Art, Music, & Mashups: A View from the Bench on Creativity and Copyright

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INTRODUCTION

Creativity has captured human fascination for centuries. It has been said that "[t]here is little that shapes the human experience as profoundly and pervasively as creativity."[1] But what is creativity? Is it pure originality? Divine inspiration? Clever assimilation of existing ideas? Despite creativity's central role in human progress, the term eludes finite definition.[2]

To Plato, creative inspiration was divine.[3] In contrast, Kant thought that creative geniuses were not divinely inspired but born with a particular quickness of mind that fostered brilliance and innovation.[4] T.S. Eliot recognized the critical role of borrowing in creative work, quipping, "[i]mmature poets imitate; mature poets steal; bad poets deface what they take; and good poets make it into something better, or at least something different."[5]

In psychology, a leading theory of creativity *requires* inspiration from existing concepts. In his "associative theory" of creativity, Sarnoff Mednick posits that most of us have predictable, stereotypical associations with a given stimulus, while the creative among us are able to retrieve remote associations.[6] For instance, although most associate "table" with "chair," the creative might proffer "leg" or "food."[7] Defining creativity as a framework of novel associations between existing concepts, Mednick distinguishes originality from creativity, finding the former of little import.[8]

However different theorists and disciplines might define creativity, its outcomes are varied, enduring, and ever evolving. Creativity has brought us everything from Rodin's

1. Scott Barry Kaufman, *The Philosophy of Creativity*, SCI. AM.: BEAUTIFUL MINDS (May 12, 2014), https://blogs.scientificamerican.com/beautiful-minds/the-philosophy-of-creativity [https://perma.cc/WN2Y-YWUM] [http://web.archive.org/web/20220119133158/https://blogs.scientificamerican.com/beautiful-minds/the-philosophy-of-creativity].

2. *See* Igor Zwir et al., *Evolution of Genetic Networks for Human Creativity*, 27 MOLECULAR PSYCHIATRY 354, 354–58 (2021) (identifying that the genes distinguishing modern humans from Neanderthals and chimpanzees are those responsible for self-awareness and creativity); Kaufman, *supra* note 1 ("Creativity drives progress in every human endeavor, from the arts to the sciences, business, and technology.").

3. 1 PLATO, *Ion., in* THE DIALOGUES OF PLATO 238, 233–46 (Benjamin Jowett trans., Oxford Clarendon Press 1871) (380 B.C.E.) (describing how "God takes away the minds of poets" such that artists are drawn "out of their senses" whilst creating, governed by neither rules nor conscious effort).

4. IMMANUEL KANT, CRITIQUE OF JUDGMENT 191 (J.H. Bernard trans., 2d ed. 1914) (1790) ("[A]rtistic skill cannot be communicated; it is imparted to every artist immediately by the hand of nature; and so it dies with him, until nature endows another in the same way, so that he only needs an example in order to put in operation in a similar fashion the talent of which he is conscious.").

5. T.S. ELIOT, *Philip Massinger*, *in* THE SACRED WOOD: ESSAYS ON POETRY AND CRITICISM 114, 114–36 (Methuen & Co. 1920).

6. *See* Sarnoff Mednick, *The Associative Basis of the Creative Process*, 69 PSYCH. REV. 220, 222–23 (1962).

7. Mathias Benedek and Aljoscha C. Neubauer, *Revisiting Mednick's Model on Creativity-Related Differences in Associative Hierarchies. Evidence for a Common Path to Uncommon Thought*, 47 J. CREATIVE BEHAV. 273, 274–75 (2013).

8. Mednick, *supra* note 6, at 221 ("Creative thinking as defined here is distinguished from original thinking by the imposition of requirements on originality. Thus, 7,363,474 is quite an original answer to the problem 'How much is 12 + 12?' However, it is only when conditions are such that this answer is useful that we can also call it creative.").

sculptures and Van Gogh's paintings to Newton's scientific discoveries, from musical scores and movies to computer code.

Where, then, does the law intersect with creativity? The United States Constitution directs Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[9] Born from that critical clause is the American approach to copyright. Recognized by the U.S. Supreme Court as "the engine of free expression,"[10] copyright law enriches "the general public through access to creative works."[11]

To illustrate how copyright law fulfills its aims through the lens of art, music, and "mashups," I invite you to accompany me on a short tour of copyright law's dance with creativity by offering select examples from federal appellate decisions and a view from the bench.

I. COPYRIGHT LAW: A FRAMEWORK

Justice Oliver Wendell Holmes counseled that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth" of fine art.[12] Yet, in many cases judges are forced into precisely that role. To begin our tour of how courts carry out copyright law's purpose, I offer a brief guide of how judges assess copyright infringement claims.

First, to come within the ambit of copyright protection, a work must qualify as *original*. The originality threshold is a "famously low bar,"[13] and only minimal creativity is required.[14] If a work has met the originality threshold, we consider whether infringement has occurred.[15] To establish infringement, the party seeking relief must prove two elements: (1) possession of a valid copyright, and (2) copying of the original elements of the work.[16] We assess whether such copying has occurred by asking whether the secondary work is "substantially similar" to the protected elements of the original work.[17] As Judge Learned Hand put it nearly a century ago, "We have to decide how much [similarity is substantial], and while we are as aware as anyone that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases."[18] In other words, a fuzzy line is better than no line at all.

9. U.S. CONST. art. I, § 8, cl. 8.
10. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).
11. Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994).
12. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).
13. Skidmore v. Led Zeppelin, 952 F.3d 1051, 1069 (9th Cir. 2020) (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)).
14. *Feist*, 499 U.S. at 345.
15. *See Skidmore*, 952 F.3d at 1069.
16. *Feist*, 499 U.S. at 361.
17. Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018) (quoting Mattel, Inc. v. MGA Ent., Inc., 616 F.3d 904, 913–14 (9th Cir. 2010)), *overruled on other grounds by Skidmore*, 952 F.3d at 1069.
18. Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).

