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Music Copyright 101

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I. Types of Copyrights in Music and Applicable Rights

Musical works contain two distinct copyrights: (1) the copyright in the musical composition and (2) the copyright in the sound recording that embodies the musical composition. The musical composition refers to the music or score and the lyrics (if any), and the copyright therein is typically owned by songwriters (as opposed to recording artists, unless the recording artist and songwriter are the same person) but is often split with or transferred to music publishers. The sound recording, on the other hand, is the fixation in a phonorecord (whether a physical record/CD, MP3, or other sound file)¹ of a specific musical composition as performed by a recording artist. The sound recording copyright is typically owned by the record label with whom the recording artist has signed.

The Copyright Act, 17 U.S.C. § 106, sets forth the exclusive rights granted to copyright owners, including owners of musical compositions and sound recordings:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

¹ Section 101 of the Copyright Act defines “phonorecords” as follows: “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘phonorecords’ includes the material object in which the sounds are first fixed.”

- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

There are several key exclusive rights under § 106 that copyright owners have in musical compositions and in sound recordings, but those rights differ slightly between the two. For musical compositions, the key exclusive rights include the reproduction right, the right to create derivative works, the distribution right, the public display right, and the public performance right. For sound recordings, the key exclusive rights include the reproduction right, the right to create derivative works, the distribution right, and the *digital* public performance right.

A. Exclusive Rights in Musical Compositions

1. Reproduction, Distribution, Derivative Works

The copyright owner of a musical composition holds the exclusive reproduction and distribution rights, so anyone seeking to fix that composition in the form of phonorecord or seeking to copy, sell, or distribute the composition in the form of a sound recording must obtain what is known as a mechanical license. This license is necessary for the embodiment of a work in a sound recording, a CD, a digital download, or an on-demand stream or tethered download, such as on services like Spotify, Apple Music, or YouTube Music.

Importantly, the reproduction and distribution of musical compositions in the form of physical phonorecords (CDs, vinyl, cassettes), digital downloads, and on-demand/interactive streams are subject to the Section 115 compulsory license, which applies a statutory fee to the transaction under certain conditions for non-dramatic musical works incorporated into a sound recording. The compulsory license is just that; anyone who wants to create a sound recording from a musical composition that (except under limited circumstances) has already been adapted into sound recording form (*i.e.*, to create a “cover” song), is entitled to this license if statutory requirements are met. Such sound recording versions cannot alter the “basic melody or fundamental character” of the composition such that it would be considered a derivative work (which rights are not conveyed by § 115).

Most mechanical licenses historically were administered by the Harry Fox Agency (HFA), but with the passage of the music Modernization Act, as of January 1, 2021, the statutorily created Mechanical Licensing Collective (MLC) became the exclusive organization in charge of compulsory licenses for digital uses of musical compositions for compulsory licenses for digital uses. HFA is still involved, now as a vendor to MLC that shares its information to help MLC get songwriters paid for digital uses, and it also continues to administer compulsory licenses for physical product.

Default statutory rates for compulsory licenses are set every five years by Copyright Royalty Judges (who are appointed per § 802 of the Copyright Act to the Copyright Royalty Board (CRB)). The current mechanical royalty rate for physical sales and downloads is the larger of 1.75 cents per minute of playing time or 9.1 cents per song, and for on-demand streaming 14.2% of streaming revenue (2021) increasing to 15.1% of streaming revenue (2022).

For more detail on mechanical royalty rates and the latest CRB decision, see <https://www.federalregister.gov/documents/2019/02/05/2019-00249/determination-of-royalty-rates-and-terms-for-making-and-distributing-phonorecords-phonorecords-iii>; <https://www.royaltyexchange.com/blog/mechanical-royalties>.

The reproduction and distribution rights also apply to the sale of sheet music and printed lyrics, which are normally handled by music publishers. Printed music and lyric sales are not subject to the above-referenced statutory licensing scheme; they are usually negotiated directly with the publisher or through an aggregator like Lyricfind.

