

## All Mixed Up: Concerns For Sampling in Music Post-Warhol

by *Garrett J. Hall*

On May 18, 2023, the United States Supreme Court published its decision regarding a major copyright case: *Andy Warhol Foundation for the Visual Arts, Inc., Petitioner V. Lynn Goldsmith, et al.*<sup>1</sup> In an opinion in which seven of the Court’s Justices joined, the Court reimagined the considerations crucial to the first factor of copyright’s fair use analysis, essentially expanding its scope and establishing a new sliding-scale test in which the extent to which a work is transformative is considered in tandem with its commerciality.<sup>2</sup> This article explores the impact this *Warhol* decision could have on the practice of sampling in music.

### ***Warhol* Changes the Copyright Infringement Test**

Under federal copyright law, when assessing whether a secondary work infringes upon an original work, a court must turn to the four-factor test as delineated by the Supreme Court in *Harper & Row, Publishers, Inc., et al. v. Nation Enterprises, et al.*<sup>3</sup> and since codified in 17 U.S. Code § 107. The first factor—which assesses “the purpose and character of

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<sup>1</sup> 598 U.S. \_\_\_\_ (2023), available at [www.supremecourt.gov/opinions/22pdf/21-869\\_87ad.pdf](http://www.supremecourt.gov/opinions/22pdf/21-869_87ad.pdf).

<sup>2</sup> *Id.*; see also Benesch, *Supreme Court’s 2023 Copyright Fair Use Decision is Not a One-Hit Wonder*, JD Supra (June 6, 2023), [www.jdsupra.com/legalnews/supreme-court-s-2023-copyright-fair-use-2804838/](http://www.jdsupra.com/legalnews/supreme-court-s-2023-copyright-fair-use-2804838/); Cathy Gellis, *The Warhol Decision: How SCOTUS Forgot The First Amendment & Turned Copyright Into A Liability Time Bomb*, Techdirt (May 25, 2023), [www.techdirt.com/2023/05/25/the-warhol-decision-how-scotus-forgot-the-first-amendment-turned-copyright-into-a-liability-time-bomb/](http://www.techdirt.com/2023/05/25/the-warhol-decision-how-scotus-forgot-the-first-amendment-turned-copyright-into-a-liability-time-bomb/) (“But the majority’s decision . . . was hardly narrow; it was a decision that fundamentally rewrote the operational axis of our current copyright law.”).

<sup>3</sup> 471 U.S. 539 (1985).

the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”<sup>4</sup>—was the sole factor at issue in *Warhol* upon appeal to the nation’s highest court.<sup>5</sup> The Court arrived at a new counterbalancing assessment for lower courts to consider when conducting a fair-use analysis: whereas previously a secondary work would make fair use of an original work if the secondary work was sufficiently transformative, that may no longer be the case if the secondary work is for a substantially similar commercial purpose as the original work; the closer in commercial purpose a secondary work is, the more transformative it must be to constitute a fair use.<sup>6</sup>

Does this decision mean artists will no longer be able to make use of previous works?<sup>7</sup> No. While *Warhol* may make it more risky or burdensome to do so,<sup>8</sup> and while artists might be subsequently less incentivized to do so,<sup>9</sup> artists are not barred from reappropriating copyrighted works in a transformative fashion. Even if the first factor weighs against the secondary artist, there are still three other fair-use factors to consider.

Because the Court was not able – in the context of the *Warhol* opinion – to demonstrate how this new analysis plays out in connection with the surrounding three factors, this decision *may* not be as damaging to the secondary users as it currently appears. Indeed,

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<sup>4</sup> 17 U.S.C. § 107(1).

<sup>5</sup> See *Warhol*.

<sup>6</sup> See *Warhol*; Benesch, *supra* n.2; Gellis, *supra* n.2.

<sup>7</sup> See also Moritt Hock & Hamroff LLP, *Warhol Case Likely to ‘Diminish but Not Eliminate’ Creative Use of Previous Artworks*, JD Supra (June 9, 2023), [www.jdsupra.com/legalnews/warhol-case-likely-to-diminish-but-not-5212461/](http://www.jdsupra.com/legalnews/warhol-case-likely-to-diminish-but-not-5212461/).

<sup>8</sup> See Linda J. Zirkelbach & Parker G. Zimmerman, *The Supreme Court’s Warhol Ruling Makes Fair Use Defense Seem Even Riskier*, Venable LLP (May 23, 2023), [www.venable.com/insights/publications/2023/05/the-supreme-courts-warhol-ruling](http://www.venable.com/insights/publications/2023/05/the-supreme-courts-warhol-ruling).

