Rearrange, Transform, or Adapt: A Few Notes on Music

Jacqueline C. Charlesworth*

TRANSCRIPT

Good morning, I'm Jacqueline Charlesworth. I want to thank everyone who worked so hard to put this symposium together and for inviting me here today. It's great to see so many familiar faces speaking about one of my favorite topics, and specifically about music.

Although music—by which I mean both musical works and sound recordings—is governed by the same Copyright Act as other creative works, it occupies its own special territory within our copyright system (yes, we music lawyers like that).

Music has an immediate emotional resonance that is unique. A memorable musical phrase can serve as inspiration for and as a core component of a new work, audio-only or audiovisual. Even a brief excerpt from a song—for example, a few notes comprising its "hook"—can be instantly recognizable and compelling to the public.

What is more, every musical creator out there has access to the tools to incorporate earlier works into their own at their fingertips. But those in the throes of creative passion may not appreciate the risk of borrowing.

This sounds like a recipe for lots and lots of music litigation involving questions of fair use, but that's not the reality. Yes, there is a good amount of litigation involving claimed copying, but fair use claims involving music are relatively small in number, especially when one considers the enormous volume of music derivatives, both professional and user-generated. In a 2018 article, *Fair Use Avoidance in Music Cases*,[1] Professor Edward Lee

* Principal, Charlesworth Law. J.D., Yale Law School.

1. Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873 (2018).

confirmed, based on empirical research, that fair use is rarely litigated in copyright cases involving musical works. Apart from a few parody cases, he identified only a single ruling on fair use (and that case arose from a spoken-word interlude).[2] As a second data point, there are fewer music cases listed in the Copyright Office index of fair use decisions than there are cases involving visual art, films, or photographs. Indeed, in recent high-profile disputes we've all heard about—for example, the "Blurred Lines"[3] and "Stairway to Heaven"[4] cases—no fair use defense was asserted.[5]

Why would this be? I would suggest a few reasons for this phenomenon.

First, I would characterize the dearth of precedent in this area as not so much a question of "fair use avoidance" as litigation avoidance, made possible by the well-established music industry protocols for licensing of derivative uses (to which I will turn in a moment). In addition to more substantial uses, the custom and practice of the industry is to license even brief excerpts of music that in the case of other types of works might attract a fair use defense. Where a party is successful in establishing copying of a prior work to create a commercially successful recording (as the Marvin Gaye estate did in the "Blurred Lines" case), it is difficult to see—whether pre- or post-*Warhol*[6]—how a fair use claim would be likely to succeed absent a claim of parody or other commentary.[7]

If use of an underlying work is extremely abbreviated (lasting less than a second, for example) and unlikely to be recognizable to the average listener, a defendant might be better off asserting a de minimis rather than fair use defense. A de minimis defense was upheld by the Second Circuit in the *VMG Salsoul v. Ciccone* case,[8] where Madonna was sued for sampling "horn hits" of less than a second in duration from plaintiff's recording and using them in modified form in her hit song "Vogue."[9] The court held that an ordinary listener would not perceive the appropriation.[10] On the other hand, there is the earlier 2005 decision of the Sixth Circuit in *Bridgeport Music v. Dimension Films*,[11] in which that court held that there is no de minimis defense to unauthorized sampling of a sound recording.[12]

2. *Id.* at 1878.
3. Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).
4. Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020) (en banc).
5. Lee, *supra* note 1, at 1899–1900.
6. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).
7. Here I part ways with Professor Lee, who finds the lack of fair use precedent in the context of music puzzling. *See* Lee, *supra* note 1, at 1877.
8. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016).
9. *See id.* at 874, 878–80.
10. *Id.* at 880.
11. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).
12. *Id.* at 800–01.

The second reason I see for the dearth of litigated fair use disputes is that music (that is, the musical part of music) does not translate easily into words. Words are the instrument of analysis and currency of our legal system. But with music, we typically rely on experts—often competing experts—to try to explain to lay judges and juries how and why a composition or sound recording has been copied. This adds another layer of uncertainty on top of the already fluid concept of fair use.

If there are lyrics involved in the taking, it is more feasible for a court or jury to assess whether the use is parodic, as in *Campbell*,[13] or whether it otherwise offers commentary on the underlying work. But if you are speaking only of musical notes or instrumentation, how do you demonstrate that a secondary use comments on or criticizes those elements? Even under a more forgiving pre-*Warhol* standard of transformativeness, how would you articulate the claimed new message or meaning? Though it may be theoretically possible, it is difficult to imagine a musicologist explaining to a judge or jury how some notes parody others.

