Bring Back the Noise: How *Cariou v. Prince* Will Revitalize Sampling

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INTRODUCTION

In 1988, John Carlin argued in an article in this Journal that fair use should be extended to cover works of appropriation art so as to protect appropriative artists from claims of copyright infringement.[1] He wrote that "[a]n extension of fair use to cover artistic use through Appropriation would not compromise either the underlying logic of copyright law, or the intent of Congress in creating a legislative exception to copyright monopoly in the fair use doctrine."[2] In 1992, artist Jeff Koons unsuccessfully argued that one of his sculptures, which borrowed heavily from a photograph he purchased in a card shop, was fair use.[3] But in 1994, the Supreme Court ruled that works of appropriation art do not inherently infringe on the original author's copyright.[4] Since then, courts have moved towards embracing Carlin's view that copyright should encourage appropriation art by accepting such art as fair use, not condemn it by finding such art to be infringement. The most recent development came from the Second Circuit in *Cariou v. Prince*, where the court of appeals embraced perhaps the most expansive interpretation of fair use of any court yet.[5] Up to this point, however, these cases have only involved visual art.

This Note seeks to track the progress that courts have made towards accepting appropriation art as fair use and argues that the reasoning from recent cases dealing with visual art can also be applied to music. Specifically, this Note argues that the legal standards for appropriation art in the visual and musical contexts have diverged, and that this should be corrected. Sampling—an integral part of the hip-hop genre—is the use of small portions of existing sound recordings to create new musical works. The practice has been the subject of several unfavorable court rulings since the 1990s, which, this Note argues, have imposed undue restrictions on the practice, particularly when compared with contemporaneous rulings in the

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1. *See generally* John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103 (1988).
2. *Id.* at 135.
3. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).
4. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
5. *See* Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

visual art context. The *Prince* ruling opens the door for courts to correct this disparity by applying the same standards of fair use in the musical *and* in the visual arts.

Part I first sets forth the general principles of the fair use standard and provides relevant background on the development of appropriation art and sampling. It then recounts how the law has responded to appropriation art and sampling and discusses the failures of the sample licensing market. Part II closely examines how the *Prince* decision interprets and develops past fair use precedent. Part III identifies how the *Prince* framework can be used to justify finding certain instances of sampling to be fair use.

I. BACKGROUND ON FAIR USE, SAMPLING AND APPROPRIATION ART

A. FAIR USE DOCTRINE

The foundation of United States copyright law is the constitutional directive to Congress "[t]o 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."[6] The stated end of copyright law is to increase the amount of knowledge and creative work available to the public. To encourage the dissemination of such works, the Constitution allows Congress to grant authors certain exclusive rights over their works. These exclusive rights, limited in time and scope, include the right to distribute copies to the public, to perform or display the work publicly, to reproduce the work, and to prepare derivative works.[7]

Because the Founding Fathers sought to provide *just enough* incentive to create, these rights have developed in a non-absolute manner to prevent certain undesirable conflicts.[8] The fair use doctrine is an equitable rule allowing the judiciary to interpret copyright laws in a way that preserves balance between the interests of artists and the public.[9] Section 107 of the 1976 Copyright Act codified the four-factor fair use test originally set forth by Justice Story in *Folsom v. March*, but it otherwise provides little instruction on what is considered fair use.[10] What has resulted is a flexible doctrine that has been adapted in various ways to prevent the

6. U.S. CONST. art. 1, § 8, cl. 1.

7. 17 U.S.C. § 106 (2012).

8. *See* SIVA VAIDHYANATHAN, COPYRIGHTS & COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 21 (2001). *But see id.*, noting that in recent decades copyright has also been viewed as a "property right."

9. *See* Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 406 (2005) (describing judicial treatment of fair use as a "safety valve" for a variety of policy, fairness and autonomy reasons).

10. *See* 17 U.S.C. § 107 (2012); Folsom v. Marsh, 9. F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (Story, J.) (articulating four-factor fair use test); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106 (1990) ("Beyond stating a preference for the critical, educational, and nonprofit over the commercial, the statute tells little about what to look for in the 'purpose and character' of the secondary use. It gives no clues at all regarding the significance of 'the nature of' the copyrighted work.").

monopoly of copyright from upending the constitutional goal of promoting the arts and sciences.[11]

As the language of the law makes clear,[12] these statutory factors are not exclusive. Courts have considered other factors that they believe are relevant to determining fair use.[13] Over the last twenty years, there have been immense changes in the types of uses that courts have found to be fair. One of the areas that has undergone drastic change is that of appropriation art, where artists have attempted to expand the boundaries of fair use in an effort to legitimize their work.

B. HISTORY OF SAMPLING & CASE LAW

Sampling is the act of incorporating portions of existing sound recordings into a new musical composition.[14] By its very definition, sampling is a form of appropriation art. Hip-hop music was initially created by DJs, who would use two turntables, both playing the same record, to extend a particular section of music for a lengthened period.[15] DJs would isolate and extend a song's "break"—the section where only the drummer was playing—allowing room for the Master of

11. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (stating that the fair use doctrine "'permits [and requires] 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'" (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990))).

12. The statutory section reads:

> [T]he 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 fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (2012).

13. *See Campbell*, 510 U.S. at 579 (emphasizing the importance of "transformative use" in the fair use analysis). Congress intended this rule to be applicable on an ad hoc basis, particularly to facilitate responsiveness to rapid technological changes. H.R. REP. NO. 94-1476, at 67 (1976) ("The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.").

14. Bruce J. McGiverin, Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1724 (1987).

15. KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 69 (2005) [hereinafter MCLEOD, FREEDOM OF EXPRESSION]. As a historical note, there are many known instances of sampling prior to hip-hop. Sampling began as a technique known as "music concrète," developed by Pierre Shaeffer, a French radio broadcaster, in the 1940s. Morgan Poyau, *Original Creator: Pierre Schaeffer*, THE CREATORS PROJECT (Mar. 14, 2011), http://perma.cc/CG4C-MDPQ.

Ceremonies (MC) to address the crowd.[16] An early example of this technique was the Sugarhill Gang's "Rapper's Delight," which sampled "Good Times" by the band Chic.[17] However, instead of sampling the original sound recording, the Sugarhill Gang's producer had musicians re-record the song to use as a backing track.[18] The song became hip-hop's first radio hit, and is considered by many to have popularized the genre on an international scale.[19]

With the advent of digital samplers and the decreasing costs of electronic music equipment, sampling began to increase in complexity and prevalence.[20] These machines had the capacity to record sounds from multiple sources and then manipulate them in various ways.[21] In the late 1980s, sampling reached its apex as groups such as Public Enemy and the Beastie Boys released albums containing hundreds of samples. Hank Shocklee, a producer for Public Enemy, described the process: "[W]e were taking a horn hit here, a guitar riff there, we might take a little speech, a kicking snare from somewhere else. It was all bits and pieces."[22] The result was a collage of sound.

During this time, it was unclear to musicians, record labels and legal practitioners how courts would treat sampling with respect to copyright law.[23] Complicating this uncertainty is the fact that there are two distinct copyrights contained in a song.[24] First, there is the musical composition, which consists of the music and lyrics.[25] The author of a musical composition is generally the composer and lyricist.[26] The musical composition can be embodied in a number of ways, such as sheet music or in the form of a phonorecording.[27] The second copyright attaches to the actual sound recording of a song.[28] What this means is that if someone wanted to produce and distribute a CD of his favorite album, he would need to obtain a license from the copyright holders of both the sound recording and the underlying musical composition. These copyrights are often held by different entities: a songwriter or publishing company typically holds the rights to the musical composition, whereas sound recording copyrights are usually assigned to a

16. MCLEOD, FREEDOM OF EXPRESSION, *supra* note 15, at 71.

17. Steven Daly, *Hip-Hop Happens*, VANITY FAIR, Nov. 2005, at 250, *available at* http://www.vanityfair.com/culture/features/2005/11/hiphop200511.

18. *Id.*

19. Nile Rodgers and Bernard Edwards, who wrote "Good Times," threatened to sue the Sugarhill Gang, and the parties eventually reached a settlement whereby Rodgers and Edwards were credited as co-writers. *Id.*

20. MCLEOD, FREEDOM OF EXPRESSION, *supra* note 15, at 77; McGiverin, *supra* note 14, at 1723 n.3.

21. MCLEOD, FREEDOM OF EXPRESSION, *supra* note 15, at 77.

22. Kembrew McLeod, *How Copyright Law Changed Hip Hop*, STAY FREE! MAG. (May 31, 2004), http://perma.cc/F2P5-FUTG [hereinafter McLeod, *How Copyright Law Changed Hip Hop*].

23. The first sampling lawsuit was not brought until 1991, *see* Grand Upright Music Ltd. v. Warner Bros. Records, 780 F. Supp. 182 (S.D.N.Y. 1991).

24. U.S. COPYRIGHT OFFICE, CIRCULAR NO. 56A.0212, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS (2012), *available at* http://perma.cc/NL3M-K95R.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

record label.[29] Unfortunately, courts have struggled with this distinction. The next section will explain how courts have developed different standards for copyright infringement for sound recordings and musical compositions.

1. Sampling Lawsuits

a. Grand Upright

In the early 1990s, hip-hop's overall share of total music sales was surging, and the industry began to take notice.[30] In 1991, a federal court granted an injunction against rapper Biz Markie and Warner Brothers Records after they released the song "Alone Again," which contained portions of Gilbert O'Sullivan's musical composition "Alone Again (Naturally)."[31] Prior to releasing the song, Biz Markie attempted to secure a proper license from O'Sullivan but was rebuffed because O'Sullivan felt that Biz Markie's version did not maintain the integrity of the original.[32] In *Grand Upright Music Ltd. v. Warner Bros. Records*, the District Court for the Southern District of New York ruled that the defendant's admission of sampling was enough to constitute copyright infringement.[33] This was an unusual move. Copyright infringement cases usually require the court to determine whether the defendant's work is "substantially similar" to the plaintiff's before making a ruling.[34] Because *Grand Upright* did not contain any similarity analysis, sampling artists had "little guidance to ascertain the quantitative and qualitative threshold level for future sampling cases."[35]

After *Grand Upright*, the music industry responded by negotiating licenses before releasing any sample-based music.[36] With increasing demand, the cost for these licenses became expensive, prohibitively so for many artists.[37] Some artists, like O'Sullivan and Michael Jackson, refused to license their works.[38] Independent artists, without the backing of a deep-pocketed major record label, were at a

29. Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1669–70 (1999).

30. *See* VAIDHYANATHAN, *supra* note 8, at 133 ("In 1987, rap records represented 11.6 percent of all music sales in the United States. By 1990, rap was 18.3 percent of the music business.").

31. Grand Upright Music Ltd. v. Warner Bros. Records, 780 F. Supp. 182, 183–85 (S.D.N.Y. 1991).

32. VAIDHYANATHAN, *supra* note 8, at 142.

33. *Grand Upright*, 780 F. Supp. at 185. The parties settled after the district court's ruling and "Alone Again" was removed from future printings of the album. Biz Markie's next album was titled "All Samples Cleared." VAIDHYANATHAN, *supra* note 8, at 143.

34. *See infra* text accompanying notes 54–55.

35. Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 188 (2002) (citing Susan Upton Douglass & Craig S. Mende, *Deconstructing Music Sampling; Questions Arise as Practice Becomes Increasingly Common*, N.Y. L.J., Nov. 3, 1997, at S3.).

36. Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 727 (1992).

37. *See* MCLEOD, FREEDOM OF EXPRESSION, *supra* note 15, at 68.

