University of Miami Business Law Review

Volume 30 | Issue 3 Article 4

"Sorry," But I Didn't Release It: How the Court's Analysis of the Fair Use Doctrine in Chapman v. Maraj Protects Innovation and Creativity in the Music Industry

Samantha Ross
University of Miami School of Law

"Sorry," But I Didn't Release It: How the Court's Analysis of the Fair Use Doctrine in *Chapman v. Maraj* Protects Innovation and Creativity in the Music Industry

Samantha Ross*

Abstract

The fair use doctrine is an important affirmative defense to copyright infringement when a particular use does not interfere with copyright law's primary goal of promoting creativity for the public good. Artists and songwriters frequently experiment with copyrighted music without permission before seeking licensing approval from the original rights holders to "sample" or "replay" the work. In Chapman v. Maraj—a copyright infringement suit brought by Tracy Chapman against Nicki Minaj—the United States District Court for the Central District of California held that experimenting with a copyrighted musical composition for the purpose of creating a new work with an intent to seek licensing approval constitutes fair use and thus does not infringe the original copyright holder's exclusive right to prepare derivative works. This Note explores why the holding in Chapman v. Maraj is vital for the protection of songwriting and the music business as well as the continuation of innovation and creativity in music, analyzing this importance in light of the established goals of copyright law.

I. INTRODUCTION

The practice of incorporating portions of existing copyrighted music into the creation of new works is a fundamental part of modern songwriting and producing, particularly in the hip hop genre.[1] Actually, "[m]usical borrowing is a pervasive aspect of musical creation in all genres and all periods."[2] Today, in a world where anyone with a computer and internet access can take pieces of existing music and combine it with their

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* Executive Editor, *University of Miami Business Law Review*; Juris Doctor and Master of Laws in Entertainment, Arts and Sports Law Candidate, University of Miami School of Law, 2022; Bachelor of Business Administration, Music Business, Belmont University, 2019. Special thanks to Professor Andres Sawicki for his support and guidance in putting together this Note, as well as the entire Editorial Board of the *University of Miami Business Law Review* for their helpful edits and feedback.

1 Sam Claflin, *How to Get Away with Copyright Infringement: Music Sampling As Fair Use*, 26 B.U. J. SCI. & TECH. L. 159, 160 (2020).

2 Olufunmilayo B. Arewa, *From JC Bach to Hip-Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 547 (2006).

own, experimenting with existing copyrighted music is more prevalent than ever despite the significant development of copyright law over the past century.[3] Although current copyright law bars the unauthorized use of copyrighted material in new works—through means such as sampling or replaying—artists often experiment with preexisting copyrighted works before ever seeking clearance from the copyright holder. In fact, if an artist intends on sampling or replaying a preexisting song—a concept that will be explained momentarily—they normally must first actually complete the creation of the song before seeking permission from the copyright holders in order to show the publisher and record company behind the ownership of the original song how it will be used in the new work.[4]

Recording artist Onika Tanya Maraj, more popularly known as Nicki Minaj ("Minaj"), did just that: experiment. Minaj was working on an album and began playing around with portions of a song, "Sorry" by Shelly Thunder, when she discovered that it was actually a cover of Tracy Chapman's ("Chapman") song "Baby Can I Hold You."[5] Minaj immediately sought a license from Chapman—the composition and sound recording copyright holder of the song—but Chapman adamantly refused, leading Minaj to subsequently remove the song from her upcoming album.[6] Still, Chapman maintained that Minaj's use of her song constituted infringement.[7] Thus, in 2018, Chapman sued Minaj for copyright infringement.[8] On September 16, 2020, the United States District Court for the Central District of California held that although Minaj infringed Chapman's copyright in taking lyrics and melody from Thunder's version, her experimentation with the song with the intention of seeking a license constituted fair use.[9]

The decision in *Chapman v. Maraj* is unlike cases involving typical copyright infringement. Although Minaj technically infringed Chapman's work, the holding instead turned on whether Minaj could be held liable for sampling Chapman's work without actually commercially releasing the song. This Note will analyze the court's holding in *Chapman v. Maraj* and discuss its importance to creativity and innovation in the music industry. Part II of this Note discusses the concept of sampling and replaying and the way in which copyright law governs derivative works. Part III then

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3 *See* Guilda Rostama, *Remix Culture and Amateur Creativity: A Copyright Dilemma*, WIPO (June, 2015).

4 *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 251 (Simon & Schuster, 10th ed. 2019).

5 Chapman v. Maraj, No. 2:18-cv-09088, 5-6 (C.D. Cal. Sept. 16, 2020).

6 *Id.* at 6.

7 *See id.* at 1.

8 *Id.*

9 *Id.* at 12.

addresses the fair use doctrine and the application of the doctrine in *Chapman v. Maraj*. Part IV then identifies the implications of the holding in *Chapman*, including the decision's impact on the music licensing process and the importance of the fair use doctrine in furthering creativity and innovation in music.

II. SAMPLING AND REPLAYING UNDER COPYRIGHT LAW

The development and progress of art and culture has, throughout history, involved referencing past or existing expressions which are then used to create new ones.[10] All forms of artistic expression, from visual art to architecture, have relied on the practice of borrowing from the past to inspire something new.[11] Yet, copyright law requires that a work must have some level of originality in order for the author to be granted certain exclusive rights over the work.[12] This idea, however, "is constantly in tension with the reality that virtually all creative persons work on the shoulders of those who preceded them."[13] This tension is kept balanced by a variety of factors, including the limited duration of copyright protection and the dichotomy between idea and expression: although creators may reference others' ideas within copyrighted works, they typically may not explicitly copy the expression of those ideas in the creation of new copyrightable material.[14]

This dichotomy can be seen within the root of federal copyright protection, found in Article I, Section 8, Clause 8 of the Constitution, which gives Congress the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[15] The generally accepted purpose of copyright law is to encourage and incentivize individuals to create works for the benefit of society.[16]

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10 *See* Rostama, *supra* note 3.

11 *See* Emily Harper, *Music Mashups: Testing the Limits of Copyright Law As Remix Culture Takes Society By Storm*, 39 HOFSTRA L. REV. 405, 405 (2010) (citing Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, 82-83 (2008)).

12 17 U.S.C. § 102.

