendant’s use of recordings of plaintiff speaking a few lines on YouTube videos); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 316 (S.D.N.Y. 2008) (defendant’s use of 15 seconds of song “Imagine” in movie); *Byrne v. British Broad. Corp.*, 132 F. Supp. 2d 229, 231–32 (S.D.N.Y. 2001) (defendant’s use part of plaintiff’s song for introduction to radio show); *Higgins v. Detroit Educ. Television Found.*, 4 F. Supp. 2d 701, 703 (E.D. Mich. 1998) (defendant’s use of part of plaintiff’s song as background music for educational program). These cases do not involve a defendant artist or composer attempting to create a new musical work based on a prior musical work. Curiously, all of these cases involved assertions of fair use. See *Estate of Barré*, 272 F. Supp. 3d at 939 (rejecting defendants’ motion to dismiss based in part on possibility of plaintiff proving infringement and of defendants not establishing fair use); *Lennon*, 556 F. Supp. 2d at 328 (preliminary injunction denied given defendants’ likelihood of prevailing on fair use defense); *Byrne*, 132 F. Supp. 2d at 236 (summary judgment not granted where fact issues remained on fair use); *Higgins*, 4 F. Supp. 2d at 710 (summary judgment granted finding fair use).

<sup>143</sup> See *supra* notes 82–106 and accompanying text.

<sup>144</sup> See, e.g., *Newton v. Diamond*, 388 F.3d 1189, 1190 (9th Cir. 2004).

<sup>145</sup> See 17 U.S.C. § 114(b) (2012) (setting out a series of limitations on the exclusive rights of the owner of a sound recording copyright).

assertion of sound recording copyrights.<sup>146</sup> The controversy over music sampling—taking parts of someone else's recording—has generated disagreement among courts and commentators.<sup>147</sup>

In sum, the study examined cases involving two competing musical works where the copyright asserted pertains to the plaintiff's musical work. In all, 177 music cases from this approximately forty-year period were identified, which amounts to an average of 4.425 music cases annually. If a case resulted in several decisions at the trial or appellate courts, it was counted as just one case. Of the 177 cases, 127 (72%) resulted in a decision on the merits of the copyright claim.

## 2. Study Limitations

The study examined copyright cases that involved a decision reported in Westlaw. Given that most copyright cases filed eventually settle and that many uses of copyrighted works are not disputed, much less litigated, the possible selection effect of this study precludes any generalizable conclusion about the prevalence of fair use in music compositions.<sup>148</sup> Whether composers make fair uses and accept fair uses of their works by others, in practice, cannot be determined without examining the myriad of musical works that are not subject to litigation or a court decision. In other words, musicians might engage in borrowing of elements of other musical works—perhaps believing such borrowing is fair use—without ever licensing the use or being challenged in litigation. I suspect, however, if fair use was widely recognized among musicians, we would see at least some non-

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<sup>146</sup> Compare *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005) (holding that no *de minimis* defense is available when defendant has admitted to digitally sampling a copyright recording), with *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 877 (9th Cir. 2016) (allowing *de minimis* defense for music sampling).

<sup>147</sup> Compare Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 402–07 (2008) (arguing that courts and legislators should follow the lead of the Sixth Circuit's holding in *Bridgeport Music* and provide greater copyright protection for sound recording copyright owners against digital sampling), with John Schietinger, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 210 (2005) (arguing that *Bridgeport Music* was wrongly decided and that as a result, the case will both inhibit creativity and undermine the purpose of copyright law).

<sup>148</sup> See generally Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990) (noting that because clear cut cases tend to settle quickly, only difficult cases go to trial, and thus a selection of tried cases may not represent a random sample); Matthew Sag, *IP Litigation in U.S. District Courts: 1994–2014*, 101 IOWA L. REV. 1065 (2016) (noting that legal empirical studies are imperfect because they are limited by the fact that most civil cases are settled or end without a written opinion).

parody fair use defenses in the music cases, which we did not find except in one recent decision involving spoken words, not music.

The survey also examined the decisions to see if fair use was mentioned. But it is possible that some defendants in these cases listed fair use as a defense in their answers but did not pursue it to judgment. The survey did not examine the pleadings except in a few limited instances not included in the results. The survey assumed that the courts' failure to mention fair use in ruling on the infringement claims meant that, at the very least, the defendants did not pursue fair use as their primary defense. And, in cases where the defendants lost and the decisions did not even mention fair use, the survey inferred that the defendants did not pursue fair use to judgment.

Thus, the survey gives us a picture of what happens in music cases that are resolved by courts. Who wins and who loses, and for what reasons, are detailed in the results of the survey.

### *B. Results from Survey of Musical Works Cases*

#### 1. Fair Use of Musical Works Is Rarely Discussed in Decisions

The first major finding of the survey is that fair use is rarely discussed in final decisions of music cases. In the majority of music cases, defendants prevailed on grounds other than fair use, thus in some respects obviating the need for the fair use defense in most music cases.

As Figure 1 below indicates,<sup>149</sup> 91% (116 of 127) of the decisions did not discuss fair use at all. Most of these cases—82.7% (105 of 127)—resulted in a finding of no infringement or liability against the defendant(s). Thus, to a large extent, a fair use defense was unnecessary for music defendants to prevail. Only 8.7% (11 of 127) of the decisions found infringement without discussing fair use.

By contrast, approximately 9% of the decisions referred to fair use, with the following breakdown:

- 3.1% (4 of 127) of the decisions found no infringement and mentioned fair use but did not rule on it (in one case because the defendant did not raise it);<sup>150</sup>

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<sup>149</sup> This graphic is also available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/lee-graphics.pdf> [<https://perma.cc/D876-7ZVU>].

<sup>150</sup> See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 539 (1994) (fair use mentioned, but not decided); *Newton v. Diamond*, 349 F.3d 591, 598 (9th Cir. 2003) (same); *Nelson v. PRN Prods., Inc.*, 873 F.2d 1141, 1144 (8th Cir. 1989) (fair use not raised by defendant but discussed). One case was unusual: it involved a mistaken assertion of fair use by a *pro se* plaintiff. See *Halper v. Sony/ATV Music Publ'g, LLC*, No. 3:16-cv-00567, 2017 WL 5478395, at \*5 (M.D. Tenn. Nov. 15, 2017).

- 3.9% (5 of 127) of the decisions involved successful parody fair uses;<sup>151</sup>
- 0.8% (1 of 127) involved an unsuccessful defense of parody fair use;<sup>152</sup>
- 0.8% (1 of 127) involved a successful defense of non-parody fair use.<sup>153</sup>

Notably, only one U.S. court has ever recognized, in a published decision under the 1976 Copyright Act, a non-parody fair use of a putative musical work. That case, *Estate of Smith v. Cash Money Records*, involved the use of only a portion of a spoken rap by the late jazz artist Jimmy Smith, not accompanied by music, to introduce his album *Off the Top*.<sup>154</sup> In that respect, the case resembles a typical fair use case involving a quotation of a literary work. In fact, as discussed above, the work “Jimmy Smith Rap” may not even constitute a musical work under the Copyright Office’s definition of musical work, which requires *music* to be an element of the composition.<sup>155</sup> I have included the case in the survey, given that the court appeared to assume without deciding that the work was a musical composition as the plaintiffs claimed.<sup>156</sup> Even then, the case is an outlier.

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<sup>151</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994); *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 253 (2d Cir. 1980); *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499, 511 (S.D.N.Y. 2009); *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 2d 84, 95 (S.D.N.Y. 2003).

<sup>152</sup> See *MCA, Inc. v. Wilson*, 677 F.2d 180, 187 (2d Cir. 1981).

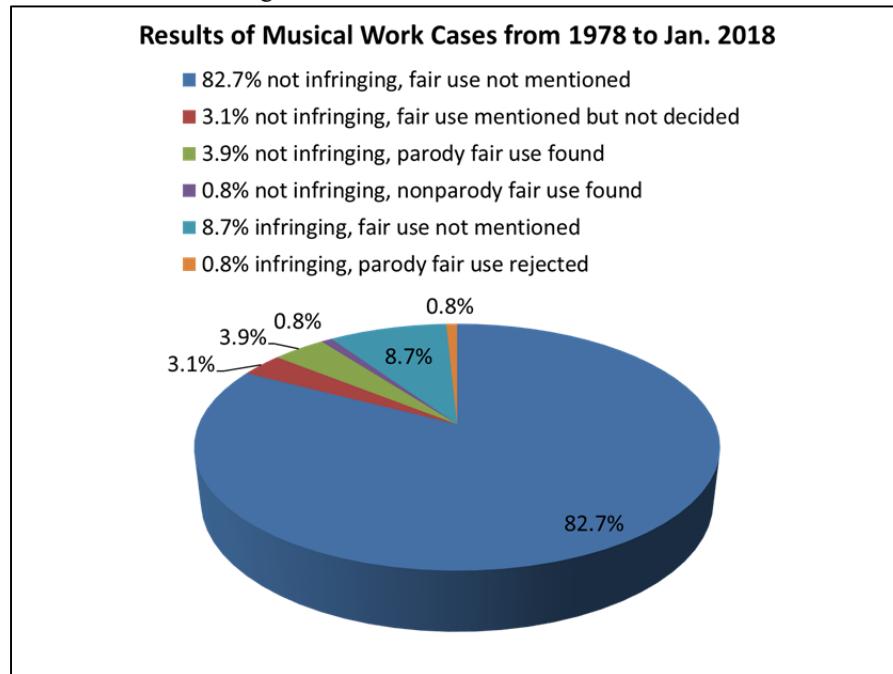
<sup>153</sup> *Estate of Smith v. Cash Money Records, Inc.*, 253 F. Supp. 3d 737, 752 (S.D.N.Y. 2017).

<sup>154</sup> *Id.*

<sup>155</sup> See *supra* notes 12–15 and accompanying text.

<sup>156</sup> See *Estate of Smith*, 253 F. Supp. 3d at 743, 751 (noting the plaintiffs’ assertion of copyright in the composition of “Jimmy Smith Rap” but characterizing the nature of the work only as a “creative work” in the fair use analysis).