38. VAIDHYANATHAN, *supra* note 8, at 140.

creative disadvantage, as they could not afford to sample well-known songs.[39] This led to a decline in both the amount of samples used and the creative progress of hip-hop music.[40] As cultural historian Siva Vaidhyanathan noted, "What sampling did occur in the late 1990s was non-transgressive, nonthreatening, and too often clumsy and obvious."[41] The high costs of sampling meant that many hip-hop acts could only afford one sample per song. What happened to artists like Public Enemy, whose entire sound was based in sampling-as-collage? Public Enemy member "Chuck D" commented on this issue in an interview:

> [Our] music was affected more than anybody's because we were taking thousands of sounds. If you separated the sounds, they wouldn't have been anything—they were unrecognizable. The sounds were all collaged together to make a sonic wall. Public Enemy was affected because it is too expensive to defend against a claim. So we had to change our whole style . . . by 1991.[42]

b. Bridgeport

The next major sampling case was decided by the Sixth Circuit in 2006. In *Bridgeport*, the court held that there was no de minimis defense to sampling a sound recording.[43] The plaintiffs allegedly owned the copyrights to the sound recording of "Get Off Your Ass and Jam" by Funkadelic.[44] A three-note, two-second sample of the song had been slowed down to alter its pitch and tempo, and extended to play for four measures in the new song "100 Miles and Runnin'" by N.W.A.[45]

The district court had agreed with the defendants that this use was de minimis, which negated the plaintiff's copyright infringement claim, and granted defendants' motion for summary judgment.[46] The Sixth Circuit reversed, holding that there was no de minimis defense to a claim of sound recording copyright infringement.[47] Although the court acknowledged that there were "no existing sound recording judicial precedents" on which to base its decision, it explained that this bright-line rule would provide parties with clear boundaries, thus increasing judicial efficiency.[48] The court wrote that the market would control the price for licenses

39. *See id.*
40. *Id.*
41. *Id.* at 143.
42. McLeod, *How Copyright Law Changed Hip Hop*, *supra* note 22.
43. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th Cir. 2005). The term "de minimis" comes from the Latin phrase *de minimis non curat lex* which translates to "the law cares not for trifles." Jeff Nemerofsky, *What Is a "Trifle" Anyway?*, 37 GONZ. L. REV. 315, 340 (2002). The de minimis principle is used in copyright cases where "it can be shown that substantial amount of the copyrighted work was not taken." Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 839–40 (M.D. Tenn. 2002).
44. *Bridgeport*, 410 F.3d at 796.
45. *Id.* (defendants were the producers of a film whose soundtrack included "100 Miles").
46. *Bridgeport*, 230 F. Supp. 2d 830, *rev'd*, 383 F.3d 390 (6th Cir. 2004), *amended on reh'g*, 410 F.3d 792 (6th Cir. 2005).
47. *Bridgeport*, 410 F.3d at 801.
48. *Id.* at 802.

and "keep it within bounds": "Get a license or do not sample. We do not see this as stifling creativity in any significant way."[49] *Bridgeport* has been criticized by observers on many grounds,[50] including the court's ignorance of the realities of the market for sample licenses.[51] Notably, the court did not consider a fair use defense, explicitly leaving the issue open for a later case, as it had not been asserted at the district court level.[52]

The foregoing discussion of *Bridgeport* relates solely to the unlicensed appropriation of a copyrighted sound recording.[53] Of course, if artists choose to sample a sound recording, they may also need to secure a license to the song's musical composition. The test for determining copyright infringement of a composition is much different from the bright-line rule enunciated by the *Bridgeport* court. Instead, the standard in the case of a composition is whether the secondary work is "substantially similar" to the original.[54] The substantial similarity test is used "after the fact of copying has been established, as the threshold for determining [whether] the degree of similarity suffices to demonstrate actionable infringement."[55] In the context of sampling, there is no dispute as to whether the secondary artist had access to and copied from a work.

c. Newton v. Diamond

The Ninth Circuit's 2002 ruling in *Newton v. Diamond* illustrates why a sampling musician does not invariably need to license the underlying musical composition.[56] The Beastie Boys sampled a six-second, three-note segment of "Choir," a song by jazz flutist James W. Newton.[57] While the Beastie Boys had obtained a license to use the sound recording, they did not license the sample's

49. *Id.* at 801.

50. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.03[B][2][b] [hereinafter NIMMER ON COPYRIGHT] (urging courts to ignore the ruling and instead apply a substantial similarity test).

51. *See* Lauren Fontein Brandes, Comment, *From Mozart to Hip-Hop: The Impact of* Bridgeport v. Dimension Films *on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 123 (2007) (describing how samples are often prohibitively expensive and the licensing process is burdensome); *id.* at 124 (samples for popular recordings can cost tens of thousands of dollars). *But see generally* Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling*, 31 COLUM. J.L. & ARTS 355, 398–402 (2008) (arguing that existing licensing schemes for sampling do not stifle creativity).

52. *Bridgeport*, 410 F.3d at 805.

53. The plaintiffs in *Bridgeport* included Bridgeport Music and Westbound Records. *Id.* at 795. Bridgeport claimed that it owned the rights to the musical composition of "Get Off Your Ass and Jam," and Westbound claimed that it owned the rights to the sound recording of that song. *Id.* at 796. The court assumed that these entities would be able to establish ownership in these respective copyrights. *Id.* The court found that Bridgeport had previously entered into a "Release and Agreement" with the original owners of the composition "100 Miles and Runnin'." *Id.* This barred Bridgeport's claims that the defendants had infringed on its copyright to the musical composition. *Id.*

54. M. Leah Somoano, Note, Bridgeport Music, Inc. v. Dimension Films*: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?*, 21 BERKELEY TECH. L.J. 289, 294 (2006) (citing Ringgold v. Black Entm't Television Inc., 126 F.3d 70, 74 (2d Cir. 1997)).

55. Ringgold v. Black Entm't Television Inc., 126 F.3d 70, 74 (2d Cir. 1997).

56. *See generally* Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004).

57. *Id.* at 1190.

underlying composition, and Newton sued.[58] The Beastie Boys raised two defenses: that the three-note segment lacked sufficient originality to warrant copyright protection and that the taking from the composition was de minimis.[59] The district court accepted both arguments and granted the Beastie Boys' motion for summary judgment.[60] The court of appeals affirmed that ruling on the ground that the taking was de minimis, asserting that "[t]he principle that trivial copying does not constitute actionable infringement has long been a part of copyright law."[61] A taking was de minimis "only if the average audience would not recognize the appropriation."[62] This standard reflects the relationship between a de minimis use and a substantially similar taking: only the latter is recognizable to the average listener.[63]

Because the Beastie Boys had licensed the sound recording, the court focused its inquiry solely as to their "appropriation of the song's compositional elements."[64] To do so, the court applied a version of the substantial similarity test that others have called "fragmented literal similarity."[65] This standard is used in cases such as *Newton v. Diamond* where a small portion of copyrighted material has been exactly copied.[66] After considering the qualitative and quantitative significance of the copied three notes in relation to the sampled song in its original form,[67] the court found that the use was de minimis. The upshot of *Newton v. Diamond* is that not all samples automatically require a license for the underlying musical composition. This takeaway will play an important role in the analysis in Part III of this Note.

2. Sampling Today

The *Bridgeport* court claimed that the sample market would control the price for licenses and "keep it within bounds." However the market for sample licenses does not function the same way as most other markets, which has created problems and prevented the sample market from properly allocating prices. Unlike traditional markets such as those for commodities, where the goods are almost always fungible, the goods (songs) in the sample market are all unique. If a rights holder

58. *Id.*

59. *Id.*

60. Newton v. Diamond, 204 F. Supp. 2d 1244, 1260 (C.D. Cal. 2002), *aff'd*, 349 F.3d 591 (9th Cir. 2003), *amended and superseded on denial of reh'g*, 388 F.3d 1189 (9th Cir. 2004), *aff'd*, 388 F.3d 1189 (9th Cir. 2004).

61. Newton v. Diamond, 388 F.3d 1189, 1192–93 (9th Cir. 2004).

62. *Id.*

63. *Id.* ("To say that a use is de minimis because no audience would recognize the appropriation is thus to say that the use is not sufficiently significant.").

64. *Id.* at 1193.

65. *See generally* 4 NIMMER ON COPYRIGHT, *supra* note 50, § 13.03[A][2].

66. *Newton*, 388 F.3d at 1195.

67. Fragmented literal similarity involves an extrinsic and intrinsic inquiry. *See* Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004). "The extrinsic test considers whether two works share a similarity of ideas and expression as measured by external objective criteria." *Id.* The intrinsic prong applies a lay listener test, asking whether a reasonable juror could find the copied portion qualitatively or quantitatively substantial. *See id.* at 847.

demands a high price to license his song, the sampling musician cannot go find another seller to license that same song. This drastically reduces the amount of competition in the market and leads to higher prices.

It is typically necessary for artists to create the sampled works before buying licenses for the samples used, though the licensing market problem might be mitigated if musicians instead sought out sample licenses before they wrote their songs. In that scenario, there would be greater competition in the market because buyers would not already have their heart set on a particular sample. But the creative process does not usually work like that. It does not make sense for the appropriation musician to pay for a license before knowing how the finished song will sound. In addition, for licensors to assess how much they will charge, they need to hear the finished song in order to determine how much of the original sample is incorporated into the new work.[68] Thus, appropriation musicians first find the samples that they want to use and then compose the new song.[69] Due to the transaction costs of obtaining licenses, these musicians will seek out the appropriate rights holders only after determining that the song is worthy of commercial release.[70] Indeed, many rights holders will ask to hear the final song before agreeing to license their work.[71]

This situation places the licensee at a disadvantage. At this point, the licensee has already invested time and money into creating a new song. The prospect of losing out on those sunk costs gives the licensor greater bargaining power, and allows him to extract a higher fee than he otherwise might have secured. Furthermore, a licensor, knowing that the licensee's release date is approaching, can hold out in hopes of obtaining a higher bounty for his license. For these reasons, it is unlikely that the sample market has functioned in a way that keeps the prices for licenses "within bounds."[72] Other aspects of the sample license market will be discussed later in this section.

Today, many major record labels have clearance departments to facilitate the licensing of samples.[73] Some labels refuse to clear samples at all and do not accept sample-based music.[74] It appears that *Bridgeport* has ushered in a "very rigid 'clearance culture' in which it is assumed that every audio quote should be

68. *See generally* Richard Salmon, *Sample Clearance: The* SOS *Guide to Copyright Law on Sampling*, SOUND ON SOUND (Mar. 2008), http://perma.cc/6P2K-CJZM (describing samples negotiations as being conducted on a case-by-case basis, due to the particularities of the original and finished song).

69. Josh Norek, *You Can't Sing Without the Bling: The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 91 (2004) ("[L]abels have literally had to put an album's manufacturing on hold or pull finished copies off record store shelves until the samples are cleared. The impact of such last-minute actions on a major promotional campaign already underway can be drastic, creating a genuine disincentive for the artist and label alike to utilize samples in the recording process.").

70. KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 160–61 (2011).

71. *Id.*

72. *Contra* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005).

73. Somoano, *supra* note 54, at 308.

74. MCLEOD & DICOLA, *supra* note 70, at 192.

licensed."[75] Many musicians and industry experts have observed the decline of sampling in the mainstream segments of the music industry.[76] Those who do wish to release complex sample-based music are relegated to less commercially viable realms.[77]

On the other hand, some commentators argue that there is no evidence that sampling licenses stifle creativity.[78] This argument is counterfactual, since it is impossible to ascertain what music would sound like if musicians did not need to secure licenses for samples. Nevertheless, there was a period of time when musicians *did* sample freely, and recreating that style of music today would be economically infeasible. A recent study has demonstrated that re-releasing the Beastie Boys' album *Paul's Boutique*, which contained 125 identifiable samples, would yield a loss of twenty-million dollars.[79] In fact, each record sold would increase the loss, thus rendering it impossible to realize a profit.[80] Proponents of *Bridgeport* also claim that since "many artists and record companies have sought licenses as a matter of course" there is no unfairness or inefficiency.[81] This argument fails to recognize the high barriers to entry and vertical equity problems that arise in the context of sample licensing negotiations. Many independent artists who lack access to substantial financial resources, unlike artists signed to deals with major record labels, cannot afford to license popular recordings.[82] Further, even successful musicians face unfairness. When a famous musician like Jay-Z attempts to clear a sample, the rights holder will often try to exact an unfair price

75. *Id.* at 187.

76. *Id.* at 188 (quoting musicologist and copyright expert Dr. Lawrence Ferrara, who notes that "[h]istorically, I think we are at a time where we're sampling less and certainly copyright law had a major part in that"; and quoting MC and music producer Aesop Rock, who notes that "[a] lot of mainstream stuff now is just avoiding sampling completely.").

77. *Id.* at 188.

78. *See generally* Reilly, *supra* note 51.

79. MCLEOD & DICOLA, *supra* note 74, at 208. In another example, McLeod and DiCola show that re-releasing Public Enemy's *Fear of a Black Planet* would sustain a loss of more than six million dollars. *Id.* at 207.

80. *Id.* at 207–08. Each time a song is sold or played on the radio, the music publisher collects a royalty for use of the musical composition and distributes a portion to the songwriters. *See* Jesse Feister, *Copyrights, Licensing, and Royalties: A Fact Sheet*, AM. SONGWRITER (June 27, 2014, 10:35 AM) http://perma.cc/4XA5-L99S. When an artist samples a song and obtains a license from the publisher, the sampled songwriters get songwriting credit on the new song, which means that they will take a percentage of the publishing royalties. For songs with multiple samples, it is not uncommon for the sampled artists to collectively demand more than 100% of the royalties. *See, e.g.*, Interview by Red Bull Music Acad. with Justin Smith (a.k.a. Just Blaze), Rapper & Founder, Fort Knocks Entm't, in Melbourne, Austl. (Oct. 2006) [hereinafter Just Blaze Interview] (transcript available at http://perma.cc/L3PM-QZJQ) (stating that the publishing splits on Jay-Z's "Show Me What Ya Got" are "actually over [100%]").