Even if infringement is established, copiers can escape liability by showing that their derivative work was "fair use" of the original.[19] The Supreme Court has described the fair use doctrine as "an 'equitable rule of reason' that 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'"[20] That is an elegant turn of phrase, but its application does not always translate gracefully. To understand whether a derivative work made "fair use" of the original, courts look to a non-exhaustive list of statutory factors, including the "purpose and character" of the use, the "nature" of the copyrighted work, the "amount and substantiality" of the copied portion as it compares to the original, and the "effect of the use [on] the potential market for or value of the copyrighted work."[21] Commentators have criticized the Copyright Act's fair use factors as "billowing white goo"[22] and "naught but a fairy tale."[23] Even so, the factors are the law and central to an increasing number of copyright disputes.

II. CREATIVITY: FROM SPARK TO ART IN THE MODERN CONTEXT

The intersection of new technologies and creative authorship has complicated copyright over the years, as courts have considered copyright challenges from cable television to file sharing to metadata and more.[24] Photographs, in particular, have proven to be a rich vein for litigation.[25] This is due in part to the fact that where creativity ends and mechanistic reproduction begins is unique to each photograph. In an 1884 case involving Oscar Wilde, the Supreme Court first considered whether copyright law protects photography.[26] The question before the Court was whether a photograph was simply a reproduction "on paper, of the exact features of some natural object" or instead a creative work amenable to copyright protection.[27] The Court determined that despite the use of a camera, the photograph of Wilde was copyrightable as an "original work of art, the product of . . . intellectual invention."[28] In years since, new technologies have continually forced courts to revisit the bounds of copyright law. This Section discusses several recent cases that illustrate challenging new intersections of creativity and copyright law.

19. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1196 (2021) (citing 17 U.S.C. § 107).

20. *Id.* (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

21. 17 U.S.C. § 107; *see also Google*, 141 S. Ct. at 1196–97.

22. Monge v. Maya Mags., Inc., 688 F.3d 1164, 1171 (9th Cir. 2012) (quoting Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008)).

23. David Nimmer, *"Fairest of Them All" & Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 287 (2003).

24. *See, e.g.*, Nat'l Cable Television Assoc., Inc. v. Copyright Royalty Trib., 724 F.2d 176, 179 (D.C. Cir. 1983); Stevens v. CoreLogic, Inc., 899 F.3d 666, 671 (9th Cir. 2018).

25. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978–2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 7–11 (2020).

26. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

27. *See id.* at 56.

28. *Id.* at 60; *see also id.* at 58 ("We entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.").

A. *RENTMEESTER V. NIKE*

Although the Supreme Court has ruled conclusively that photographs can be creative, applying modern copyright law to photographs remains a complex undertaking for courts and litigants. Consider the images below. On the left is a photograph of a young Michael Jordan in college at the University of North Carolina. The photograph was taken by renowned photographer Jacobus Rentmeester for a photo essay of athletes participating in the upcoming Summer Olympic Games.[29] The middle photograph of Jordan was taken by a Nike photographer many years later. That photograph was converted into the well-known Nike "Jumpman" logo pictured on the right. The logo has been used in connection with the sale of billions of dollars of Nike merchandise.[30] In 2018, the Ninth Circuit considered whether Nike's photograph and logo infringed on Rentmeester's original shot.[31]

Rentmeester's photograph

Nike's photograph

Nike's Jumpman logo

No one debated that Rentmeester's photograph was an original work.[32] Because only a work's original elements are protected under copyright law, the court's first task was to sort through the protected and unprotected elements of Rentmeester's photograph.[33] The court found that there were many highly original elements to Rentmeester's photographs, including: Jordan's unusual pose (inspired more by "ballet's *grand jeté* than by any pose a basketball player might naturally adopt when dunking a basketball"), the photograph's setting on a grassy knoll on the University of North Carolina's campus instead of a basketball court, and the basketball hoop's whimsical placement in the frame.[34] However, the court determined that these elements were akin to ideas or facts, and therefore not copyrightable.[35] Where the photograph displayed original expression meriting protection was in the "selection and arrangement of the photo's otherwise unprotected elements."[36]

Having found Rentmeester's photograph protectable, the court then turned to the central issue of whether the works were substantially similar. The conclusion: they were not.[37] Just as Rentmeester "made a series of creative choices in the selection and

29. Rentmeester v. Nike, Inc., 883 F.3d 1111, 1115 (9th Cir. 2018).
30. *Id.* at 1116.
31. *Id.* at 1115.
32. *Id.* at 1118.
33. *Id.* at 1118.
34. *Id.* at 1121.
35. *Id.* at 1123.
36. *Id.* at 1119.
37. *Id.* at 1121.

arrangement of the elements in his photograph, so too Nike's photographer made his own distinct choices in that regard."[38] In the court's view, "[t]hose choices produced an image that differed from Rentmeester's photo in more than just minor details."[39] Because, for example, Jordan's balletic pose itself was not copyrightable, Nike's photograph would only infringe if the other details also copied Rentmeester's photo.[40] The court observed, "[T]he *arrangement* of the elements within the photographs is materially different. . . . In Rentmeester's photo, Jordan is positioned slightly left of center and appears as a relatively small figure within the frame."[41] In contrast, in the Nike photo, Jordan "is perfectly centered and dominates the frame."[42] The lighting, angles, borders, and other details are also different.[43] These key distinctions led the court to conclude that there was no substantial similarity between the two photographs, and thus Nike's photograph did not infringe Rentmeester's photograph as a matter of law.[44]

But what of the Jumpman logo? The court reasoned that "[i]f the Nike photo cannot as a matter of law be found substantially similar to Rentmeester's photo, then the same conclusion follows ineluctably with respect to the Jumpman logo."[45] The Jumpman logo is simply a silhouette of Jordan from the Nike photo.[46] Yet, one wonders what role Jordan's celebrity played in the court's decision. To be sure, the Jumpman logo is both an anonymous silhouette and a clear homage to Jordan.