2. Public Performance

The owner of the musical composition copyright owns the exclusive public performance right (except as discussed below), such that anyone seeking to play or perform the musical work publicly, *e.g.*, in a bar, restaurant, concert venue, dance hall, on terrestrial radio stations, on broadcast television, on non-interactive digital streaming services like Pandora and SiriusXM, etc., must have a license. Purely private performances do not need a license; § 101 of the Copyright Act says the following concerning what constitutes a public performance:

To perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable

of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Public performance licenses for the benefit of composition copyright owners (*i.e.*, songwriters and publishers) are administered in the United States by four performing rights organizations (PROs) that provide collective/blanket licenses to facilitate monetization of public performances: ASCAP, BMI, SESAC, and GMR. ASCAP and BMI are the longest-running organizations and control the vast majority of the market share of musical composition public performance rights.

Venues and services that publicly perform music can obtain a blanket license from these organizations in order to authorize their use of music in public places. Accordingly, as long as a venue or service has a license from at least the major PROs, it is likely that an artist would not have a copyright infringement claim regarding public performance (unless that artist's works are registered with the smaller PROs or are not registered with any of the PROs).

Statutory license rates for public performances are set by “rate courts”—specific judges in the U.S. District Court for the Southern District of New York who, as part of their dockets, oversee and resolve disputes between musical composition copyright holders and those who publicly perform music when the two sides are unable to reach negotiated agreements on rates for blanket licenses for particular types of music use.

ASCAP and BMI are subject to long-running antitrust decrees established many years ago that are beyond the scope of this program, but it is worth mentioning that the continued application of those antitrust decrees has come into question and the DOJ recently reviewed the decrees (although has decided not to take any action at this time). See <https://www.broadcastlawblog.com/2021/01/articles/doj-ends-its-review-of-ascap-and-bmi-consent-decrees-for-nowwhat-does-it-mean/>

3. Public Display

The exclusive right to publicly display a musical composition applies, for example, to anyone seeking to display lyrics in karaoke venues, and also requires a license, which are typically negotiated directly with the owner(s) of the musical composition, such as the music publishers.

4. Synchronization Rights

Stemming from the exclusive right to create derivative works synchronization means the incorporation of a musical work in an audiovisual work. A “synch” license is required for anyone seeking to use the musical composition in synchronization with an audiovisual work such as a music video, television show, movie, or commercial. Fees

for these licenses tend to vary widely. “Synch” licenses are typically negotiated with the owner(s) of the musical composition, such as the music publisher.

B. Exclusive Rights in Sound Recordings

It is important to note that copyright rights in sound recordings did not exist until February 15, 1972. Sound recordings fixed before that date were historically only subject to state law protection as opposed to federal copyright protection. This has caused significant controversy in recent years, which resulted in several lawsuits starting in 2014, most notably, suits brought by Flo & Eddie of The Turtles as well as several major and independent record labels, against SiriusXM and Pandora for using pre-1972 sound recordings without a license. With the passage of the Music Modernization Act (discussed below), pre-1972 sound recordings will be brought within federal copyright protection to the same degree as post-1972 sound recordings as of January 1, 2022.

1. Reproduction, Distribution, Derivative Works

The exclusive reproduction and distribution rights in sound recordings typically belong to the record label representing the recording artist (which usually own and control the “master” recordings of the songs), and anyone seeking to engage in reproduction or distribution of such sound recordings will require a license, notably in addition to the license required for the musical composition (which, as noted above, would come from the publisher or songwriter).

Take, for example, Taylor Swift’s album “Fearless (Taylor’s Version).” Famously, Swift did not own the actual master sound recordings of many of her early songs. Accordingly, if she wanted to make (and sell) an album of her own sound recordings, she would have needed a license from the record label to use those recordings. However, instead of licensing the original master sound recordings (or reproducing and distributing them unlawfully), she independently produced virtually identical “cover” versions of the songs and therefore did not infringe the reproduction or distribution rights in the sound recordings owned by the label.