81. Reilly, *supra* note 51, at 402 (quoting Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 804 (6th Cir. 2005)).

82. MCLEOD & DICOLA, *supra* note 74, at 200 ("'Plenty of times an artist will sample something, and we'll come back with a quote that's too high or an outright 'No,' and the artist will be forced to shelve that song and not release it on the album.'"); Norek, *supra* note 69, at 91 ("For an independent artist, the price for clearing a single sample can run more than an entire album's recording budget.").

from him or her knowing that he or she has deep pockets.[83]

Another common argument is that artists are free to recreate the sample with musicians and use music editing software to make it sound like the original; therefore, the argument goes, there is no impediment to achieving the sound that one wants.[84] If this were true, the music licensing regime currently in place would be more palatable. Unfortunately, the replayed, non-sampling version often fails to achieve the aesthetics of the original, sampling version.[85] Because hip-hop began as an appropriative art form, the sample aesthetic is likely to enhance the work's cultural cachet, thus increasing its expressive value. In other words, there is value in the subversive quality intrinsic in a work which borrows from another.

There might also be efficiency gains in allowing unlicensed samples. First, it might be socially inefficient for artists to constantly pay to have the same samples replayed. Second, sampling can have positive effects on the market for sampled songs. A recent paper used Greg Gillis, who is known by the stage name Girl Talk, as a case study to illustrate this point.[86] Gillis is a musician who creates songs by splicing together recognizable portions of others' music. He has managed to do so without licensing any of the copyrighted songs that he samples.[87] The study found that sales of the sampled songs in the year after the release of Gillis' album *All Day* were greater than sales of the songs in the year before the release, to a 92.5% statistical significance.[88] If high transaction costs and the cost of licensing itself prevent a work from being released, then both the sampling and sampled artists lose. But if the work is allowed to be released without a license and both artists are able to realize pecuniary gain from it, then both parties win at least from an economic standpoint. However, the sample market currently functions so poorly that these potential benefits are not fully captured.

Professor Michael Heller has written about the effects of sampling litigation on the sound of hip-hop.[89] He observes that hip-hop music sounds differently today than it did in the late 1980s not only because musical tastes have changed, but also due to "song owners [who] use their copyrights like big inches. The collage sound in rap is gone from the major music labels."[90] Heller reads this loss of collage sound as a diminishment of our collective wealth.[91] Too much ownership, he

83. *See* Just Blaze Interview, *supra* note 80 ("Everybody sees my name and they see Jay's name and they get the dollar signs in their eyes.").

84. Reilly, *supra* note 51, at 391–92 (quoting *Bridgeport*, 410 F.3d at 800).

85. MCLEOD & DICOLA, *supra* note 74, at 190–91.

86. W. Michael Schuster II, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling's Effect on the Market for Copyrighted Works*, 67 OKLA. L. REV. (forthcoming 2014).

87. Some have argued that he has never been sued because rights holders are worried that the case would lead to a fair use finding in favor of Gillis, establishing a strong precedent against them. Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug. 7, 2008, at E1.

88. Schuster, *supra* note 86.

89. *See* Michael Heller, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES 13–16 (2008).

90. *Id.* at 14 (noting that collage still exists in underground versions).

91. *Id.*

writes, has led to this state of affairs: "Hip hop music is a victim of gridlock."[92] In addition, it is often the case that the original author is not the owner of the copyright to his or her work. In *Bridgeport*, the plaintiff was not Funkadelic or one of the songwriters to "Get Off Your Ass and Jam," but a music "catalog company" that controls a portfolio of copyrights to recordings by Funkadelic and other musicians.[93] Bridgeport Music has filed hundreds of lawsuits against samplers who allegedly did not obtain the proper licenses.[94] This behavior, known as "sample trolling," occurs when there is "an individual or company who purchases copyrights from another artist and enforces those copyrights aggressively for the purposes of making money through litigation."[95]

Unlike other markets for licensed uses of popular works, sampling suffers from acute symptoms of market failure. When music venues or public performance centers want to have a song performed during a show, they only need to secure a public performance license from the American Society of Composers, Authors and Publishers (ASCAP) or Broadcast Music, Inc. (BMI).[96] An individual who wants to listen to a song for personal use can purchase that song from iTunes or another online music store. By contrast, sampling lacks a smoothly functioning market, which renders licensing less available—or unavailable—to would-be users.[97] It may be unclear to sampling musicians who the owner of the rights to the underlying work is, and the sampling musicians might not know how to go about acquiring those rights.[98] Even if the owners are easily identifiable, the transaction costs of negotiation may be prohibitive, particularly where multiple samples must be licensed in order to create a single work.[99] This problem of high transaction costs, which is present in many other markets for licensed uses, is exacerbated by the fact that, for each sample, a sampling musician might have to secure two separate licenses—the sound recording and underlying composition—which are

92. *Id.* Heller's idea of gridlock is that, "When too many people own pieces of one thing, whether a physical or intellectual resource, cooperation breaks down, wealth disappears, and everybody loses." *Id.* at xiv.

93. Jaia A. Thomas, *Rise of the Sample Trolls: 99 Problems and a Sample is 1*, UPTOWN MAG. (Nov. 12, 2013), http://perma.cc/4WRA-PP5Y; *see also* Tim Wu, *Jay-Z Versus the Sample Troll*, SLATE (Nov. 16, 2006, 1:50 PM), http://perma.cc/87Q4-3Y72. Bridgeport's owner is alleged to have forged George Clinton's signature in order to seize most of the copyrights in his catalog. Wu, *supra*. George Clinton himself has denounced the practice of sample trolling: "We never minded them sampling, or covering a song. . . . the people that stole our shit is suing people all over the world and almost killing the concept of sampling, which is important for a lot of music. But we still are out there fighting for that right." Jeremiah Alexis, *George Clinton: 'We Never Minded Them Sampling,'* RED BULL MUSIC (May 14, 2013), http://perma.cc/D2DN-M98F. Clinton himself was reportedly sued by Bridgeport for using his own work. MCLEOD, FREEDOM OF EXPRESSION, *supra* note 15, at 99.

94. Wu, *supra* note 93.

95. *Id.*

96. David Fagundes, *Efficient Copyright Infringement*, 98 IOWA L. REV. 1791, 1813 (2013).

97. *Id.* at 1813–14.

98. *Id.* (explaining that this phenomenon is especially true for artists who are not sophisticated repeat participants in licensing transactions).

99. *Id.*; MCLEOD & DICOLA, *supra* note 74, at 207–08 (studies showing that it would be economically unfeasible to release albums containing dozens of samples).

usually held by different entities.[100]

Professor Wendy Gordon explained that when the costs associated with acquiring a use license become greater than the value the user expects to internalize for the work, the user is likely to forgo the use altogether.[101] Others have argued that there are many unauthorized uses that are socially valuable, but not sufficiently so to outweigh the costs of acquiring the necessary licenses.[102] One scholar gives the example of a DJ who creates a mashup song consisting entirely of twenty-five samples.[103] In theory, this DJ could have acquired licenses for the uses of the respective works of authorship. But even if ownership of the borrowed works is clear, the costs, including time and effort, of negotiating as many as fifty separate licenses, are so high that they are unlikely to be outweighed by the DJ's relatively low-profit expectations for his song.[104] Gordon argued that fair use should be allowed when market failure prevents socially valuable works from being created or disseminated.[105] She broadly defines "market failure" as any situation in which private transactions cannot be relied upon to fulfill public goals.[106] The constitutionally-stated purpose of copyright is "[t]o promote the Progress of Science and useful Arts."[107] If we assume that this is in fact the public goal of copyright, then Gordon's argument for allowing fair use in instances of market failure should be uncontroversial.

This section has given a brief overview of the history of sampling, how courts have responded to it and the symptoms of market failure that have arisen in the wake of those decisions. The next section will provide a short review of the history of appropriation art and how it connects to sampling, and then will discuss the fair use cases that arose in this realm.

C. HISTORY OF VISUAL APPROPRIATION ART

Appropriation can be broadly defined as the act of taking or copying preexisting elements to create a new work.[108] Examples of appropriation can be found in many

100. Although compulsory licenses are available to those who create new arrangements to old songs, they are not available to those who "change the basic melody or fundamental character of the work." U.S. COPYRIGHT OFFICE, CIRCULAR NO. 73.0311, COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS (2011) (quoting 17 U.S.C. § 115(a)(2) (2006)) (internal quotation marks omitted), *available at* http://perma.cc/J69D-PNBE.

101. *See generally* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) [hereinafter Gordon, *Fair Use as Market Failure*].

102. Fagundes, *supra* note 96, at 1814.

103. A mashup is a song created by mixing different song recordings. *Id.* at 1814–15.

104. *Id.* at 1815.

105. *See generally* Gordon, *Fair Use as Market Failure*, *supra* note 101.

106. Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149, 151 (2003) [hereinafter Gordon, *Excuse and Justification*].

107. U.S. CONST. art. 1, § 8, cl. 1.

108. *Art Today: Appropriation*, WALKER ART CENTER, http://perma.cc/WQ4N-T3B5 (last visited Oct. 13, 2014).

creative mediums. James Joyce's *Ulysses* and T.S. Eliot's *The Wasteland* each borrowed fragments from existing art to create literary masterpieces.[109] Andy Warhol and Jasper Johns took soup cans and flags and elevated them to fine art.[110] Public Enemy and the Beastie Boys sampled the musicians that they grew up listening to and reused them to create an entirely new aesthetic of sonic collage.[111] The borrower-as-creator has been a constant presence in the history of intellectual production.[112]

During the late twentieth century, appropriation became an integral part of the creative process for many artists. John Carlin describes appropriation as an "important, and perhaps . . . inevitable chapter in the evolution of Modern art."[113] Mass media and communication have transformed our collective sense of reality, which now "owes as much to the media as it does to a direct, unmediated perception of nature."[114] Some artists appropriate the popular images that pervade our daily lives "in order to help us understand the process by which the media has come to monopolize huge chunks of reality."[115]

Pop art challenges traditions of fine art by transforming and recontextualizing images taken from vehicles of popular culture such as advertising.[116] For philosopher Jean Baudrillard, Pop art represented a turning point in art history; art became the reproduction of signs of consumer society, which itself is primarily a system of signs.[117] Appropriation as literal quotation of popular imagery "helped shift the basic mode of representation in Western art from a mimetic to a semiotic basis."[118] Semiotic figuration is based on the idea that all perception is subjective. This theory holds that there is no objective, stable reality from which objects can be transcribed into art.[119] Accepting the legitimacy of appropriation art as more than mere plagiarism requires a recognition of the rise of semiotic figuration in late twentieth century art.[120] For one to appreciate appropriation as new expression, as

109. Carlin, *supra* note 1, at 106.

110. *Id.* at 110.

111. *See* MCCLEOD & DICOLA, *supra* note 74, at 201–12.

112. *See, e.g.*, John T. Winemiller, *Recontextualizing Handel's Borrowing*, 15 J. MUSICOLOGY 444, 447–49 (1997) (describing instances of "transformative imitation" in various artistic forms in the seventeenth and eighteenth centuries).

113. Carlin, *supra* note 1, at 108.

114. *Id.* at 104.

115. *Id.*

116. *See id.* at 110.

117. Douglas Kellner, Jean Baudrillard and Art (unpublished essay, UCLA), *available at* http://perma.cc/K2ZT-33FP. Distinguish "representational art which copied tangible objects in the 'real' world from recent art which copies the images already circulating as two-dimensional signs through the media." Carlin, *supra* note 1, at 109 n.20 (citing Julia Kristeva, REVOLUTION OF POETIC LANGUAGE (1975)). These two-dimensional signs include advertisements, print media and television. *See id.* at 103–04.

118. Carlin, *supra* note 1, at 110 n.24 ("Mimetic figuration refers to a one-to-one correspondence between the object depicted in art and its original existence as a tangible object in the real world. Semiotic figuration is based upon the notion that all perception is subjective and therefore there is no tangible, stable real world from which objects can be transcribed into art.").

119. *Id.*

120. *Id.* at 110.

opposed to theft, one must appreciate the modern condition: that we exist in a social habitat increasingly determined by simulated signs. "The realm of the 'imaginary' has supplanted that of the 'real' in determining our sense of self and nature. As a result, artists now represent beer cans and Coke bottles as readily as they once did apples and oranges."[121] By broadening the artist's vocabulary in this way, the artist's ability to communicate with the viewer is enhanced.

The increasing pervasiveness of appropriation in visual art during the mid-twentieth century led art critics to begin questioning fundamental notions of authorship. In his essay "The Death of the Author," Roland Barthes took issue with the notion that works of art have fixed, objective meanings prescribed by the artist.[122] Instead, Barthes postulated that meaning is only subjective; it is produced by the reader while interacting with a work.[123] Under this modern conception of authorship, copyright's conferral of privilege and power is inherently problematic; the artist is granted near-exclusive control over his or her work even though the artist does not supply all of the meaning in the work. Michel Foucault alluded to this problem in his response to Barthes' essay, commenting that "the notion of 'author' constitutes the privileged moment of *individualization* in the history of ideas, knowledge, literature, philosophy, and the sciences."[124] The "author" is simply a social construct, but individualization allows this idealized "author" to serve "as a locus for a complex network of activities and judgments that deal with ownership, power, knowledge, expertise, constraints, obligations, penalties and retribution."[125] In the case of appropriation art, where a work has been transformed and recontextualized, this tension between authorship and privilege/power is augmented due to the intermediary force of a second artist. Now, the original artist's "meaning" is twice removed from his or her audience—if it remains at all. In this context, arguments for granting the original artist ownership and control rights over the secondary work are severely weakened.