13 Richard H. Chused, *The Legal Culture of Appropriation Art: The Future of Copyright in the Remix Age*, 17 TUL. J. TECH. & INTELL. PROP. 163, 170 (2014).

14 17 U.S.C. § 102(b). This dichotomy has proven tumultuous over time in the enforcement of copyright law, as the intangible distinction between ideas and expressions of those ideas is often subjective. *See generally* Dale P. Olson, *The Uneasy Legacy of Baker v. Selden*, 43 S.D. L. REV. 604 (1998).

15 U.S. CONST. art. I, § 8, cl. 8.

16 *See, e.g.*, Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); *see also* Mazer v. Stein, 347 U.S. 201, 219 (1954); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv., Co. 499 U.S. 340, 359-60 (1991).

Copyright owners, therefore, have a set of exclusive rights in their copyrighted work and can prevent others from distributing, reproducing, performing, or creating derivative works based on such copyrighted work.[17] These exclusive rights incentivize authors to produce creative works for the advancement of the arts and, ultimately, the benefit of the public through access and use of the works.[18]

When it comes to music, copyright protection is separated into the musical composition and the sound recording, which are two separate copyrights.[19] A musical composition is a song's melody and lyrics, while a sound recording is the embodiment of the performance of a musical composition—nowadays, this is usually the digital recording of the song.[20] The copyright owner of a musical composition, as mentioned previously, enjoys certain exclusive rights, including the right to create derivative works,[21] which is the right at issue in the court's decision in *Chapman v. Maraj*.[22] If someone interferes with a copyright owner's exclusive right without permission, the copyright holder can sue for infringement.[23] And unless the defendant can successfully assert an affirmative defense, the plaintiff will be entitled to a remedy.[24]

A "derivative work" is a work that is based upon a previously copyrighted work.[25] The category of derivative works includes sound recordings as well as various other forms in which a copyrighted work is transformed or adapted in some way.[26] In the music industry, the practice of building upon previously copyrighted work to create derivative works is quite prevalent. Under the compulsory licensing regime in copyright law, anyone can make their own version of a musical composition as long as the composition has been previously recorded with the permission of the composition copyright owner and a statutory royalty is paid to the composition copyright owner for the use of the composition.[27] This practice contributed to a musical culture that widely accepted the act of using the music of others without permission.[28] And sampling or

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17 17 U.S.C. § 106(a).

18 Michael Allyn Pote, *Mashed-Up In Between: The Delicate Balance of Artists' Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 649 (2010).

19 *See* 17 U.S.C. § 102(a).

20 17 U.S.C. § 101.

21 *See* 17 U.S.C. § 106(a).

22 Chapman v. Maraj, No. 2:18-cv-09088, 21-29 (C.D. Cal. Sept. 16, 2020).

23 Harper, *supra* note 11, at 413 (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985)).

24 *Id.* (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574-75 (1994)).

25 17 U.S.C. § 101.

26 *Id.*

27 *See* 17 U.S.C. § 115.

28 Chused, *supra* note 13, at 179.

replaying—both involving the practice of taking pieces of a copyrighted work in the creation of a new one—have also been integral to the development of music during the past century.[29]

The legal right to use a composition without permission, upon the payment of a royalty, is called a compulsory mechanical license.[30] This license, however, applies only to pure covers of a musical composition; if the use changes the "fundamental character" of the composition, the use then requires permission from the composition copyright owner.[31] A copyright holder can, therefore, deny anyone permission to create a derivative work that changes the fundamental character of the song for any reason. Although Chapman accordingly cannot prevent Minaj from creating a pure cover of her song, Chapman may deny—and did numerous times—Minaj's use of the song because Minaj's use of the composition altered the character of the song.

Minaj's use of Chapman's song falls into the realm of sampling or "replaying," which either involves the use of the original sound recording or a duplication of a part of a song in a studio, respectively, both of which require express permission from the original copyright owner.[32] These practices differ from a cover, which involves a new recording of the composition and generally only requires a compulsory license (but not in all circumstances).[33] Minaj was experimenting with Shelly Thunder's song—a cover of Chapman's work—which means that Minaj's use is considered a "replay" of Chapman's composition, even if Minaj is directly sampling a cover track. Although sampling requires permission from both the musical composition copyright owner *and* the sound recording copyright owner, "replaying" only requires permission from the musical composition copyright owner.[34] Here, Chapman owns both the musical composition copyright and the sound recording copyright to the song in question. Her denial of a license to Minaj, however, is solely based in her exclusive rights as a musical composition copyright holder because Minaj was not attempting to directly sample Chapman's work, but rather was experimenting with a cover of it, thus only using the lyrics and melody of Chapman's composition in her new work. That being said, this Note discusses the implications of the court's holding for both replaying *and* sampling.

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29 Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 94 (2007) (internal citation omitted)).

30 17 U.S.C. § 115.

31 17 U.S.C. § 115(a)(2).

32 *See* Passman, *supra* note 4, at 215-217.

33 *See id.* at 251.

34 *Id.*

Since the Southern District of New York's holding in a 1991 case involving a rap sample, courts have made it clear that under copyright law, the practice of sampling without permission constitutes copyright infringement.[35] That decision severely reduced the amount of sampling at the time, which had a significant impact on rap music—a genre built on sampling.[36] Fourteen years later, the Sixth Circuit confirmed that sampling copyrighted work requires a license and asserted that doing so does not stifle creativity.[37] In 2016, however, the Ninth Circuit published a contrary holding involving Madonna's song "Vogue" in ruling that some samples are so trivial that they are *de minimis* and therefore non-infringing.[38] Despite the general licensing requirement for sampling sound recordings and the uncertainty surrounding whether a specific sample constitutes infringement, sampling remains quite popular in music today. And, "to avoid liability for copyright infringement, popular artists obtain licenses for the works they sample"—at least most of the time.[39]

The process of obtaining a license to sample or replay a copyrighted sound recording or musical composition in the creation of a new work is a matter of private negotiation between a potential licensee and licensor.[40] When directly sampling the original sound recording in a new composition, a license is required not only from the sound recording copyright owner—typically the artist and their record label—but also from the musical composition copyright owner—usually the songwriter and their publisher.[41] As previously mentioned, the practice of replaying only requires the original musical composition copyright holder's permission.[42] In the professional music industry, artists commonly sample or replay songs in the studio and, before commercially releasing the new work, wait

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35 *See* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991) (holding that a rap artist's partial inclusion of a piece of copyrighted material in a rap recording constituted copyright infringement).