B. *ANDY WARHOL FOUNDATION FOR VISUAL ARTS V. GOLDSMITH*

The celebrity role often looms large in copyright cases. In the 2022 term, the Supreme Court will decide a high-profile copyright case involving two more American icons: Prince and Andy Warhol.[47] The case concerns a feud between Lynn Goldsmith, who took the photograph of pop singer Prince (left), and Warhol, who produced a collection of silkscreen prints and illustrations of Prince based on Goldsmith's photograph (right).

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 1122 (emphasis added).
42. *Id.*
43. *Id.*
44. *Id.* at 1123.
45. *Id.*
46. Notably, one panel member wrote a separate concurrence because, while he agreed the Jumpman logo did not infringe, he thought the Nike photo's distinctiveness was "not an uncontested breakaway layup." *Id.* at 1129 (Owens, J., concurring). Therefore, he believed disposing of the claim at the motion-to-dismiss stage was premature. *Id.* at 1127 (Owens, J., concurring).
47. Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021) ("*Warhol*"), *cert. granted*, 142 S. Ct. 1412 (2022). Judge McKeown delivered the 34th Annual Horace S. Manges Lecture on April 4, 2022, six months before the Supreme Court heard oral argument in *Warhol v. Goldsmith* on October 12, 2022. At the time this Article went to press, the Supreme Court had not yet issued its opinion.

In *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith* ("*Warhol*"), the Second Circuit considered whether Warhol impermissibly infringed on Goldsmith's copyrighted photograph.[48] Although the district court ruled for Warhol,[49] on appeal, the Second Circuit undertook the substantial similarity analysis and held in favor of Goldsmith.[50] The court was persuaded by the fact that Warhol had used the original photograph as the "raw material" for his creations.[51] Because Warhol had not simply copied the "idea" of Goldsmith's photo, but instead Goldsmith's "particular expression" of that idea, Warhol's work was substantially similar to that of Goldsmith's and thus infringed on her copyright.[52]

Remembering Justice Holmes's caution, the Second Circuit warily stepped into the role of art critic.[53] The court viewed "the overarching purpose and function of the two works" as identical, "not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person."[54] Also, the court warned against creating a "celebrity plagiarist privilege" by applying different rules to well-known artists like Warhol.[55] Notably, the Second Circuit contrasted Warhol's silk screens with Nike's photograph in *Rentmeester v. Nike*.[56] Nike had created its own photograph inspired by the Rentmeester photograph with key artistic details changed.[57] By contrast, Warhol used the photograph as the very foundation of his work, tipping the scales in favor of the copyright owner.[58] The court cautioned, "This is not to say that every use of an exact reproduction constitutes a work that is substantially similar to the original. But here, given the degree to which Goldsmith's photograph remains recognizable within Warhol's, there can be no reasonable debate that the works are substantially similar."[59]

48. *Id.* at 32.
49. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312 (S.D.N.Y. 2019).
50. *Warhol*, 11 F.4th at 54.
51. *Id.* at 53–54.
52. *Id.* at 54.
53. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). See also the Article text that accompanies note 12.
54. *Warhol*, 11 F.4th at 42.
55. *Id.* at 43.
56. *Id.* at 54.
57. *Id.*
58. *Id.*
59. *Id.*

Having established substantial similarity, the court asked whether Warhol could nevertheless escape liability by establishing that his use of the photograph fell under the fair use exception.[60] The court cautioned that "fair use presents a holistic, context-sensitive inquiry 'not to be simplified with bright-line rules . . . All four statutory factors are to be explored, and the results weighed together, in light of the purposes of copyright.'"[61] When examining the first factor, the court established that "assessment of this first factor has focused chiefly on the degree to which the use is 'transformative.'"[62] In other words, to what extent does the work in question contribute something meaningfully new not found in the original?

The district court had concluded that the works in Warhol's *Prince Series* are transformative because they "can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure."[63] But the Second Circuit disagreed, reasoning that the *Prince Series* failed to convey "a new meaning or message" separate from the Goldsmith photograph.[64] With that in mind, and because the Goldsmith photograph visibly served as the "raw material" for the *Prince Series*, the Second Circuit concluded that Warhol's work was not transformative.[65]

So too, the remaining fair use factors weighed in favor of Goldsmith. The nature of Goldsmith's work was creative, rather than factual, so the second factor weighed in her favor.[66] The third factor—the amount and substantiality of the use—weighed in Goldsmith's favor because "while Goldsmith has no monopoly on Prince's face, the law grants her a broad monopoly on its image as it appears in her photograph."[67] Finally, the fourth factor—the effect of the *Prince Series* on the market for Goldsmith's photo—weighed in her favor because she lost out on potential licensing royalties from the Warhol Foundation and other market opportunities due to the presence of the *Prince Series* in the market.[68] The net result of this calculus: Warhol's *Prince Series* did not make fair use of Goldsmith's photograph.[69] Thus, concluding that the *Prince Series* was non-transformative and commercial in nature (though demonstrating artistic value that serves the public interest), the appeals court held that the "purpose and character" of the *Prince Series* weighed in the photographer's favor.[70]

When the Supreme Court takes up this issue, the justices will evaluate whether the Second Circuit's decision advances the goals of copyright. As Judge Dennis Jacobs on the Second Circuit noted in his concurrence, "[r]isk of a copyright suit or uncertainty about an artwork's status can inhibit the creative expression that is a goal of copyright"

60. *Id.* at 37.
61. *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994)) (cleaned up).
62. *Id.* at 37 (citing *Campbell*, 510 U.S. at 579).
63. *Id.* at 41.
64. *Id.*
65. *Id.* at 53–54.
66. *Id.* at 53.
67. *Id.* at 46.
68. *Id.* at 51.
69. *Id.*
70. *Id.* at 44–45.

just as copyright protection can incentivize new original works.[71] In this vein, the Court will also confront how the Second Circuit's restrictive reading of transformative use implicates these competing objectives. Amicus briefs emphasize a variety of arguments: the importance of copying in art, the chilling of creation, that the prohibition on considering a work's meaning violates the Supreme Court's teachings in *Campbell v. Acuff-Rose Music*, and that ignoring a work's message risks a First Amendment violation.[72] Finally, it is notable that the two historically active justices in the field of copyright—Justice Ginsburg and Justice Breyer—will no longer be on the Court. This case may signal whether a newer justice will take up the Supreme Court's copyright mantle.