Figure 1. Results of Musical Work Cases



## 2. Most Music Defendants Prevail on Other Grounds

One reason that fair use is not prevalent in music cases is that defendants prevail on other grounds and do so at a fairly high rate in the entire universe of music cases surveyed. In some respects, fair use isn't needed. Defendants prevailed in 86% of the music cases (109 of 127) on grounds other than fair use, while defendants raised successful fair use defenses in only a few cases—4% (5 of 127) of the decisions (parody fair use), and less than 1% (1 of 127) involved a successful non-parody fair use.<sup>157</sup> Collectively, defendants prevailed in 91% (115 of 127) of the music cases decided.<sup>158</sup>

On what grounds have defendants prevailed? As shown in Figure 2 below,<sup>159</sup> the most successful defense relates to the test of infringement: approximately 61.7% (71 of 115) of the cases in which the defendant pre-

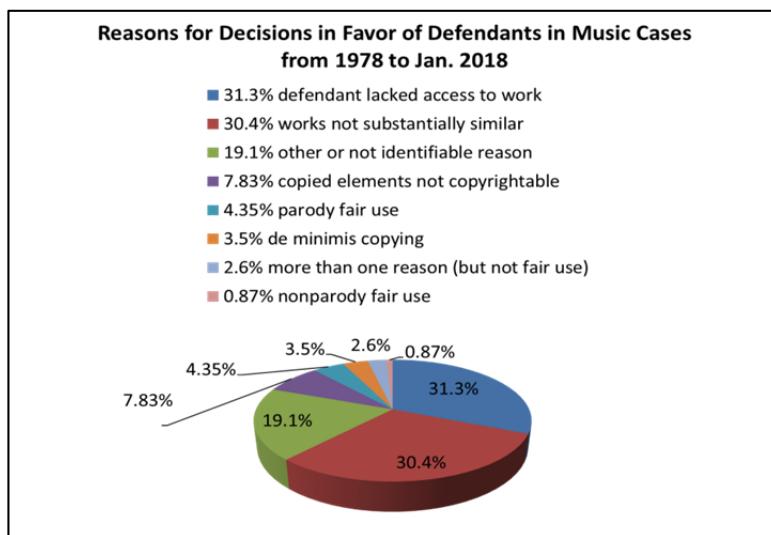
<sup>157</sup> The data for the survey are available in Excel format. See Fair Use Avoidance in Music Cases, Chicago-Kent Center for Empirical Studies of Intellectual Property, <https://www.kentlaw.iit.edu/institutes-centers/center-for-empirical-studies-of-intellectual-property/cesip-projects/fair-use-avoidance-in-music-cases> [http://perma.cc/3D2K-FNKJ] [hereinafter Music Survey Data].

<sup>158</sup> *Id.*

<sup>159</sup> This graphic is also available at <http://www.bc.edu/content/dam/bcl/schools/law/pdf/law-review-content/BCLR/59-6/lee-graphics.pdf> [https://perma.cc/D876-7ZVU]

vailed turned on the courts' application of elements of the test of infringement, either the defendant's lack of access to the plaintiff's copyrighted work (31.3%, or 36 of 115) or the lack of substantial similarity between the two songs (30.4%, of 35 of 115). A few cases recognized or assumed that the defendant copied portions of the plaintiff's song but ruled in the defendant's favor: 7.8% (9 of 115) found that the defendant copied unprotected or uncopyrightable elements, and 4.3% (5 of 115) found de minimis copying. Additionally, 2.6% (3 of 115) of cases relied on more than one of these reasons, but not fair use, while 19.1% (22 of 115) of the cases defendants prevailed based on other reasons or reasons not identifiable from the decisions (such as a jury verdict). As mentioned above, roughly 4% of the cases decided in favor of the defendant involved successful fair use defenses. In short, fair use is seldom the reason why defendants have so often prevailed in music cases.

Figure 2. Reasons Courts Ruled in Favor of Defendants in Music Cases



Given the relatively high success rate of defendants in music cases on grounds other than fair use, the lack of discussion of fair use in music cases is understandable to some degree. Part III revisits this issue in greater detail and offers possible explanations for this result.<sup>160</sup>

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<sup>160</sup> See *infra* notes 164–252 and accompanying text.

### 3. Most Losing Music Defendants Do Not Pursue Fair Use Defenses

Defendants have lost in a small minority of the music cases (9%, or 12 of 127). Surprisingly, even in the music cases in which defendants lost, fair use was rarely litigated. Only one decision even discussed fair use, ultimately rejecting the parody fair use defense.<sup>161</sup> Curiously, a defense of non-parody fair use is absent from every music infringement case in which the defendant lost. This was true, even though some of these cases seemed well-suited for a fair use argument, such as the case involving Pharrell and Thicke,<sup>162</sup> or the case involving Michael Bolton's 1991 hit "Love Is a Wonderful Thing," which was found to have infringed the Isley Brothers' 1966 song by the same name.<sup>163</sup> Bottom line, win or lose, defendants in music cases typically did not pursue fair use defenses outside of parodies.

## III. THE THEORY OF FAIR USE AVOIDANCE

Part III sets forth a new theory of fair use avoidance to help explain the results of the empirical study described in Part II.<sup>164</sup> Both litigants and courts may decide to avoid pursuing a fair use defense for various reasons, even when a case might lend itself to fair use as either a primary or secondary defense. Although it is difficult to conclusively determine why non-parody fair use has not been recognized in music cases, despite the relatively high number of music cases that have been decided, this part offers several hypotheses.<sup>165</sup> Of course, more than one reason may explain why both litigants and courts have avoided fair use in music cases for decades.

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<sup>161</sup> See *MCA, Inc.*, 677 F.2d at 185 (affirming the district court's finding that "defendants' song was neither a parody or burlesque of Bugle Boy nor a humorous comment on the music of the '40's').

<sup>162</sup> See *supra* notes 5–10 and accompanying text.

<sup>163</sup> See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 480–81 (9th Cir. 2000). Although the sample size is too small to make generalizations, it is worth mentioning that the type of losing defendant did not seem to affect the lack of pursuit of a fair use defense. Entities outside of the music industry also failed to pursue fair use defenses in cases, just as individuals and entities established in the music industry (including composers, publishers, and labels) have. See generally *Cream Records, Inc. v. Jos. Schlitz Brewing Co.*, 754 F.2d 826 (9th Cir. 1985) (beer company failed to pursue a fair use defense); *ZZ Top v. Chrysler Corp.*, 54 F. Supp. 2d 983 (W.D. Wash. 1999) (car company failed to pursue fair use defense). Likewise, defendants failed to pursue fair use defenses against individuals and entities both established and not established in the music industry. See, e.g., *Harley v. Nesby*, No. 08 Civ. 5791(KBF)(HBP), 2011 WL 6188718, at \*1 (S.D.N.Y. Dec. 12, 2011) (plaintiff was established in music industry); *Jackson v. Sturkie*, 255 F. Supp. 2d 1096, 1098–99 (N.D. Cal. 2003) (plaintiff was not established in music industry). Of course, this finding does not necessarily preclude the possibility that established music industry participants are less likely to invoke fair use due to some industry norm—a topic discussed further below.

<sup>164</sup> See *infra* notes 166–252 and accompanying text.

<sup>165</sup> *Id.*

### A. General Theory of Avoidance

Before considering fair use avoidance, this section discusses avoidance more generally in litigation and judicial decisions.<sup>166</sup>

#### 1. Avoidance by Litigants

When it comes to legal disputes, litigants, typically upon the advice of their lawyers, employ avoidance strategies in whether and how to litigate a case. The prime example is when parties avoid lawsuits altogether through settlement. The vast majority of cases, including copyright cases, settle.<sup>167</sup> Settlement helps parties avoid costly litigation and the uncertainty of result when the decision is left to a jury or court.<sup>168</sup> Settlement also helps litigants avoid the possibility that a court might set a bad precedent detrimental to their long-term interests.

Alternatively, litigants may decide to pursue a case, but may avoid certain arguments or positions within litigation for a variety of reasons. One obvious reason is that the litigant's attorney believes the argument is a losing argument or has no chance of succeeding. For example, litigants might avoid raising constitutional challenges, which might seem to be desperate or unlikely to prevail, although the U.S. Supreme Court's recent *Matal v. Tam* decision in 2017 shows that constitutional challenges sometimes prevail even in the face of directly adverse lower court precedent.<sup>169</sup> In addition, an argument or position might be perceived by the litigant or attorney as inconsistent with the facts or theory of the case,<sup>170</sup> the overall litigation strategy, the litigant's professional or personal beliefs, or an industry or professional norm or position. Also, the uncertainty of an argument or the lack of clear precedent may contribute to litigants' avoidance of the position. Presumably, if an argument was perceived as having a high probability of success, the attorney would strongly recommend pursuing it, even if it ran counter to the client's beliefs or industry norms. But ultimately it's the client's decision to make.

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<sup>166</sup> See *infra* notes 167–190 and accompanying text.

<sup>167</sup> See Eisenberg, *supra* note 148, at 337; Brian T. Fitzpatrick, Twombly and Iqbal Reconsidered, 87 NOTRE DAME L. REV. 1621, 1641 (2012).

<sup>168</sup> Fitzpatrick, *supra* note 167, at 1641.

<sup>169</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (affirming a challenge to the disparagement clause of the Lanham Act as unconstitutional under the First Amendment's Free Speech Clause). A panel of the Federal Circuit initially refused to register the trademark as disparaging, but upon rehearing en banc, the Federal Circuit vacated the panel's judgment and remanded. See *In re Tam*, 808 F.3d 1321, 1358 (Fed. Cir. 2015).

<sup>170</sup> See generally Binny Miller, *Teaching Case Theory*, 9 CLINICAL L. REV. 293, 298 (2002) (noting the importance for litigants to develop a case theory to fit the facts within, and to tell a story about what the case is about).

## 2. Avoidance by Courts

Courts employ avoidance strategies as well. The most well-recognized avoidance doctrine is the doctrine of constitutional doubt. This doctrine holds that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”<sup>171</sup> This canon of statutory construction is justified as a matter of judicial prudence and a display of respect for Congress, a co-equal branch of government. As the Supreme Court explained, “[t]his approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution.”<sup>172</sup> Cass Sunstein suggests that the doctrine of constitutional doubt can also be viewed as a form of democracy-enhancing judicial minimalism by which courts recognize that “constitutionally troublesome judgments ought to be made by politically accountable bodies, and not by bureaucrats and administrators.”<sup>173</sup> In Sunstein’s view, sometimes courts intentionally “[l]eav[e] things undecided.”<sup>174</sup>

Judicial minimalism may be especially appropriate to deal with “an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise).”<sup>175</sup> These issues need not be constitutional issues; they could simply be difficult or complex issues of statutory or common law. The basic premise is that, if given two paths to decide a case, one easy and the other hard, courts will tend to choose the path of least resistance. Why? They do so for reasons of judicial economy and, for multi-member appellate courts, agreement among different judges. Moreover, this inclination for courts to choose the path of least resistance is not simply about opting for what’s easy. Lower courts may also be concerned about reversal of their decisions, so embarking on a complex or novel issue of law, with little or no precedent, increases the likelihood of reversal compared to the path of least resistance.

## 3. Examples of Avoidance in Copyright Law

Courts have routinely used avoidance strategies in copyright law. Before discussing fair use avoidance in the next section, it is worth noting a

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<sup>171</sup> Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

<sup>172</sup> *Id.*

<sup>173</sup> Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 38 (1996).

<sup>174</sup> *Id.* at 16. Sunstein refers to this phenomenon as “decisional minimalism.” *Id.*

<sup>175</sup> *Id.* at 8.

few of the other areas in copyright law in which courts have adopted avoidance strategies to appreciate how pervasive avoidance is.