Derivative works of sound recordings can include remixes and mashups. These types of uses would require a license from the sound recording owner, typically the record label.

2. Public Performance

There is no public performance right in sound recordings except for a digital streaming right. This limitation has for a long time been a source of controversy in the music industry because it means that record labels and recording artists are not compensated for public performance of their sound recordings in terrestrial radio transmissions, TV

transmissions, and at live venues. It was long argued that radio play provided significant promotional value to recording artists which drove record sales, thus justifying the lack of a public performance right, but that argument has arguably lost strength as the music industry has turned away from traditional forms of promotion, radio play, and sale of physical records in recent years.

Nonetheless, as of 1995 with the passage of the Digital Performance Right in Sound Recordings Act, an exclusive public performance right in sound recordings was created, but limited to digital streaming, so a license is required for anyone creating a digital audio transmission of a sound recording. Terrestrial broadcast transmissions of sound recordings still do not require a license. For example, Z100 does not need a license to broadcast a sound recording, but Pandora and Spotify do.

Additionally, an important distinction exists between “interactive” and “non-interactive” transmissions. For non-interactive transmissions, for example, on Pandora or SiriusXM, a compulsory license is available per § 114 of the Copyright Act and is administered by an organization called SoundExchange (discussed below), with rates also determined by the CRB. An interactive transmission, for example, on Spotify where a user can select a sound recording to play on-demand, requires a negotiated license directly with the sound recording copyright owner, typically the record labels.

3. Synchronization Rights

As with musical compositions, a “synch” license is required to use a sound recording in synchronization with an audiovisual work. These licenses are negotiated directly with the owner of the master recording, typically the record labels.

II. Royalties: How Does the Money Flow?

A. Musical Composition Royalties (Publishing)

For musical compositions, there are three main types of royalties, as discussed above.

- **Mechanical royalties** are paid when the composition is reproduced and sold in the form of a phonorecord, download, or interactive/on-demand stream. The process of paying mechanical royalties differs between on-demand streaming and digital and physical sales.
 - For on-demand streaming, such as on Spotify or Apple Music, and for digital downloads, services typically pay through the MLC. Streaming services sign a blanket license with MLC and pay advance license fees, the MLC matches the streaming data to the applicable publisher payees, and

those payees then send along the songwriters' shares. Collection and disbursement of past-due royalties is beyond the scope of this program.

- For physical sales of phonorecords, the retailer (such as “big box” stores that sell CDs and other brick-and-mortar record stores) first pays the record label (after taking its cut). The label then pays HFA (which takes a fee), who distributes to the publisher, and the publisher then pays the songwriters their share. MLC does not collect royalties for these physical sales, so HFA is still the main source for such services.
- **Public performance royalties** are paid when the composition is publicly played in a venue, on the radio, on TV, on non-interactive streaming services, etc.
 - Songwriters and publishers first register with PROs for the songs to be played in public.
 - The PROs issue licenses to those seeking to publicly perform music.
 - The PROs collect royalties from their licensees and then pay songwriters and publishers each their respective shares pursuant to proprietary formulas.
 - PROs will often enforce their members' rights by sending personnel to investigate users who publicly perform music without a license, and often pursue lawsuits against such unauthorized users.
- **“Synch” royalties** are paid when the composition is used in audiovisual work.
 - They are typically negotiated between publishers and those who wish to use the composition. For that reason, producers pay the publishers directly, and publishers then pay the songwriters whatever their share is.
 - There are no statutory or compulsory licenses or rates for “synch” uses.

B. Sound Recording Royalties (Masters)

For sound recordings, there are also three main types of royalties, as discussed above.

- **Reproduction/distribution royalties** are paid when the sound recording is sold in physical format or streamed via an interactive/on-demand streaming service. Unlike with composition mechanical royalties, the process of payments for reproduction/distribution royalties for sound recording does not materially differ as between on-demand streaming and digital and physical sales.
 - For interactive/on-demand streaming, the streaming service pays the record label, and the record label then pays the band or artist, producer, and any other musicians who are entitled to royalties.