36 Brandes, *supra* note 29, at 95.

37 Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005) (holding that a two-second sample of a George Clinton song looped through the N.W.A. track "100 Miles and Runnin'" was a violation of Clinton's copyright).

38 VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016) (holding that Madonna's sample in Vogue was de minimis and therefore not enough to constitute copyright infringement).

39 Pote, *supra* note 18, at 684 (internal citations omitted).

40 *See* Harper, *supra* note 11, at 437 (citing David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recording*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75, 111 (2008)).

41 *See* Buck McKinney, *Creating the Soundtrack of Our Lives: A Practical Overview of Music Licensing*, 48 TEX. J. BUS. L. 1, 3 (2020).

42 *See generally* Passman, *supra* note 4, at 215-217.

for licensing permission from the copyright owner of the sampled or replayed work.[43]

Although some believe that the permission requirement in sampling or replaying undermines the goals of copyright law,[44] *Chapman v. Maraj* involves the distinct issue of whether an artist can be liable for pulling from an existing copyrighted song before commercially releasing the work.[45] The question was not whether Chapman's permission was necessary for Minaj to release a new song based on Chapman's song; the answer there is undoubtedly yes, as Minaj's work clearly infringed Chapman's copyright.[46] Instead, the question is whether Chapman's permission was necessary for Minaj to experiment with Chapman's composition in the studio in light of the fact that Minaj intended to obtain a license before releasing the work commercially.[47] To answer this question, the court considered Minaj's asserted affirmative defense of fair use.[48]

III. THE FAIR USE DOCTRINE AND CHAPMAN V. MARAJ

Copyright law requires that a songwriter or artist obtain permission from the copyright owner to use a copyrighted work.[49] Someone cannot simply sample or replay a song and release it without a license.[50] Under specific circumstances, however, an individual may use a copyrighted work without infringing on the copyright owner's exclusive rights if the use is considered "fair."[51] The fair use doctrine is asserted as an affirmative defense to copyright infringement actions,[52] so the party claiming it carries the burden of proof.[53]

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43 *See* Jeffrey Omari, *Mix and Mash: The Digital Sampling of Music Has Stretched the Meaning of the Fair Use Defense*, 33 L.A. LAW. 35, 40 (Sept. 2010).

44 *See, e.g.*, Terry Hart, *License to Remix*, 23 GEO. MASON L. REV. 837, 837 (2016) (citing Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1193 (2007)); *see also* Amy B. Cohen, *When Does a Work Infringe the Derivative Works of a Copyright Owner?*, 17 CARDOZO ARTS & ENT. L.J. 623, 646 (1999).

45 *See* Chapman v. Maraj, No. 2:18-cv-09088 (C.D. Cal. Sept. 16, 2020).

46 *See id.* at 5.

47 *See id.*

48 *See id.* at 9-11.

49 *See* 17 U.S.C. § 114.

50 *See* Am. Jur. 2d Copyright and Literary Property § 119.

51 17 U.S.C. § 107.

52 *See id.*

53 *See, e.g.*, American Geophysical Union v. Texaco Inc., 60 F.3d 913, 918 (2d Cir. 1994).

The doctrine is applied and analyzed by courts on a case-by-case basis,[54] allowing courts to interpret copyright law according to the specific facts of each case in a way that balances the interests of copyright owners and the general public.[55] As a result of the "uncertainty of fact-specific inquiries,"[56] the fair use doctrine is often considered "the most troublesome in the whole law of copyright"[57] in that previous situations constituting fair use do not always help predict the outcome of future cases involving fair use defenses.

A. Development and Justification of the Fair Use Doctrine

The fair use doctrine,[58] as observed by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[59] The doctrine is based upon the idea that creating new works often involves referencing existing ones, and in some circumstances, this sort of referential activity should be permitted, as it furthers the purpose of copyright law.[60] As a result, the fair use doctrine is arguably the most important mechanism in balancing the interests of copyright holders in the control and exploitation of their work on the one hand, and the public's interest in access to and use of work for

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54 Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc., 150 F.3d 132, 141 (2d Cir. 1998).

55 *See* Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 406 (2005).

56 Gregory M. Duhl, *Old Lyrics, Knock-Off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665, 679 (2004).

57 Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

58 The idea of fair use can be traced back to English courts whose rationale was that new authors who used previous authors' works in good faith could create works that would then benefit the public. *See* Gyles v. Wilcox, 2 Atk. 141 (1740). Fair use in the United States was likely first explicitly introduced in Justice Story's opinion in *Folsom v. Marsh*. Justice Story analyzed the two extremes of referencing past work: essentially copying the entire work versus copying for the purpose of review or criticism. Story believed that if a new work fell somewhere in between these two extremes, courts must then evaluate the defendant's creative effort and whether the new work diminished the value of the original. If a work was simply the result of a "facile use of scissors" rather than substantial "intellectual labor," Story stated that the use of existing work was not fair. Justice Story believed several factors should be taken into consideration when determining the fair use of copyrighted work in the creation of a new one, including "the value of the materials taken, and the importance of it to the sale of the original work." Congress eventually codified similar factors in the Copyright Act of 1976. *See* Folsom v. Marsh, 9 F. Cas. 342, 344-48 (C.C.D. Mass. 1841).

59 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

60 *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1108 (1990).

the furtherance of the arts on the other.[61] The fundamental goals of copyright law require not only that "artists be incentivized to create works of art," but also that "future artists be able to use those works in order to advance the arts."[62] Thus, copyright law must balance the interests of both sides—something that the application of the fair use doctrine can help accomplish.[63]

B. Chapman v. Maraj

The bulk of intellectual discussion on fair use, replaying, and sampling in the music industry over the past few decades involves whether sampled music being sold without a license should constitute fair use.[64] The use in *Chapman v. Maraj*, however, involved a song that was never commercially released.[65] The analysis in *Chapman* turned on whether experimenting with a copyrighted song without permission with the intention to request a license before a commercial release constitutes fair use of that copyrighted work.[66]

In October 2018, Tracy Chapman sued Nicki Minaj for copyright infringement of Chapman's musical composition, "Baby Can I Hold You."[67] Minaj had been working on a project using a song by artist Shelly Thunder entitled "Sorry."[68] She experimented with the song to see what would come of it, with the intention of seeking a license if she decided to release it.[69] After Minaj's representatives discovered that "Sorry" was, in fact, a cover of a song by Tracy Chapman, Minaj began seeking permission from Chapman to release the song on her upcoming album.[70]

Chapman denied all requests from Minaj for a license to release the new song incorporating Chapman's composition, even after multiple attempts over the course of about two months and an attempt to get

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61 *See* THE DEP'T OF COM. INTERNET POL'Y TASK FORCE, *Copyright Policy, Creativity, and Innovation in the Digital Economy*, 21 (2013) (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)).