<sup>9</sup> See Paul Kimani, *Towards A Copyright Law That Encourages Creativity*, 63 IDEA 354, 365 (2023).

the Court points to this in its decision, reminding us that “the four statutory fair use factors may not ‘be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.’”<sup>10</sup> Going forward, legal experts expect that this decision will cause courts to more heavily weigh commercial concerns like market competitiveness between the works when engaging in their fair use inquiries.<sup>11</sup>

As courts begin to apply *Warhol’s* first-factor doctrinal adjustment in full fair use analyses, we will get a better sense of how substantially impacted the commercial viability of transformative artistic expression is by this change.<sup>12</sup>

Let’s take a closer look at one major area in which artists constantly make use of previous artists’ work: sampling.

## Sampling

Sampling—the process of reappropriating portions of sound recordings in new musical works<sup>13</sup>—has for several decades been a major

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<sup>10</sup> See *Warhol* (quoting Campbell, 510 U. S., at 578).

<sup>11</sup> See Matt Stevens, *After the Warhol Decision, Another Major Copyright Case Looms*, New York Times (May 22, 2023), [www.nytimes.com/2023/05/22/arts/warhol-prince-decision-copyright.html](https://www.nytimes.com/2023/05/22/arts/warhol-prince-decision-copyright.html) (“Bart Lazar, who specializes in copyright law, said the Warhol decision seemed to prioritize more pragmatic concerns about market competitiveness between an art work and the underlying photograph.”).

But aren’t market competition considerations enveloped in the fourth factor—“the effect of the use upon the potential market for or value of the copyrighted work?” How did such a result come out of an opinion in which only the first factor was at issue?

<sup>12</sup> See *id.* (“I think it will be some time, as we see this play out in the lower courts, before we understand the full implications of the opinion,” said Laura Heymann, a professor at William & Mary Law School who specializes in intellectual property law.”).

<sup>13</sup> *Sampling, Interpolations, Beat Stores and More: An Introduction for Musicians Using Preexisting Music*, U.S. Copyright Office (Rev. Dec. 2021), at 3 (“Sampling involves taking part of an existing sound recording and incorporating it into a new work.”), available at [www.copyright.gov/music-modernization/educational-materials/Sampling-In-terpolations-Beat-Stores-and-More-An-Introduction-for-Musicians-Using-Pre](https://www.copyright.gov/music-modernization/educational-materials/Sampling-In-terpolations-Beat-Stores-and-More-An-Introduction-for-Musicians-Using-Pre)

component of the music-making process for many well-established artists. Indeed, countless songs in hip-hop and electronic music have reached mainstream success through sampling the tunes of past performers,<sup>14</sup> and such sampling techniques have played a central role in the careers of major artists from the likes of Kanye West to Daft Punk.<sup>15</sup>

Sampling hardly fits neatly into the U.S. copyright framework; to the contrary, samples often exploit *two* copyrighted works at once—the sound recording from which the sample is sliced and the underlying musical composition.<sup>16</sup> In this way, artists who employ samples in their tracks double their risk of legal liability.<sup>17</sup> At a minimum, these artists double their own burden: having to obtain two licenses in order to clear a sample.

Further, unlike elsewhere in the federal copyright regime, the use of ‘samples’ is not so cleanly covered by a compulsory license.<sup>18</sup> Since the only way to license a sound recording is through direct agreement with the original artist, clearing samples

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[existing.pdf](#); see also Melissa Eckhause, *Digital Sampling v. Appropriation Art: Why Is One Stealing and the Other Fair Use? A Proposal for a Code of Best Practices in Fair Use for Digital Music Sampling*, 84 MO. L. REV. (2019) 371, 371 n.2 (providing definitions of sampling from case law), available at: <https://scholarship.law.missouri.edu/mlr/vol84/iss2/6>

<sup>14</sup> See, e.g., Ryan Bassil, *The Ten Best Songs You Didn't Know Were Based on Sample*, VICE (July 31, 2017), [www.vice.com/en/article/zmvay8/10-best-songs-obscure-samples-beyonce-emi-nem](http://www.vice.com/en/article/zmvay8/10-best-songs-obscure-samples-beyonce-emi-nem).