- For digital and physical sales, the retailer pays the record label, and the record label then pays the band or artist, producer, and any other musicians who are entitled to royalties.
- **Public performance royalties** are paid only when the recording is played by non-interactive non-on-demand digital streaming services or satellite radio. There are two possible payment options for digital public performance royalties for sound recordings.
 - SoundExchange (a PRO-like collection organization) may collect royalties from digital services and subsequently pay the band or artist, label, and background musicians, etc. each their respective shares.
 - Alternatively, the digital service may negotiate with and pay the label directly, who then pays the band or artist or other recipient.
- **“Synch” royalties** are paid when the recording is used in an audiovisual work.
 - Much like with compositions, licensors pay the record label directly, and the record label then pays the band or artist.

See <https://www.royaltyexchange.com/blog/mechanical-royalties> for more information and helpful flow charts.

III. The Music Modernization Act

The Music Modernization Act, signed into law in 2018, is comprised of three separate provisions.

- Title I is the Musical Works Modernization Act, which established a blanket licensing system under which the MLC collects and distributes mechanical royalty payments from digital music providers. This system began on January 1, 2021. Title I was meant to update and streamline the process of obtaining a § 115 compulsory license.
- Title II, the Classics Protection and Access Act, brought pre-1972 sound recordings partially into the federal copyright system and provided federal remedies for the unauthorized use of sound recordings fixed before February 15, 1972. Specifically, as noted above, copyright protection for pre-1972 sound recordings was brought essentially on par with post-1972 sound recordings, including with respect to a digital public performance right.
- Title III, the Allocation for Music Producers Act, allows music producers, mixers, and sound engineers to receive royalties for the use of sound recordings to which they contribute. It codifies a process by which SoundExchange distributes the royalties to these contributors under a “letter of direction.”

For more information, see <https://cdas.com/closer-look-senate-passes-music-modernization-act/>.

IV. Music Copyright Infringement Litigation: Substantial Similarity

Proving copyright infringement requires an assessment of whether the alleged infringer had access to the allegedly infringed work and whether there is “substantial similarity” between the works at issue. Hit songs provide fertile ground for artists to litigate whether protectable aspects of another artists’ song have been copied.

There have been several high-profile music copyright infringement cases in the last several years. In the Ninth Circuit, where several of the following cases were decided, courts apply a two-step test to determine if the two works at issue are substantially similar. The first step of the test is an “extrinsic” assessment of whether protected elements of the plaintiff’s work are objectively similar to corresponding elements of defendant’s work. This is a question of law for the court and often involves input from expert witnesses. The second step of the test is an “intrinsic” assessment of whether a reasonable person would find that the total concept and feel of defendant’s work was substantially similar to plaintiff’s. This latter question is one for the jury (or judge in a bench trial).

The substantial similarity analysis is fact-sensitive and often unpredictable. Even if the copying was subconscious or unintentional, a court may find that, if the alleged infringer had access to and heard the song, they infringed. In other cases, even when an alleged infringer intends to copy a song, if a court does not find “substantial similarity,” there may be a finding that the work does not infringe.

***Griffin v. Sheeran*, 351 F. Supp. 3d 492 (S.D.N.Y. 2019)**

The heirs of Edward Townsend sued Ed Sheeran alleging “Thinking Out Loud” infringed “Let’s Get it On,” the 1973 classic which Townsend co-wrote with Marvin Gaye.

The two songs share a similar chord pattern, a fact Sheeran did not dispute, but Sheeran contended the chords are “commonplace musical building blocks.” The parties disputed whether the “I-iii-IV-V” chord progression and rhythm of chords are unprotectible common musical elements.

The court denied the defendant’s motion for summary judgement in 2019, noting that this Circuit treats the question of whether “particular elements of a work demonstrate sufficient originality and creativity to warrant copyright protection as a question for the factfinder.”