62 Pote, *supra* note 18, at 692 (citing U.S. CONST. art. I, § 8, cl. 8).

63 *See id.*

64 *See, e.g.*, Vera Golosker, *The Transformative Tribute: How Mash-Up Music Constitutes Fair Use of Copyrights*, 34 HASTINGS COMM. & ENT. L.J. 381, 381 (2012); *See also* Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My! How Hip Hop Music is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843 (2011); *see generally* Pote, *supra* note 18.

65 Chapman v. Maraj, No. 2:18-cv-09088, 10 (C.D. Cal. Sept. 16, 2020).

66 *See id.* at 9-12.

67 *Id.* at 1.

68 *Id.* at 5.

69 *Id.*

70 *Id.* at 6.

permission via Twitter.[71] After these rejections, Minaj decided not to commercially release the song and removed it from her 2018 album, *Queen*.[72] Chapman and Minaj agreed that Minaj never intended to exploit the song without a license.[73] However, even after Minaj was repeatedly denied permission, Minaj had the song mastered by a recording engineer.[74]

Although Minaj did not release the song on her album, Chapman maintained that Minaj was liable for creating a song that incorporated the lyrics and melodies of her composition.[75] Additionally, Chapman alleged that Minaj willfully infringed her exclusive right of distribution by "leaking" the song to a radio host who played it once on the radio.[76] Minaj sought summary judgment only on the issue of her alleged infringement, arguing that the creation of the new song constituted fair use.[77] The distribution issue regarding the radio leak of the infringing song was settled in January 2021, with a court ordering Minaj to pay Chapman $450,000.[78] It is unclear whether Chapman would have alleged copyright infringement were it not for the radio leak, however, this factor is not analyzed in this Note.

In September 2020, the court granted Minaj's motion for partial summary judgment on the issue of alleged infringement for the creation of a derivate work because liability was barred by the fair use doctrine, stating that her "creation of the new work for the purpose of artistic experimentation and to seek license approval from the copyright holder thus did not infringe Chapman's right to create derivative works."[79] The court's analysis of the factors in determining whether Minaj's use constituted fair use are discussed below.

C. The Fair Use Factors

Under copyright law, "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright."[80] The statute provides that a court must consider four main factors—though it may

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71 *Id.*
72 *Id.*
73 *Id.* at 10.
74 *Id.* at 6.
75 *Id.* at 1.
76 *Id.*
77 *Id.*
78 Dylan Smith, *Nicki Minaj Ordered to Pay $450,000 to Tracy Chapman in 'Sorry' Copyright Infringement Suit*, DIGITAL MUSIC NEWS (Jan. 8, 2021), https://www.digitalmusicnews.com/2021/01/08/nicki-minaj-tracy-chapman-payment/.
79 Chapman v. Maraj, No. 2:18-cv-09088, 11 (C.D. Cal. Sept. 16, 2020).
80 17 U.S.C. § 107.

consider more—when determining whether an allegedly infringing use of a copyrighted work constitutes fair use:

> the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.[81]

The law does not attempt to direct the courts on how to weigh the four factors; however, it does indicate that the statutory factors should not be analyzed purely in isolation, but should be "weighed together, in light of the purposes of copyright."[82] The court in *Chapman v. Maraj* analyzed and weighed each of the fair use factors, concluding that the first, third, and fourth factors favored a finding of fair use.[83]

i. The Purpose and Character of the Use

In analyzing the first factor, courts determine how the copyrighted work is being used and for what purpose, emphasizing that uses which are "transformative" are more likely to be fair.[84] The purpose of this inquiry is to determine whether the new work "supersede[s] the objects" of the original work, thus taking the place of the original, "or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[85] Typically, the practice of sampling involves taking actual parts of a recording and placing them in a new work,[86] in which case the use of the original copyrighted work would likely not be transformed at all. In some cases, however, sampling or replaying sound recordings can be transformative, particularly if the use "combines genres, tempos, and styles of music . . . resulting in a whole creatively distinct from just the sum of its popular parts."[87]

Courts may find in favor of fair use, "[e]ven where a use is only mildly transformative," if the new work has a "substantial benefit to the public."[88]

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81 *Id.*

82 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

83 *Chapman*, No. 2:18-cv-09088 at 10-11.

84 *Campbell*, 510 U.S. at 578-579.

85 *Id.* at 579 (citations omitted).

86 *See* John Schietinger, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 210 (2005).

87 Golosker, *supra* note 64, at 390.

88 Pote, *supra* note 18, at 674-75 (citing Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007)).

Sampling and replaying, however, are used primarily for entertainment purposes, so any resulting public benefit is unlikely to weigh significantly in favor of a finding of fair use.[89] Although the transformative inquiry is often utilized in courts' analyses of the first fair use factor, a use "need not be transformative" to constitute fair use, as the "concept of transformative use is intended to be explanatory of the most common fair use purposes, [though] it is not exhaustive of the doctrine."[90]

Over time, courts have determined that the first factor requires an analysis not just of the purpose of the use, but also whether the specific use was necessary to achieve the asserted purpose.[91] In doing so, the inquiry focuses on the use instead of the user, "forc[ing] courts to properly examine the actual nature of the use made, rather than the general nature of the defendant's work as a whole."[92] This particular portion of the first factor's analysis is central to the court's findings in *Chapman*.

