

Drake Infringement Case: Fair Use as a Matter of Law

by Steve Kramarsky

One of the thorniest questions faced by intellectual property lawyers advising clients on copyright matters is what constitutes “fair use” of a protected work. With the explosive growth of user-generated content, the artistic ideas of sampling, repurposing and appropriation have become common in broader contexts, and the social media economy is, to a certain extent, built on the idea that works gain value as they are shared and commented on. But the rights of content creators must also be protected if those communities are to continue to exist. Lawyers and judges called on to examine and balance these issues tend to fall back on familiar tools, and for the last 20 years or so, the touchstone of fair use analysis has been a concept that does not actually appear in the Copyright statute: the question of whether the use is “transformative.”

Transformative use analysis can be particularly challenging when it comes to art and artistic commentary. Comparing artistic works—and balancing their contextual similarities and differences—can be challenging, sometimes with the result that “courts knowingly or inadvertently rely on aesthetic theories of interpretation.” Robert Kirk Walker & Ben Depoorter, “Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard,” 109 NW. U.L. REV. 343, 368 (2015). While it may seem surprising that a court would undertake that sort of aesthetic analysis, particularly on summary judgment, that is exactly what is called for by the current law of fair use. It is easy to forget that the U.S. Supreme Court’s 1994 opinion in *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994), a landmark in fair-use law, was also a landmark in hip-hop, with 2 Live Crew and Roy Orbison squaring off before the court. The doctrine and the genre have been intertwined ever since. For example, in 2003, Judge Gerard Lynch of the Southern District of New York ruled that fair use protected a song by Ghostface Killah, a member of rap’s iconic Wu-Tang Clan, that began with an off-key rendition of the classic song “What a Wonderful World.” Judge Lynch observed that Ghostface had not merely parodied the song, he used it to set up a “contrast between the assertedly delusional innocence of mainstream culture and the purportedly more realistic viewpoint of the rapper.” *Abilene Music v. Sony Music Ent.*, 320 F. Supp. 2d 84, 91 (S.D.N.Y. 2003). This, the court ruled, was transformative.

Similar (if less dark) issues informed the court’s recent analysis in *Estate of Smith v. Cash Money Records*. There, the court again addressed the question of when an artist is protected even though he indisputably uses portions of a copyrighted work. Judge William Pauley III’s discussion of transformative use in that case is worth a closer look: It is interesting and informative not only from a legal point of view, but from an aesthetic and philosophical one.

Drake Gets Sued

In 2014, the estate of jazz legend Jimmy Smith brought an action for copyright infringement against the hugely popular Canadian musician Aubrey Drake Graham—yes, that's Drake—and several companies involved in the recording, production, marketing and distribution of the song “Pound Cake/Paris Morton Music 2” (Pound Cake) from his 2013 album “Nothing Was the Same.” See generally Complaint, Estate of Smith v. Cash Money Records, No. 1:14-cv-02703 (WHP) (S.D.N.Y. April 16, 2014), ECF No. 2. The suit alleged that Drake impermissibly copied about 35 seconds of a minute-long spoken-word recording from Smith's 1982 album “Off the Top” entitled “Jimmy Smith Rap” (JSR) for use in Pound Cake.

The estate filed its suit along with co-plaintiff Hebrew Hustle, a company to which the estate had assigned a 50 percent interest in the copyright for the composition of JSR. Hebrew Hustle's business model is itself interesting. According to the opinion, Hebrew Hustle's principal, Stephen Hacker, obtained an advance copy of the credits for Drake's album and reviewed them to “look for openings in the rights, sign those rights and then disclose that to the Drake representatives' after the release of the Album.” Estate of Smith v. Cash Money Records, 14 CV 2703, 2017 WL 2333770, at *2 (S.D.N.Y. May 30, 2017). Having determined that, in his view, Drake had obtained necessary rights for the sound recording of JSR, but not for the composition, Hacker informed the Smith estate. He then entered into a deal with the estate, which registered a composition copyright for JSR (which had not previously been registered) and sent a cease and desist letter to Drake's representatives, some months after the release of Drake's album. This was the first time defendants learned of any alleged composition copyright in JSR.

It is undisputed that Pound Cake literally copies at least some of the sound recording of JSR: It samples about 35 seconds of JSR, with some words rearranged or deleted, but none added. Importantly (for this case), JSR's lyrics opine that “Jazz is the only real music that's gonna last. All that other bullshit is here today and gone tomorrow. But jazz was, is and always will be.” Pound Cake samples that line, but remixes it to say: “Only real music is gonna last, all that other bullshit is here today and gone tomorrow.”