The unique conventions of the music industry are especially apparent when it comes to the treatment of derivative works. Although the basic tenets of copyright stand as tall trees in the forest we know as music law, it is in fact a thick undergrowth of custom and practice that largely regulates the creation and use of music derivatives. Drawing on the section 106 rights of reproduction, distribution, performance, display[14]—and of course the right to prepare derivative works—the music industry has devised subspecies of the exclusive rights listed in the Copyright Act to define and authorize the exploitation of music in follow-on works.

I assume most of you are familiar with the synchronization right, the right to reproduce music in conjunction with visual content. This well-recognized form of exploitation, representing a combination of the reproduction and derivative work rights, is nowhere to be found in the Copyright Act. Yet record companies and music publishers have whole departments devoted to reviewing and negotiating licenses for synch uses in television, film, and commercials. The synch right is also the basis of catalog-wide licensing deals with platforms like YouTube that host user-posted content incorporating music. Indeed, elaborate rights clearance mechanisms have developed around such synch uses, most notably YouTube's Content ID tool,[15] which allows rights owners to monetize or block the use of their

13. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

14. *See* 17 U.S.C. § 106.

15. *See generally How Content ID Works*, YouTube Help, https://support.google.com/youtube/answer/2797370?hl=en [https://perma.cc/B325-ZE7D] [https://web.archive.org/save/https://support.google.com/youtube/answer/2797370?hl=en] (last visited Mar. 25, 2024).

content in lieu of sending takedown notices under the Digital Millennium Copyright Act.[16]

Then there is the somewhat more obscure concept of grand rights in a musical work, also not mentioned in the Copyright Act, which address the right to perform the work in a dramatic context, for example, in a musical or theatrical rendition. As grand rights are not included in a blanket performance license issued by ASCAP or BMI, those seeking to create and stage dramatic performances of musical works apply to the copyright owner for a negotiated license.

No doubt you are all familiar with the common practice of sampling an existing sound recording to incorporate an excerpt into a new recording—though perhaps less familiar with its sister act, interpolation, which refers to the analogous use of an excerpt of a musical work, either in connection with the sampling of a sound recording in which it is embodied or by rerecording it as part of a new work. The licensing market for samples and interpolations is highly evolved in the industry. Depending upon the use—which may involve just a memorable phrase or "hook" from the underlying work, or a significantly longer selection, the license might call for a one-time buyout, an ongoing share of royalties, or the grant of a partial copyright interest in the new work to the owner of the earlier one.

In sum, despite its idiosyncratic sub-rights and rituals, there are well-traveled paths through the woods of music law that support a thriving marketplace for music derivatives. Rather than spend time and money litigating uncertain issues of infringement or fair use, industry players tend to negotiate licenses to resolve potential claims. In many cases it is less expensive to agree to a license than litigate in federal court. Rights holders with a large catalog of works will likely be on both the giving and receiving ends of these sorts of transactions. Logically, unless the stakes are very high, it often makes sense to keep the money in the industry rather than share it with the lawyers.

In sum, although *Warhol*'s clarification of transformative use may be helpful to the occasional music owner facing a claim of fair use, overall, I believe the market for music derivatives can be expected to continue much as it has.

That said, there are a few aspects of *Warhol* worth highlighting in relation to music, including whether its interpretation of transformative use would have caused some of the limited number of music fair use precedents to turn out differently had they been litigated today.

In offering these thoughts, I want to clarify that I do not see a line, fine or otherwise, between derivative works and works deemed to constitute a fair use. Most (though not all) claims of fair use involve the creation of a

16. *See* 17 U.S.C. § 512 (DMCA notice and takedown provisions).

derivative from a preexisting work. In my mind the question is not whether the derivative line has been crossed, but whether the derivative at issue qualifies as a fair use under the statutory test.