Lastly, courts are called to consider the commercial nature of the work in analyzing the purpose and character of the use in question.[93] Commercial motivation typically weighs against a finding of fair use, but the degree to which the person claiming fair use actually exploits their work for commercial gain is also relevant to the analysis of the first fair use factor.[94] If the use of a work is merely incidentally commercial, a court may find that its commerciality does not weigh against a finding of fair use.[95]

In some cases, even the use of sampled music in a new work that is not commercially released can be considered commercially motivated if the new work's artist stands to profit from other realms like touring or fan donations.[96] The Supreme Court has accordingly held that the question of

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89 *See id.* at 675 (arguing that audio mashups offer very little public benefit to the public, which likely does not contribute to a finding of fair use).

90 WILLIAM F. PATRY, PATRY ON FAIR USE § 3:1 (2021) (citing Society of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colorado, 2010 WL 4923907, at *6 (D. Mass. 2010).

91 *See id.* (citing Storm Impact v. Software of Month Club, 13 F. Supp 2d 782, 787 (N.D. Ill. 1998)).

92 *Id.* (citing Savage v. Council on Am.-Islamic Rels., Inc., 2008 WL 2951281, at *5 (N.D. Cal. 2008)).

93 *See* 17 U.S.C. § 107.

94 Seltzer v. Green Day, Inc., 725 F.3d 1170, 1178 (9th Cir. 2013) (citing Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 627 (9th Cir. 2003)).

95 *See id.* (reasoning that the band Green Day's use of a drawing was only incidentally commercial, which weighs in favor of a finding of fair use) (citing Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 627 (9th Cir. 2003)).

96 Golosker, *supra* note 64, at 393-94 (recognizing that although the music of Greg Gillis—the man behind sampling and mash-up artist Girl Talk—was not commercially released, the music is still considered commercial because Gillis made enough money from the music in other avenues to quit his day job as a biomedical engineer).

commerciality is not "whether the sole motive of the use is monetary gain[,] but whether the user stands to profit from exploitation of the copyrighted material" without first obtaining a license.[97]

In *Chapman*, this is a vital point in the court's consideration of the first factor. In analyzing the first factor, the court applied the Ninth Circuit's two-step analysis, which asks "whether the use of the work is commercial in nature" and "whether such use is transformative."[98] The initial purpose of the Minaj's use of Chapman's composition was to experiment with it, and Minaj "never intended to exploit the work without a license," thus the use of Chapman's work was not purely commercial.[99] Although it was her intention to commercially exploit the song if given permission, the weight of commercialism is lessened because she excluded the song from her album upon being denied a license.[100] Because Minaj was simply experimenting with the song in the studio, the commercial purpose of the use was merely incidental.[101] Despite the incidentally commercial nature of the use—in that she intended to use the song for her album if she had obtained permission—the "low degree of [actual] exploitation here counterbalances that" because Minaj ultimately excluded the song from her album.[102]

The purpose of the use of Chapman's song was not only to experiment with the work, but also to "create a form that can be submitted to the rights holder for approval."[103] As the court discusses, artists typically experiment with copyrighted works before seeking a license from the copyright holder, as copyright holders usually ask to listen to the proposed work before granting permission to use their work.[104] Even Chapman herself has asked to see samples of proposed works by other artists before approving licensing requests to see how her work was used, thus arguing "against the very practice she maintains."[105]

Even if a use is commercial in nature or purpose, courts often consider the public benefit—whether or not it is direct or tangible—of a challenged

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97 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

98 Chapman v. Maraj, No. 2:18-cv-09088, 10 (C.D. Cal. Sept. 16, 2020) (citing Furie v. Infowars, LLC, 401 F. Supp. 3d 952, 972 (C.D. Cal. 2019)).

99 *Id.* at 10.

100 *Id.* (citations omitted).

101 *Id.*

102 *Id.* (citing Sundeman v. Seajay Soc'y, Inc., 142 F.3d 194, 203 (4th Cir. 1998) (holding that the commercial motivation to receive royalties with or without permission is outweighed by the fact that the paper was not published when permission was not granted).

103 *Id.* at 10.

104 *Id.*

105 *Id.*

use.[106] The court in *Chapman* discussed the public benefit in allowing artists to experiment with copyrighted work before seeking a license.[107] In fact, it is common practice for artists to work on projects incorporating copyrighted works before ever requesting a license to use the copyrighted work.[108] As the court points out, "[a] ruling uprooting these common practices would limit creativity and stifle innovation in the music industry," which opposes copyright law's goal "of promoting the arts for the public good."[109] Therefore, the court found that the purpose and character of Minaj's work favored a finding of fair use.[110]

ii. The Nature of the Copyrighted Work

When considering the nature of the work, courts must "recognize that some works are closer to the core of intended copyright protection than others."[111] Works that are creative in nature fall into this category, which results in this factor weighing against a finding of fair use, as it is more difficult to establish that the use or copying of creative works is fair.[112] Because music is a creative work, it is at the heart of copyright protection. Thus, this factor weighs against a finding of fair use in cases involving the use of copyrighted musical compositions or sound recordings.[113] The nature of the work must also be considered in conjunction with the first factor because where the purpose of the use is more beneficial to the public, the second factor can be weighed more lightly, thus being less determinative.[114]

The court in *Chapman* briefly discussed the nature of the copyrighted work. Chapman's musical composition belongs in the category of music, which is "at the core of copyright's protective purpose" because it is creative in nature.[115] Therefore, the *Chapman* court determined that the second factor weighed *against* a finding of fair use.[116]

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106 *See id.* (citing Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1992)).
107 *Id.*
108 *See id.*
109 *Id.*
110 *Id.*
111 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).
112 *Id.*
113 *See, e.g., id.*
114 WILLIAM F. PATRY, PATRY ON FAIR USE § 4:1 (2021).
115 *Chapman*, 2020 WL 6260021, at 11 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)).
116 *Id.*

iii. The Amount and Substantiality of the Portion Used

The third factor requires courts to consider "the quantity and value of the materials used."[117] Fair use is less likely to be found where a new work uses a significant portion of the copyrighted work, while fair use is more likely in scenarios where only a small part of copyrighted material is utilized.[118]