The Supreme Court's doctrine in dealing with First Amendment challenges to copyright law is a prime example of judicial avoidance.<sup>176</sup> In both the 2002 decision in *Eldred v. Ashcroft* and the 2012 decision in *Golan v. Holder*, the Court took the approach that, generally, no First Amendment scrutiny of copyright law is necessary because copyright law has "built-in free speech safeguards," including fair use and the idea-expression dichotomy.<sup>177</sup> The Court left open the possibility of applying First Amendment scrutiny where "Congress has . . . altered the traditional contours of copyright protection."<sup>178</sup> In a recent trademark case, Justice Kennedy suggested during oral argument that a copyright law that authorized the Copyright Office to deny registration to works deemed to be disparaging of people would violate the First Amendment's protection against viewpoint discrimination.<sup>179</sup> Nevertheless, in the typical copyright case, courts will not even apply First Amendment scrutiny to copyright law. The Court's approach in *Eldred* and *Golan* indicates its general reluctance to apply First Amendment scrutiny to copyright law.<sup>180</sup>

Although legal scholars have criticized the Supreme Court's insulation of copyright law from First Amendment scrutiny,<sup>181</sup> the Court's approach can be viewed as a judicial avoidance strategy. Instead of opening the floodgates to First Amendment challenges in run-of-the-mill copyright cases, the Court opted to avoid such challenges while leaving open the possibility of applying First Amendment scrutiny in an exceptional case. The result of this ruling is that courts avoid thorny constitutional questions that would likely require

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<sup>176</sup> See, e.g., *Golan v. Holder*, 565 U.S. 302, 327 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003) (rejecting petitioners' First Amendment argument given free speech safeguards in copyright law).

<sup>177</sup> *Golan*, 565 U.S. at 328; *Eldred*, 537 U.S. at 221.

<sup>178</sup> *Eldred*, 537 U.S. at 221.

<sup>179</sup> Transcript of Oral Argument at 3–4, *Matal*, 137 S. Ct. 1744 (No. 15-1293) (question of Justice Kennedy).

<sup>180</sup> *Golan*, 565 U.S. at 328; *Eldred*, 537 U.S. at 221.

<sup>181</sup> See, e.g., Howard B. Abrams, *Eldred, Golan and Their Aftermath*, 60 J. COPYRIGHT SOC'Y U.S.A. 491, 493 (2013) (arguing that the juncture between the Copyright Clause in the Constitution and the First Amendment is inevitable); William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1640–43 (2004) (discussing the problems and two solutions stemming from the retroactive nature of the Sonny Bono Copyright Term Extension Act); Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2334–35, 2394–95 (2003) (characterizing the Supreme Court's resolution of *Eldred v. Ashcroft* as incomplete and unsatisfactory and offering an alternative framework for understanding the Copyright Clause).

some difficult balancing of copyright versus free speech interests.<sup>182</sup> The Court's approach minimizes the number of copyright cases in which First Amendment challenges can arise by employing a doctrinal strategy of avoidance. The approach may not be entirely satisfying, but it has some virtue in avoiding repeated constitutional challenges to copyright law. The approach is similar to the constitutional doubt doctrine in that the approach allows courts to avoid having to decide constitutional challenges by interpreting the Copyright Act as containing First Amendment safety valves that insulate copyright law from First Amendment challenges.

The principle of aesthetic non-discrimination provides another example of judicial avoidance. In the Supreme Court's 1903 decision in *Bleistein v. Donaldson Lithographing Co.*, Justice Holmes famously wrote: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."<sup>183</sup> Holmes was cautioning against allowing judges to go beyond their competence in the service of, for example, deciding which works were works of "fine art" or otherwise deserving of a copyright.<sup>184</sup> Except for "the narrowest and most obvious limits," judges are not equipped to make aesthetic determinations and therefore should avoid doing so in copyright cases.<sup>185</sup> As the saying goes, beauty is in the eye of the beholder.

Beyond concerns of judicial competence, the principle of aesthetic non-discrimination may also be justified as a way for courts to avoid First Amendment problems.<sup>186</sup> If courts were called upon to discriminate based on the content of works in determining which works deserved copyrights, serious First Amendment problems would be raised. Such discrimination would likely constitute impermissible content discrimination. But courts

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<sup>182</sup> See Abrams, *supra* note 181, at 491. See generally Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (noting that courts have rarely constrained copyright protections through application of the First Amendment, and that most courts quickly dismiss free speech defenses to copyright infringement).

<sup>183</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

<sup>184</sup> *Id.*

<sup>185</sup> See Situation Mgmt. Sys., Inc. v. ASP. Consulting LLC, 560 F.3d 53, 60 (1st Cir. 2009) ("[A] work's entitlement to copyright protection does not depend in any way upon the court's subjective assessment of its creative worth."); Esquire, Inc. v. Ringer, 591 F.2d 796, 805 (D.C. Cir. 1978) ("Neither the Constitution nor the Copyright Act authorizes the Copyright Office or the federal judiciary to serve as arbiters of national taste. These officials have no particular competence to assess the merits of one genre of art relative to another. And to allow them to assume such authority would be to risk stultifying the creativity and originality the copyright laws were expressly designed to encourage.").

<sup>186</sup> See Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 840 (2010).

need not decide the constitutionality of such a practice because the aesthetic non-discrimination principle avoids the problem altogether.

A more recent example of copyright avoidance is provided by the 2005 decision in *Mannion v. Coors Brewing Co.*<sup>187</sup> There, the U.S. District Court for the Southern District of New York expressly avoided the application of the well-recognized idea-expression dichotomy to photographs or visual works.<sup>188</sup> Judge Kaplan avoided analyzing the idea-expression dichotomy because he found it be ill-suited to visual works:

In the visual arts, the distinction breaks down. For one thing, it is impossible in most cases to speak of the particular “idea” captured, embodied, or conveyed by a work of art because every observer will have a different interpretation. Furthermore, it is not clear that there is any real distinction between the idea in a work of art and its expression. An artist’s idea, among other things, is to depict a particular subject in a particular way . . . In other words, those elements of a photograph, or indeed, any work of visual art protected by copyright, could just as easily be labeled “idea” as “expression.”<sup>189</sup>

Judge Kaplan’s reason for avoidance is similar to Justice Holmes’s in *Bleistein*; both shy away from judicial decision-making that would be highly subjective or lacking in administrable principles that fall within the competence of judges. As suggested below, perhaps one reason courts and litigants avoid fair use defenses in music cases is the difficulty of articulating a transformative purpose to musical sounds or notes, just as it would be difficult to articulate what the idea of a sound is.<sup>190</sup>

### *B. Fair Use Avoidance in Music Cases*

With a basic understanding of avoidance theory, we can now turn to the main subject of this Article: fair use avoidance in music cases. Parties, their respective attorneys, and courts may avoid fair use in music cases for a variety of reasons. The following section sets forth several hypotheses to explain the results of the survey in Part II.<sup>191</sup>

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<sup>187</sup> *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 463 (S.D.N.Y. 2005).

<sup>188</sup> *Id.* at 458.

<sup>189</sup> *Id.* at 458–59.

<sup>190</sup> See *infra* notes 242–252 and accompanying text.

<sup>191</sup> *Id.*

## 1. Potential Reasons Why Musicians May Elect to Avoid Fair Use Defenses

### a. Ease of Settlement: Song Credit and Royalties

Although the study discussed in Part II did not include music disputes that ultimately settled, it deserves mentioning that the existence of an established practice of handling songwriting disputes within the music industry may diminish the invocation of fair use in such disputes. It is not uncommon for song writers accused of copyright infringement by other song writers, especially ones who are established musicians, to agree to share—sometimes begrudgingly—songwriting credit and royalties.<sup>192</sup>

For example, the British pop star Sam Smith won the Grammy for record of the year for his hit song “Stay with Me” in 2015.<sup>193</sup> The song sold close to four million copies in one year.<sup>194</sup> Smith, however, agreed to a settlement that shared songwriting credit and 12.5% royalties with Tom Petty and Jeff Lynne due to similarities in the melodies of “Stay with Me” and the 1989 hit “I Won’t Back Down,” written by Petty and Lynne.<sup>195</sup> Smith and his two co-authors, James Napier and William Phillips, claimed they were not even familiar with Petty’s 1989 hit song written over twenty-five years earlier and that the similarities between the two works were “coincidental,” but they nonetheless quickly settled the dispute.<sup>196</sup> Petty stated: “All my years of songwriting have shown me these things can happen. Most times you catch it before it gets out the studio door but in this case it got by . . . . Sam did the right thing and I have thought no more about this. A musical accident no more no less.”<sup>197</sup> Other popular musicians, including the Black Eyed Peas, Demi Lovato, and Ed Sheeran, have opted to settle claims by giving songwriting credit and royalties to the original songwriters.<sup>198</sup>

<sup>192</sup> See *infra* notes 193–198 and accompanying text.

<sup>193</sup> See Tim Jonze, *Grammys 2015—Sam Smith’s Stay With Me Wins Record of the Year*, GUARDIAN (Feb. 8, 2015), <https://www.theguardian.com/music/2015/feb/08/grammys-2015-sam-smith-stay-with-me-record-year> [https://perma.cc/8AQL-RNTT].

<sup>194</sup> Chris Coplan, *Update: Tom Petty Awarded Songwriting Royalties for Sam Smith’s ‘Stay With Me,’* CONSEQUENCE OF SOUND (Jan. 29, 2015), <https://consequenceofsound.net/2015/01/tom-petty-awarded-songwriting-royalties-for-sam-smiths-stay-with-me/> [https://perma.cc/LQR2-R7UC].

<sup>195</sup> *Id.*; see Daniel Kreps, *Sam Smith on Tom Petty Settlement: ‘Similarities’ but ‘Complete Coincidence,’* ROLLING STONE (Jan. 26, 2015), <https://www.rollingstone.com/music/news/sam-smith--tom-petty-settlement-20150126> [https://perma.cc/N247-R36N]; *Stay with Me by Sam Smith*, SONGFACTS, <http://www.songfacts.com/detail.php?id=32862> [https://perma.cc/4CRC-EVQU].

<sup>196</sup> See Kreps, *supra* note 195.

<sup>197</sup> Daniel Kreps, *Tom Petty on Sam Smith Settlement: ‘No Hard Feelings. These Things Happen,’* ROLLING STONE (Jan. 29, 2015), <https://www.rollingstone.com/music/news/tom-petty-on-sam-smith-settlement-no-hard-feelings-these-things-happen-20150129> [https://perma.cc/TS98-3QF2].

<sup>198</sup> See, e.g., Anthony McCartney, *George Clinton, Black Eyed Peas Settle Song Suit*, SAN DIEGO UNION-TRIB. (May 18, 2012), <http://www.sandiegouniontribune.com/sdut-george-clinton>.