<sup>15</sup> Kanye has amassed 2,962 samples, as sampling is heavily involved in his songwriting process. See *Kanye West*, WhoSampled, [www.whosampled.com/Kanye-West/](http://www.whosampled.com/Kanye-West/) (accessed June 2023); see also Jacob Kastrenakes, *Kanye West's Sampling: A Listenable History*, The Verge (Aug. 20, 2014), [www.theverge.com/2014/8/20/6048381/kanye-west-samples-listenable-history](http://www.theverge.com/2014/8/20/6048381/kanye-west-samples-listenable-history) (exploring Ye's samples through *Yeezus*). Daft Punk has utilized a (relatively modest) 742 samples, wherein their use of sampling was more-project dependent. See *Daft Punk*, WhoSampled, [www.whosampled.com/Daft-Punk/](http://www.whosampled.com/Daft-Punk/).

<sup>16</sup> *What Musicians Should Know about Copyright*, U.S. Copyright Office, [www.copyright.gov/engage/musicians/](http://www.copyright.gov/engage/musicians/).

<sup>17</sup> See *id.*

<sup>18</sup> See Sam Clafin, *How To Get Away With Copyright Infringement: Music Sampling As Fair Use*, 26 B.U. J. SCI. & TECH. L. 101, 102 (2020).

can be tedious, time-consuming, and expensive, as well as an unfortunate distraction from the creative process.<sup>19</sup> Indeed, Kanye's debut single *Through the Wire* took serendipitous convincing for Chaka Khan to begrudgingly clear use of her 1984 sound recording.<sup>20</sup>

And uncleared samples can be even more costly; for example, Diddy famously purports to still pay Sting \$5,000 *per day* some two-and-a-half decades removed from failing to clear a sample from The Police's catalog on Diddy's (then Puff Daddy) *I'll Be Missing You*.<sup>21</sup> Just as astoundingly, uncleared samples kept the entire early discography of hip-hop group De La Soul in digital darkness – obscured from streaming platforms like Spotify and Apple Music – until March of this year.<sup>22</sup>

## Uncleared Samples & Available Legal Defenses

Artists who take the legal risk of proceeding without seeking permission for a sample must ensure that their use falls into one of two categories: a *de minimis* use, which is not copyright infringement, or a transformative use, for which any alleged infringement is unactionable.

For many, a *de minimis* argument is inapplicable. To start, the inconspicuousness and brevity required of the sample in order to raise this

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<sup>19</sup> See, e.g., Karl Fowlkes, *The Art of Clearing A Sample: Deciding If It's Worth It and How To Actually Do It.*, Medium (Apr. 11, 2020), [medium.com/the-courtroom/the-art-of-clearing-a-sample-deciding-if-its-worth-it-and-how-to-actually-do-e26fa56ad090](https://medium.com/the-courtroom/the-art-of-clearing-a-sample-deciding-if-its-worth-it-and-how-to-actually-do-e26fa56ad090).

<sup>20</sup> Brian Zisook, *Kanye West Used Chaka Khan's Son to Clear the Sample on "Through The Wire"*, DJBOOTH (Oct. 23, 2017), [djbooth.net/features/2017-10-23-kanye-west-chaka-khan-through-the-wire-sample](https://djbooth.net/features/2017-10-23-kanye-west-chaka-khan-through-the-wire-sample).

<sup>21</sup> But see Emily Zemler, *Diddy Actually Does Not Pay Sting \$5,000 Per Day For Uncleared Song Sample*, Rolling Stone (Apr. 7, 2023), <https://www.rollingstone.com/music/music-news/diddy-sting-uncleared-sample-payment-1234710483/>.

<sup>22</sup> Dan Charnas, *It's Time to Legalize Sampling*, Slate (Mar. 3, 2023), [www.slate.com/culture/2023/03/de-la-soul-streaming-legalize-sampling-hip-hop/](https://www.slate.com/culture/2023/03/de-la-soul-streaming-legalize-sampling-hip-hop/).

defense is often either unattainable or untenable for many sampling artists: a “use is *de minimis* only if the average audience would not recognize the appropriation.”<sup>23</sup> Couple that with the fact that there is a circuit split calling into question the doctrine’s doctrinal feasibility and a *de minimis* defense gives artists very little ground to stand on.<sup>24</sup>

In regard to those who have relied upon the transformativeness argument, artists can defend their craft as fair use if their new work has a change in purpose or a sufficient change in substance. Purpose is the easier transformation to decipher, as many of its uses are delineated in 17 U.S.C. 107, “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research;” courts have also clarified other such transformative purposes include sampling as parody<sup>25</sup> and non-commercial experimentation.<sup>26</sup> Drake’s fair use win in *Estate of James Oscar Smith v. Cash Money Records, Inc., et al.*—where he repurposed the audio of *Jimmy Smith Rap* to convey a different message from the original—serves as yet another example.<sup>27</sup>

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<sup>23</sup> *Newton v. Diamond*, 388 F.3d 1189, 1190, 1193 (9th Cir. 2004) (defendants’ sample of “a six-second, three-note segment” of Plaintiff’s song was deemed to be *de minimis*).