This inquiry, like those of the other fair use factors, must be considered along with other factors, as it is a matter of degree.[119] For example, where a use is highly transformative, courts typically allow a greater quantity of the work to be considered fair.[120] This is because a transformative use is more likely to advance the progress of the arts, which is central to the purpose of copyright law.[121] Thus, "the determination of the amount and substantiality of the portions used depends greatly on the specific . . . samples used."[122] If the material used refrains from taking the "heart" of the copyrighted work, a finding of fair use is much more likely, as well.[123] The commerciality analyzed in the first factor may also be considered when determining whether the amount and substantiality of the copyrighted work used weighs against or in favor of a finding of fair use because "a commercial use exploits the original artist, thereby diminishing the incentive of the original artist to create art."[124] If a use is noncommercial or private, using almost the entire work may be considered fair, while the use of a much smaller portion of a copyrighted work may not be considered fair if the use is commercial in nature.[125]

In the *Chapman* court's analysis of the third factor, it noted that Minaj's work incorporated most of the lyrics and portions of the vocal melodies from Chapman's musical composition.[126] Typically, this would weigh heavily against a finding of fair use, however, this factor, as mentioned previously, should be analyzed in conjunction with the other factors, particularly the purpose of the use.[127] The court argued that the

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

118 *See id.*

119 *See* Warner Bros. Ent. Inc. v. RDR Books, 575 F. Supp. 2d 513, 546-49 (S.D.N.Y. 2008) (holding that the amount and substantiality of the portion copied from Harry Potter companion books "weighs more heavily against a finding of fair use" because the purpose of the new work was only slightly transformative of the companion books' purpose).

120 Pote, *supra* note 18, at 679 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587-88 (1994)).

121 *Id.* at 681.

122 *Id.* at 680.

123 *Id.*

124 *Id.* at 681.

125 *Id.*

126 Chapman v. Maraj, No. 2:18-cv-09088, 11 (C.D. Cal. Sept. 16, 2020).

127 Pote, *supra* note 18, at 681.

amount that Minaj used "was no more than that necessary to show Chapman how [she] intended to use the [c]omposition in the new work."[128] Therefore, the amount used actually favored a finding of fair use in this case.[129]

iv. The Effect of the Use Upon the Potential Market or Value of the Copyrighted Work

Lastly, courts must consider "whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner's original work. In *Harper & Row v. Nation Enterprises*, Justice O'Connor argued that the last factor of fair use is "undoubtedly the single most important element of fair use."[130] Evaluating the effect on the market is rooted in the purpose of copyright law: to incentivize artists in order to promote the progress of the arts.[131] Copyright holders are likely to be discouraged from creating new works when they are unable to fully exploit their existing copyrighted works due to market harm from infringing uses.[132]

In assessing this factor, courts consider "the extent of market harm caused by the particular actions of the alleged infringer" as well as "'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."[133] Thus, the inquiry turns on whether the new work acts as a substitute for the original copyrighted work in the original's market.[134] Courts analyzing the fourth factor, therefore, are concerned primarily with economic injury to the copyright holder.[135] Because sampling or replaying copyrighted work in new music creates a derivate work of the original song, artists are likely to lose licensing revenue if that new work is commercially exploited without a license from the original artist.[136] Even though new works that sample or replay the original may not directly harm the market of the original work, at a minimum, "the likelihood of harm for lost licensing revenues exists."[137]

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128 *Chapman*, 2020 WL 6260021, at 11.
129 *Id.*
130 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).
131 Pote, *supra* note 18, at 681.
132 *Id.*
133 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (quoting Nimmer § 13.05[A] [4], 13-102.61).
134 Pote, *supra* note 18, at 681 (citing Castle Rock Entm't., Inc. v. Carol Publ'g Group, Inc. 150 F.3d 132, 145 (2d Cir. 1998)).
135 Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 99 (2d Cir. 2014) (citing Campbell, 510 U.S. at 591).
136 Pote, *supra* note 18, at 682.
137 *Id.*

Judge Pierre Leval, in reviewing the fair use opinions in *Sony Corp. v. Universal City Studios* and *Harper & Row*, said, "In short, the market effect by itself is nearly meaningless. We cannot interpret it without learning from other factors."[138] Typically, courts analyze the first and fourth factors together, noting that market effect should be considered in light of whether the purpose or character of the use is commercial.[139] The analysis in *Sony* affirms this idea, asserting that the importance of demonstrating a likelihood of significant market harm is greater when a use is noncommercial, whereas a likelihood of harm is sometimes presumed if the use is intended for commercial gain.[140] Nevertheless, the fact that a use presents no possible harm to the market does not necessarily mean that the use is fair, as no single factor is determinative of the result of a fair use analysis.[141] In the realm of sampling and replaying, the more a new work transforms the original, is used noncommercially, and only takes smaller or less significant portions of the original, the more likely the market will not be harmed by the use, thus constituting a fair use.[142]

In *Chapman v. Maraj*, the court analyzed the potential harm that Minaj's use has on the market for Chapman's musical composition. It noted that "there is no evidence that the new work usurps any potential market for Chapman."[143] Chapman argued that because Minaj used her work with the intention to commercially gain from it, there should have been a presumption of market harm.[144] The commercial purpose of Minaj's use, however, was only incidental, and she did not attempt to exploit the work without Chapman's permission.[145] The court concluded that because "the creation of the work for private experimentation and to secure a license from the license holder has no impact on the commercial market for the original work," the fourth factor weighed in favor of a finding of fair use.[146]

v. Other Considerations and Weighing the Factors

Due to the indeterminate and discretionary nature of the fair use doctrine, courts are free to consider other relevant factors in determining

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138 Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1460 (1997).

139 National Rifle Ass'n of Am. v. Handgun Control Fed'n of Ohio, 15 F.3d 559, 561 (6th Cir. 1994).

140 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

141 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78 (1994).