Discussion of *Warhol* would be incomplete without turning to what some call the copyright case of the century—*Google v. Oracle* (2021).[73] The Supreme Court issued this decision just ten days after the Second Circuit's opinion in *Warhol*.[74] Writing for a 6-2 majority, Justice Breyer concluded that Google's use of certain elements of Oracle's Java code was transformative and fair use as a matter of law.[75] Google was seeking to "create new products" and used Java code to make the new products more accessible to users.[76] The Court's analysis moved directly to fair use, thus sidestepping the question of whether the code was copyrightable in the first place—in other words, whether the code was original.[77] This approach is not uncommon, and we see it in lower court decisions as well.[78] Because of the Supreme Court's discussion of fair use, the Second Circuit was asked to revisit *Warhol*. However, the circuit court did not stray from its original disposition.[79] The court concluded that *Warhol* is fully consistent with *Google* because the *Google* decision did not reshape the field of fair use in copyright—a field that is "highly contextual and fact specific."[80]

71. *Id.* at 55 (Jacobs, J., concurring).

72. As of September 5, 2022, twenty amicus briefs had been filed in the case. *Supreme Court Docket, No. 21-869*, U.S. SUP. CT. (Sept. 5, 2022, 4:21 PM), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-869.html [https://perma.cc/6HMH-9B5Y] [https://web.archive.org/web/20221011002851/https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-869.html].

73. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021).

74. *Id.*; *Warhol*, 11 F.4th at 26.

75. *Google*, 141 S. Ct. at 1209.

76. *Id.* at 1203.

77. *Id.*

78. *See, e.g.*, Perfect 10, Inc. v. Yandex N.V., 962 F. Supp. 2d 1146, 1154 (N.D. Cal. 2013); Calkins v. Playboy Enters. Int'l, Inc., 561 F. Supp. 2d 1136, 1140 (E.D. Cal. 2008); 321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d 1085, 1090 (N.D. Cal. 2004).

79. Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 32–33 n.1 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

80. *Id.* at 51.

C. THE FUTURE FACE OF COPYRIGHT LAW

This brings us to our important question: who will be the future face of copyright law? Can non-humans assert copyright protection too?

The above photograph is a selfie of Naruto, a monkey living on a reserve in Indonesia. In 2011, wildlife photographer David Slater left his camera unattended in the reserve.[81] Naruto came across the unattended camera and took several photographs of himself with Slater's camera.[82] Slater published a book called the *Monkey Selfies* that included this image.[83] Slater saw himself as the creative mind behind the photograph and thus the rightful copyright owner.[84] The United States Copyright Office saw it differently, deciding that the monkey was the creator but that a non-human creator cannot hold a copyright.[85]

People for the Ethical Treatment of Animals (PETA) later sued Slater on Naruto's behalf, arguing that Naruto owned the copyright and that Slater, along with the other defendants, were infringers.[86] Jurisdictional questions plagued the proceedings: do monkeys have standing to assert copyright protection? On appeal, the Ninth Circuit held that the answer is no, and dismissed the case without having the opportunity to the other novel legal questions that the case presented.[87]

81. Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018).

82. *Id.*

83. DAVID J. SLATER, WILDLIFE PERSONALITIES (2014).

84. Brief for Appellant-Defendant at 12, Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018) (No. 16-15469), 2016 WL 4585006, at *4 ("[Plaintiff] insults all professional photographers with the suggestion that seeing your reflection in a lens and pressing a shutter button—by itself—entitles one to a copyright for the photograph, even when someone else made the critical artistic decisions that resulted in a photographic work adored by millions worldwide.").

85. U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 313.2 (3d ed. 2014); *see also* Maria A. Pallante, *From Monkey Selfies to Open Source: The Essential Interplay of Creative Culture, Technology, Copyright Office Practice, and the Law*, 12 WASH. J.L. TECH. & ARTS 123, 123–29 (2017).

86. *See generally Naruto*, 888 F.3d 418.

87. *Id.* at 425.

The questions underlying non-human copyright are not limited to animals. Developments in artificial intelligence (AI) have also challenged the boundaries of copyright law. The above artwork, titled *A Recent Entrance to Paradise*, is one such example of AI's artistic potential.[88] The author of the computer code disclaimed any human involvement in the artwork's creation, explaining that it was "autonomously created by a computer algorithm running on a machine."[89] He sought to challenge the Copyright Review Board's "human authorship requirement [as] unconstitutional and unsupported by case law."[90] However, the Copyright Review Board refused to budge: it denied registration for *A Recent Entrance to Paradise*, emphasizing that "the nexus between the human mind and creative expression" is a vital element of copyright.[91] Thus, early signs suggest that AI-generated works will not be subject to copyright because, like our friend Naruto, they lack the necessary human element.[92] Yet, as AI becomes a more significant part of our lives, including the lives of artists, the Board's decision here may not be the end of the story.[93]

The same question confronting the Supreme Court in 1884 circles back to us today: Can technological developments produce artistic masterpieces, or mere mechanical

88. *See* Copyright Review Board, Re: Second Request for Reconsideration for Refusal to Register a Recent Entrance to Paradise (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071), at 1 (Feb. 14, 2022).

89. *Id.* at 2.

90. *Id.* at 3.

91. *Id.* at 4, 7.

92. *Id.* at 3 ("After reviewing the statutory text, judicial precedent, and longstanding Copyright Office practice, the Board again concludes that human authorship is a prerequisite to copyright protection in the United States and that the Work therefore cannot be registered.").

93. *See, e.g.*, Tim Dornis, *Artificial Creativity: Emergent Works and the Void in Current Copyright Doctrine*, 22 YALE J.L. & TECH. 1, 59 (2020); Joanna Gill, *As AI-Generated Art Booms: Who Really Owns It?*, REUTERS (Sept. 7, 2022), https://news.trust.org/item/20220907094856-onbmp [https://perma.cc/ZF5W-ALXX] [https://web.archive.org/web/20221014024913/https://www.context.news/ai/as-ai-generated-art-booms-who-really-owns-it].

reproductions?[94] Will works created by animals and computer codes be embraced or land in the copyright dust pile? We must wait to see if Congress steps in to extend the copyright universe or if the Supreme Court takes up this issue in a future term.