Deconstructing "authorship" will hardly prevent the ever-growing concentration of content ownership and control.[126] But it is important to understand these philosophical underpinnings in order to properly contextualize the various arguments relating to fair use and copyright policy.

1. Appropriation Art and Sampling

Similar to Pop art, hip-hop can also be seen as a product of social condition. Hip-hop has been described as a "culture [that was] founded upon a lack of

121. *Id.* at 110−11.

122. *See* ROLAND BARTHES, *The Death of the Author*, *in* IMAGE-MUSIC-TEXT 142 (Stephen Heath trans., Hill & Wang ed. 1978).

123. *Id.*

124. Michel Foucault, *What Is an Author?*, *in* THE FOUCAULT READER 101 (Paul Rabinow ed., 1984).

125. VAIDHYANATHAN, *supra* note 8, at 9–10. In the context of this Note, we can substitute this complex network with copyright law, which grants similar privileges to those mentioned above.

126. *Id.* at 10.

resources."[127] Sampling was viewed as a necessity to many early hip-hop artists who lacked the resources to purchase musical instruments and lessons.[128] Even today, when the costs of music production are historically low, artists sample as a way of re-contextualizing their social environment. Jay-Z's song "Hard Knock Life" borrowed heavily from "It's the Hard Knock Life" from the musical *Annie*.[129] Using the chorus from the original song, Jay-Z surrounds the listener with vivid imagery from his youth in the Marcy Projects, a public housing complex in Brooklyn.[130] One might characterize this borrowing as lazy, a way of "avoid[ing] the drudgery in working up something fresh."[131] But his use of the original is more complicated and allows him to communicate with a broader audience using multiple layers of meaning. In the song, Jay-Z conveys his own understanding of what it means to live a "hard knock life." By sampling *Annie*, he juxtaposes these divergent meanings in a way that would be impossible without using the sample. "Hard Knock Life" unsettles the meaning of the original in the viewer's mind and thus makes a comment on the original work, adding "new expression, meaning or message."[132] "[O]nce we know that Jay-Z drew on *Annie*, we listen to both the Broadway song and Jay-Z's songs differently."[133]

Most sample-based music does not borrow as heavily from a single sample as "Hard Knock Life." The Beastie Boys' second album, *Paul's Boutique*, is hailed as a triumph of multi-layered sampling.[134] Unlike "Hard Knock Life," where one sample dominates the song's musical bed and chorus, the songs on *Paul's Boutique* were meticulously crafted using as many as fifteen samples on a single song.[135] An engineer and producer who worked on the album claimed that "[n]inety-five

127. COMMUNITY CLASSROOM, INDEP. TELEVISION SERV., COPYRIGHT CRIMINALS: EDUCATOR GUIDE 6 (2010) [hereinafter COPYRIGHT CRIMINALS: EDUCATOR GUIDE] (quoting an interview with DJ Bobbito Garcia in Benjamin Franzen and Kembrew McLeod's *Copyright Criminals*, a 2010 PBS Independent Lens documentary), *available at* http://perma.cc/35HP-42V3.

128. *See, e.g.*, Reed Jackson, *Kanye West Calls MPC the Guitar of Our Time During Rant*, XXL.COM (Nov. 21, 2013), http://perma.cc/PZX9-7XKE (quoting Kanye West's speech at his Nov. 20, 2013 concert, where West said, "It gave us the ability to chop up bands when we couldn't afford our own band"); *see also* COPYRIGHT CRIMINALS: EDUCATOR GUIDE, *supra* note 127, at 7 (quoting an interview with poet and hip-hop artist Saul Williams, who said, "The idea of not having any instruments, but having a turntable and saying, well, fine, this is my instrument. You know? And you see it now with people with overturned buckets and pots and pans. And we saw it then.").

129. Terry Gross, *Jay-Z: The Fresh Air Interview*, NAT'L PUB. RADIO (Nov. 16, 2010) (transcript available at http://www.npr.org/templates/transcript/transcript.php?storyId=131334322).

130. *See* JAY-Z, *Hard Knock Life (Ghetto Anthem)*, *on* VOL. 2. . . HARD KNOCK LIFE (Roc-a-Fella 1998).

131. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).

132. *Id.* at 579.

133. MICHELE ELAM, THE SOULS OF MIXED FOLK: RACE, POLITICS, AND AESTHETICS IN THE NEW MILLENNIUM 193 (2011).

134. *See* Mark Kemp, *The Beasties' Golden Age of Sampling*, ROLLING STONE, Mar. 5, 2009, at 72; Nate Patrin, *Beastie Boys: Paul's Boutique*, PITCHFORK (Feb. 13, 2009), http://perma.cc/TR2K-DKYU (album review).

135. A website devoted to discovering all of the samples and references contained in *Paul's Boutique*. *See* PAUL'S BOUTIQUE SAMPLES AND REFERENCES LIST, http://www.paulsboutique.info (last visited Oct. 7, 2014).

percent of the record was sampled."[136] *Rolling Stone* wrote that the album was "an extended goof on Abbey Road, which was Paul McCartney's boutique—and like that record, it ambitiously stitches together song fragments in a way rarely seen before or since."[137] Dan LeRoy wrote, "Paul's Boutique [is] universally recognized as a landmark achievement, a masterpiece of rhyme and collage that changes in sampling law had insured could never be repeated."[138]

The samples in *Paul's Boutique* were not used to avoid the cost and effort of producing original musical ideas. The samples were carefully picked and painstakingly pieced together in order to "create the illusion that this is all one solid slice of vintage soul."[139] In contrast to the efforts of past musicians, who would spend their time attempting to come up with new melodies and rhythms,[140] the Beastie Boys and the Dust Brothers—the album's producers—directed their energy towards weaving a cohesive sonic collage from pre-existing material.[141] Regardless, the "sweat of the brow" theory of rewarding copyright based on the amount of effort put into a work has been rejected by the Supreme Court.[142]

2. Appropriation Art Case Law

This section will review some of the fair use cases involving appropriation art. All of the cases to be discussed in this section were decided prior to *Cariou v. Prince*, which will be examined in Part II.

In analyzing the fair use of a derivative work, courts weigh the factors together in light of the goals of copyright. "Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."[143] This section will examine how courts have applied the fair use doctrine in cases involving appropriation art. These cases have presented courts with challenging issues that appear to set the public interest in promoting the progression of art directly against the private interest in rewarding creativity.[144] The Supreme Court's ruling in *Campbell v. Acuff-Rose Music, Inc.* is the last time that the Court made a major statement on the fair use doctrine, and it has since served as a template for lower courts to apply the test.

136. MCLEOD, FREEDOM OF EXPRESSION, *supra* note 15, at 89 (quoting record producer Mario Caldato Jr.).

137. Pat Blashill et al., *Paul's Boutique: Beastie Boys*, ROLLING STONE, Dec. 11, 2003, at 134.

138. DAN LEROY, THE BEASTIE BOYS' PAUL'S BOUTIQUE (33 1/3), at 4 (2006).

139. *Id.* at 77.

140. The concept of "originality" or "newness" in music and art is somewhat controversial as there are many who believe that there are no truly "original" ideas in music. *See* Jim Jarmusch, *5 Golden Rules (or Non-Rules) of Moviemaking*, MOVIEMAKER MAG. (June 5, 2014), http://perma.cc/U65P-UTPD; *see also* Brandes, *supra* note 51, at 100 ("Sampling is part of a broad musical and artistic tradition of borrowing from and elaborating on prior works.").

141. *See generally* LEROY, *supra* note 138, at 4.

142. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 352–53 (1991).

143. Leval, *supra* note 10, at 1110.

144. These goals are not mutually exclusive. Indeed, it is through private incentive that copyright seeks to achieve its public goal of the wide dissemination of art and knowledge.

a. The Impact of Campbell *on Fair Use*

i. First Factor: Purpose and Character

Campbell involved a song by hip-hop group 2 Live Crew, "Pretty Woman" —a parody of Roy Orbison's "Oh, Pretty Woman."[145] In *Campbell*, the Supreme Court reversed a ruling by the Court of Appeals for the Sixth Circuit, which had held that commercial uses of copyrighted material were presumptively unfair.[146] The Court instead found that a use's commerciality was merely a "factor that tends to weigh against a finding of fair use."[147] The court of appeals had ruled that the new work's commercial nature essentially compelled the court to find against the parodists.[148] Justice Souter, writing for the Supreme Court, explained that the fair use doctrine could not be "simplified with bright-line rules."[149] Rather, he directed that courts must employ the doctrine so as to "avoid rigid application of the copyright statute when . . . it would stifle the very creativity which [the] law is designed to foster."[150] Since then, lower federal courts have found fair use in a number of commercial contexts.

The first factor in a fair use analysis is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[151] *Campbell*'s innovation was its inquiry into the transformative aspects of the new work as a principal factor of the first prong of the fair use test:

> The central purpose of this investigation is to see . . . whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent the new work is "transformative."[152]

The Court noted that "transformative use is not absolutely necessary for a finding of fair use," citing its decision in *Sony Corp. of America v. Universal City Studios*, where it held that recording video for non-commercial time-shifting was fair use.[153] In *Sony*, the Court wrote that if the user had instead sold those recorded programs for profit, then that would almost certainly not be a fair use.[154] Thus, in

145. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572−73 (1994).

146. *Id.* at 595.

147. *Id.* at 585 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).

148. *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (1992) *rev'd by* 510 U.S. 569.

149. *Campbell*, 510 U.S. at 577.

150. *Id.*

151. *Id.* at 578 (quoting 17 U.S.C. § 107(1) (1976)).

152. *Campbell*, 510 U.S. at 579 (citing Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)).

153. Time shifting is the recording of programming, such as a television show, to a storage medium, such as a digital video recorder (DVR), to be viewed or listened to at a time more convenient to the consumer. *Id*. (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454–55 (1984)).

154. *See Sony*, 464 U.S. at 451.

the context of non-transformative works, such as a recorded television program, the importance of the commercial/noncommercial distinction is enhanced and will often drive the fair use analysis. But in *Campbell*, the work was transformative and the Court's finding of commerciality did not prevent a fair use finding.

Here, the Court found that "Pretty Woman" was transformative because of its use of the original's music coupled with a substitution of the original lyrics with "shocking ones to show 'how bland and banal the [original] is.'"[155] This was found to be a form of parodic criticism, thus advancing the broader goals of fair use.[156] However, commenting on the original work is not a requirement to finding that a transformative work is a fair use under *Campbell*. Parody, "[l]ike less ostensibly humorous forms of criticism, . . . can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[157] Thus, that a new work has been created out of another is itself favorable to a finding of fair use.[158]

But the Court was careful to distinguish parodies from satires. Although both involve the creation of a new work, satires are inherently more difficult to justify as fair use. Unlike a parody, which makes a direct comment on the original work, a satire uses another work merely as a vehicle to make a broader statement about society. The reason why parodies are privileged is because they "need[] to mimic an original to make [their] point," whereas a satire can "stand on its own two feet and so requires justification for the very act of borrowing."[159] The Court recognized that this distinction is not always clear, and that "parody often shades into satire when society is lampooned through its creative artifacts."[160] Accordingly, when judging the fair use merits of a parody or a satire, a court has to work its way through the relevant factors, and make a case-by-case assessment.[161] Therefore parodies are not invariably treated as fair use per se, just as non-parodic transformative works, such as satires, are not copyright infringement per se.[162]

ii. Second Factor: Nature of the Copied Work

After analyzing the song's transformativeness, the Court examined the second

155. *Campbell*, 510 U.S. at 573.

156. *Id.* at 582–83.

157. *Id.* at 579.

158. *See id.* at 580 n.14 ("[W]hen there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required.").

159. *Id.* at 580–81.

160. *Id.* at 581.

161. *See id.* at 577 ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

162. *See id*. at 581 ("Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners' suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair."); *see also supra* note 158 (quoting *Campbell*, 510 U.S. atat 580 n.14).

fair use factor, "the nature of the copyrighted work."[163] The purpose of this factor is to examine the expressive value of the original work, recognizing "that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."[164] For example, a news broadcast would be less protected than a movie because the former easily lends itself to productive uses by others.[165] The Court found that the plaintiff's original work fell within the core of copyright's protective purpose. However, this was not very helpful to the analysis since parodies, by their nature, must copy publicly known creative works.[166] Indeed, the second factor "typically recedes into insignificance in the greater fair use calculus."[167]

iii. Third Factor: Amount and Substantiality

In contrast, the third factor, whether "'the amount and substantiality of the portion used in relation to the copyrighted work as a whole' . . . are reasonable in relation to the purpose of the copying," was given a more thorough treatment.[168] It was at this juncture that the Court considered the parodist's justification for the particular copying done. This factor interacts with the first factor, as the extent of permissible copying will vary depending on the purpose and character of the use.[169] In addition to the relevance of the amount of material taken from the original, courts also look to the borrowed portion's quality and importance to the original work.[170] A parody's humor might require a reference to the original work that is recognizable so as to "conjure up" the original in the audience's minds. Therefore substantial copying that borrows from the "heart" of the original work may be appropriate.[171] Conversely, where the author is not seeking to parodically make a direct comment on the original work, the author may have to justify substantial copying on other grounds.

iv. Fourth Factor: Effect on the Original's Potential Market

Finally, the Court looked to the fourth factor of the fair use test— "the effect of

163. *Id.* at 586 (quoting 17 U.S.C. § 107(2) (1976)).