142 Pote, *supra* note 18, at 682.

143 Chapman v. Maraj, No. 2:18-cv-09088, 11 (C.D. Cal. Sept. 16, 2020).

144 *Id.*

145 *Id.*

146 *Id.*

whether a use is fair.[147] For example, courts may contemplate how a request for permission from the copyright owner affects whether or not the use of the copyrighted work is fair. A request for permission from the copyright owner to use a work can indicate bad faith if the copyright owner refuses to grant a license but the person requesting uses the copyrighted work anyway.[148] However, requests for permission should not necessarily be weighed against a finding of fair use, as the request for a license can simply indicate an effort to avoid litigation, even if the use is a fair one.[149] Although the Sixth Circuit created a bright-line rule in *Bridgeport Music, Inc. v. Dimension Films* that sampling copyrighted music requires a license, courts are not precluded from finding fair use in cases where the copyright holder does not grant permission.[150]

Regardless of whether a court decides to stick with the four primary factors or consult additional ones, the case-by-case character of the fair use doctrine requires that the inquiry analyze all factors together and in light of the purposes of copyright law.[151] In doing so, courts must attempt to maintain the "constitutional balance between sufficient incentives to authors and reasonable, unconsented-to and uncompensated uses by the public."[152] Thus, the four statutory factors should not be looked at individually as if mechanically referencing a checklist.[153] Judge Leval emphasizes this idea, noting that the factors "do not represent a score card that promises victory to the winner of the majority."[154] A comprehensive analysis weighing each of the factors together keeps with the case-by-case nature of the fair use doctrine, as the specific circumstances of every case will alter the way in which a court will take the factors into consideration to determine whether or not a particular use is fair and thus non-infringing.

In weighing each of the four factors, the court in *Chapman* found that Minaj was entitled to a finding of fair use because the purpose behind her use of Chapman's composition was "artistic experimentation and to seek

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147 *See Sony*, 464 U.S. at 454 (stating that the fair use doctrine is an "equitable rule of reason" that should be applied in light of the purposes of copyright law).

148 *See* WILLIAM F. PATRY, PATRY ON FAIR USE § 7:1 (2021).

149 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 at n. 18 (1994) (arguing that although 2 Live Crew was denied permission to use a work, the denial of permission should not weigh against a finding of fair use because if the use is fair, no permission is required in the first place).

150 Golosker, *supra* note 64, at 388 (citing Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 799 (6th Cir. 2005)).

151 *Campbell*, 510 U.S. at 577-78.

152 WILLIAM F. PATRY, PATRY ON FAIR USE § 2:1 (2021).

153 *See* Cambridge University Press v. Patton, 769 F.3d 1232, 1260 (11th Cir. 2014) (criticizing the district court's mechanical approach to the fair use factors that improperly gave equal weight to each of the four factors and then counted which ones favored and disfavored a finding of fair use).

154 Leval, *supra* note 60, at 1110.

license approval" from Chapman; she therefore could not be held liable for infringing Chapman's right to create derivative works from the musical composition.[155] Because Minaj used what was necessary in order to request a license, her use was therefore only incidentally commercial and thus did not impact the market for Chapman's musical composition.[156] This holding has broad implications for the songwriting and sound recording process, as well as innovation and experimentation in the music industry under copyright law.

IV. CHAPMAN'S IMPACT

The holding in *Chapman* has a number of implications for not only music licensing but creativity and innovation in general. Section A examines how *Chapman* interprets the fair use doctrine in a way that balances the interests of artists who own copyrighted works and artists who wish to build upon existing copyrighted work. The holding protects copyright owner's exclusive rights while allowing for some unauthorized use of copyrighted work when that use is not for purposes of commercial exploitation, or at least not initially. The ruling also not only helps copyright law avoid an entirely infeasible regulation of pre-commercially released sampling and replaying, but it also limits the burden imposed on artists wishing to license copyrighted music they experiment with. Section B analyzes the case's impact more broadly as it relates to creativity and innovation in music.

A. The Functions of the Music Industry

The court in *Chapman* properly interpreted the fair use doctrine, and its holding has important implications for the music industry. First, it balances copyright owner's interests in exploiting their works with the interests of artists who wish to experiment with copyrighted work in the creation of new ones. Second, it reduces the burden on creators in seeking out licenses for the use of copyrighted work.

i. Balancing the Interests of New and Existing Artists

Experimentation with copyrighted works does not undermine incentives for the creation of new works or unfairly deprive existing copyright holders of revenue. As the court held in *Chapman*, Minaj's experimentation with Chapman's musical composition had no impact on the commercial market for Chapman's work simply because Minaj may

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155 Chapman v. Maraj, No. 2:18-cv-09088, 11 (C.D. Cal. Sept. 16, 2020).

156 *Id.* at 10-11.

have intended to eventually release it commercially after obtaining a license.[157] Generally speaking, pre- and non-commercial uses of copyrighted material, according to the court, pose no threat to the original author's ability to exploit their work in the market.[158]

Copyright law in the United States has treated private and personal uses of copying as de facto non-infringing since before the 1970s.[159] The private experimentation with melodies and lyrics of copyrighted material prior to commercial distribution should fall into this category. If the purpose of the use of a copyrighted work is private or noncommercial, it is much more likely that the use is a fair one.[160] For example, the practice of sampling or replaying existing copyrighted materials, no matter the amount or substantiality of the use or even to what extent the new work transforms the copyrighted one, probably constitutes fair use if the individual does not distribute the new work commercially.[161] Thus, anyone is essentially free to sample or replay any song they wish to any degree, "so long as the [work] is never distributed."[162] This practice should not be altered simply because the person experimenting is a well-known recording artist who has an incidental commercial purpose in using the work.

Regulating the sampling and replaying of copyrighted materials for noncommercial or incidentally commercial purposes, as discussed below, is impractical. Avoiding the regulation of noncommercial use of preexisting copyrighted work "serves the interests of both consumers and creators."[163] A lack of regulation of pre- and non-commercial use of copyrighted material will still continue to provide original authors with the economic incentive to create new works while also encouraging new artists to create meaningful access to preexisting works.[164] Ultimately, this balances both economic incentive and access to and use of works for the public good and the development of the arts in society, which are each fundamental to the goal of copyright law.[165]

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157 *Id.*

158 *See id.*

159 Fred von Lohmann, *Fair Use As Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 832 (2008).

160 Pote, *supra* note 18, at 693.

161 *Id.* at 687-88 (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 468-70 (1984)).

162 *Id.* at 688.

163 *See* Kelly Cochran, *Facing the Music: Remixing Copyright Law in the Digital Age*, 20 KAN. J.L. & PUB. POL'Y 312, 327 (2011).