III. MUSIC & CREATIVITY

Let us now turn from visual art to music, a space where copyright principles have an immense impact. As with visual art, courts' analysis of whether a musical work infringes is both highly technical and instinctual. The doctrine requires judges to parse distinct elements of a musical composition and to decide whether certain musical elements may be considered non-protectable as a matter of law or are best determined by a jury.

The way that courts come down on these questions has significant implications both for the development of new musical works and for the fair compensation of musicians. Copyright has long had major impact on musicians' compensation. Famously, after the introduction of copyright protection in Italy, Giuseppe Verdi was able to amass "a considerable fortune"—so much so that he stopped composing entirely.[95] Likewise, Johannes Sebastien Brahms began earning vast sums from his compositions and retired early.[96] Because economic stakes are high, the steady stream of high-profile copyright disputes is no surprise, from Chuck Berry to the Beach Boys to Katy Perry.[97] Contemporary cases continue to confront whether and which new artists can take inspiration—and even pieces of prior recordings—from the existing greats.

A. *WILLIAMS V. GAYE*

Music copyright has a long and winding history, but today, two things are clear: both physical musical scores and sound recordings are copyrightable.[98] What remains an open question is whether copyright law extends beyond musical scores and sound recordings to include the more abstract concept of musical style.

Just four years ago, the Ninth Circuit fostered uncertainty about the answer to that question in one of the most influential and controversial copyright cases of our time: *Williams v. Gaye*.[99] The case involved two highly popular musical works: Marvin Gaye's

94. *See supra* Part I.

95. Peter K. Yu, *How Copyright Law May Affect Pop Music Without Our Knowing It*, 83 UMKC L. Rev. 363, 363 n.3 (2014) (quoting WILLIAM F. PATRY, HOW TO FIX COPYRIGHT 36 (2011)); *see also* F.M. Scherer, *The Emergence of Musical Copyright in Europe from 1709 to 1850*, 5 REV. ECON. RES. ON COPYRIGHT ISSUES 3, 11 (2008).

96. *Id.*; *see also* JAN SWAFFORD, JOHANNES BRAHMS 343–45 (2012).

97. *See e.g.*, Jordan Runtagh, *Songs on Trial: 12 Landmark Music Copyright Cases*, ROLLING STONE MAG. (June 8, 2016), https://www.rollingstone.com/politics/politics-lists/songs-on-trial-12-landmark-music-copyright-cases-166396/the-beach-boys-vs-chuck-berry-1963-65098 [https://perma.cc/9CND-7WHN] [https://web.archive.org/web/20221014025208/https://www.rollingstone.com/politics/politics-lists/songs-on-trial-12-landmark-music-copyright-cases-166396/the-beach-boys-vs-chuck-berry-1963-65098]; Gray v. Perry, No. 2:15-cv-05642-CAS-JCx, 2020 WL 1275221 (C.D. Cal. Mar. 16, 2020).

98. *See, e.g.*, Skidmore v. Zeppelin, 952 F.3d 1051, 1061–1063 (9th Cir. 2020).

99. 895 F.3d 1106 (9th Cir. 2018).

enduring hit, "Got to Give it Up" (1977), and Pharrell Williams's and Robin Thicke's modern favorite "Blurred Lines" (2013).[100] The dispute highlights the importance of "who decides"—courts or juries. The "Blurred Lines" case came to the Ninth Circuit after a jury found that Thicke and Williams infringed on Gaye's song.[101] A divided panel of the court affirmed, upholding a jury award of over five million dollars as well as a piece of future royalties from "Blurred Lines."[102]

However, the case drew a vigorous dissent, which claimed that the majority "allows the Gayes to accomplish what no one has before: copyright a musical style."[103] The dissent contended that Blurred Lines' use of the repeated notes was not copyright infringement but fair use of the building blocks of music.[104] Because such building blocks are unprotectable as a matter of law and thus do not require factual inquiry, the dissent would have resolved the case in a summary judgment posture rather than permitting it to proceed to the jury.[105]

The dissent drew comment among both artists and attorneys. Some musicians worried that the opinion's reasoning would allow copyright law to cover a musical "style" and proscribe publishing music legitimately inspired by prior works.[106] Meanwhile, some legal thinkers expressed concern that courts taking it into their own hands to resolve these extremely challenging, fact-bound questions could threaten an important constitutional and procedural check.[107]

B. *SKIDMORE V. LED ZEPPELIN*

Another high-profile case illustrates the important role that a jury can play in copyright matters. Decades after the release of both songs, Randy Wolfe's estate claimed that Led Zeppelin's famous song "Stairway to Heaven" infringed on Wolfe's song "Taurus."[108] Trial was a battle of the experts, with each side explaining the basics of music composition, arpeggios, and the like.[109] Weighing these complex factual questions, the jury concluded that the two songs were not substantially similar and

100. *Id.* at 1115.

101. *Id.*

102. *Id.* at 1138.

103. *Id.* (Nguyen, J., dissenting).

104. *Id.* (Nguyen, J., dissenting).

105. *See id.* at 1138–52 (Nguyen, J., dissenting).

106. *See* Ed Christman, *'Blurred Lines' Verdict: How It Started, Why It Backfired on Robin Thicke and Why Songwriters Should Be Nervous*, BILLBOARD (Mar. 13, 2015), https://www.billboard.com/articles/business/6502023/blurred-lines-verdict-how-it-started- why-it-backfired-on-robin-thicke-and [https://perma.cc/3MA2-AHU4] [https://web.archive.org/web/20221014025304/https://www.billboard.com/pro/blurred-lines-verdict-how-it-started-why-it-backfired-on-robin-thicke-and].