*b. Availability of Other Defenses, Some of Which Do Not Admit Copying*

A major reason that fair use does not appear with much frequency in music cases is that other arguments have been more successful or attractive to defendants.<sup>199</sup> Thus far, the success rate of defendants avoiding liability in music cases has been high.<sup>200</sup> The success of those defenses—for example, the lack of access to the plaintiff's work, lack of similarities, copying unprotected elements, and *de minimis* copying—may present defendants or, more aptly, defense counsel with a positive feedback loop to continue to use what prevailed in other cases in the past.<sup>201</sup> Success breeds, not only success, but repeated attempts at achieving the same success by the established arguments. Although defendants could argue in the alternative that any copying they committed constituted a fair use, music defendants do not often pursue or press a fair use defense.<sup>202</sup>

One possible reason that fair use is less attractive, at least compared to the defense of lack of access to or lack of similarity between the works—the two most successful bases in music cases<sup>203</sup>—is that unlike those de-

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black-eyed-peas-settle-song-suit-2012may18-story.html [<https://perma.cc/F6YX-W3VR>] (reporting that George Clinton and the Black Eyed Peas reached a settlement agreement based on the Peas alleged copying of elements of Clinton's song "(Not Just) Knee Deep" in their song "Shut Up"); Gil Kaufman, *Demi Lovato Settles Sleigh Bells 'Infinity Guitars' Infringement Lawsuit*, BILLBOARD (Apr. 13, 2017), <http://www.billboard.com/articles/columns/pop/7760267/demi-lovato-settle-sleigh-bells-infringement-lawsuit> [<https://perma.cc/8E7P-JR37>] (reporting that Demi Lovato settled with Sleigh Bells, an indie rock band, over her alleged copying of the band's "Infinity Guitars" in her song "Stars."); Daniel Welsh, *Ed Sheeran Reaches Deal in Copyright Lawsuit Over Matt Cardle's 'Amazing'*, HUFFINGTON POST (Apr. 12, 2017), [http://www.huffingtonpost.co.uk/entry/ed-sheeran-lawsuit-photograph-matt-cardle-amazing\\_uk\\_58edd961e4b0c89f91229aeb](http://www.huffingtonpost.co.uk/entry/ed-sheeran-lawsuit-photograph-matt-cardle-amazing_uk_58edd961e4b0c89f91229aeb) [<https://perma.cc/MCF7-WA3S>] (reporting that Ed Sheeran settled with Matt Cardle after the singer accused Sheeran of copying his song, "Amazing").

<sup>199</sup> See *supra* notes 157–160 and accompanying text.

<sup>200</sup> See *id.*

<sup>201</sup> See *id.* See generally Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C. L. REV. 373 (2008) (discussing how institutional processes create positive feedback loops in the context of race and poverty). Roithmayr gives the example of visualizing positive feedback loops as snowballs gathering more snow or a bank account accumulating more wealth, conditions that are amplified because the changes in one direction work to produce more change in that same direction. *Id.* at 374.

<sup>202</sup> See *supra* notes 17–18 and accompanying text.

<sup>203</sup> See *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir. 1946). The test of infringement lends itself to two major grounds for defendants to defend themselves: unless the plaintiff has direct evidence (such as the plaintiff's admission) that the plaintiff copied, the plaintiff must prove copying by presenting evidence (1) that the defendant had reasonable access to the plaintiff's work and (2) that there are probative similarities in the competing songs. *Id.* Reasonable access to plaintiff's work can be shown by establishing that work was widely available to the public or that the defendant or his associates had access to a copy of the work. See *Loomis v. Cornish*, 836 F.3d 991, 994–95 (9th Cir. 2016). Moreover, some courts recognize that evidence of striking similarity

fenses, fair use assumes that the defendant *copied* the plaintiff's work.<sup>204</sup> Music defendants may pursue defenses other than fair use when the defendants did not copy the plaintiffs' songs—or, at least, the defendants do not believe they copied or were not conscious of any copying. As discussed in greater depth below, *coincidental* similarities between songs probably occurs with some frequency, given the limited number of musical notes, tones, and rhythms.<sup>205</sup> Accordingly, to the extent composers or songwriters believed they independently created a song, they may be less inclined to admit copying or borrowing a portion of a prior work even as an alternative defense of fair use. After all, musicians have their professional reputation to worry about and copying other works, even in part, might make it sound like the musicians didn't write their own songs. Notwithstanding the common practice of settling music cases by granting songwriting credit and royalties, songwriters accused of music infringement might prefer defenses that are consistent with the explanation that they independently created their own music.

The dynamics of avoiding an admission of copying, even for the purpose of pursuing a fair use defense, may play out differently depending on whether the litigants are “established” in the music industry.<sup>206</sup> For the purposes of the survey, several indicia of “established artist” were used to categorize the parties: an artist who (1) was signed to a major record label or music publisher, (2) wrote, performed, or was credited on a song listed on the *Billboard* chart, (3) wrote, performed, or was credited on a gold or platinum record, or (4) had national recognition via a biography on AllMusic or Wikipedia.<sup>207</sup> Music labels and music publishers were considered established in the music industry.

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between the songs can provide a basis for concluding that both elements, copying and access, have been satisfied. See *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997).

<sup>204</sup> See 17 U.S.C. § 107 (2012).

<sup>205</sup> See SHAFTER, *supra* note 110, at 156.

<sup>206</sup> See *infra* notes 208–216 and accompanying text.

<sup>207</sup> The last factor created some risk of being over-inclusive in identifying “established” artists. At the same time, some independent artists might achieve fame online without necessarily being tied to a major music label or publisher. Including both AllMusic and Wikipedia was intended to help identify artists who had achieved a certain level of recognition short of being signed with major label or publisher. Started in 1991, AllMusic provides “a comprehensive and in-depth resource for finding out more about the albums, bands, musicians and songs you love.” *Welcome to AllMusic*, ALLMUSIC, <https://www.allmusic.com/about> [https://perma.cc/67S2-UFLH]. AllMusic employees determine whether to include an artist’s bio in its database. *Product Submissions*, ALLMUSIC, <https://www.allmusic.com/product-submissions> [https://perma.cc/YV9S-EN26]. Although anyone can write an article and post it to Wikipedia, Wikipedia strongly discourages people from attempting to write autobiographical posts about themselves and subjects any such submissions to the standard editing process by others. *Creating an article about yourself*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Wikipedia:Autobiography#Creating\\_an\\_article\\_about\\_yourself](https://en.wikipedia.org/wiki/Wikipedia:Autobiography#Creating_an_article_about_yourself) [https://perma.cc/SG9H-U2JR].

### i. Unestablished v. Established Artists or Music Entities

Of the music infringement decisions surveyed, 54% (68 of 127) were brought by individuals who were not established in the music industry.<sup>208</sup> All except two of these lawsuits involved a copyright claim against a “bigger” or more prominent defendant, whether an established musician, a music publisher, or label. In such “Unestablished v. Established” cases, when a plaintiff who is relatively unknown or unestablished in the music industry (an “unestablished songwriter”) accuses an established musician, music publisher, or label of copyright infringement, the “established” defendant probably does not view the fair use defense as an appropriate or attractive option.

At least some of these Unestablished v. Established cases might involve frivolous claims brought by an unestablished songwriter hoping to strike it rich based on some putative similarity in the music. For example, an unestablished rap artist named Anthony Woods, who was in prison at the time of the lawsuit, sued Lil Wayne for \$51.1 million for allegedly infringing the copyright to a mixtape Woods posted online.<sup>209</sup> Woods, who represented himself, made no specific factual allegation that Lil Wayne ever heard Woods’ mixtape.<sup>210</sup> The court dismissed the case for lack of substantial similarities between the respective songs of Woods and Lil Wayne.<sup>211</sup> In this scenario, asserting fair use seems incongruous. If the defendant did not copy, why argue fair use? Disputing a basic element of infringement—that the defendant copied the plaintiff’s work—by asserting that the defendant did not have access to the plaintiff’s work or that there are no probative similarities in the competing songs is the more logical choice. Fair use just does not fit the facts.

The fact that a plaintiff is relatively unknown in the music industry, however, does not necessarily mean that the defendant could not have copied from the plaintiff. In some cases, the unestablished music plaintiff is able to present direct or circumstantial evidence that the established music defendant had access to the plaintiff’s song.<sup>212</sup> For instance, an unestablished songwriter who is trying to break into the music industry may circulate her work to people in the music industry in the hope of being discovered. It is quite possible that, in some instances, an associate of an estab-

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<sup>208</sup> See Music Survey Data, *supra* note 157.

<sup>209</sup> Woods v. Carter, No. 15 C 9877, 2016 WL 640526, at \*1 (N.D. Ill. Feb. 18, 2016).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at \*3 (characterizing the similarities as minor and cosmetic and finding that Woods has failed to state a claim of copyright infringement).

<sup>212</sup> See, e.g., Hobbs v. John, 722 F.3d 1089, 1091 (7th Cir. 2013); Peters v. West, 692 F.3d 629, 631 (7th Cir. 2012). These two cases are discussed further below. See *infra* notes 270–292 and accompanying text.

lished artist received a copy of the unestablished songwriter's work and may have borrowed parts of it without her permission. It would be incorrect to assume that every music infringement suit brought by an unestablished artist involves a frivolous claim.

### ii. Established v. Established Artists or Music Entities

By contrast, 37% (47 of 127) of the decisions surveyed involved established artists or entities suing other established artists or entities.<sup>213</sup> The dynamics of fair use avoidance are probably different in music cases in which both the plaintiff and the defendant are established in the music industry. In such cases, one might expect that professional reputation in admitting copying would be less of a concern. Some of the most successful artists have openly admitted borrowing from other successful artists. To return to our opening example, Robin Thicke said that "one of my favorite songs of all time was Marvin Gaye's 'Got to Give It Up.' I was like, 'Damn, we should make something like that, something with that groove.'"<sup>214</sup> Although Thicke later recanted that explanation and said Pharrell wrote the song "Blurred Lines," even Pharrell acknowledged "channeling . . . that late '70s feeling."<sup>215</sup>

Is there any downside to an established artist claiming a fair use of another established artist's work? For Pharrell and Thicke, perhaps not. Given their success, probably no one would think less of their music abilities if they asserted they made a fair use of Gaye's song. On the other hand, perhaps it sounds better professionally for a songwriter, especially one just breaking into the music industry, to say that he is writing all original music without copying even a small portion of the style or work of another songwriter. For example, Sam Smith maintains that he independently created his hit song, even while agreeing to a license from Tom Petty.<sup>216</sup>

Moreover, as discussed in the next section, some segments of the music industry may frown upon fair use defenses due to concerns of opening the floodgates to similar defenses raised by amateur songwriters and musicians who attempt to borrow the established artists' copyrighted music. Established artists, many of whom are signed by major labels and publishers, may end up toeing the music industry line on fair use, even if they believe some borrowing should be considered fair use. Establishing a precedent of

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<sup>213</sup> See Music Survey Data, *supra* note 157.

<sup>214</sup> See Phili, *supra* note 6.

<sup>215</sup> Austin Siegemund-Broka, '*Blurred Lines*' Trial: Pharrell Says His Song Channels "That Late '70s Feeling," HOLLYWOOD REP. (Mar. 4, 2015), <http://www.hollywoodreporter.com/thr-esq/blurred-lines-trial-pharrell-says-779355> [https://perma.cc/2UFE-AEG8]; see *supra* notes 6–9, 121 and accompanying text.