164. *Id.* at 586.

165. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984), *cited by Campbell*, 510 U.S. at 586.

166. *Campbell*, 510 U.S. at 586.

167. 4 NIMMER ON COPYRIGHT, *supra* note 50, § 13.05[A][2][a].

168. *Campbell*, 510 U.S. at 586 (quoting 17 U.S.C. § 107(3) (1976)).

169. *Id.* at 586–87 ("[R]eproduction of entire work 'does not have its ordinary effect of militating against a finding of fair use' as to home videotaping of television programs . . . ." (quoting *Sony*, 464 U.S. at 449–50)); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985) (noting that "even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech" but not in a scoop of a soon-to-be-published memoir).

170. *Campbell*, 510 U.S. at 587.

171. *Id.* at 588 ("[T]he heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim.").

the use upon the potential market for or value of the copyrighted work."[172] This prong of the test can be read as a balancing mechanism that seeks to protect the author's monopoly interest in his or her copyrighted work. To that end, harm may be found in either the primary market for the original or in the market for derivatives of the original.[173] A commercial non-transformative use has a high likelihood of usurping the original's primary market.[174] However, the Court rejected the Sixth Circuit's presumption that a commercial use necessarily meant that there is likelihood of harm to the primary market where the work is transformative.[175] This presumption was in error, the Court wrote, in part because a parody will rarely serve as a substitute for the original in the primary market.[176]

In the derivative market, on the other hand, it is possible that a parody will usurp the original author's ability to issue licenses for other derivative uses. But such economic harm must be distinguished from any injury sustained by the author resulting from harsh criticism that "kills demand for the original," which does not factor into the analysis.[177] Only harm that results from actual market substitution is relevant to this inquiry.[178]

The market for potential derivative uses is protectable only to the extent that a creator "would in general develop or license others to develop."[179] Since creators would be unlikely to grant licenses to those wishing to parody or otherwise criticize their work, copyright does not protect such markets under the fourth factor.[180] But it was under this prong that the *Campbell* Court noted that the parody at issue was also a rap song, and that there needed to be an inquiry into whether the original sustained harm in that derivative market.[181] In this context, the Court wrote that even if the derivative enhanced the original's market, it would not necessarily make an act of copying fair.[182] Since there was insufficient evidence on whether the parody had any effects on the original's market for derivative non-parodic rap versions of "Oh, Pretty Woman," the Court remanded for further findings.[183] Only then could it be determined whether "Pretty Woman" was a protectable fair use parody.

Although the Court did not resolve the merits of the fair use claim in their entirety, the analysis in *Campbell* advanced the notion that certain commercial

172. *Campbell*, 510 U.S. at 590 (quoting 17 U.S.C. § 107(4) (1976)).

173. *Campbell*, 510 U.S. at 587.

174. *See Sony*, 464 U.S. at 451.

175. *See Campbell*, 510 U.S. at 570 ("*Sony* itself called for no hard evidentiary presumption.").

176. *Id.* at 591–92 ("But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.").

177. *Id.* at 592.

178. *See id.* at 593.

179. *Id.* at 592.

180. *Id.*

181. *Id.* at 593.

182. *Id.* at 590 n.21. The Court has not yet resolved this issue of whether enhancing the original work's market would tend towards finding fair use or not.

183. *Id.* at 594. After remand, the parties reached a settlement whereby Acuff-Rose dismissed the lawsuit and 2 Live Crew paid for a license. *See Acuff-Rose Settles Suit with Rap Group*, COMMERCIAL APPEAL (MEMPHIS), June 5, 1996, at A14.

transformative uses could be fair use, and it has served as a roadmap for how courts should apply the doctrine in appropriation art cases.

b. Cases After Campbell

i. Developing the Transformative Doctrine

Subsequent cases reveal that *Campbell* has had a large effect on the fair use landscape, especially in the context of appropriation art.[184] Courts have since been much less likely to invoke the presumption of unfairness for commercial uses, and have increased their focus on transformativeness.[185] In fact, certain empirical data suggest that a finding of transformativeness is often sufficient to trigger a finding of fair use.[186] Understanding transformativeness is therefore critical. This section does not seek to undertake an examination of all of the post-*Campbell* fair use cases. Rather, this section will review a few of the more notable fair use cases involving transformative works, particularly appropriation art. A review of the Second Circuit's ruling in *Cariou v. Prince* will follow in Part II.

Since *Campbell*, courts have had significant trouble with consistently assessing transformativeness. This problem is due in part to the difficulty in devising bright-line rules on the kinds and degrees of transformation required to find fair use.[187] Appropriation art in particular has presented courts with uniquely difficult questions on the scope of copyright law's protections. On the one hand, the constitutionally stated purpose of copyright law is to promote the progress of science and the arts; thus there is a concern that giving too much protection will stymie efforts by appropriation artists to explore new types of creative expression.[188] But, if artists are given carte blanche to create transformative works, then the exclusive right of the author to create derivative works could be eliminated "since derivative works seem, by definition, to involve some transformation of the underlying work."[189]

Judge Leval, cited by the Supreme Court in *Campbell*, frames the inquiry as whether "the secondary use adds value to the original—if copyrightable expression in the original work is used as raw material, transformed in the creation of new

184. *Compare* Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992), *with* Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006), *and* Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011).

185. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 601–02, 604–05 (2008)

186. *Id.* at 605 (finding that each of the forty out of forty-two total opinions which found the defendant's use to be transformative also found it to be fair use and that one of the two outliers was reversed on appeal).

187. *See Blanch*, 467 F.3d at 263 ("[Defendant's] work, like that of other appropriation artists, inherently raises difficult questions about the proper scope of copyright protection and the fair-use doctrine. I would continue to answer those questions as necessary to decide particular cases, mindful that the fair-use inquiry is a fact-specific one that is 'not to be simplified with bright-line rules.'" (quoting *Campbell*, 510 U.S. at 577)).

188. U.S. CONST. art. 1, § 8, cl. 1.

189. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 468 (2008).

information, new aesthetics, new insights and understandings."[190] It appears that this framework was not immediately embraced by the lower courts.[191] In *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, one of the first major fair use cases after *Campbell*, the Second Circuit found no transformative purpose in a trivia book based on the television show "Seinfeld."[192] The court rejected the author's argument that the book was written to educate viewers and provide a critical commentary of the show. Instead, it found the trivia book to be a mere repackaging of the show to entertain the show's audience, and fair use protection was denied.[193]

Professor Nimmer has commented that the result in *Castle Rock* was surprising given that the work "even if low-brow, necessarily invoke[d] new information and new aesthetics."[194] For a time, courts followed the *Castle Rock* approach of not finding transformativeness unless the secondary work parodied or made a direct comment on the underlying work. In other words, adding "new information" and "new aesthetics" was not enough. In *Leibovitz v. Paramount Pictures Corp.*, the Second Circuit granted fair use protection to a movie poster that mimicked a photograph used on a Vanity Fair magazine cover.[195] The court interpreted *Campbell* as requiring a secondary use to comment on the original.[196] Further, it noted that merely "[b]eing different from an original does not inevitably 'comment' on the original."[197] However, because the advertisement mimicked the original so as to "ridicule" it, the poster was deemed to be transformative.[198]

Following the Second Circuit's rulings in these two cases,[199] some lower courts began to read *Campbell*'s "new expression, meaning, or message" test as requiring that such message or comment, at least in part, point towards the underlying work.[200] This misreading of *Campbell* was not expressly corrected until *Cariou v. Prince*.[201] But a 2006 case involving appropriation artist Jeff Koons suggested that

190. Leval*, supra* note 10, at 1111.

191. 4 NIMMER ON COPYRIGHT, *supra* note 50, § 13.05[A][1][b].

192. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., 150 F.3d 132, 142 (2d Cir. 1998) ("Any transformative purpose possessed by *The SAT* is slight to non-existent.").

193. *Id.* at 142.

194. 4 NIMMER ON COPYRIGHT, *supra* note 50, § 13.05[A][1][b].

195. Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998).

196. *Id.* at 114 ("Applying *Campbell* to the first-factor analysis, we inquire whether Paramount's advertisement 'may reasonably be perceived,' as a new work that 'at least in part, comments on' Leibovitz's photograph." (internal citations omitted)).

197. *Id.*

198. *Id.* at 114, 117 (affirming the district court's grant of summary judgment in favor of the defendant).

199. *But see* Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394 (1997). This case, as opposed to the two cases in the Second Circuit, may have started this trend, although it was not cited in *Castle Rock.* The court determined that a book portraying O.J. Simpson as the cat in the hat was a satire and not parody because it did not "target" the original.

200. *See* Elvis Presley Enters. v. Passport Video, 349 F.3d 622, 628–29 (9th Cir. 2003) (stating that "voice-overs do not necessarily transform a work," but still finding the use to be transformative because "they are cited as historical reference points in the life of a[n] . . . entertainer"); Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011).

201. This lead to a practice by defendants of straining to offer unusual explanations of why their

courts would begin to allow fair use for non-parodic transformative works.[202]

Blanch v. Koons involved Koons' "Easyfun-Ethereal" paintings, whereby the artist took images from various sources and superimposed them against backgrounds of pastoral landscapes.[203] One of those paintings, "Niagara," consisted of four pairs of women's legs dangling over a backdrop of assorted pastries. Koons painted the objects in this painting from magazines and advertisements, one of which was adapted from one of plaintiff Andrea Blanch's photographs, which had been used in a print advertisement for Gucci.[204] The photo "depict[ed] a woman's lower legs and feet, adorned with bronze nail polish and glittery Gucci sandals, resting on a man's lap in what appears to be a first-class airplane cabin."[205] From this image, Koons took only the legs and feet, inverted the orientation of the legs, added a heel to one of the feet and changed the coloring.[206] The court found that the "new expression, meaning or message" test "almost perfectly describe[d] Koons's adaptation."[207]

> [T]he use of a fashion photograph created for publication in a glossy American "lifestyles" magazine—with changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects details and, crucially, their entirely different purpose and meaning—as part of a massive painting commissioned for exhibition in a German art-gallery space.[208]

In concluding that "Niagara" was transformative, the court made no mention of Koons' painting commenting directly on the underlying work. It next considered the purpose of the work, writing that because the work was "substantially transformative," its commercialism was of "less significance" to the overall analysis.[209]

In discussing the first prong of the fair use test, the court first discussed the transformative merits of "Niagara," then separately considered the work's fair use justification as a parody. Up to that point, most courts, including the Supreme Court, had subsumed parody within the transformative inquiry, but the *Blanch* court took a different approach.[210] After quickly finding that the work was better

work made a comment on the original, suggesting that such a move was an *ex post* rationalization of their work. *See* Blanch v. Koons, 396 F. Supp. 2d 476 (S.D.N.Y. 2005), *aff'd*, 467 F.3d 244 (2d Cir. 2006); Bourne Co. v. Twentieth Century Fox Film Corp., 602 F. Supp. 2d 499 (S.D.N.Y. 2009). *But see* Abilene Music, Inc. v. Sony Music Entm't, Inc., 320 F. Supp. 2d 84, 90 (S.D.N.Y. 2003) ("[T]he question is not whether Ghostface Killah intended *The Forest* purely as a parody of *Wonderful World*, but whether . . . *The Forest* 'differs [from the original] in a way that may reasonably be perceived as commenting, through ridicule, on what a viewer might reasonably think' is the unrealistically uplifting message of *Wonderful World*." (internal citations omitted) (quoting *Leibovitz*, 137 F.3d at 114)).