Although I was not surprised that the Supreme Court granted certiorari, a dispute involving the works and legacy of Andy Warhol may not have been the easiest pick as the case in which to revisit the fair use doctrine. Justice Kagan's strident dissent to the majority opinion might best be summed up as, "But it's a Warhol!"[17] In rereading Justice Sotomayor's majority opinion, however, I believe it was likely strengthened by having to grapple with Kagan's passionately held view that art has intrinsic merit and meaning that is ascertainable by a court (albeit with the help of an expert or two), and that courts should engage in just such analysis in assessing whether a use is transformative. Given Warhol's iconic status in the art world, it was not surprising that Warhol's derivative use of Goldsmith's photo passed Kagan's transformative test with vivid, flying colors.[18]

The significant correction made by the *Warhol* majority was not just reining in the concept of transformative use but reining in the very sorts of subjective judgments of transformativeness that Justice Kagan found so compelling. Although surely never intended by the *Campbell* Court or Judge Leval in his famous article,[19] in some pre-*Warhol* cases the question of transformativeness had been reduced simply to a question of whether the secondary user altered or added meaning to the underlying work.

Indeed, this was exactly what the Warhol Foundation argued in *Warhol*[20]—and something that can be said of virtually any derivative work by some expert somewhere. Invoking the enduring wisdom (and democratizing spirit) of the Supreme Court's 1903 *Bleistein* decision,[21] Justice Sotomayor's opinion flatly rejects attempts to "evaluate the artistic significance of a particular work"[22] and makes clear that judges "'should not assume the role of art critic.'"[23]

This command was expressly followed in one of the first fair use decisions to follow *Warhol*, *Sedlik v. Von Drachenberg*,[24] involving the unlicensed use of a photo to create a tattoo. On a motion for reconsideration, the district court rejected the tattoo artist's transformative use argument,

17. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 558–93 (2023) (Kagan, J., dissenting).

18. *See id.* at 560–66.

19. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

20. *See Warhol*, 598 U.S. at 539–41.

21. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

22. *Warhol*, 598 U.S. at 544.

23. *Id.* (quoting decision below, Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F. 4th 26, 41 (2d Cir. 2021)).

24. Sedlik v. Von Drachenberg, No. CV 21-1102 DSF (MRWx), 2023 U.S. Dist. LEXIS 183184 (C.D. Cal. Oct. 10, 2023).

explaining that the court's prior analysis had improperly "'assess[ed] the aesthetic character of the resulting work,' instead of focusing on the purpose of its use as required by *Warhol*."[25]

This is a marked development in the law of fair use. Assuming other courts similarly retrain their focus on fundamental transformative categories such as criticism, commentary, and parody—as such can be reasonably and objectively perceived—I am hopeful we will see more predictable outcomes and fewer outlier fair use cases going forward.

I am reminded here of a 2017 case, *Estate of Smith v. Cash Money Records*,[26] in which the estate of deceased jazz musician Jimmy Smith sued popular recording artist Drake and others for incorporating a thirty-five-second excerpt from a spoken-word track taken from one of Smith's albums in a Drake release. The excerpt was reproduced largely verbatim, though with Smith's original statement, "Jazz is the only real music that's gonna last," edited to become "Only real music is gonna last."[27] The court found the use transformative because, in its words, Drake had turned Smith's "brazen dismissal of all non-jazz music into a statement that 'real music,' with no qualifiers, is 'the only thing that's gonna last.'"[28] In so doing, the court rebuffed the Smith estate's objection that the typical Drake listener would not recognize the obscure original as Smith's, let alone perceive supposed commentary on it. With all due respect to my music attorney colleagues who won this case for Drake and his cohorts, this was a prime example of transformativeness gone awry. I hope that under the clarifying light of *Warhol* this case would come out differently today.

By contrast, although it didn't make the music community happy, an earlier 2008 case, *Lennon v. Premise Media Corp.*,[29] made more sense in concluding that a fifteen-second use of John Lennon's song "Imagine" in a documentary film questioning the theory of evolution was a fair use.[30] The musical excerpt, which followed remarks by several speakers expressing negative views about religion, was accompanied by a display of Lennon's lyrics, "Nothing to kill or die for/And no religion too."[31] The court held that the use of Lennon's music was transformative because it was for purposes of criticism and commentary.[32] I don't see anything in *Warhol* that would alter this particular outcome.

25. *Id.* at *7–13 (but noting other triable issues under the fair use factors).
26. Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737 (S.D.N.Y. 2017).
27. *Id.* at 749.
28. *Id.* at 749–50.
29. Lennon v. Premise Media Corp., 556 F. Supp. 2d 310 (S.D.N.Y. 2008).
30. *Id.* at 327.
31. *Id.* at 317.
32. *Id.* at 322–23.