Two musicologists gave conflicting testimonies as expert witnesses. Sheeran testified and performed in front of the jury in Spring 2023 and ultimately prevailed; the jury found that Sheeran and his co-writer created the song independently and that the song did not wrongfully copy any protectable compositional elements from “Let’s Get It On.”

“These chords are common building blocks which were used to create music long before ‘Let’s Get It On’ was written and will be used to create music long after we are all gone,” Sheeran stated.

***Structured Asset Sales, LLC v. Sheeran*, 2023 WL 3475524 (S.D.N.Y. May 16, 2023)**

Separately from the *Griffin* case, Structured Asset Sales, a company with rights to a percentage of “Let’s Get It On” royalties, sued Sheeran for unpaid royalties in connection with the profits from “Thinking Out Loud.” Initially, the court denied Sheeran’s motion for summary judgement, but he sought reconsideration after prevailing in the *Griffin* trial.

The court granted reconsideration and summary judgement, finding the combination of chord progression and chord rhythm “too commonplace to merit copyright protection,” and holding to protect the combination would award “Let’s Get It On” an impermissible monopoly over a basic musical building block. The chord progression in both songs was used at least twenty-nine times before “Let’s Get It On” and twenty-three times before “Thinking Out Loud.”

***Larball Publ’g Co. v. Lipa*, 22 Civ. 1872 (KPF) (S.D.N.Y. Aug. 8, 2023)**

In March 2022, Larball Publishing Company and Sandy Linzer Productions commenced a copyright infringement suit against Dua Lipa and associated producers and publishing companies responsible for her hit track “Levitating,” and its remix. The plaintiffs alleged that the hit song unlawfully copied elements from their copyrighted songs “Wiggle and Giggle All Night” and “Don Diablo.”

The court denied the defendant’s motion to dismiss the claim in connection with infringement of the song “Wiggle and Giggle,” holding that the plaintiffs adequately alleged copyright infringement. The court explained that the plaintiffs failed to plead that the defendants had access to “Wiggle,” but found that “Plaintiffs have alleged just enough facts to proceed to discovery on a theory of ‘striking similarity.’”

As the parties proceed in the suit, the plaintiffs will have to demonstrate that their similarities are “so striking so as to compel the conclusion that ‘copying is the only realistic basis for them.’”

***Sound and Color, LLC v. Samuel Smith, et al.*, 2:22-cv-01508-WLH-AS (C.D. Cal. Sep. 6, 2023)**

Three songwriters filed a claim of copyright infringement against Sam Smith, alleging that Smith and Normani's hit song "Dancing with a Stranger" appropriated the "lyrics, pitch sequence, melodic contour, metric placement of the syllables, rhythm, feel, and structure" of the trio's song of the same name.

The court found that most, if not all, of the plaintiff's alleged similarities were not protectable by law, pointing out that the musical building blocks belong to the public domain. The court granted the defendant's motion to dismiss the case.

***Robinson v. Nayvadius Wilburn, LLC*, 21-cv-03585 (N.D. Ill. Aug. 25, 2023)**

DaQuan Robinson, who uses the stage name Gutta, filed a copyright infringement suit against Nayvadius Wilburn, known by his rap name Future, over his song "When I Think About It," alleging that Wilburn's song is substantially similar to Robinson's similarly titled song "When U Think About It."

Despite claiming that Wilburn's song includes many of the same themes as Robinson's song, namely, "money, guns, jewelry, and other material possessions," the court failed to see sufficient substantial similarity to substantiate a copyright infringement claim and granted the defendant's motion to dismiss the claim. The court found that the similar storylines, themes, and structures of the songs are frequently present in hip hop and rap music and are not protectable by copyright law.

***Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018)**

Marvin Gaye's heirs accused Pharrell Williams and Robin Thicke of copyright infringement over their song "Blurred Lines," alleging it was substantially similar to Gaye's "Got to Give it Up." In response, Williams and Thicke brought a declaratory judgment action for non-infringement that ultimately went to trial, including dueling music experts, salacious deposition testimony, and complex issues of music theory, all leading to a controversial verdict in favor of the Gaye estate.