<sup>216</sup> See *supra* notes 194–196 and accompanying text.

fair use can also be used against a songwriter's own work. Fair use could thus be a double-edged sword for creators. This dual nature of fair use applies beyond music to all other types of works, including computer programs, other literary works, and pictorial works. Some artists might not mind this double-edged quality of fair use, but other established artists might prefer receiving royalties for any borrowings of their own works, even ones that might be considered fair uses. Just imagine that, in the year 2040, Sam Smith could assert a copyright claim against a young artist whose song sounds similar to "Stay with Me." Whereas the lack of a fair use precedent hurt Smith's possible defense in the dispute with Petty, it would help Smith's possible copyright claim in the dispute with the young artist in the hypothetical scenario.

### *c. Music Industry Norms and Practices*

Another possible explanation for the low salience of fair use defenses in music cases is that the norms of the music industry might militate against it. As explained above, artists might be ambivalent about fair use because it acts as double-edged sword, enabling them to borrow from other works but allowing their works to be borrowed by others. And perhaps an artist can establish greater credibility and acceptance within the music industry if the artist is perceived as writing or performing "original" music instead of music that openly borrows from other works.

More generally, the recording industry and the music publishing industry might be less than enamored with promoting fair use, which could facilitate unlicensed uses of music. At least in statements to the Copyright Office regarding remixes of music, both the Recording Industry Association of America ("RIAA") and National Music Publishers Association ("NMPA") appear to have taken very narrow views of fair use.<sup>217</sup> Thus, even if artists

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<sup>217</sup> See Reply Comments of ASCAP, BMI, NMPA, CMPA, NSAI, RIAA, and SESAC to Request for Comments on Department of Commerce Green Paper "Copyright Policy, Creativity, and Innovation in the Digital Economy" 2, [https://www.uspto.gov/sites/default/files/documents/ascap\\_bmi\\_cmipa\\_nsai\\_nmpa\\_riaa\\_sesac\\_post-meeting\\_comments.pdf](https://www.uspto.gov/sites/default/files/documents/ascap_bmi_cmipa_nsai_nmpa_riaa_sesac_post-meeting_comments.pdf) [https://perma.cc/DYB3-A66Y] ("Implicit in the submissions supporting an expansion of fair use or a compulsory license is an assumption that a work assembled by a secondary user out of pieces taken from an author of an original work created from scratch is somehow more valuable to society than the underlying original work."); Comments of National Music Publishers' Association, Nashville Songwriters Association International SESAC, Inc., Church Music Publishers Association 4, [https://www.ntia.doc.gov/files/ntia/national\\_music\\_publishers\\_association\\_et\\_al.\\_comments.pdf](https://www.ntia.doc.gov/files/ntia/national_music_publishers_association_et_al._comments.pdf) [https://perma.cc/R496-GTKG] ("However, our members' experience suggests the vast majority of unauthorized 'remixes' are not entitled to such protection. These 'remixes' simply use pre-existing works without the authorization of the author or owner. This doctrine should not be expanded to allow for further stripping away of the rights and livelihoods of creators. The Copyright Act should only permit unlicensed uses in the rarest of circumstances in which use of the original work is neces-

routinely borrow from others as an acceptable practice, such artists might be reluctant to pursue fair use defenses if the doctrine is not widely promoted or accepted by the major music labels and publishers.<sup>218</sup> Perhaps the most powerful artists or ones with their own labels, such as Beyoncé, can do what they want.<sup>219</sup> But artists who are signed by the major music labels and publishers might not even own the copyrights to the songs they write or perform, and even if they do, they still are beholden to the music labels and publishers to promote their music.

In sum, musicians might avoid fair use defenses for a variety of reasons ranging from a lack of fit with the facts or theory of the case, to professional concerns and music industry norms that militate against recognizing fair uses in music.

## 2. Potential Reasons Why Courts Have Avoided Fair Use

### a. Defendants Do Not Pursue Fair Use

Courts may avoid fair use in music cases for a variety of reasons. The simplest reason would be if the defendant waived the defense by not asserting it. The defendant has effectively made the decision for the court not to consider fair use, even though it may be relevant. The defendants' avoidance results in the courts' avoidance as well. If the defendants do not assert the defense (as was the case with Pharrell and Robin Thicke), the court will not entertain a defense waived by the defendants. In some cases, the defendants asserted the fair use defense in their answers, but apparently ended up not pursuing it at trial.<sup>220</sup> Of course, this explanation begs the question why fair use avoidance by defendants in music cases has persisted for many years; several reasons were proffered above.

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sary to communicate a message, e.g. for parodies. Otherwise, the law should encourage independent creation or require licensing.”). The RIAA’s position was perhaps the most moderate of the music industry submissions. See Comments of the Recording Industry Association of America, Inc. 6 (Nov. 13, 2013), [https://www.uspto.gov/sites/default/files/documents/Recording\\_Industry\\_Association\\_of\\_America\\_Comments.pdf](https://www.uspto.gov/sites/default/files/documents/Recording_Industry_Association_of_America_Comments.pdf) [<https://perma.cc/8V3C-LWZV>] (“Some works and uses may suitably fall within the proper parameters of the fair use doctrine; others do not. The Task Force should keep this in mind in reviewing the current legal framework. In particular, a nuanced, flexible approach to deal with the various uses that can be made of copyrighted material may be a better approach than a one-size-fits-all policy.”).

<sup>218</sup> See Comments of National Music Publishers’ Association et. al, *supra* note 217.

<sup>219</sup> See Tufayel Ahmed, *Meet Beyoncé’s Protégés: What We Know About Her First Record Label Signings*, NEWSWEEK (Apr. 6, 2016), <http://www.newsweek.com/meet-beyoncés-protegees-what-we-know-about-her-first-record-label-signings-444522> [<https://perma.cc/U3YD-PJM7>].

<sup>220</sup> See *supra* notes 17–18 and accompanying text.

*b. Historical Artifact*

Perhaps another factor contributing to the lack of a non-parody fair use music decision is historical artifact. Fair use first developed as judge-made law in the context of quotations for literary works, with the Circuit Court of Massachusetts' 1841 case *Folsom v. Marsh* commonly recognized as the first fair use decision.<sup>221</sup> U.S. copyright law first included musical works within the scope of protection in 1831.<sup>222</sup> Historically, courts were just developing a body of fair use precedent when music cases were first decided. While fair use was in its infancy, litigants might not have understood how it applied, if at all, to respective copyright disputes, including music cases. It is therefore not surprising that the old music cases before the 1976 Copyright Act did not often consider fair use defenses.<sup>223</sup> More typical was the view of courts that some adaptation or borrowing to create new music was permissible, and simply not infringement.<sup>224</sup> Even where infringement was found, it was common for the defendant to argue that such similarities in music were standard or frequent in other songs and therefore not infringing.<sup>225</sup> Thus, because courts entertained arguments for permissible borrowing of music in older copyright cases, fair use was, in some respect, not needed—or at the very least, not invoked by name. Indeed, courts generally took a narrow view of copyright for musical works.<sup>226</sup> The test of infringement itself could be used to allow some permissible borrowing of musical works to create a new work.<sup>227</sup>

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<sup>221</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901).

<sup>222</sup> Copyright Revision Act of 1831, ch. 16, 4 Stat. 436.

<sup>223</sup> See, e.g., *Jollie v. Jaques*, 13 F. Cas. 910, 913 (S.D.N.Y. 1850) (No. 7437) (“The composition of a new air or melody is entitled to protection; and the appropriation of the whole or of any substantial part of it without the license of the author is a piracy. How far the appropriation might be carried in the arrangement and composition of a new piece of music, without an infringement, is a question that must be left to the facts in each particular case.”).

<sup>224</sup> *Id.* at 914 (“The new arrangement and adaptation must not be allowed to incorporate such parts and portions of it as may seriously interfere with the right of the author; otherwise the copyright would be worthless. That portions may be taken and mixed up in the new arrangement and composition, cannot probably be denied; and there may be great difficulty in distinguishing between those new compositions that do, and those that do not absorb the merit of the original work.”).

<sup>225</sup> See, e.g., *Haas v. Leo Feist, Inc.*, 234 F. 105, 107 (S.D.N.Y. 1916) (“It is said that such similarities are of constant occurrence in music, and that little inference is permissible.”); *Hein v. Harris*, 175 F. 875, 876 (S.D.N.Y. 1910) (“The defendant urges with much truth that both his own and the complainant’s songs are in the lowest grades of the musical art. The vogue which for a number of years that style of composition has obtained, which is popularly known as ‘rag-time,’ has resulted in the production of numberless songs, all of the same general character.”).

<sup>226</sup> See *Haas*, 234 F. at 107; *Hein*, 175 F. at 876.

<sup>227</sup> See, e.g., *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (holding that music mechanically performed on a piano roll did not infringe the copyright for a musical work).

Benjamin Kaplan's 1967 account of music copyrights espouses this view:<sup>228</sup>

The musical tradition tolerates considerable definite and deliberate borrowing provided the later composer manipulates what he has taken. This may be the point of the tale about the composer who, treating the Ten Commandments as a musical subject, unabashedly took a generous helping from someone else's work when he came to the Commandment "Thou shalt not steal." Having in mind the nature of the audience, the proclivities of music critics, the unlikelihood that borrowing diverts profit from the original composer, we may agree that the law can afford to take a permissive attitude toward cross-lifting among serious musical works.<sup>229</sup>

Although Kaplan wrote his analysis before fair use was codified in the 1976 Copyright Act, courts had recognized fair use before the passage of the 1976 Act, as Kaplan discussed in other parts of his book.<sup>230</sup> Notably, however, Kaplan does not conceptualize music borrowing as a fair use, notwithstanding his discussion of one of the fair use factors recognized by Justice Story, i.e., diminishing the profits of the original.<sup>231</sup> Instead, as the lead-in to that same paragraph makes clear, Kaplan analyzes the issue of music borrowing under infringement, suggesting that borrowing some music from another work is permissible, as long as "the later composer manipulates what he has taken."<sup>232</sup> In particular, Kaplan points to (1) "the nature of the audience," (2) "the proclivities of music critics," and (3) "the unlikelihood that borrowing diverts profit from the original composer."<sup>233</sup> Presumably, the first factor stems from the test of substantial similarity, as infringement is analyzed from the point of view of the intended audience of the work.

This is not to suggest that applying fair use to music cases was not ever entertained before the 1976 Act. Alfred Shafter, for example, discussed possible fair use in music saying that among the legitimate uses of a copyrighted work is "the right of *quotation* for purposes of research, commentary, criticism or study."<sup>234</sup> Shafter limits the copying of music such as "the use of a few bars of a song" to these four purposes in his discussion of fair use, and he analyzes examples of copying of music in books, a different

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<sup>228</sup> BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 53 (1967).

<sup>229</sup> *Id.*

<sup>230</sup> See, e.g., *id.* at 17, 21, 28, 67–70.

<sup>231</sup> See *Folsom*, 9 F. Cas. at 348; KAPLAN, *supra* note 228, at 53, 67.

<sup>232</sup> KAPLAN, *supra* note 228, at 53.