Before releasing Pound Cake, defendants obtained a license for the JSR sound recording. But the 1982 album on which JSR appears does not list a composer or author, and at the time the Drake album was released, no copyright was registered for the JSR composition, so defendants never cleared those rights. Having identified this “gap” in rights, however, Smith's estate registered the composition copyright in JSR and sued for copyright infringement of the JSR composition alone. After engaging in discovery on liability, the parties made cross motions for summary judgment. On May 30, 2017, the court granted defendants' motion.

The Court's Decision

The opinion addressed a number of issues. It began by addressing two issues relating to necessary elements

of a claim for infringement: validity of the JSR copyright and whether there was a “substantial similarity” between JSR and Pound Cake. After a considerable discussion of both issues—especially of the law applicable to substantial similarity—the court ultimately determined that neither were suitable for resolution on a motion for summary judgment.

While a copyright registration is usually *prima facie* evidence of a valid copyright, the court noted that a copyright registration filed 30 years after the fact to take advantage of a potential litigation has little evidentiary value. Given that there was little evidence of whether Smith was actually the author of JSR, the court held that the issue should properly be decided by a jury.

On the issue of substantial similarity, the court examined the various methods used for that analysis in some detail, but held that that issue was also best left for the jury. The court explained (quoting Justice Oliver Wendell Holmes Jr.):

In the end, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [art], outside of the narrowest and most obvious limits.” Ultimately, a determination of whether the copied portions of JSR are entitled to copyright protection depends on a subjective assessment better suited for a jury than a court.

Id. at *6 (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.)). These issues were mooted, however, because the court decided the case on the affirmative defense of fair use. The court acknowledged that this, too, was “highly fact-dependent”—in fact, “especially” so. *Id.* at *7 (citations omitted). Nevertheless, the court explained, summary judgment may be appropriate when it is unlikely that additional evidence will be presented at trial. *Id.* (citing *Abilene Music v. Sony Music Ent.*, 320 F. Supp. 2d 84, 88 (S.D.N.Y. 2003)). Without calling it a trend (though others have done so), the court observed that “courts in the Second Circuit have ‘on a number of occasions’ resolved fair use determinations at the summary judgment stage.” *Id.* (quoting *North Jersey Media Grp. v. Pirro*, 74 F. Supp. 3d 605, 614 (S.D.N.Y. 2015)).

The court then addressed each of the four statutory fair-use factors: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect on the market for the copyrighted work. See 17 U.S.C. §107.

As is often the case, however, the court’s analysis turned largely on the question of whether Pound Cake’s use of the JSR composition was transformative. The defendants argued that it was, and gave three reasons, two of which the court quickly rejected. Defendants argued (1) “that Pound Cake omits all references to the recording of Off the Top, thereby making the words applicable to the process of making Drake’s album rather than Jimmy Smith’s,” and (2) “that the addition of background music, the rearrangement of some words, and the placement of the recording in a seven-minute hip hop track renders their use serves the

same purpose it is simply a derivative work (which may be controlled by the copyright holder), not a protected, transformative fair use.

Defendants' remaining argument, however, provided "a compelling reason to find this use transformative." *Id.* Whereas the original meaning of JSR was to say that jazz is superior to all other music, "Defendants' use of JSR, by contrast, transforms Jimmy Smith's brazen dismissal of all non-jazz music into a statement that 'real music,' with no qualifiers, is 'the only thing that's gonna last.'" *Id.* Drake had altered JSR in fashion that created a "new expression, meaning, or message." *Id.* (quoting *Campbell*, 510 U.S. at 579) (internal quotation marks omitted). This, the court held, was a transformative use and thus protected. The court rejected plaintiffs' counterargument that Smith was too obscure to be the basis for a transformative use of this kind, noting that a secondary use can be transformative even when no reasonable observer would recognize the original work from which it was taken.

The court concluded by evaluating the remaining three fair-use factors, finding that they either supported a finding of fair use or (in the case of the "nature of the copyrighted work") were trumped by the finding of transformative use. In particular, the final factor—the effect on the market for the copyrighted work, which is "undoubtedly the single most important element of fair use" (*id.* at *10 (citing *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 566 (1985)))—favored a finding of fair use, since Pound Cake would never be considered a substitute for JSR. As a result, the court held that Pound Cake's use of DSR was protected by the doctrine of fair use. Plaintiffs' claims were dismissed.

Conclusion

Though once chaotic, the legal environment for sampling (at least in the U.S. music industry) has settled into a well-understood legal regime, with rigorous clearance and licensing practices becoming the industry norm. Nevertheless, as this case shows, there are always edge cases, and litigation does arise. With the meteoric rise of shared and repurposed content in social media and other digital contexts, those cases are likely to be more and more common. In that environment, it is helpful to have considered opinions about where the lines are drawn.

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