On appeal, the Ninth Circuit upheld the jury verdict in favor of Gaye. Although the melody, harmony, and rhythm between the two songs were not very similar, the bass line and drumbeats, and overall genre, vibe, and groove were found to be substantially similar. The Ninth Circuit gave deference to the jury's verdict in finding that the substantial similarity standard was met. Many critics, and a strong dissenting opinion, have pushed back, arguing that this broad interpretation of music copyright protection essentially allows for the assertion of a monopoly over a certain musical style, effectively

protecting ideas rather than expression (which is specifically prohibited by the Copyright Act).

***Skidmore, as Trustee for the Randy Craig Wolf Trust v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020)**

Skidmore sued Led Zeppelin over the famous “Stairway to Heaven” intro (a descending chromatic chord progression), alleging it infringed on the band Spirit’s earlier song “Taurus,” which also included an eight-measure descending chromatic scale intro. Looking only at the musical compositions of the two works, a jury found no substantial similarity, despite Zeppelin’s having access to “Taurus,” because the elements of the song that were shared between the two were not original enough to be protectable.

A panel of the Ninth Circuit overturned the verdict, finding that the court failed to inform the jurors that unprotectable elements could be protected when selected, arranged, or coordinated in an original manner.

On rehearing, the *en banc* Ninth Circuit vacated the panel ruling, reinstating the jury verdict below. First, the court held that the district court was correct to only allow analysis of the compositions rather than the sound recordings because the 1909 Copyright Act controlled, and did not protect the sound recording, as sound recordings were not protected until 1972. Second, the court found that the extrinsic step of the two-part substantial similarity test was not satisfied because descending chromatic scales are not inherently original and thus not protectable. Finally, the court held that the inverse ratio rule, permitting a lower standard of proof to satisfy substantial similarity if a higher degree of access to the protected work was shown, “defies logic and creates uncertainty” and therefore abrogated that rule in the Ninth Circuit. The inverse ratio rule was already rejected in the Second, Fifth, Seventh, and Eleventh Circuits and its abrogation in the Ninth is pivotal in the era of modern music in which access to music is more ubiquitous than ever.

***Gray v. Perry*, No. 2:15-cv-05642-CAS-JCx (C.D. Cal. Mar. 16, 2020)**

Plaintiffs alleged that Katy Perry’s eight-note ostinato in her song “Dark Horse” was substantially similar to one in their song, “Joyful Noise.” A jury found infringement and awarded plaintiffs \$2.8 million in damages. Defendants moved for judgment as a matter of law, which requires a finding that there are no genuine factual disputes and that a reasonable jury would not have a sufficient evidentiary basis to find for the winning party. The district court granted the motion and overturned the jury’s verdict.

The court found that the “Joyful Noise” ostinato failed the extrinsic step of the two-part test. None of the individual elements (key, phrase length, pitch sequence, rhythm

“shape,” and musical texture) were independently protectable, and they were not arranged in a sufficiently original manner to warrant protection. The court added that even if it was protectable, the “Dark Horse” ostinato would have to be virtually identical to find substantial similarity given the “thin” protection plaintiffs’ ostinato would have received, and that it was not virtually identical.

The court, reiterating what the Ninth Circuit implied in the *Led Zeppelin* case, insinuated that shorter, isolated musical phrases, as opposed to the entire song, often do not warrant copyright protection, and thus tend not to support a finding of substantial similarity/infringement.

***Hall v. Swift*, 2021 WL 6104160, (C.D. Cal. Dec. 9, 2021)**

Sean Hall and Nate Butler sued Taylor Swift over her song “Shake it Off”, alleging it infringed on their song “Playas Gon’ Play.” The claim covered lyrics only as the music of the song was not part of the infringement claim.