202. *See* Blanch v. Koons, 467 F.3d 244, 246–47 (2d Cir. 2006).
203. *Id.* at 247.
204. *Id.* at 247–48.
205. *Id.* at 248.
206. *Id.*
207. *Id.* at 253.
208. *Id.*
209. *See id.* at 254 (quoting NXIVM Corp. v. Ross Inst., 364 F.3d 471, 478 (2d Cir. 2004)).
210. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–86 (1994); Castle Rock Entm't,

characterized as satire rather than parody, it sought to justify Koons' borrowing of Blanch's photograph in particular.[211] Framing the issue in this way allowed the court to sidestep—but not explicitly overrule—the direct comment inquiry from prior cases. Since parody *must* borrow in order to "conjure up" the original, the court instead asked whether Koons had a "genuine creative rationale for borrowing Blanch's image."[212] Supreme Court precedent holds that a work's parodic character must be "reasonably perceived."[213] By contrast, it might not have been appropriate for the *Blanch* court to have determined whether Koons' "genuine creative rationale" could have been reasonably perceived, as this would have put the judge in the position of assessing the work's artistic merit.[214] The court then accepted Koons' stated justification for using the image: "[t]he ubiquity of the photograph is central to my message."[215] While *Blanch* made substantial inroads in correcting the errors of prior courts, *Prince* was the first to explicitly reject any requirements of direct comment on the original. The next section will explore some of the recent issues that courts have dealt with in applying the fourth fair use factor in appropriation art cases.

ii. Market Effects

While the Supreme Court once remarked "[t]his last factor is undoubtedly the single most important element of fair use,"[216] the Court has since changed its view, recognizing that all factors "are to be explored, and the results weighed together in light of the purposes of copyright."[217] In addition, courts must "consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether [such] unrestricted and widespread conduct . . . would result in a substantially adverse impact on the potential market for the original."[218] For example, in *Salinger v. Colting*, the Second Circuit, ruling on a motion for a preliminary injunction, found that a Swedish author who wrote an unauthorized sequel to *Catcher in the Rye* was unlikely to prevail in asserting a fair use defense.[219] Although the sequel was deemed unlikely to impact sales of the original, the court found that an unauthorized sequel might undermine the potential

Inc. v. Carol Publ'g Grp., 150 F.3d 132, 143 (2d Cir. 1998); Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400–02 (9th Cir. 1997).

211. *See Blanch,* 467 F.3d at 254 (finding that the work's "message appear[ed] to target the genre of [the photograph], rather than the individual photograph itself").

212. *Id.* at 255.

213. *Campbell,* 510 U.S. at 582.

214. *See id.* at 582 ("As Justice Holmes explained '[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.'" (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903))).

215. *Blanch,* 467 F.3d at 255.

216. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

217. *Campbell,* 510 U.S. at 578.

218. *Id.* at 590.

219. Salinger v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *rev'd on other grounds*, 607 F.3d 68 (2d Cir. 2010).

market for an authorized *Catcher* sequel.[220]

Part of the difficulty with this inquiry lies in defining the original work's protectable market for derivatives. It is clear that not all derivative works fall within the author's monopoly.[221] The Supreme Court's standard for defining the rights holder's protectable market "for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."[222] To that end, some lower courts have held that "copyright owners may not preempt exploitation of transformative markets, which they would not '*in general* develop or license others to develop,' by actually developing or licensing others to develop those markets."[223] Therefore, the act of an author in licensing another to parody or make other transformative uses of his work would not prevent others from later entering those markets and successfully claiming fair use.[224]

Some courts and scholars have recognized the "danger of circularity" that this inquiry poses.[225] "[I]t is a given in every fair use case that plaintiff suffers a loss of a *potential* market if that potential is defined as the theoretical market for licensing the very use at bar."[226] If this circularity is to be avoided the plaintiff should not be able to point to the defendant's transformative use as evidence that his or her potential market for derivatives has been usurped. Courts have attempted to get around this problem by recognizing limits on the concept of a potential market for derivatives "by considering only traditional, reasonable, or likely to be developed markets."[227] In *Castle Rock*, the Second Circuit held that an unauthorized trivia book based on the television show Seinfeld was "likely to fill a market niche that [plaintiff] would in general develop."[228] The fact that the plaintiff had not shown any interest in exploiting that market was of no consequence to the court. In *Salinger*, the Second Circuit went even further, noting that "there is value in the right *not* to authorize derivative works."[229]

But in *Bill Graham Archives v. Dorling Kindersley Ltd.*, even though the

220. *Id.* at 268.

221. *See Campbell,* 510 U.S. 569.

222. *Id.* at 592.

223. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., 150 F.3d 132, 145 n.11 (2d Cir. 1998) (quoting *Campbell,* 510 U.S. at 592).

224. *See id.* at 145 n.11.

225. 4 NIMMER ON COPYRIGHT, *supra* note 50, § 13.05[A][4]; *see Campbell,* 510 U.S. at 593 ("And while [plaintiff] would have us find evidence of a rap market in the very facts that [defendant] recorded a rap parody of 'Oh, Pretty Woman' and another rap group sought a license to record a rap derivative, there was no evidence that a potential rap market was harmed in any way by 2 Live Crew's parody, rap version."); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929 n.17 (2d Cir. 1994) ("Were a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder."); *see also Texaco,* 60 F.3d at 937 (Jacobs, J., dissenting) ("There is a circularity to the problem: the market will not crystallize unless courts reject the fair use argument . . . but, under the statutory test, we cannot declare a use to be an infringement unless . . . there is a market to be harmed.").

226. 4 NIMMER ON COPYRIGHT, *supra* note 50, § 13.05[A][4].

227. *Texaco*, 60 F.3d at 930.

228. *Castle Rock*, 150 F.3d at 145.

229. Salinger v. Colting, 607 F.3d 68, 74 (2d Cir. 2010).

plaintiff had shown a willingness to negotiate with the defendant for a license to use its images in a book on the Grateful Dead, the court did not find any impairment to the market for the original.[230] The court relied upon language in *Castle Rock*, holding that because the secondary work was "transformatively different" from the original, the original author could not "prevent others from entering fair use markets merely 'by developing or licensing a market for . . . transformative uses of its own creative work.'"[231] However, the court's analysis on this issue is somewhat unsatisfying because it fails to offer any distinction as to where the rights holder's protectable derivative market ends and where a transformative work's fair use defense begins. Similarly in *Blanch*, the court determined that because the photographer had acknowledged that she had never licensed the work at issue, and that Koons' use did not "cause any harm to her career or upset any plans she had for [the photograph]," the fourth fair use factor "greatly favor[ed] Koons."[232] This issue remains open insofar as no articulable test has been formulated to resolve the distinction.

Another issue that courts have yet to resolve is the significance of an increase of value caused by the secondary use. If a defendant could show that its secondary use would actually increase the market for the original, a court might find that this would favor allowing the use.[233] On the other hand, the Supreme Court wrote that while "favorable evidence about relevant markets" was important to the defendant satisfying its burden of demonstrating fair use, even favorable evidence in certain circumstances "is no guarantee of fairness."[234] In a footnote, the Court cites Leval's example of a "film producer's appropriation of a composer's previously unknown song that turns the song into a commercial success; the boon to the song does not make the film's simple copying fair."[235] It is important to recognize that this example would likely fail the fair use test because such a use would be unjustified under the first factor, and that the final outcome might be different if the work is transformative.[236] The bottom line is that the Supreme Court has not yet directly confronted these questions; therefore, lower courts are free to construct their own tests and approaches to this specific issue.

II. CARIOU V. PRINCE

This Part will closely examine the *Prince* decision, including how it changes the fair use framework, specifically with respect to the first and fourth fair use prongs of § 107.

230. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).

231. *Id.* at 615 (quoting *Castle Rock*, 150 F.3d at 145 n.11).

232. Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006).

233. *See Bill Graham*, 448 F.3d at 614 n.5.

234. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 & n.21 (1994). *But see id.* ("Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.").

235. *Id.* (citing Leval, *supra* note 10, at 1124 n.84).

236. *See* Leval, *supra* note 10, at 1124 n.84. Also note that licensing music for film is a paradigm of a protectable traditional market for derivatives.

A. TRANSFORMATIVENESS

As discussed in Part II.C.2, fair use cases after *Campbell* placed a heavy emphasis on commentary. But commentary is only one of the express purposes provided in the introductory paragraph to § 107, and the House Report does not indicate that commentary is a necessary element of fair use. In addition, there have been many cases outside of the appropriation context where fair use was found despite the lack of direct comment.[237] Is there something about appropriation that should make direct commentary necessary in those cases? The Second Circuit answered that question in the negative in *Cariou v. Prince*.[238]

Richard Prince is a well-known appropriation artist, whose work "involve[s] taking photographs and other images that others have produced and incorporating them into paintings and collages that he then presents, in a different context, as his own."[239] Patrick Cariou, the plaintiff, is a photographer who spent several years living among Rastafarians in Jamaica.[240] He assembled photographs that he took during this time into a book, *Yes Rasta*.[241] Prince came across a copy of this book and decided to use some of its images in a series of collages that would be entitled *Canal Zone*.[242] Twenty-nine of the thirty *Canal Zone* works incorporated Cariou's images in different ways, "vary[ing] significantly from piece to piece."[243]

> In certain works, such as *James Brown Disco Ball*, Prince affixed headshots from *Yes Rasta* onto other appropriated images, all of which Prince placed on a canvas that he had painted. In these, Cariou's work is almost entirely obscured. The Prince artworks also incorporate photographs that have been enlarged or tinted, and incorporate photographs appropriated from artists other than Cariou as well. *Yes Rasta* is a book of photographs measuring approximately 9.5" x 12". Prince's artworks, in contrast, comprise inkjet printing and acrylic paint, as well as pasted-on elements, and are several times that size. . . . In other works, such as *Graduation,* Cariou's original work is readily apparent: Prince did little more than paint blue lozenges over the subject's eyes and mouth, and paste a picture of a guitar over the subject's body.[244]

The Gagosian Gallery in New York exhibited twenty-two *Canal Zone* works and also published and sold an exhibition catalog from the show that featured all of the pieces in the series.[245] Upon hearing about the show, Cariou sued Prince, the

237. *See* Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006); Ty v. Publ'ns Int'l, 292 F.3d 512 (7th Cir. 2002); Authors Guild, Inc. v. Google Inc., 2013 WL 6017130 (S.D.N.Y. Nov. 14, 2013); Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006).

238. Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

239. *Id.* at 699.

240. *See id.* at 698.

241. *Id.*

242. *Id.* at 699.

243. *Id.* at 700.

244. *Id.* at 700–01. Images of the Prince artworks, along with the *Yes Rasta* photographs, were included in an appendix to the *Prince* opinion. *See* Appendix to Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013) (No. 11-1197) [hereinafter *Prince* Appendix], *available at* http://perma.cc/6RWW-LGG6.

245. *Id.* at 703.

gallery and its owner for copyright infringement.[246] Prince raised a fair use defense, arguing that his use of the photographs as "'raw ingredients' in the creation of new works" was fair use.[247] This reasoning was rejected by the district court, which was "aware of no precedent holding that such use is fair absent transformative comment on the original."[248] The Second Circuit reversed this ruling, stating that "[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative."[249] Indeed, language found in a footnote in a decision by the Supreme Court suggests that the court of appeals' interpretation is correct. In *Campbell*, the Court wrote: "We express no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it."[250]

The court of appeals reiterated the "new expression, meaning, or message" test,[251] and proceeded to examine the transformative qualities of the pieces:

> Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative. . . . Prince has created collages on canvas that incorporate color, feature distorted human and other forms and settings, and measure between ten and nearly a hundred times the size of the photographs. Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work.[252]

At this point in the analysis, the court in *Blanch* looked to the artist's subjective justifications for using the particular underlying work. Here, "Prince's work could be transformative even without . . . Prince's stated intention to do so. Rather than confining our inquiry to Prince's explanations of his artworks, we instead examine how the artworks may 'reasonably be perceived' in order to assess their transformative nature."[253] The court was careful to note that not just any cosmetic changes to the photographs would be fair use per se: "For instance, a derivative work that merely presents the same material but in a new form, such as a book of synopses of televisions shows, is not transformative."[254] The court found that twenty-five of Prince's images "g[a]ve Cariou's photographs a new expression, and employ[ed] new aesthetics with creative and communicative results distinct from Cariou's."[255]

246. *Id.* at 704.
247. Cariou v. Prince, 784 F. Supp. 2d 337, 348 (S.D.N.Y. 2011).
248. *Id.*
249. Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).
250. *Campbell*, 510 U.S. at 592 n.22.
251. *Prince*, 714 F.3d at 706 (quoting *Campbell*, 510 U.S. at 579).
252. *Id.*
253. *Id.* at 707 (but noting that if Prince had provided explanations for his use, they "might have lent strong support to his defense.").
254. *Id.* at 708.
255. *Id.*

While the court was able to rule that twenty-five of the thirty works were transformative as a matter of law, the five remaining works "present[ed] closer questions."[256] These five works, in the court's view, did not differ from the underlying photographs to the same extent as the other twenty-five pieces. Although there were "key differences" in these secondary works compared to the incorporated originals, they were "still similar in key aesthetic ways."[257]