<sup>233</sup> *Id.*

<sup>234</sup> ALFRED M. SHAFTER, MUSICAL COPYRIGHT 184 (1932).

medium.<sup>235</sup> This kind of copying of music resembles *textual* quotation for use in a literary work. A harder case is presented when the copying of a few bars of music for use is used in another *musical work*, or a same-type transformative work. Could such use in the same medium of music constitute fair use? Shafter, writing before the Court's modern fair use jurisprudence, ignored the question and, without discussing the purpose of use, argued that copying the style of music is fair use as long as "the melody itself is original in the main."<sup>236</sup> Like Kaplan, Shafter focused on infringement over fair use.<sup>237</sup> E. DeMatt Henderson went a step further in discussing the test of infringement for music cases in depth, but also mentioning the possibility of a fair use in music: "A 'fair use' of a prior composition is allowed by the copyright Act, and this issue is largely in the discretion of the court."<sup>238</sup>

The historical treatment of music borrowing—with some borrowing permitted under the basic test of infringement—helps to explain the results of the survey. Out of 119 cases reaching a judgment, only 15 (13%) found infringement.<sup>239</sup> Thus, in the vast majority of music cases, the defendants have prevailed without needing to rely on a fair use defense. Instead, the courts have found no infringement, commonly due to the defendant's lack of access to the plaintiff's song or the lack of substantial similarities, both of which are elements of the basic test of infringement.<sup>240</sup> Logically speaking, the question of infringement precedes fair use, so the courts' preference for deciding music cases on the basic liability question makes sense. The result is also consistent with the historical treatment of music borrowing by early cases predating the 1976 Copyright Act.

### c. Lack of Clear Precedent for Non-Parody Music Fair Use

Relatedly, the lack of clear precedent recognizing a non-parody fair use in music cases may also explain why both litigants and courts avoid it. The lack of clear precedent establishes, over time, a self-reinforcing feedback loop as courts and litigants opt for the tried-and-true precedent establishing non-infringement in music cases.<sup>241</sup>

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 185.

<sup>237</sup> See *id.* at 176–87.

<sup>238</sup> Henderson, *supra* note 110, at 152.

<sup>239</sup> See Music Survey Data, *supra* note 157.

<sup>240</sup> *Arnstein*, 154 F.2d at 468–69.

<sup>241</sup> See generally James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property*, 116 YALE L.J. 882, 899–903 (2007) (positing that uncertainty in fair use can create "doctrinal feedback" by which prospective fair users end up licensing potentially fair uses of works, thereby resulting in an expansion of copyright). Gibson focuses on licensing as an alternative to litigating

By contrast, fair use in music borrowing raises a difficult question whether copying portions of someone else's music and incorporating it into one's own song "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message."<sup>242</sup> The case law on transformative use has more often focused on articulating a transformative *purpose*, which perhaps is more contestable or difficult to describe in the case of a musical work borrowing from another musical work.<sup>243</sup> Beyond parody (a comment on the original work), courts have not had the opportunity to articulate a transformative purpose in music borrowing to create another musical work. The U.S. Court of Appeals for the Second Circuit's 2013 decision in *Cariou v. Prince* offers a different focus on *transformative content*, which is perhaps a better fit with the kind of music borrowing discussed herein.<sup>244</sup> In applying fair use to music cases, courts would have to confront these different approaches to transformative use.

Take, for example, the "Blurred Lines" case. The court or jury would have had to consider whether the song adds new expression to whatever it has borrowed from Marvin Gaye's "Got to Give It Up."<sup>245</sup> Pharrell and Thicke could argue it does so in the form of both music and lyrics that give the new song a distinct twenty-first century dance vibe.

Although the lyrics of the two songs are different in words, they both involve a man's sexual pursuit of a woman.<sup>246</sup> Marvin Gaye uses the metaphor of dancing in the beginning of the song, but it soon becomes clear the pursuit is (also) about sex: "But if you see me spread out and let me in/Baby just party high and low/Let me step into your erotic zone/Move it up/Turn it 'round/Shake it down/OOWWWWW."<sup>247</sup> The title "Got to Give It Up" thus has double meaning, relating to both dancing and having sex. By contrast, in Pharrell's song, the woman is already attached to another man, but the narrator of the song wants to "liberate" her.<sup>248</sup> There's no dance involved. Though she is "a good girl," she "[m]ust wanna get nasty" (presumably meaning having sex) with him in the narrator's view.<sup>249</sup> Although Pharrell's

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fair use. I use feedback loop more broadly here to encompass the entire range of alternatives to fair use that courts and litigants may choose instead of fair use.

<sup>242</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>243</sup> See *Reese*, *supra* note 45, at 486.

<sup>244</sup> See *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).

<sup>245</sup> See *Williams v. Gaye*, 885 F.3d 1150, 1183 (9th Cir. 2018).

<sup>246</sup> See *Marvin Gaye Lyrics*, "Got To Give It Up," AZLYRICS, <https://www.azlyrics.com/lyrics/marvingaye/gottogiveitup.html> [<https://perma.cc/C473-YZUP>]; see *Robin Thicke Lyrics*, "Blurred Lines," AZLYRICS, <https://www.azlyrics.com/lyrics/robinthicke/blurredlines.html> [<https://perma.cc/N2XR-KPV4>].

<sup>247</sup> See *Marvin Gaye Lyrics*, "Got To Give It Up," *supra* note 246.

<sup>248</sup> See *Robin Thicke Lyrics*, "Blurred Lines," *supra* note 246.

<sup>249</sup> *Id.*

music bears some similarity to the beat of Marvin Gaye's song, there's no mistaking that Pharrell's music sounds like a contemporary pop song, while Gaye's song sounds like an older groove or funk song from the 70s. A reasonable observer arguably can perceive that whatever beat or music Pharrell copied from Marvin Gaye has been altered with new, contemporary expression and meaning for the twenty-first century. There is arguably, in other words, a transformative character to Pharrell's use.

But is there a transformative purpose as well? And should a showing of such a purpose be required for Pharrell and Thicke to prevail on fair use? The answer to both questions is unclear. It is easier to discuss "purpose" when referring to a novel than it is to musical notes or a song. After all, what's the meaning or purpose of sounds or musical notes? In one respect, all music is meant to entertain. But the U.S. Supreme Court's 1994 decision in *Campbell v. Acuff-Rose Music* instructs that a parody song, even if entertaining, has a legitimate fair use purpose to comment on the work parodied.<sup>250</sup> Perhaps one purpose of "Blurred Lines" might be historical transformation, to recall an older work but to spin out a new work that is fresh and modern. Joseph Liu and Justin Hughes have each argued that as a work gets older, it should be subject to a more generous scope fair use.<sup>251</sup> Applying that approach here would mean that it should be easier for a songwriter to make a fair use of an older song than a contemporary one. For example, the passage of time—over 35 years—from Marvin Gaye's 1977 work should perhaps weigh in favor of fair use. Arguably, Pharrell borrowed some elements of Gaye's song in 2014, but added new meaning and expression to the old vibe of Gaye's song. But, if Pharrell and Thicke were unsuccessful in articulating a new purpose in borrowing elements of Gaye's song, should that count against their fair use defense?

Courts have thus far avoided this difficult question of how transformative purpose and character can be applied to music borrowing outside of parodies. Although the defendants appear to be largely responsible for not pursuing fair use defenses in music cases, the historical treatment of musical borrowing by courts before the 1976 Act and the lack of clear precedent recognizing non-parody fair use in music probably contribute to the defendants' avoidance of fair use.<sup>252</sup>

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<sup>250</sup> See *Campbell*, 510 U.S. at 579.

<sup>251</sup> Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 799 (2003); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 412 (2002).

<sup>252</sup> See *supra* notes 220–251 and accompanying text.

#### IV. TRADEOFFS OF FAIR USE AVOIDANCE

This Part considers the tradeoffs of fair use avoidance in music cases.<sup>253</sup> Avoidance is not without some advantages, at least from the perspective of courts in handling music cases. Ultimately, however, the lack of a clear fair use precedent for non-parody music cases may have the deleterious effects of chilling creativity and producing “copyright clutter” by which bits of music in older copyrighted works are subject to property rights and viewed as off-limits to what would otherwise be transformative uses by other songwriters.<sup>254</sup>

##### *A. Advantages*

From the standpoint of courts, fair use avoidance offers several advantages. As discussed later, however, it is not clear whether these advantages outweigh the potential harms to music creation. This section focuses on the chief advantages that fair use avoidance offers to courts.<sup>255</sup>

###### 1. Alternatives Simpler for Courts to Apply Than Fair Use

One potential advantage of fair use avoidance is that the alternative doctrines courts have applied in the majority of music cases (typically finding in favor of defendants and against infringement) are easier to apply. These alternative doctrines operate like an on-off switch—the factor is present or not. No balancing of multiple factors is needed. Although simplicity is not necessarily a virtue in the legal system if it leads to the wrong result, simplicity at least enables courts to train their focus on a single factor—for example, no access to the work, lack of similarity, only unprotected elements copied, or de minimis copying—instead of the four-factor balancing test of the fair use doctrine. The open-endedness of fair use’s balancing test, which must be applied on a case-by-case basis, is both a virtue and a vice. It offers flexibility but at the price of predictability.<sup>256</sup> This complex inquiry is harder to determine and predict than a single-factor test.<sup>257</sup> As one commentator notes, “fair use is vague and unpredictable in application, particularly when it intersects with the derivative works right.”<sup>258</sup>

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<sup>253</sup> See *infra* notes 253–313 and accompanying text.

<sup>254</sup> See *infra* notes 301–313 and accompanying text.

<sup>255</sup> See *infra* notes 256–292 and accompanying text.

<sup>256</sup> Christina Bohannan, *Taming the Derivative Works Right: A Modest Proposal for Reducing Overbreadth and Vagueness in Copyright*, 12 VAND. J. ENT. & TECH. L. 669, 685 (2010).

<sup>257</sup> See *id.*

<sup>258</sup> *Id.* at 670.

## 2. Courts Avoid the Difficult Question About Transformative Works Versus Derivative Works

Another advantage of fair use avoidance in music cases is avoiding the difficult doctrinal question about transformative works versus derivative works, discussed above in Part I, that would be raised by such a fair use defense. The use of a portion of a musical work to create another musical work, such as in the “Blurred Lines” case, would enmesh a court in this difficult question. Although a few courts have touched upon the issue, the case law is far from settled. Indeed, the Second Circuit’s own case law discussing transformative use in 2015 in *Authors Guild, Inc. v. Google, Inc.* and in 2013 in *Cariou* emphasize two different approaches to the issue—transformative purpose and transformative content, respectively.<sup>259</sup> In 2018, in *Oracle America, Inc. v. Google LLC*, the Federal Circuit, while conceding the possibility that a use of a copyrighted work to create new expression in a new context could be transformative, focused instead on finding a transformative *purpose*, an approach that mirrors the competing strands of the doctrine found in prior decisions, without providing clarity to the issue.<sup>260</sup>

Thus, to borrow Cass Sunstein’s theory of judicial minimalism, fair use avoidance in music cases may be a convenient way for the courts to reach the desired outcome of the case through an incompletely theorized agreement.<sup>261</sup> A fair use decision in one of the music cases would likely require greater theorization of the whole concept of transformative works and its relationship with and distinction from an infringing derivative work. Instead of getting mired in such a doctrinal thicket, courts can reach the same desired outcome in a copyright case by resting on simpler reasons. Substantial similarity, lack of protection for uncopyrightable elements, and the de minimis defense are relatively simple, straightforward inquiries based on a relatively “low-level” theory, if any theory at all.<sup>262</sup>

## 3. Courts Avoid Possible Pandora’s Box of Music Appropriation

Relatedly, fair use avoidance in music cases permits courts to avoid opening a potential Pandora’s box of music appropriation. Perhaps this criticism is a straw man, given that the *Cariou* decision recognized fair use for many of Richard Prince’s appropriation artwork, apparently without disas-

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<sup>259</sup> See *supra* notes 46–76 and accompanying text.