<sup>24</sup> *Compare VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016) (doctrinally accepting *de minimis*) with *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (finding *de minimis* incompatible with copyright law); see also Michaela S. Morrissey, *A Music Industry Circuit Split: The De Minimis Exception in Digital Sampling*, 56 U. RICH. L. Rev. 1435, 1449–50 (2022) (discussing how a resolution to the circuit split must balance policy considerations like judicial economy and the need for bright-line rules with copyright’s role in encouraging authors to make creative works).

<sup>25</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)

<sup>26</sup> *Chapman v. Maraj* No. 2:18-cv-09088-VAP-SS (C.D. Cal. Sept. 16, 2020).

<sup>27</sup> 253 F.Supp.3d 737, 750 (S.D.N.Y. May 30, 2017) (“There can be no reasonable dispute that the key phrase of JSR—‘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.’—is an unequivocal statement on the primacy of jazz over all other forms of popular 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.’ Thus, Defendants’ ‘purposes in using [the

With regard to transformativeness of substance, so long as the sampling artist created a new work that was distinct from the initial sound recording sampled, the artist would not be infringing upon the copyright interests of the initial songwriter.<sup>28</sup> Or so we thought.

### **Post-*Warhol* Makes Fair Use In Sampling Less Practicable**

Now, let's consider how *Warhol* affects the transformative fair use claim. Under *Warhol*, transformativeness of substance no longer guarantees a fair use. The same artist, once reassured by their creative input into the use of a sample that they were not committing copyright infringement, now must worry how their commercial use of the initial sound recording affects the amount to which they must be creative.

Take the Drake case for example. Certainly, Drake had a commercial purpose when repurposing the *Jimmy Smith Rap* sample for use in *Pound Cake / Paris Morton Music 2*: since its 2013 release, the song has been streamed over 241 million times on Spotify.<sup>29</sup> Because *Pound Cake* shared ostensibly the same commercial purpose as *Jimmy Smith Rap*, would the *Cash Money Records* case have received a different verdict after *Warhol*?<sup>30</sup> Is the *amount* he transformed

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original work] are sharply different from [the original artist's] goals in creating it.' (citation omitted). This is precisely the type of use that 'adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message.'")

<sup>28</sup> See *Castle Rock Entm't, Inc. v. Carol Publ. Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) ("The more transformative the secondary use, the less likelihood that the secondary use substitutes for the original.")

<sup>29</sup> To be exact, 241,811,536 times. *Drake – Spotify Top Songs*, [kworkb.net](http://kworkb.net) (updated: 2023/06/11), [kworkb.net/spotify/artist/3TVXtAsR1Inumwj472S9r4\\_songs.html](http://kworkb.net/spotify/artist/3TVXtAsR1Inumwj472S9r4_songs.html); see also *Cash Money Records*, 253 F.Supp.3d at 737, 750.

<sup>30</sup> See *Warhol*, 598 U.S. \_\_\_, at 19 (suggesting that a use that shares the purpose of a copyrighted work may be considered a substitute for the original work, undermining a finding of fair use).

the sample enough to counteract the song's commerciality?

It is easy for one to see how the margin for error in sampling has been greatly reduced, opening the door for more circumstances than ever before to be considered infringing. Sampling is a clear loser post-*Warhol*, and artists who sample without clearances must endeavor to proceed with the utmost caution in transforming the original works.<sup>31</sup>

### **Just a Sample: Could Compulsion Be The Fix?**

The current U.S. copyright system lacks a non-clunky avenue for sampling licensing, and this has been criticized by musicians, industry figures, legal advocates alike.<sup>32</sup> For example, when the Los Angeles Times published an article in 2021 insinuating that Daft Punk's sample of an Eddie Johns record in their 2000 single *One More Time* went uncleared, Roots drummer Questlove took to Twitter to lambaste the law's current sampling system.<sup>33</sup> What solutions could be proposed to remedy this creativity- disincentivizing legal blunder?