The claim was initially dismissed for lack of copyrightability/originality of the lyrics at issue but was revived on appeal because plaintiffs “plausibly alleged originality” of the lyrics. On appeal, the court held plaintiffs were “entitled to at least some level of protection in the structure and arrangement of the phrases contained in the Playa lyrics, even if they utilize words in the public domain.”

Ultimately, the court held there were enough objective similarities between the two works to the extent the court could not conclude that no reasonable juror could find substantial similarity between their lyrical phrasing, word arrangement, or poetic structure.

For more information on the above cases, see:

<https://cdas.com/ninth-circuit-rules-in-favor-of-led-zeppelin-laying-a-new-foundation-for-music-cases-to-follow/>

<https://cdas.com/musical-composition-copyright-infringement-cases-back-vogue/>

<https://cdas.com/gray-v-perry-the-pendulum-swings-on-copyright-infringement-verdict-against-katy-perry/>

V. Music Litigation Defenses: Fair Use and De Minimis Use

A. Fair Use

Fair use is a highly complex topic that could easily take up an entire lecture. In short, Section 107 of the copyright Act codifies the defense, stating:

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The watershed fair use case is *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), which is a Supreme Court case involving fair use in the context of music parodies and is therefore instructive. In that case, the rightsholders to the song “Pretty Woman” sued rap artists 2Live Crew for its rap parody of the Roy Orbison classic. The Supreme Court, analyzing the above factors, held that the rap version was a parody that constituted fair use and therefore was not infringing, and that the commercial character of the song (factor 4) did not create a presumption against fair use, but rather, the purpose and character of the use (factor 1) required an analysis of the extent to which the use was “transformative”; this set the stage for the evolution of the fair use analysis in the ensuing years to focus much more on the “transformative” nature of the use even though that term does not even appear in § 107.

***Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 589 U.S. ___, No. 21-869 (2023).**

The Supreme Court recently issued a 7-2 decision regarding the reach of the fair use doctrine in a case involving Andy Warhol’s use of a photograph of the artist Prince in a series. Lynn Goldsmith, a prominent rock photographer, was hired by *Newsweek* in 1981 to take pictures of Prince. Three years later, Warhol paid Goldsmith for a one-time license of the photograph and used it as reference for a series that has since been displayed in distinguished museums and galleries and sold for over six figures. Warhol later licensed one of the artworks based on the photograph to a magazine for a story regarding Prince’s life after he died.

After learning of the subsequent magazine use, Goldsmith notified the Andy Warhol Foundation that she believed it violated her copyright in the original photograph. Warhol initiated a suit against Goldsmith for a declaratory judgment that Warhol's works were protected under fair use. Goldsmith countersued for copyright infringement.

Goldsmith's case against the Warhol foundation rested on whether Warhol had sufficiently changed her photo to support fair use protection. A New York federal judge sided with Warhol, holding that Warhol's work qualified as a new and distinct piece of art by incorporating a new meaning and message. A [federal appeals court](#) in 2021 overturned the decision, and the Supreme Court affirmed.

The Supreme Court's analysis emphasized the significance of commercial exploitation and transformative purpose (i.e., whether the original use and subsequent use were in the same category) over whether the new work was sufficiently transformative in meaning or message. The analysis arguably blurs the first and fourth fair use factor and focuses more on commercial vs. non-commercial use, and does not address whether Warhol's work was transformative artistically. Justice Sotomayer, who wrote the decision, noted that ruling the other way would permit artists to make slight alterations to an original photograph and sell it by claiming transformative use. Justice Kagan drafted a fiery dissent.

B. De Minimis Use

The *de minimis* use defense often arises in cases involving "sampling." Sampling is the act of directly taking a portion of a sound recording and putting it into another sound recording. This generally requires a license, but if the use of the song is *de minimis*, a license is not required.

De minimis use occurs where the use of the copyrighted work is "so trivial as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying." *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) (quoting *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997)). If what is copied is so miniscule that it cannot, as a matter of law, be considered substantially similar to the original, then there is no infringement.