107. *See* Olivia Lattanza, Note, *The Blurred Protection for the Feel or Groove of a Song Under Copyright Law: Examining the Implications of* Williams v. Gaye *on Creativity in Music*, 35 TOURO L. REV. 723, 726 (2019) (asserting that "the Ninth Circuit's affirmance of the jury's decision inappropriately expanded the scope of copyright protection to the feel or groove of a song," which will "substantially diminish the creative output of artists."); *see also* John Quagliarello, *Blurring the Lines: The Impact of* Williams v. Gaye *on Music Composition*, 10 HARV. J. SPORTS & ENT. L. 133, 141–45 (2019).

108. Skidmore v. Zeppelin, 952 F.3d 1051, 1056 (9th Cir. 2020).

109. *See id.* at 1058.

found in favor of Led Zeppelin.[110] On appeal, the Ninth Circuit en banc upheld the verdict, in an opinion that I authored.[111]

Although Wolfe's copyright was filed under an earlier version of the copyright law, several key principles emerged that remain important. Skidmore—the Wolfe Trustee and the appellant in the case—claimed that the opening five chromatically descending notes of *Stairway to Heaven* are substantially similar to the eight-measure introduction of the *Taurus* score deposited with the copyright office.[112] Skidmore's expert musicologist listed another of five categories of "unique and memorable" elements that *Stairway to Heaven* drew from *Taurus*.[113]

The case also confronted the enduring question of when building blocks of music—"'common or trite' musical elements" or "common place elements" that belong in the public domain—become copyrightable original composition.[114] As I explained in the opinion, "'[D]escending chromatic scales, arpeggios or short sequence of three notes' are examples of 'common musical elements.'"[115] The chromatic scale, even a minor descending chromatic scale, is individually unprotectable because it is one of only two principal scales in Western music and is composed of only twelve pitches.[116] Likewise, chords and arpeggios are individually unprotectable elements because they are simply three or more pitches sounded simultaneously or successively.[117]

The Ninth Circuit delved into a "substantial similarity" inquiry as in *Rentmeester*.[118] Once again, the devil was in the details. Even though common building blocks may be insufficient to be a "'modicum' of 'creative spark,'" there can be an "original selection and arrangement of unprotected elements" as a basis for the substantial similarity comparison.[119] The clincher in *Skidmore* was that Wolfe's estate failed to argue a selection and arrangement theory and failed to object to the district court's decision to omit a jury instruction on such a theory.[120]

One week after the Ninth Circuit issued *Skidmore*, its lessons were put to the test.[121] A rapper known as Flame claimed Katy Perry's hit song *Dark Horse* infringed his *Joyful Noise* song.[122] The jury sided with Flame, awarding $2.8 million, but the Central

110. Skidmore v. Led Zeppelin, No. CV1503462RGKAGRX, 2016 WL 6674985 (C.D. Cal. Aug. 8, 2016), *vacated and remanded sub nom.* Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 905 F.3d 1116 (9th Cir. 2018), *aff'd en banc sub nom.* Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051, 1056 (9th Cir. 2020).

111. *Skidmore*, 952 F.3d at 1055–56.

112. *Id.* at 1057–58.

113. *Id.* at 1059.

114. *Id.* at 1069 (first quoting Smith v. Jackson, 84 F.3d 1213, 1216 n.3 (9th Cir. 1996), then quoting Williams v. Gaye, 895 F.3d 1106, 1140–41 (9th Cir. 2018) (Nguyen, J., dissenting)).

115. *Id.* at 1070.

116. *Id.*

117. *Id.*

118. *See generally id.*

119. *Id.* at 1071 (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 341, 362 (1991)), 1074 (quoting Apple Comput., Inc. v. Microsoft Corp., 35 F.3d 1435, 1446 (9th Cir. 1994)).

120. *Id.* at 1076.

121. *See* Gray v. Perry, No. 2:15-cv-05642-CAS-JCx, 2020 WL 1275221 (C.D. Cal. Mar. 16, 2020), *aff'd*, 28 F.4th 87, 103 (9th Cir. 2022).

122. *Id.* at *1.

District of California ultimately vacated the verdict and damages award.[123] The case illustrates the monetary and musical stakes of this issue, as well as the continually complex dynamic between trial judges and juries.

C. *THIS LAND IS YOUR LAND*

Woody Guthrie's ballad *This Land is Your Land* is a catchy American folk classic, but it is also a sharp political commentary. On the heels of the Great Depression, Guthrie felt that Irving Berlin's *God Bless America* "inadequately addressed land and wealth inequality," so he wrote an anthem that presented a truer portrait of America.[124]

Little did Guthrie know that his own protest ballad would become the basis for one of the most popular riffs in modern politics—one that its creators claimed was a parody.[125] In 2007, the digital entertainment studio JibJab created the "parody" video in the run up to the Bush-Kerry election, and it has since garnered more than five million views on YouTube.[126] According to its creators, the video has been viewed on every continent, including Antarctica, and even on the International Space Station.[127] There was only one problem: JibJab never licensed Guthrie's music.[128]

A messy dispute over exactly who did own Guthrie's song ensued.[129] Ludlow Music, Inc., a music publishing company, claimed it had owned the song since filing for copyright in 1956.[130] Unbeknownst to Ludlow, however, Guthrie had published the song in 1945, which triggered its copyright protection. Under the then-applicable laws, the copyright protection extended for twenty-eight years, with an option for one

123. *Id.* at *1, *18.

124. Niraj Chokshi, *Who Owns the Copyright To 'This Land Is Your Land'? It May Be You and Me*, N.Y. TIMES (June 17, 2016), https://www.nytimes.com/2016/06/18/business/media/this-guthrie-song-is-your-song-a-lawsuit-claims.html [https://perma.cc/2PGJ-2FL3] [https://web.archive.org/web/20221021012441/https://www.nytimes.com/2016/06/18/business/media/this-guthrie-song-is-your-song-a-lawsuit-claims.html].