> *Graduation,* for instance, is tinted blue, and the jungle background is in softer focus than in Cariou's original. Lozenges painted over the subject's eyes and mouth—an alteration that appears frequently throughout the *Canal Zone* artworks—make the subject appear anonymous, rather than as the strong individual who appears in the original. Along with the enlarged hands and electric guitar that Prince pasted onto his canvas, those alterations create the impression that the subject is not quite human. Cariou's photograph, on the other hand, presents a human being in his natural habitat, looking intently ahead. Where the photograph presents someone comfortably at home in nature, *Graduation* combines divergent elements to create a sense of discomfort. . . .
>
> . . . *Charlie Company* prominently displays four copies of Cariou's photograph of a Rastafarian riding a donkey, substantially unaltered, as well as two copies of a seated nude woman with lozenges covering all six faces. Like the other works just discussed, *Charlie Company* is aesthetically similar to Cariou's original work because it maintains the pastoral background and individual focal point of the original photograph—in this case, the man on the burro. While the lozenges, repetition of the images, and addition of the nude female unarguably change the tenor of the piece, it is unclear whether these alterations amount to a sufficient transformation of the original work of art such that the new work is transformative.[258]

The court's detailed analysis of the differences between these five works and the others may be more descriptive than instructive. Aside from the court's holding that no direct comment on the original is necessary to find transformativeness, the analysis leaves much to be desired by way of precise rules that can be used by courts in the future. However, this is not necessarily a fault in the decision. The fair use inquiry is intended to be flexible and case-specific. On the other hand, the vagueness of the court's ruling might hamper its reach. At least one scholar has argued that the inherent uncertainty of the fair use defense combined with stiff statutory penalties for copyright infringement might produce chilling effects.[259] Some works that would qualify as falling under fair use might not be created or disseminated because the doctrine's indeterminacy leaves open the possibility that a court will rule against the secondary use.[260] Another concern with the *Prince* decision is that it might put courts back in a position of judging the artistic merits of a work. A concurring opinion in *Prince* raised this very issue and argued that the court should have remanded all thirty paintings and allowed the district court to

256. *Id.* at 710.
257. *Id.* at 711.
258. *Id.*
259. Fagundes, *supra* note 96, at 1833.
260. *Id.* at 1833.

apply the correct legal standard.[261]

Instead of looking at the superficial similarities of two works, courts should consider whether the second work is transformative in its meaning. Professor Laura Heymann has argued that, instead of evaluating artistic merit or probing authorial intentions, judges should measure how audiences have reacted to the work.[262] Heymann's thesis is built on Roland Barthes' reader-response theory, which recognizes that the interpretation of artwork is always contextual.[263] The reader, viewer or listener is the one who ultimately determines the meaning of the work, and therefore judges should consider evidence of audience response in copyright cases.[264] The test should be "the amount of the interpretive distance that the defendant's use of the plaintiff's work creates."[265] If a "distinct and separate discursive community" has developed around the secondary work, then that indicates a substantial interpretive distance between the two works.[266] A discursive community is made up of those who engage with the work, and the discourse is formed as that community begins to offer its interpretations of the work. "If distinct discursive communities can be identified surrounding each copy, that fact should lead us to think that the meaning of the expression has been transformed, even if the expression itself has not."[267]

Returning to a previous example, the discursive community that engaged with Jay-Z's "Hard Knock Life" was likely very different from that which engaged with *Annie*.[268] This is due to the fact the Jay-Z's song signifies something different from *Annie*; thus, the former is not attempting to displace the latter. In the case of Richard Prince, reader response is critical because the value of his work arguably lies in its meaning rather than its graphic merits. "The discursive community formed around Prince's work through gallery displays and critical reception (whether positive or negative) indicates that their activities are transformative in the way fair use should care about."[269] In this regard, the Second Circuit erred in focusing on the extrinsic aspects of his work, rather than the intrinsic. However the *Prince* court did not say that an extrinsic analysis was the hallmark of the transformative test; rather, the inquiry is whether the new work "alter[s] the first with new expression, meaning or message."[270] Therefore the decision does not foreclose an intrinsic analysis from playing a meaningful role in the fair use test—the *Prince* court simply failed to conduct it.

Another note about the *Prince* decision is that the court found the use to be fair

261. *See Prince*, 714 F.3d at 712–14.

262. Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008).

263. *Id.* at 447.

264. *Id.* at 446.

265. *Id.* at 449.

266. *Id*.

267. *Id.* at 455.

268. *See supra* text accompanying notes 129–133.

269. *Id.* at 459 (internal citation omitted).

270. Cariou v. Prince, 714 F.3d 694, 705 (2d Cir. 2013) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)) (internal quotation marks omitted).

even though it involved a direct copying from another work. Prince took the images from Cariou's book, whereas in *Blanch*, Jeff Koons copied an image by repainting it. The *Prince* court does not discuss this difference. Whether this was an oversight or not, it was the correct result. Since all art is, to a degree, representational, it should not make a difference that one artist has taken the time to repaint a photograph while another has merely taken that photograph. This consideration will serve as an important undercurrent to the analysis in Part III, where I argue that certain types of sampling—a form of direct copying—are now fair use.

B. MARKET EFFECTS

In the Second Circuit, courts have asked whether the secondary work "usurps" the original's potential derivative market.[271] In making this determination, the *Prince* court wrote that a market has been usurped "where the infringer's target audience and the nature of the infringing content is the same as the original."[272] The court resolved this issue by noting that the audiences for works by Cariou and Prince were "entirely different."[273] This reasoning is problematic. It appears that the court found "entirely different" audiences on the basis of Prince attracting "a number of . . . wealthy and famous" individuals such as Jay-Z and Angelina Jolie.[274] It should not make a difference that Prince was able to sell eight artworks for more than ten million dollars, whereas Cariou had not "actively marketed his work or sold work for significant sums."[275] Courts should not privilege one artist's right to create over another's merely because they do not frequent the same social circles or because they achieved different degrees of economic success.

However, in *Prince*, the Second Circuit is struggling with one of the most difficult problems in the fair use analysis—defining the relevant market—and is attempting to avoid the previously mentioned problems of circularity and proof.[276] Instead of its different audiences test, the court should have returned to a standard used in previous decisions, asking whether the licensing of photographs for appropriation art would constitute a "traditional, reasonable, or likely to be developed market[]."[277] Nothing in the record suggested that Prince's work would stymie subsequent attempts by Cariou to license his work for derivative uses; thus the court could have reached a similar conclusion as it did in *Blanch*, finding no market usurpation.[278] That a conclusion could have been reached without invoking the novel and unsatisfying different audiences test suggests that the court's

271. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614 (2d Cir. 2006).
272. *Prince*, 714 F.3d at 709.
273. *Id.*
274. *Id.*
275. *Id.*
276. *See* discussion *supra* Part I.C.2.b.ii.
277. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994) (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994)).
278. *Prince*, 714 F.3d at 710; *see* Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006).

reasoning in this area went beyond what was necessary.

Part II has discussed the *Prince* case and its contributions to the fair use standard. Part III will apply to the *Prince* framework to a hypothetical sampling case.

III. SAMPLING AS FAIR USE: APPLYING *CARIOU* TO SAMPLING

In this Part, I argue that the *Prince* ruling can be applied to many instances of sampling. *Prince* stands for the proposition that certain transformative derivative works of appropriation art can qualify as fair use. In that regard, the sampling cases seem inconsistent with this ruling. Having already explored how the fair use factors have been addressed in the context of visual appropriation art, this Part will apply those principles to a hypothetical sampling case in order to demonstrate that music has been held to a different standard from other artistic works, and that this should be corrected. If the standards applied in *Prince* were applied in sampling cases, then recording artists would have greater ability to sample without invariably having to seek permission for all samples. This Part will also discuss some of the shortcomings of the *Prince* opinion mentioned in Part II, and how courts might avoid making similar errors.

A. PURPOSE AND CHARACTER OF THE USE

Transformativeness is only one element of the first factor of the fair use test, though it is the one courts tend to emphasize. Also to be considered is whether the work is used for commercial or educational purposes. Many commercial works have been afforded the fair use defense.[279] Almost all music is released for commercial purposes, and sample-based music is no exception. But certain instances of sampling are more transformative than others and are therefore more likely to qualify as fair use. To facilitate this analysis, a two-dimensional spectrum of transformative works is assumed, with works of minimal transformative value at one end, and works of maximum transformative value at the other end.

A song such as "Holla" by Ghostface would lie close to the extreme end of minimal transformative value.[280] The song features Ghostface rapping over The Delfonics' "La-La (Means I Love You)."[281] The sample has not been altered in any way so as to change the aesthetic of the original; the meaning of the original song is maintained, and the only part added is Ghostface's vocals. This is a different case from "Hard Knock Life," where Jay-Z flips the *Annie* music into an ironic comment about race and class, completely redefining the meaning of the original song. Therefore, from both an extrinsic and intrinsic perspective, "Holla" has minimal transformative value, and thus would probably not constitute fair

279. *See Campbell*, 510 U.S. at 579 ("The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

280. GHOSTFACE, *Holla*, *on* THE PRETTY TONEY ALBUM (Def Jam 2004).

281. THE DELFONICS, *La-La (Means I Love You)*, *on* LA LA MEANS I LOVE YOU (Philly Groove Records 1968).

use.[282]

At the opposite end of the spectrum would be "Bring the Noise" by Public Enemy, produced by The Bomb Squad, a song with much transformative value.[283] "Bring the Noise" features approximately nine samples, and each one serves as a fragmentary piece of the song's background music.[284] This analysis will examine three of the more prominently used samples, the first of which is a two-second horn part taken from Marva Whitney's "It's My Thing."[285] This snippet was "chopped" into smaller pieces and then reorganized to create a new melody, which is looped at various points of the song.[286] The second sample is a three-note arpeggiated guitar riff from Funkadelic's "Get Off Your Ass and Jam," which is distorted and obscured behind other parts to sound like a siren.[287] The last sample, James Brown's "Get Up, Get Into It, Get Involved" ("Get Up"), has been completely changed.[288] The Bomb Squad took a guitar riff and "scratched" the record on a turntable, completely changing its sonic character.

Finding that a work has transformative value does not depend on the work making a direct comment on any of the sampled works.[289] Instead, the test is whether a work adds "new expression, meaning or message."[290] As noted in Part II, a court administering this test should consider both intrinsic and extrinsic elements of the new work.[291] Simply adding new expression does not mean the use will be fair; the amount of new expression must be compared with how much of the original work is used.[292]

In *Prince*, the court noted that there was transformative value in the fact that Prince did not simply take Cariou's photos and paste them on his canvas.[293] Instead, Prince cut out specific parts of Cariou's images and drew on top of them, thus changing their aesthetic character and perhaps reducing the amount taken under the second factor of the fair use test. In "Bring the Noise," each of the samples is set against a backdrop of drums, bass and other sounds that were added

282. Instances where substantial portions are taken from a sound recording are outside the scope of this Note and will not be addressed further.

283. PUBLIC ENEMY, *Bring The Noise*, *on* IT TAKES A NATION OF MILLIONS TO HOLD US BACK (Def Jam/Columbia 1988).

284. As with the Beastie Boys and *Paul's Boutique*, Public Enemy is understandably reticent to reveal all the samples used in "Bring the Noise" given the threat of litigation. The samples have mostly been discovered by avid listeners. *See Bring the Noise by Public Enemy*, WHOSAMPLED, http://perma.cc/L3KK-D2TJ (last visited Oct. 13, 2014).

285. MARVA WHITNEY, *It's My Thing (You Can't Tell Me Who To Sock It To)*, *on* IT'S MY THING (King Records 1969).

286. Looping means extending a part of a sample by having it repeat itself. *See* Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2003).

287. FUNKADELIC, *Get Off Your Ass and Jam*, *on* LET'S TAKE IT TO THE STAGE (Westbound Records 1975).

288. JAMES BROWN, *Get Up, Get Into It, Get Involved*, *on* IN THE JUNGLE GROOVE (Polydor Records 1986).

289. Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).

290. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

291. Heymann, *supra* note 262, at 448–49.

292. *See Campbell*, 510 U.S. at 586–90.

293. *Prince*, 714 F.3d at 700 ("In these, Cariou's work is almost entirely obscured.").

by Public Enemy from other sources. Public Enemy took the horns from "It's My Thing" and altered them to create a new melody. "Get Off Your Ass and Jam" and "Get Up" were revamped in a similar fashion. The guitar riffs from these songs are distorted and manipulated in ways that leave them "almost entirely obscured."[294] The aggregate effect of this distorted collage gives rise to an energy of rebellion, which is distinct from each of the underlying works.

From the foregoing analysis it is clear "Bring the Noise" is transformative with respect to at least three of its sampled sound recordings. The next issue is whether there is any appropriation of samples' underlying compositions. Unlike sound recordings, claims of musical composition infringement are not adjudicated with bright-line rules.[295] Therefore, before analyzing the fair use merits on this issue, infringement must first be established. Using the Ninth Circuit's reasoning in *Newton v. Diamond*, the issue is whether any of the samples embody qualitatively or quantitatively substantial portions of original works' musical compositions.[296]

First, Public Enemy altered the horn part taken from "It's My Thing" such that the notes are played in a sequence different from the original. By creating a new melody in this way, Public Enemy avoids copying any of the original's underlying composition. This is in contrast to *Newton v. Diamond*, where the Beastie Boys did not alter the sample's sequence of three notes.[297] Second, Public Enemy chose to leave the three-note sequence from "Get Off Your Ass and Jam" intact. However, after focusing solely on the melody and rhythm of the sampled guitar part, a court or jury would probably find that the three-note arpeggio lacks sufficient originality to merit copyright protection, leaving no grounds for finding infringement.[298] The last sample, "Get Up," is distorted such that the original melody is no longer present in "Bring the Noise." Thus, not one of these three samples in "Bring the Noise" is likely to qualify as infringement of the underlying compositions. Because a fair use defense is only raised after infringement is found, Public Enemy would only defend its appropriation of the sound recordings, not the underlying compositions.