***Smith v. Cash Money Records*, 253 F. Supp.3d 737 (S.D.N.Y. 2017)**

In 2013, Drake released "Pound Cake/Paris Morton Music 2," which sampled 35 seconds of the spoken word "Jimmy Smith Rap" by jazz artist James Oscar Smith. Smith's estate sued Drake and Cash Money Records for copyright infringement. Drake raised a fair use defense, arguing that his use of the Jimmy Smith Rap was permissible.

The court granted Drake’s motion for summary judgment because “Pound Cake” fundamentally altered the message of the Jimmy Smith rap, the use was transformative and did not readily identify Smith. Even though Drake used more than half of the Jimmy Smith rap, the court found that it was reasonable in proportion to the needs of the use. *Chapman v. Maraj*, 2020 WL 6260021, (C.D. Cal. Sept. 16, 2020)

Nicki Minaj worked with Nas on an experimental remake of what they thought was an old song, but the target song was actually a cover of Tracy Chapman’s “Baby Can I Hold You.” Minaj thus “incorporated a large number of lyrics and vocal melodies from” Chapman.

Chapman repeatedly denied Minaj’s pre-release license requests, including personal outreach through a Twitter direct message. Minaj left the track off her album, but messaged radio host DJ Flex, allegedly texting him the track, which he played on air. Chapman then sued alleging unlawful distribution and derivative work.

The court could not decide on summary judgment whether there was a distribution. There was a fact dispute over whether the mastered version Flex played was the version Minaj sent him, and whether a mastered track can even be sent by text message.

Regardless, the court found for Minaj on her fair use defense, finding the purpose was more experimental than commercial, i.e., to provide a sample to Chapman to ask for a license. There was no presumption of market harm given the “only incidental commercial purpose.”

***VMG Salsoul, LLC v. Madonna Louise Ciccone*, 834 F. 3d 871 (9th Cir. 2016)**

In *VMG Salsoul, LLC v. Ciccone*, the petitioner alleged that Madonna’s “Vogue” infringed on their sound recording rights in the song “Love Break” when Madonna used the single and double horn hits from “Love Break” without licensing the sound recording. Although already established for musical compositions, the court found that the *de minimis* use standard also applies to sound recordings. As such, the Ninth Circuit affirmed the lower court and held that no license for the sound recording was needed in this case because the use of the horn hits was *de minimis*. Each horn hit lasted less than half a second, they were used only a handful of times, and the hits were not exact copies of the horn hits in “Love Break” because various effects and instruments were added.²

² Notably, the Sixth Circuit does not follow the above rule. It only applies the *de minimis* rule to musical compositions and not to sound recordings, finding that any sampling in this context is infringing.

***Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003)**

A songwriter sued the Beastie Boys, who allegedly had sampled a six-second three-note sequence from the plaintiff's song and had procured a sound recording license but not a musical composition license. Even though the Beastie Boys had copied the "entire composition" for the given musical segment, the court still found the sample to be quantitatively *de minimis* as compared to the plaintiff's work as a whole—and no more qualitatively significant than any other portion of the song—and noted that the average audience would not have recognized the appropriation. (This is known as "fragmented literal similarity"—where a defendant copies a very limited "portion of the plaintiff's work exactly or nearly exactly, without appropriating the work's overall essence or structure.")

***Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986)**

Contrast *Fisher v. Dees*, a scenario where the defendant's copying was held to be qualitatively and quantitatively substantial and therefore not *de minimis*. There, the defendant had copied the central theme and the lyrics of the plaintiff's song (with only minor variation) in a way that was easily recognizable and had appropriated six out of 38 bars of the original song. While the defendant ultimately prevailed on fair use grounds because his work was deemed a parody, the Ninth Circuit rejected a *de minimis* use defense under these facts.

For more information on *de minimis* use, see https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/november-december/this-not-another-fair-use-article-implied-license-de-minimis-use-copyright-defenses/