<sup>260</sup> Oracle America, Inc. v. Google LLC (*Oracle II*), 886 F.3d 1179, 1201–02 (Fed. Cir. 2018).

<sup>261</sup> See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995).

<sup>262</sup> *Id.* at 1740 (discussing “low-level” principles versus “high-level” principles in the context of incompletely theorized agreements).

trous effect on the art community.<sup>263</sup> One difference, though, is that Richard Prince is well-recognized among the art community as an appropriation artist, and appropriation art is accepted by many in the art world as a form of art.<sup>264</sup> Indeed, prominent museums, including the Metropolitan Museum of Art, the Museum of Modern Art, and the Art Institute of Chicago, filed an amicus brief supporting Prince's argument of fair use in the *Cariou* case.<sup>265</sup> By contrast, the recording industry and music publishers have not publicly embraced music appropriation as an accepted practice, notwithstanding the history of borrowing in music.<sup>266</sup> Parody songs are one thing. But non-parody songs strike at the core of the music industry. Although artists do borrow from other works and some openly admit it, neither the recording nor publishing industry has openly embraced appropriation or borrowing in music, not even in the creation of new (potentially money-generating) songs.<sup>267</sup>

Fair use in music could operate like a Pandora's box to music appropriation because it might potentially allow greater copying than the test of infringement or *de minimis* doctrine. Indeed, the determination of the affirmative defense of fair use often follows a finding of infringement, and the *de minimis* doctrine, as its name implies, is meant to deal with trivial copying. By contrast, fair use has no hard-and-fast limit on the amount of copying. When a defendant's use of a work is transformative, courts recognize that fair use permits a defendant to copy an amount that is reasonable for the transformative use.<sup>268</sup>

Of course, allowing greater music borrowing under the fair use doctrine may be, in the end, good for music creation and society. A court, however, might be more cautious about such a ruling if it feared disrupting the music industry in a significant way.

#### 4. Judicial Economy

Fair use avoidance also may result in judicial economy. The alternative bases courts have used in music cases are more amenable to summary disposition than fair use, thereby reducing litigation and administrative costs.<sup>269</sup>

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<sup>263</sup> See *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).

<sup>264</sup> See *supra* notes 91–98 and accompanying text.

<sup>265</sup> See Abigail Rubenstein, *Museums, Google Back Richard Prince Fair Use Appeal*, LAW360 (Nov. 3, 2011), <https://www.law360.com/articles/283044/museums-google-back-richard-prince-fair-use-appeal> [<https://perma.cc/7N9B-X576>].

<sup>266</sup> See *supra* notes 108–128, 217 and accompanying text.

<sup>267</sup> See *supra* notes 121–128, 217 and accompanying text.

<sup>268</sup> See *Cariou*, 714 F.3d at 710.

<sup>269</sup> See *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002) (quoting *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989) (stating that fair use “‘may be resolved on summary judgment if a reasonable trier of fact could reach only one conclusion’—but not otherwise”)).

Take, for example, Guy Hobbs's complaint against Elton John for allegedly copying Hobbs's love song titled "Natasha."<sup>270</sup> Seeking a publisher, Hobbs had sent his work to Big Pig Music in 1983 but was unsuccessful in landing a publisher.<sup>271</sup> Then, in 1985, Elton John and Bernard Taupin composed a song "Nikita" that was published by the same Big Pig Music.<sup>272</sup> Hobbs sued John, Taupin, and Big Pig Music for copyright infringement based largely on similarities in the lyrics, as well as the theme of a doomed love story involving women named "Natasha" and "Nikita," respectively.<sup>273</sup> The district court, however, dismissed the complaint upon a motion to dismiss for failure to state a copyright claim, and the Seventh Circuit affirmed.<sup>274</sup> The Seventh Circuit held that the two works were not substantially similar.<sup>275</sup> The court discounted the key similarities proffered by Hobbs, namely, that his song used the phrase "to hold you" three times and John's song used the phrase four times; that Hobbs's song used the phrase "you'll never know" six times and John's song used the same phrase three times; and that "Natasha" and "Nikita" were similar Russian-sounding female names.<sup>276</sup> For a court to grant a motion to dismiss and to decide the case merely on the allegations, where some similarities in the two songs existed, is questionable. Yet the test of infringement has been interpreted by courts to afford such judicial economy.<sup>277</sup> Although acknowledging the two songs had similar expression, the Seventh Circuit found the similarities were unprotected and "rudimentary, commonplace, standard, or unavoidable in popular love songs."<sup>278</sup>

In the backdrop of the case is the question whether a successful artist like Elton John would have even been aware of Hobbs's work in the first place. On the motion to dismiss, the court did not have an opportunity to consider evidence regarding Big Pig Music's receipt of and possible use of Hobbs's work.<sup>279</sup> Under the Second Circuit's substantial similarity test, set forth in its 1946 decision in *Arnstein v. Porter*, a defendant's reasonable access to a work is circumstantial evidence of copying if probative similari-

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<sup>270</sup> Hobbs v. John, 722 F.3d 1089, 1091 (7th Cir. 2013).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 1096.

<sup>277</sup> See *id.* (comparing two musical works that had some common elements, but concluding that "as a matter of law" they are not substantially similar) (citing *Peters v. West*, 692 F.3d 629, 633-34 (7th Cir. 2012)).

<sup>278</sup> *Id.*

<sup>279</sup> *Hobbs*, 722 F.3d at 1094.

ties between the two works can be shown.<sup>280</sup> Such access can be shown by evidence that an intermediary of the defendant's had a copy of the work, so if Hobbs's allegation of Big Pig Music's receipt of his work was true, it might be enough, with further fact development, to establish a *prima facie* case that Elton John had access to the work.<sup>281</sup> In some cases, the lack of sufficient allegation or evidence of access can provide a basis for a court to dispose of the case.<sup>282</sup> But, here, the allegation might be sufficient to survive a motion to dismiss, so the court instead rested on the lack of substantial similarity between the two songs by holding that the key portions of Hobbs's song allegedly copied were simply not copyrightable.<sup>283</sup>

Of course, one might question whether fair use even fits *Hobbs v. John*. As discussed in Part III, where the case involves a well-known defendant who is established in the music industry and an unestablished plaintiff, the facts may be such that the defendant never knew the plaintiff, much less his work.<sup>284</sup> The fact scenario of an unestablished plaintiff suing an established defendant does raise the possibility, if not worry, of a plaintiff seeking a deep pocket on a trumped-up claim. In such case, fair use simply does not fit.<sup>285</sup>

We cannot automatically assume, however, that every case involving an unestablished plaintiff suing an established artist involves a trumped-up claim. Arguably, Hobbs presented a plausible basis in his allegations to suggest his claim was not frivolous. Likewise, in the Seventh Circuit's 2012 case *Peters v. West*, Vince Peters, an aspiring hip-hop artist, alleged that the defendant, Kanye West, had access to Peters's work "Stronger" through an intermediary of Kanye West.<sup>286</sup> West eventually came out with a mega-hit "Stronger" that allegedly contained some of the same elements as in Peters's "Stronger," including the reference to Nietzsche's quote "what does not kill me, makes me stronger;" use of the rhymes "longer" and "wronger" (a slang term); and a line in both songs expressing desire for a woman like

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<sup>280</sup> *Arnstein v. Porter*, 154 F.2d 465, 468–69 (1946); *see Loomis v. Cornish*, 836 F.3d 991, 994–95 (9th Cir. 2016).

<sup>281</sup> *See Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 54 (2d Cir. 2003) (requiring a showing that defendant had "reasonable possibility of access," such as through intermediaries in contact or connected with defendant).

<sup>282</sup> *See, e.g., Arnett v. Jackson*, No. 5:16-CV-872-D, 2017 WL 3493606, at \*4 (E.D.N.C. Aug. 14, 2017) (granting defendants' motion to dismiss because "Arnett fails to plausibly allege access as required to state a claim for copyright infringement").

<sup>283</sup> *Hobbs*, 722 F.3d at 1091.

<sup>284</sup> *See supra* notes 209–211 and accompanying text.

<sup>285</sup> *See id.*

<sup>286</sup> *Peters v. West*, 692 F.3d 629, 631 (7th Cir. 2012). The alleged intermediary was a business manager and close friend of Kanye West, who allegedly met with Vince Peters, listened to his song, and said he would produce the recording if Peters found a record label. *Id.*

“Kate Moss.”<sup>287</sup> The allegations of both access and copying do seem stronger (pun intended) than in the case against Elton John.<sup>288</sup> But even on these allegations, the Seventh Circuit affirmed the district court’s dismissal of the case for failure to state a copyright claim.<sup>289</sup>

By contrast, fair use, as an affirmative defense often involving the need for discovery, is rarely decided on a motion to dismiss.<sup>290</sup> As one court explained:

It is easy to see why a fair use defense typically cannot be analyzed upon a Rule 12(b)(6) motion. “Fair use is a mixed question of law and fact.” . . . The court’s determination involves weighing at least four statutory factors, which usually requires making factual findings or relying on undisputed or admitted material facts.<sup>291</sup>

Although one might disagree with the courts’ dismissals in *Peters* and *Hobbs* before discovery, they do exemplify how courts can use the test of substantial similarity to dispose of music cases on a motion to dismiss.<sup>292</sup> Fair use would not typically afford courts such a possibility, early in the litigation.

### B. Disadvantages

Fair use avoidance has its disadvantages as well. Of greatest concern is the possible harm the lack of clear precedent recognizing non-parody music fair use has on the creation of music.

#### 1. Possible Chilling Effect

It is hard to quantify what, if any, effect the lack of a clear precedent has on a particular activity or industry. Lack of a clear fair use precedent can cut both ways, given the uncertainty in what the law actually is. Some artists may take advantage of the lack of a clear precedent, viewing it as a blank check or at least a gray area to borrow other music in the creation of

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<sup>287</sup> *Id.* at 635–36.

<sup>288</sup> See *Hobbs*, 722 F.3d at 1093–96.

<sup>289</sup> *Peters*, 692 F.3d at 631.

<sup>290</sup> See, e.g., BWP Media USA, Inc. v. Gossip Cop Media, LLC, 87 F. Supp. 3d 499, 505 (S.D.N.Y. 2015) (“The Court thus finds that it is possible to resolve the fair use inquiry on a motion to dismiss under certain circumstances, but observes that there is a dearth of cases granting such a motion.”); Katz v. Chevaldina, 900 F. Supp. 2d 1314, 1315–17 (S.D. Fla. 2012) (court holding that whether the use of a photograph was fair use could not be resolved at the motion to dismiss stage). *But see* Brownmark Films, LLC. v. Comedy Partners, 682 F.3d 687, 690 (7th Cir. 2012) (upholding the district court’s dismissal based on a parody fair use defense).