125. *See* Complaint, JibJab Media, Inc. v. Ludlow Music, Inc., No. C-04-3097-(PVT) (N.D. Cal. July 29, 2004). As a parody of a parody, the JibJab video raises another safety valve in copyright. What is a parody? A parody "imitates the characteristic style of an author or a work for comic effect." Campbell v. Acuff-Rose Music, 510 U.S. 569, 580 (1994) (collecting dictionary definitions). Courts have long held that works that borrow from original works to parody them can be transformative and qualify as fair use. *See id.* at 578–80. For example, the author of *The Wind Done Gone* defended her work as a parody of *Gone with the Wind*. *'Wind Done Gone' Suit is Settled*, WASH. POST (May 10, 2002), https://www.washingtonpost.com/archive/lifestyle/2002/05/10/wind-done-gone-suit-is-settled/2c3cdd51-dc94-4b15-8f1c-c5926302997d [https://perma.cc/SH4Q-27MN] [https://web.archive.org/web/20221103211640/https://www.washingtonpost.com/archive/lifestyle/2002/05/10/wind-done-gone-suit-is-settled/2c3cdd51-dc94-4b15-8f1c-c5926302997d].

126. *See* JibJab, *This Land!*, YOUTUBE (Nov. 16, 2007), https://www.youtube.com/watch?v=z8Q-sRdV7SY [https://perma.cc/PXF6-LQFX] [https://web.archive.org/web/20221021221355/https://www.youtube.com/watch?v=z8Q-sRdV7SY].

127. Jody C. Baumgartner, *American Youth and the Effects of Online Political Humor*, *in* LAUGHING MATTERS: HUMOR AND AMERICAN POLITICS IN THE MEDIA AGE 131, 133 (Jody C. Baumgartner & Jonathan S. Morris eds., 2008).

128. *See generally* Complaint, JibJab Media, Inc. v. Ludlow Music, Inc., No. C-04-3097-(PVT) (N.D. Cal. July 29, 2004).

129. Chokshi, *supra* note 124.

130. *Id.*

twenty-year renewal. Guthrie, who passed away in 1967, did not seek the renewal. JibJab claimed that the song entered the public domain after the copyright elapsed in 1973, whereas Ludlow asserted that their 1956 copyright still stood. Because the parties ultimately settled,[131] we still do not know just who owns *The Land is Your Land*—Ludlow or "you and me."[132]

IV. MASHUPS & CREATIVITY

Let us turn to another contemporary challenge—mashups. It has become increasingly common for artists, across media, to draw from a medley of preexisting works in shaping their own. Imitation may be the highest form of flattery, but it is also often a violation of copyright law. How do courts deal with these works that involve both clear copying and obvious creativity? When, if ever, is a mashup a form of fair use?

A. MASHUPS IN LITERATURE: *DR. SEUSS ENTERPRISES V. COMICMIX*

Consider another Ninth Circuit decision that I authored, *Dr. Seuss Enterprises v. ComicMix*.[133] This 2020 case pitted one of the authors of *Star Trek* against none other than Dr. Seuss. The last book that Dr. Seuss published before he passed, *Oh, the Places You'll Go!* (*Go!*), continues to top the *New York Times* Best Seller list during graduation season every year.[134] The Trekkies, enamored by Seuss's beloved children's book, wrote their own version: *Oh, the Places You'll Boldly Go!* (*Boldly*). This book borrows, boldly, from *Go!* and other works by Dr. Seuss to share the message that "life is an adventure but it will be tough."[135] However, the Trekkies never sought a license from Dr. Seuss Enterprises,[136] and they never contended in court that *Boldly* did not infringe on Dr. Seuss's work.[137] Apparently, the Trekkies thought they would be "pretty well protected" by the fair use defense, but acknowledged "people in black robes" may disagree.[138] As it so happened, we did.[139]

As in *Warhol*, the fair-use question was examined through the lens of the four statutory fair use factors. First, we looked at the purpose and characteristics of the work.[140] The panel concluded that *Boldly* was not a parody[141] because it did not comment on Seuss's original work but "simply retold" the tale "to get attention or maybe

131. *JibJab Media v. Ludlow Music ("This Land" Parody)*, ELEC. FRONTIER FOUND., https://www.eff.org/cases/jibjab-media-inc-v-ludlow-music-inc [https://perma.cc/WA47-8TTD] [https://web.archive.org/web/20221021222001/https://www.eff.org/cases/jibjab-media-inc-v-ludlow-music-inc].

132. Chokshi, *supra* note 124.

133. Dr. Suess Enters, L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020).

134. *Id.* at 449.

135. *Id.* at 448.

136. *Id.* at 450.

137. *See generally id.*

138. *Id.* at 148.

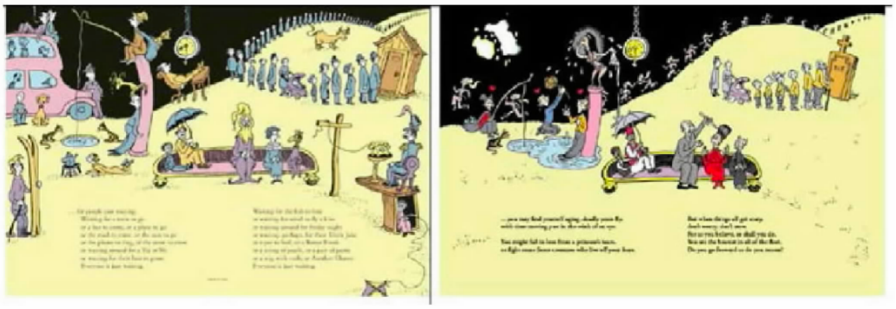
139. *Id.* at 463.

140. *See id.* at 452.

141. *Id.*

even to avoid the drudgery in working up something fresh."[142] *Boldly* likewise was not transformative.[143] Critical to our analysis was the Trekkies' repackaging of *Go!*s illustrations.[144]

The illustrations of the machines are virtually identical in color, shape, and down to the detail of the squiggly shadow mark in front.[145] The Star Trek character's movement in and out of the machine mirrors the movement of the Seussians as well.[146] The copying is obvious. The transformation is not.