Many have proposed a fairly intuitive fix: add a compulsory licensing regime to sound recordings akin to

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<sup>31</sup> See Jonathan Bailey, *How the Warhol Ruling Could Change Fair Use*, Plagiarism Today (May 18, 2023), [www.plagiarismtoday.com/2023/05/18/how-the-warhol-ruling-could-change-fair-use/](http://www.plagiarismtoday.com/2023/05/18/how-the-warhol-ruling-could-change-fair-use/) (“[*Warhol*] is likely a major win for photographers, musicians and any creative person who routinely has their work used by others in the creation of new works. Appropriation artists, musicians who sample, and others that are frequent users of outside material need to be more cautious.”).

<sup>32</sup> See Charnas, *supra* n.13.

<sup>33</sup> Michael Gonik, *Questlove Breaks Down The Daft Punk Sampling Controversy*, okayplayer (May 2021), [www.okayplayer.com/music/questlove-breaks-down-the-daft-punk-sampling-controversy.html](http://www.okayplayer.com/music/questlove-breaks-down-the-daft-punk-sampling-controversy.html) (including a discussion about how artist royalties are neglected logistically, leaving many artists' interests accidentally severed when their record labels or publishing companies change hands); see also *Breakdowns of Daft Punk's Samples on "One More Time" & 'Discovery'*, TrackLib (Mar. 2, 2023), [www.tracklib.com/blog/daftpunk-samplebreakdown-discovery-samples](http://www.tracklib.com/blog/daftpunk-samplebreakdown-discovery-samples).



what already exists for licensing compositions.<sup>34</sup> Instead of being ‘out of luck’ if the original artist says no, a compulsory license would give a sampling artist solid legal ground to fall back on. Industry input can be used to determine the best practices for incorporating a compulsory licensing fee to appease all sides—perhaps the compulsory rate could be percentage-based dependent on the amount of the original sound recording sampled. Exceptions could be established so as to not create disparate and unintended results. For example, such a sound recording compulsory license need not apply to audiovisual uses of the sound recording; a result to the contrary would disturb the current system of music licensing to film and television presently in place.

In replacing the hapless clearance crapshoot that has for decades frustrated and frozen careers, some semblance of certainty and predictability would finally be attainable for sampling artists under a compulsory licensing structure. Though such a structure has failed

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<sup>34</sup> For just a sample of the scholarly works to suggest compulsory licensing for sampling, see 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 (2004), available at [escholarship.org/uc/item/96d414rm](https://escholarship.org/uc/item/96d414rm); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 Am. Bus. L.J. 515, 560 n.153 (2006) (discussing prior articles suggesting the same); Amanda Webber, *Digital Sampling and the Legal Implications of Its Use After Bridgeport*, 22 JCRED 373 (2007); Robert M. Vrana, *The Remix Artist’s Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music*, 68 Wash. & Lee L. Rev. 811 (2011), available at: [scholarlycommons.law.wlu.edu/wlulr/vol68/iss2/7](https://scholarlycommons.law.wlu.edu/wlulr/vol68/iss2/7); Andy Sellars, *Rethink Music: A Compulsory Sampling License*, Medium (Oct. 19, 2017), [andy-sellars.medium.com/rethink-music-a-compulsory-sampling-license-a37d96b62b59](https://andy-sellars.medium.com/rethink-music-a-compulsory-sampling-license-a37d96b62b59); Maxwell Christiansen, *Fixing the Sample Music Industry: A Proposal For a Sample Compulsory License*, 22 J. of Tech. Law & Policy 115 (2017), available at: [scholarship.law.ufl.edu/jtlp/vol22/iss1/2](https://scholarship.law.ufl.edu/jtlp/vol22/iss1/2); Bruce Fan, *How the Compulsory Licensing System Has Impacted Sampling in Today’s Music Industry and Potential Calls for Reform*, USC Gould’s Business Law Digest (May 6, 2019), available at [lawforbusiness.usc.edu/how-the-compulsory-licensing-system-has-impacted-sampling-in-todays-music-industry-and-potential-calls-for-reform/](https://lawforbusiness.usc.edu/how-the-compulsory-licensing-system-has-impacted-sampling-in-todays-music-industry-and-potential-calls-for-reform/); but see Eckhause, *supra* n.12, at 373 (suggesting a Digital Music Sampling Code in lieu of repeated failures to implement a compulsory licensing regime for sampling).