<sup>291</sup> *Katz*, 900 F. Supp. 2d at 1315–16 (internal citations omitted).

<sup>292</sup> See, e.g., *Hobbs*, 722 F.3d at 1096 (affirming district court’s grant of defendant’s motion to dismiss); *Peters*, 692 F.3d at 636 (affirming dismissal of suit for copyright infringement)

their own, especially if such borrowing is a widespread practice among other artists.<sup>293</sup> To take an extreme example of borrowing, Girl Talk, who samples, manipulates, and mashes up other artists' recordings into his songs, presumably operates under the general authority of fair use.<sup>294</sup> So far, Girl Talk has not been sued for copyright infringement.<sup>295</sup>

By contrast, the lack of a clear fair use precedent in music might chill other artists from borrowing or building on the works of others. Independent and unestablished artists might be particularly susceptible to such a chilling effect out of fear of either being sued or not being accepted as a true artist in the music industry. To the extent a new artist like Sam Smith becomes successful with a hit song that is later accused of being plagiarized from an older song, the lack of a clear fair use precedent militates toward the artist's conceding to a license and the payment of royalties to deal with claims of copyright infringement.

In the appeal of the verdict against Pharrell and Thicke, 212 musicians and songwriters submitted an amici curiae brief to the Ninth Circuit expressing great concern about the decision and its possible effect on music.<sup>296</sup> The artists included members of successful bands including Train; Linkin Park; Earth, Wind & Fire; The Black Crowes; Three 6 Mafia; Great White; Poison; Fall Out Boy; Tool; The Go-Go's; Weezer; and Tears for Fears, as well as individual artists R. Kelly; John Oates of Hall & Oates; Hans Zimmer; Jennifer Hudson; Jean Baptiste; Evan Bogart; and Danger Mouse.<sup>297</sup> According to the brief, Pharrell and Thicke's song was a creation "inspired by" a prior work, which, the musicians argued, is how all music is created:

Amici are concerned about the potential adverse impact on their own creativity, on the creativity of future artists, and on the music industry in general, if the judgment in this case is allowed to stand. The verdict in this case threatens to punish songwriters for creating new music that is *inspired* by prior works. All music shares inspira-

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<sup>293</sup> See Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1544–45 (discussing "warming," a phenomenon in which users take from copyrighted works while operating under the assumption that such use is warranted given the widespread practice by others).

<sup>294</sup> See Alex Mayyasi, *The Economics of Girl Talk*, PRICEONOMICS (Apr. 11, 2013), <https://priceonomics.com/post/47719281228/the-economics-of-girl-talk> [https://perma.cc/ATS8-42U3].

<sup>295</sup> See Mike Masnick, *Why Hasn't the Recording Industry Sued Girl Talk?*, TECHDIRT (July 8, 2009), <https://www.techdirt.com/articles/20090707/0237205466.shtml> [https://perma.cc/6B2ASBT8].

<sup>296</sup> See generally Brief of Amici Curiae 212 Songwriters, Composers, Musicians, and Producers in Support of Appellants, Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018) (No. 16-56880, 16-55089, 16-55626), 2016 WL 4592129.

<sup>297</sup> *Id.* at 2.

tion from prior musical works, especially within a particular musical genre. By eliminating any meaningful standard for drawing the line between permissible *inspiration* and unlawful *copying*, the judgment is certain to stifle creativity and impede the creative process. The law should provide clearer rules so that songwriters can know when the line is crossed, or at least where the line is.<sup>298</sup>

The brief cites examples of famous artists—David Bowie, Lady Gaga, Elton John, The Beatles, Elvis Presley, and even Marvin Gaye—who were influenced by prior works in creating their own music.<sup>299</sup> A clear decision on music fair use would provide greater guidance to songwriters on how much borrowing is permissible. Of course, Pharrell and Thicke chose not to assert fair use.<sup>300</sup> But the lack of clear precedent on the issue may have contributed to their litigation strategy.

## 2. Copyright Clutter

Another possible harm exacerbated, if not created, by the lack of a clear fair use precedent in music is what I will characterize as “copyright clutter.” The concept of “clutter” has been used in other areas of intellectual property, including patent<sup>301</sup> and trademark,<sup>302</sup> and thus is not unique to copyright. Obtaining a copyright for an original work is easy because it happens upon fixation of the work automatically, by operation of law.<sup>303</sup> Given the relatively long term of copyright (e.g., life of the author plus seventy years), works dating back to 1923 are still under copyright today.<sup>304</sup> Many of these musical works have a limited commercial shelf life, both in terms of sales and public performances. Even the biggest hits of yesterday are not as popular as they once were. Because copyrights do not need to be registered or renewed by

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<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 9.

<sup>300</sup> Complaint for Declaratory Relief at 5, Williams v. Bridgeport Music, Inc., No. LA CV13-06004 JAK (AGRx), 2015 WL 13648068 (C.D. Cal. Aug. 15, 2013) [hereinafter Pharrell Williams Complaint].

<sup>301</sup> See Arti K. Rai, *Patent Validity Across the Executive Branch: Ex Ante Foundations for Policy Development*, 61 DUKE L.J. 1237, 1250 (2012). “Patent clutter” describes a situation in which many patents (some of which are dormant or not exploited through the manufacturing of the invention) overlap over the same area of technology, making it difficult to conduct research or further innovation in the area. *Id.*

<sup>302</sup> See Graeme B. Dinwoodie, *Territorial Overlaps in Trademark Law: The Evolving European Model*, 92 NOTRE DAME L. REV. 1669, 1687 (2017). “Trademark clutter” refers to many registrations of trademarks (some of which perhaps are not being used in commerce), making it difficult to find a new trademark to register. *Id.*

<sup>303</sup> See 17 U.S.C. § 102(a) (2012).

<sup>304</sup> See *id.* § 302(a) (“Copyright in a work created on or after January 1, 1978, . . . endures for a term consisting of the life of the author and 70 years after the author’s death.”).

payment of maintenance fees, many older works that are not being utilized or exploited are still protected by copyright. As a result, they have the potential to create “copyright clutter,” with many older musical works—including certain combinations of notes contained therein—becoming off-limits to songwriters who might otherwise build upon those works if they operated under a clear, non-parody music fair use precedent.

Copyright clutter might not have been a big concern in the past. Laches used to be a defense against copyright claims that could have been brought long ago.<sup>305</sup> But after 2014, when the Supreme Court, in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, reversed lower court precedent that had recognized laches as a defense to copyright claims,<sup>306</sup> copyright clutter is now more real. There has already been a slight uptick in lawsuits involving older musical works, including Taurus’s lawsuit against Led Zeppelin for its 1971 hit song “Stairway to Heaven.”<sup>307</sup> Although Led Zeppelin was found not to have infringed, the band still had to fight the claim of copyright infringement at trial and any subsequent appeal.<sup>308</sup> The Supreme Court’s laches decision in *Petrella* has given new life to many lawsuits involving older musical works that were allegedly infringed by more recent music.<sup>309</sup> As one commentator described, “[f]ederal courts were awash last year in copyright infringement lawsuits claiming popular songs stole key elements from earlier tunes.<sup>310</sup> Those targeted included the biggest names in contemporary music—Justin Bieber, Kanye West, Ed Sheeran—as well as musical legends, like Notorious B.I.G. and Eric Clapton.”<sup>311</sup>

### C. Overall Assessment

A greater need exists today for a clear, non-parody music fair use ruling as the U.S. Supreme Court’s 1994 decision in *Campbell v. Acuff-Rose Music* established for parodies. Although the music sector has survived and seemingly flourished without such a fair use ruling for many years, the recent spate of music lawsuits following *Petrella* will likely test the limits of

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<sup>305</sup> See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946, 951 (9th Cir. 2012) (holding that the plaintiff’s copyright infringement claim was barred by the doctrine of laches), *rev’d*, 134 S. Ct. 1962 (2014).

<sup>306</sup> See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1972–77 (holding that laches cannot be asserted to preclude plaintiff’s damages claim).

<sup>307</sup> Bill Donahue, *2016: The Year the Music Sued*, LAW360 (Jan. 13, 2017), <https://www.law360.com/articles/880127/2016-the-year-the-music-sued> [https://perma.cc/HRA6-BMHT].

<sup>308</sup> See *Skidmore v. Led Zeppelin*, No. CV 15-03462 RGK (AGRx), 2016 WL 6674985, at \*1 (C.D. Cal. Aug. 8, 2016).

<sup>309</sup> Donahue, *supra* note 307.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

the single-factor doctrines (for example, access, similarity, stock elements, de minimis doctrine) that courts have used in the past to resolve such disputes.<sup>312</sup> Even Bruno Mars's smash hit "Uptown Funk," which is one of only thirteen songs in history to earn the RIAA's highest award of diamond status for sales of over 10 million copies, has been the subject of no fewer than three different copyright lawsuits: two by 1970s musicians the Gap Band and the Sequence, respectively, and one by 1980s musicians Zapp and Collage, all of whom allege that Bruno Mars and the other composers of "Uptown Funk" copied elements of the plaintiffs' songs and committed infringement.<sup>313</sup> Regardless of the outcome of these lawsuits, it is striking that one of the top-selling songs in history written and performed by one of the top-selling artists in history is not immune from multiple allegations of plagiarism by artists from the 1970s and 1980s. It could be that Bruno Mars borrowed elements from prior songs as alleged in the lawsuits, but whether such borrowing constitutes infringement cannot be fully answered with consideration of fair use. Given the pervasiveness of borrowing in music among even the most successful and established artists in both modern and classical times, a clear precedent that recognizes that some borrowing of music to create another musical work is a fair use in some cases might strike the right chord for music creativity.

## CONCLUSION

This Article provides the first comprehensive study of fair use in music cases. The result of the empirical study is puzzling. Despite the relatively high number of music cases decided under the 1976 Copyright Act, no decision recognizes non-parody fair use of a musical work to create another musical work except a recent decision whose applicability is marginal because it only involved the copying of words of a rap that contained no accompanying music. Few music cases have even considered a fair use defense. Although this Article posited several hypotheses to explain this fair use avoidance, it remains inconclusive whether the lack of a clear precedent recognizing music fair use has harmed the creation of music. The potential problem of "copyright clutter," however, and the resulting quarantine of note combinations from older, unutilized, and underutilized musical works may make the need for a clear fair use precedent more pressing today.

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<sup>312</sup> See *id.* (compiling recent music lawsuits).

<sup>313</sup> See Michelle Fabio, *Bruno Mars and Mark Ronson's 'Uptown Funk' Faces (Yet Another) Copyright Infringement Suit*, FORBES, (Dec. 30, 2017), <https://www.forbes.com/sites/michellefabio/2017/12/30/bruno-mars-and-mark-ronsons-uptown-funk-faces-yet-another-copyright-infringement-suit/#35e1e18c70c0> [https://perma.cc/2ECE-UT5Q].