In this second image, one can see how the Trekkies copied the exact composition of the famous 'waiting place' in *Go!*, down to the placement of the couch and the fishing spot.[147] Merely replacing the Seussian figures with Star Trek characters is hardly a radical transformation. With this in mind, we resolved that, "[a]lthough [the Trekkies'] work need not boldly go where no one has gone before, its repackaging, copying, and lack of critique of Seuss, coupled with its commercial use of *Go!*, do not result in a transformative use," so the first factor weighed "definitively against fair use."[148]

142. *Id.* at 452–53 (quoting Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997)).
143. *Id.* at 451.
144. *Id.* at 454–55.
145. *See id.* at 457–58.
146. *See id.* at 455.
147. *Id.* at 454–55.
148. *Id.* at 455.

The remaining statutory factors also weighed against fair use here. In particular, the amount and substantiality of the use were significant.[149] The Trekkies copied "close to 60%" of *Go!*," and "for each of the highly imaginative illustrations" the Trekkies borrowed, they "replicated, as much and as closely as possible from *Go!*, the exact composition, the particular arrangements of visual components, and the swatches of well-known illustrations."[150] Just adding something on top does not make a claimed mashup protectible.[151] Finally, the fourth factor—the potential market for or value of *Go!*—weighed against fair use.[152] The Trekkies "intentionally targeted and aimed to capitalize on the same graduation market as *Go!*."[153] Additionally, if allowed to proliferate, "[w]orks like *Boldly* would curtail *Go!*'s potential market for derivative works, and the direct market for *Go!*."[154]

The end result: the Trekkies' expression collided with the intellectual property rights of Seuss Enterprises, and the Trekkies could not escape liability with a fair use defense.

B. MASHUPS IN MUSIC: SAMPLING

Despite some critics' concerns, the panel in *Dr. Seuss Enterprises* never suggested that mashups are broadly unprotectible.[155] As judges, we must take basic copyright principles intended to apply to everything, from music scores to mashups, and look at the works in context. A good example of how copyright protection has been extended to include mashups is sampling—the art of cutting a sound bite from an existing song to create a new composition. Sampling forms the bedrock of modern hip hop and rap.[156] As one industry insider put it, "Old recordings are to the hip-hop producer what paint is to the painter—raw material to be manipulated into art."[157]

Given the variety of forms that sampling can take—from a thirty-second excerpt to a quarter-second horn beat of another's copyright-protected recording—courts need to consider how far sampling protections should extend. The answers have created a rift in the circuits, ripe for Supreme Court consideration. According to the Sixth Circuit, the rule is simple: "Get a license or do not sample."[158] The Ninth Circuit expressly rejected the Sixth Circuit's approach about a decade later, holding that "the 'de minimis' exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions."[159]

149. *Id.* at 456.
150. *Id.* at 456–58.
151. *Id.* at 453.
152. *Id.* at 458–59.
153. *Id.* at 460.
154. *Id.* at 461.
155. *See generally id.*
156. *See* Tonay M. Evans, *Sampling, Looping, and Mashing . . . Oh My! How Hip Hop Music is Scratching More than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP., MEDIA & ENT. J. 845 (2011).
157. JOSEPH G. SCHLOSS, MAKING BEATS: THE ART OF SAMPLE-BASED HIP HOP 23 (2004) (quoting "Mr. Supreme," a consultant in the industry).
158. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005).
159. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016).

The split garnered significant attention in legal circles.[160] Critics of the Sixth Circuit decision argued it would stymie new forms of expression by making it nearly impossible to create certain music. For example, intellectual property scholar Tim Wu argues that the costs of the Sixth Circuit's bright-line rule vastly outweigh the benefits because of the pervasiveness of sampling in rap and hip-hop music.[161] For its part, the Sixth Circuit contends that its decision would not "stifl[e] creativity in any significant way."[162] Artists could recreate sounds in their studios and market forces are likely to "control the license price and keep it in bounds."[163] Given the dispute between the circuits, it may be only a matter of time before the Supreme Court delves into the music sampling arena.

V. CONCLUSION

We come full circle back to the question of creativity and copyright. Congress has set out the basic framework for copyright, but it is the courts' interpretations of resulting questions that put the meat onto the statute's bones. And the answers are often far from clear. Recognizing that copyright is intended to strike a delicate balance between providing protection to incentivize creators and providing avenues for inspiration to promote creativity, the copyright principles and factors cannot be applied in a rote manner; rather, courts need to respond to context and nuance.

Even though judges are not art critics, we need to look critically at the facts of each case. Indeed, facts matter, even in the courts of appeal. We, too, face the challenge of applying an often-outdated statutory construct to new mediums and works. Over the last two centuries of copyright, there has been a fascinating dance between the courts and Congress as to the scope of copyright occasioned by advances in technology. The question here is who will make the next move—Congress or the courts?

160. *See, e.g.*, Lesley Grossberg, *A Circuit Split at Last: De Minimis Exception*, AM. BAR ASSOC. INTELL. PROP. LITIG. PRAC. POINTS (June 21, 2016); Spencer K. Gray, *Circuit Split: An Efficient Rule To Govern the Sampling of Sound Recordings*, 106 KY. L. J. ONLINE (Jan. 26, 2018).

161. Tim Wu, *Jay-Z Versus the Sample Troll: The Shady One-Man Corporation That's Destroying Hip-Hop*, SLATE (Nov. 16, 2006), https://slate.com/culture/2006/11/the-shady-one-man-corporation-that-s-destroying-hip-hop.html [https://perma.cc/5EPD-389F] [https://web.archive.org/web/20221021072001/http://www.slate.com/favicon.ico] ("Early rap, like Public Enemy, combined and mixed thousands of sounds in a single album. That makes sense musically, but it doesn't make sense legally. Thousands or even hundreds of samples, under the *Bridgeport* theory, mean thousands of copyright clearances and licenses. Today, Public Enemy's breakout album, *It Takes a Nation of Millions to Hold Us Back*, would cost millions to produce or, more likely, would never have been made at all.").

162. *Bridgeport*, 410 F.3d at 801.

163. *Id.*