The *Warhol* majority accepted Goldsmith's invitation to remove the Warhol elephant from the room (or ignore the elephant, from Justice Kagan's perspective) by excluding Warhol's original creations from consideration and evaluating only the magazine uses.[33] While it is difficult to predict how the majority's emphasis on specific commercial purpose will play out in the lower courts, it seems that in future cases there may be less focus on the artistic process behind a derivative and more on particular uses of the derivative—more slicing and dicing within the fair use analysis, as it were. Prospective plaintiffs—music and non-music alike—may become more specific in their pleadings, and we may see more splintered fair use analyses as courts sort through different manifestations of the same unauthorized work.

Such an approach is evident in a pre-*Warhol* case in which recording artist Nicki Minaj successfully defended against one of the claims in an infringement action brought by musician Tracy Chapman, *Chapman v. Maraj*.[34] After Minaj "experiment[ed]" with one of Chapman's songs to create a new track, Chapman declined Minaj's repeated requests to license a derivative and the track was excluded from Minaj's forthcoming album.[35] Somehow, however, the unlicensed track was transmitted to a deejay, who played it on his show.[36] Sued over both the creation and distribution of the unauthorized derivative, Minaj argued that her use of Chapman's song for the purpose of exploring the possibility of a new work for potential release should be considered noninfringing.[37] The court agreed, holding that Minaj's "artistic experimentation" qualified as fair use, especially given the industry's general practice of providing a proposed track to the original artist for approval before seeking a license.[38] Would *Warhol* have changed the outcome here? It's hard to see that it would have, given the court's determination that Minaj's use of Chapman's song to create the unreleased track was only "incidental[ly] commercial" and did not "usurp any potential market" for Chapman's work.[39]

Last but not least, as we move into campaign season again, it seems appropriate to highlight one final aspect of the *Warhol* decision, namely the

33. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 534 (2023).

34. Chapman v. Maraj, No. 2:18-cv-09088-VAP-SSx, 2020 U.S. Dist. LEXIS 198684 (C.D. Cal. Sept. 16, 2020). Maraj is Minaj's actual last name.

35. *Id.* at *16–17.

36. *Id.* at *17–21.

37. *See id.* at *22, *27–28

38. *See id.* at *16, *28–30, *33. It does not appear Minaj asserted a fair use defense with respect to the distribution claim (and the court did not grant her judgment on that). *Id.* at *33–34.

39. *Id.* at *32–33.

majority's reiteration of the distinction between parody and satire[40]—a significant point that is also made, but less prominently, in *Campbell*.[41] This distinction exemplifies what I view as a (perhaps the) core principle of fair use: that there has to be a reason you are using the underlying work to achieve your purpose—*that* work, not just any work that might be a useful vehicle for your expression.

On the modest roster of fair use cases involving music, the handful of parody cases stand out, led by *Campbell*, of course. In *Campbell,* there couldn't be much of a question that 2 Live Crew was targeting Roy Orbison's well-known song—the lyrics were (pretty graphically) clear.[42] But in another case I litigated a while back, *Henley v. DeVore*,[43] the distinction between parody and satire was critical. In that case, California senatorial candidate Chuck DeVore rewrote the lyrics to two Don Henley songs, taking aim at Barack Obama and Barbara Boxer, and posted videos featuring the altered songs on YouTube and other sites as campaign ads.[44] Because the ads mocked Obama and Boxer rather than the songs themselves, the district court determined that they fell on the satire side of the line, and rejected the defendants' claim of fair use.[45]

More recently, a New York court, ruling on a motion to dismiss, relied on *Henley* to reject a transformative use claim in a case brought by the musician Eddie Grant against Donald Trump, *Grant v. Trump*.[46] Grant sued over Trump's use of his song in a 2020 animated campaign ad depicting Trump on a high-speed train and Biden on a handcar, with Grant's music playing in the background.[47] As the unauthorized use of music by politicians seems to be a perennial election season affliction, it is a good thing for musicians that the *Warhol* majority doubled down on the parody/satire distinction.

40. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 530–33, 542–43 (2023).
41. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580–81 (1994).
42. *See id.* at 595–96 (Appendix B).
43. Henley v. DeVore, 733 F. Supp. 2d 1144 (C.D. Cal. 2010).
44. *Id.* at 1148–49.
45. *Id.* at 1157–58.
46. Grant v. Trump, 563 F. Supp. 3d 278, 284–86 (S.D.N.Y. 2021).
47. *Id.* at 282–83.