B. NATURE OF THE COPYRIGHTED WORK

The Supreme Court has held that creative works fall within the core of copyright's protective purposes.[299] The Second Circuit has elaborated on this factor by noting that it "may be of limited use where the creative work of art is being used for a transformative purpose."[300] Such is the case here, so that while

294. *See id.*

295. *See* discussion *supra* Part I.

296. *See* Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2003).

297. *See* Newton v. Diamond, 204 F. Supp. 2d 1244, 1246 (C.D. Cal. 2002).

298. *See, e.g.*, *id.* at 1256 (finding that the three-note sequence at issue lacked "any distinct melodic, harmonic, rhythmic or structural elements"). A court or jury would likely find that this three-note arpeggio is a generic sequence used as a "basic building block tool" that "has been used over and over again" by musicians in the 20th century. *See id.* at 1254–55 (internal quotation marks omitted).

299. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

300. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006).

this factor cuts against a finding of fair use, that disposition is weakened by the transformative values inherent in "Bring the Noise."

C. AMOUNT AND SUBSTANTIALITY OF THE PORTION USED

With respect to the third factor of the fair use test, the Supreme Court has directed that "the extent of permissible copying varies with the purpose and character of the use."[301] The inquiry is directed not only to the amount of material taken from the original, but also to the taken material's quality and importance to the original work.[302] This is where parody's advantage lies in the fair use analysis. Because a parody takes direct aim at the original work, it must be allowed to "conjure up" enough of the original to make it recognizable.[303] Because sampling usually lacks such direct comment, the amount of taking allowable will probably be less than in the case of a parody. However, a transformative work will still be able to borrow enough from the original to fulfill its transformative purpose.[304]

The focus of this inquiry is on the proportion of the original work that was taken and used in the new work.[305] It was at this point in the analysis in *Prince* that the court of appeals was unable to grant summary judgment to the defendants with respect to five of the thirty works at issue.[306] By comparing these five works to the originals, it is evident that a large proportion of the original photographs have been taken.[307] For example, the photograph used for *Meditation* features a man standing in shorts amongst foliage.[308] For the new work, it appears that Prince cut out the subject from the background and placed the cut-out against a blank backdrop, tinted it to give it a reddish overtone, and added lozenges and a guitar with hands.[309] Even though Prince did not use the whole photograph, the court might have taken issue with Prince taking a qualitatively substantial part of the original.[310] For *Canal Zone (2008)*, which borrowed from six Cariou photographs, the court found that the "cumulative effect" of the work was not dissimilar from many of the *Yes Rasta* photographs, namely "subject[s] in a habitat replete with lush greenery."[311] Although the court does not fully explain its reason for remanding this particular work, this language suggests that the aesthetic of *Canal Zone (2008)* resembles the

301. *Campbell*, 510 U.S. at 586–87.
302. *Id.* at 587.
303. *Id.* at 588.
304. *See* Cariou v. Prince, 714 F.3d 694, 710 (2d Cir. 2013).
305. *Id.* ("[W]e consider the proportion of the original work used, and not how much of the secondary work comprises the original.").
306. *Id.* at 710–11.
307. The court of appeals included several images of Cariou's and Prince's work within the opinion itself. *See id.* at 700–03. In addition, high-quality images of all thirty Prince works and the corresponding Cariou works were published in an appendix to the *Prince* opinion. *See Prince* Appendix, *supra* note 244.
308. PATRICK CARIOU & PERRY HENZELL, *Untitled*, *in* YES RASTA 118 (2000), *available at* http://perma.cc/ZB2S-YYDP.
309. RICHARD PRINCE, *Meditation* (2008), *available at* http://perma.cc/ZNM3-UFU7.
310. *See Prince*, 714 F.3d at 711.
311. *Id.*

originals to the extent that Cariou's photographs might be superseded.[312] If the jury were to make such a finding, that would undercut Prince's fair use claim.[313]

Shifting to an analysis of "Bring the Noise," that the song consists almost entirely of samples does not matter.[314] The focus is on how much has been taken from *each* sample. First, Public Enemy only took a small snippet from the bridge section of "It's My Thing." Second, less than three seconds is used from the introduction to "Get Off Your Ass and Jam." Third, a very short fragment has been appropriated from "Get Up." Finally, it is important to observe that the "cumulative effect" of "Bring the Noise" is substantially different from all three of the samples in question.[315] The overall aesthetic of the new song can be characterized as a sonic collage geared towards a hip-hop audience, whereas none of the original works feature any samples or rapping. This analysis suggests that Public Enemy has not appropriated too much from the original works, which would militate against a finding of fair use.

D. EFFECT ON THE POTENTIAL MARKET

The fourth factor of the fair use test looks to the effect of the secondary use upon two separate potential markets for the original work.[316] The first is the market for the original work, and the second is the market for derivative works.[317] In cases where the second work is transformative, there is less of a risk for market substitution, and market harm cannot be presumed.[318] It is important to avoid the "danger of circularity" identified by Nimmer—that is, a court should not find that a plaintiff's market has necessarily been usurped merely because the defendant used the plaintiff's work.[319] Adding to this difficulty is the focus on potentiality, which can present the defendant with severe problems of proof.[320]

The Second Circuit has approached this issue in different ways. In *American Geophysical Union v. Texaco*, the court looked to whether the potential market in question was "traditional, reasonable, or likely to be developed."[321] In *Prince*, the court wrote that a market has been usurped "where the infringer's target audience and the nature of the infringing content is the same as the original."[322]

The deficiencies of the *Prince* audiences test were explained in Part II.B, above.

312. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994) (discussing superseding works as market replacements).

313. *See id.*

314. *Prince*, 714 F.3d at 710 ("[W]e consider the proportion of the original work used, and not how much of the secondary work comprises the original.").

315. *See Prince*, 714 F.3d at 711.

316. *Campbell*, 510 U.S. at 590 (citing 17 U.S.C. §107(4) (1976)).

317. *Id.*

318. *Id.* at 591.

319. 4 NIMMER ON COPYRIGHT, *supra* note 50, § 13.05[A][3].

320. *Id.* § 13.05[A][4].

321. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994) (quoting *Campbell*, 510 U.S. at 592).

322. Cariou v. Prince, 714 F.3d 694, 709 (2d Cir. 2013).

Nevertheless, I argue that under either test there is no viable market for transformative fragmentary sample licenses, such as the three used in "Bring the Noise." Building off of Part I.B.2's discussion of market failure, I argue that the *Bridgeport* ruling led to an industry practice of clearing even the most fragmentary uses of sound recordings, and that this created an artificial and inefficient market. For these reasons, *Bridgeport* should be overturned. Finally I argue certain transformative samples do not usurp the original's potential market and should therefore qualify as fair use.

The decisions in *Grand Upright* and *Bridgeport* led to the industry practice of licensing any and all samples, no matter how small, which has created an artificial market.[323] The bright-line rule in *Bridgeport* has been widely criticized and should be overturned.[324] The *Bridgeport* bright-line rule added certainty to the market, but it did so at the expense of pushing certainty to an extreme. To the extent that relevant actors in the music industry were already risk-averse and likely to obtain licenses notwithstanding the bright-line rule, the decision has magnified those behaviors and led to market distortions. By requiring all samples to be licensed, the court left musicians vulnerable to more lawsuits.[325] It also increased the incentive to settle, as defendants know that doing so will be cheaper than litigation, which has led to a rise in wasteful sample trolls.[326] Additionally, although the court held that there was no de minimis defense to sound recording infringement, it explicitly did not foreclose a fair use defense by a sampler.[327] Therefore, in a similar case, a court will have to conduct a four-prong fair use analysis instead of applying the much simpler de minimis doctrine. This will lead to a more complex fact-specific analysis that is less amenable to summary judgment, thus increasing litigation costs.

It is notable that there have not been any significant sampling cases since *Bridgeport*. As the court predicted, its decision has removed uncertainties from the marketplace and virtually eliminated litigation on this issue. Instead, it seems that labels and artists are more content to license all samples, no matter how little is taken, rather than risk being sued and incurring substantial legal fees while arguing fair use. Thus, even though *Bridgeport* explicitly left the fair use defense available,

323. I define artificial market as one that would not exist but for the decision in *Bridgeport*. An artificial market should be viewed as a market failure since resources are not allocated so as to serve social goals. *See* Gordon, *Excuse and Justification*, *supra* note 106, at 151.

324. *See* Jennifer R. R. Mueller, *All Mixed Up:* Bridgeport Music v. Dimension Films *and De Minimis Digital Sampling*, 81 IND. L.J. 435 (2006); John Schietinger, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209 (2005); Somoano, *supra* note 54.

325. In 2007, Bridgeport Music sued Bad Boy Entertainment, owners of the Notorious B.I.G. album *Ready to Die*, for copyright infringement. The judge overseeing the case instituted a sales ban on the album forcing the record label to pull the album, originally released in 1994, from record stores and online retailers. *Judge Halts Sales of Notorious B.I.G. Album After Jury Finds Song Snippet Used Without Permission*, BRYAN TIMES (Mar. 24, 2006), http://news.google.com/newspapers?id=VvkvAAAAIBAJ&sjid=iUkDAAAAIBAJ&pg=5587%2C2536180.

326. *See* Jaia A. Thomas, *Rise of the Sample Trolls: 99 Problems and a Sample is 1*, UPTOWN MAG. (Nov. 12, 2013), http://perma.cc/SEK7-XMS6.

327. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 805 (6th Cir. 2005).

relevant actors have not been acting on that assumption, and instead have presumed that all samples require a license.

This has led to market activity that would not exist but for the ruling. For example, the song "Nosetalgia" by Pusha T and Kendrick Lamar contains three licensed samples, one of which will be the focus of this discussion.[328] The song contains a sample from "D'Ya Like Scratchin'?" by Malcolm McLaren, consisting of a voice asking, "what is it?"[329] This borrowed portion is less than one second long, it is altered with various echoing effects and it appears twice in the new work. Thus, the sample taken is not qualitatively or quantitatively significant to the original work and the use is transformative (the third and first factors of fair use, respectively). But for any potential market effects, the borrowing would probably qualify as fair use. The only reason why there would be market effects is because relevant parties in the music industry are acting in a bright-line regime where they assume that all unlicensed sampling constitutes infringement. But if the *Bridgeport* court had instead used the same substantial similarity analysis used in other copyright infringement contexts and allowed for a de minimis defense, then samples such as the one used in "Nosetalgia" would not have to be licensed and there would be no market for them. Comparing this result to that in the *Prince* case serves as an illustration for how the legal rules in the visual art context differ from those in the musical context, even though both are forms of appropriation art. By overruling *Bridgeport*, this inequality would be corrected.

If *Bridgeport* had not eliminated the de minimis defense, then de minimis samples would not be licensed, and this particular market would not have developed.[330] By acknowledging that this artificial market is a form of market failure, courts could easily find no market harm and allow fragmentary transformative samples as fair use. In other words, when an artist uses a fragmentary sample, he or she is not usurping any market because it should not have existed in the first place. Even if courts are not willing to ignore the market, it should not change the analysis significantly given that potential market effects is not the most important factor of the fair use test.[331]

IV. CONCLUSION

The fair use doctrine has and will continue to develop in response to changes in technology and art, which was Congress' intent when it enacted the statute. *Prince* has expanded the role that transformativeness will play in the fair use analysis and serves as an example of how courts have adapted the doctrinal framework to new

328. PUSHA T & KENDRICK LAMAR, *Nosetalgia*, *on* MY NAME IS MY NAME (GOOD Music/Def Jam 2013).

329. MALCOLM MCLAREN & THE WORLD'S FAMOUS SUPREME TEAM, *D'ya Like Scratchin'?*, *on* D'YA LIKE SCRATCHIN'? (Island Records 1983).

330. To be clear, this Note does not argue that the market for all sample licenses is artificial. From that broader market, I only identify as artificial the market for samples that would be considered de minimis but for the *Bridgeport* decision.

331. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

forms of art. Up to this point, legal rules have had an adverse effect on creative output in hip-hop, by limiting the amount of samples that can be used in any given work. This Note has argued that sampling, as a form of appropriation art, deserves equal treatment in the fair use sphere. Creativity will be enhanced if artists have fewer economic constraints in sampling from multiple sources, thus fulfilling copyright's goal of "promot[ing] the Progress of Science and useful Arts."[332]

332. *See* U.S. CONST. art. 1, § 8, cl. 8.