164 *See id.*

165 *See id.*

ii. Limiting the Burdens of the Music Licensing Process

The decision in *Chapman* is crucial to the existing music licensing process, as well. Requiring a license for any and all experimentation with a copyrighted work would be costly and quite burdensome. The existing music licensing system is notoriously complicated and expensive.[166] Licensing a song to use as a sample in new work "typically cost[s] between $1,000 and $5,000."[167] And popular recording artists often demand licensing costs that are "several times these amounts" because of the value of their celebrity.[168] Some copyright holders even require licensees to pay additional "rollover rates" which vary depending on the success of the new work, thereby increasing the cost of licensing.[169] Also, some copyright holders require that licensees give up a percentage of future profits from the new work or even a percentage of copyright ownership in that work.[170] Requiring individuals who wish to experiment with copyrighted material to obtain a license for every song they may possibly use in a commercially released work would also be extremely expensive.

Not only would this process pose a significant financial burden to those wishing to sample or replay music, but it would present considerable transaction costs, as well.[171] Locating the copyright holder, negotiating a license, and paying the negotiated price all take time and effort; and "despite all these efforts, a copyright holder can arbitrarily refuse to license [their] work."[172] The licensing process is "burdensome and extremely expensive for professional artists," but it is even more so for amateur ones.[173] Amateur artists would likely not pay the costs of obtaining a license before working with it in the creation of a new one because they may "have virtually no incentive to purchase the rights to a

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166 *See* Aaron Power, *15 Megabytes of Fame: A Fair Use Defense for Mash-Ups as DJ Culture Reaches Its Postmodern Limit*, 35 SW. U. L. REV. 577, 586 (2007) (highlighting the issues with implementing a bright-line rule requiring licenses for all instances of sampling).

167 Brandes, *supra* note 29, at 123 (citing Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 217, 291 (1996)).

168 *Id.* (citing Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 217, 291 (1996)); Pote, *supra* note 18, at 685.

169 *Id.* at 124.

170 *Id.* (citing Music and Copyright 147 (Simon Frith and Lee Marshall eds., 2d ed. 2004); 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, 90 (2004)).

171 Harper, *supra* note 11, at 437 (citing Morrison, *supra* note 40, at 134).

172 *Id.* (citing David Mongillo, *The Girl Talk Dilemma: Can Copyright Law Accommodate New Forms of Sample-Based Music?*, U. PITT. J. TECH. L. & POL'Y, Spring 2009, at 21; Pote, *supra* note 18, at 646.

173 Harper, *supra* note 11, at 437-38 (citing Edward Lee, *Developing Copyright Practices for User-Generated Content*, J. INTERNET L. 1, 8, 17 (2009)).

song that will not bear any financial fruits."[174] On the other hand, those who experiment with preexisting music, even if only for the purpose of pure enjoyment rather than for ultimate sale or distribution, might actually be willing to pay the cost of obtaining a license for the same reason that amateurs with no intention of trying to "make it" in the music industry invest in musical instruments or music editing software, for example. That being said, those who work with a significant amount of copyrighted material, whether for fun or for a commercial purpose, probably would not find it worthwhile to negotiate and pay for a license for every single song they experiment with knowing that they may only use a very small percentage of that music in new works they actually end up distributing.

Seeking permission for replaying an existing copyrighted work already gives the experimenter the burden of finding the copyright owner or owners of the musical composition, which can prove to be quite difficult, particularly if the copyrighted song in question does not have easily accessible copyright ownership information online. Finding ownership information for purposes of sampling is even more difficult because there are two distinct copyrights involved in sampling, forcing potential licensees to "locate and purchase clearances from both the sound recording and musical composition copyright holders."[175] Not only is it costly just to pay for the license itself, but keeping track of all potential samples and replays and negotiating licensing fees presents further transactional costs.[176] Together, the price of obtaining a license to experiment with a copyrighted work for the purpose of sampling or replaying it in a new work would be far too burdensome for many artists, songwriters, and producers.

Even aside from the burden on artists wishing to sample or replay copyrighted music, regulating the use of copyrighted material in the studio before commercial release would be nearly impossible. Attempting to track down individuals who sample or replay copyrighted material and distribute it "is expensive and often unsuccessful."[177] Thus, regulating the experimentation with copyrighted music for the purpose of sampling or replaying presents the same challenges that scholars have identified

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[174] *Id.* at 438 (citing Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 802 n.15 (6th Cir. 2005); Edward Lee, *Developing Copyright Practices for User-Generated Content*, J. INTERNET L. 1, 8, 14, 17 (2009) (arguing that licensing costs for noncommercial uses are far too high)).

[175] Brandes, *supra* note 29, at 123 (citing Music and Copyright 147 (Simon Frith and Lee Marshal eds., 2d ed. 2004)).

[176] *Id.* (citing Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 217, 291 (1996)).

[177] Chused, *supra* note 13, at 183 (arguing that attempting to suppress digital copying, particularly in the form of remixes, is inefficient and enforcement costs are high).

regarding the regulation of mashups and remixes that use copyrighted material: "Given the fact that anyone with a computer and the requisite software can create his very own mashup, regulating the creation of mashups seems like an insurmountable challenge."[178] One of the only instances in which a requirement to license samples or replays for experimentation could be adequately enforced would be those similar to the circumstances in *Chapman* in which a copyright holder only knows about a use because an artist, in good faith, requested a license to use it. And these situations, one could argue, are the least of concern regarding an imposition on copyright holders' exclusive rights, as the copyright holder has the power to deny a license and has been put on notice in the event that the potential licensee moves forward with releasing sampled or replayed music without a license.

If experimenting with copyrighted music—whether for pre- or non-commercial use—did not constitute fair use, the sheer scale of activity is "so enormous that it is unstoppable."[179] Because artists' level of access to copyrighted music is so great and the "widespread cultural sensibility that we all have the *right* to freely use significant amounts of copyrighted work . . . and cleverly manipulate copyrighted materials," it does not seem practical to attempt to "cabin the extent to which creative people [feel] free to use copyrighted materials in their work," particularly if those uses do not lead to a commercially released work that could actually harm the market for the original copyrighted song.[180]

Giving copyright holders of musical works the ability to deny permission to experiment with their work is contrary to the goals of copyright law, as it would do little to actually prevent the distribution of unlicensed derivative works and has no impact on the copyright holder's own exploitation of the work.[181] A copyright owner's loss of control of their work when artists experiment with it should not be a concern when the standard practice in the music industry is to seek permission before commercially releasing a new work that incorporates preexisting copyrighted work. Although licensing—and thus obtaining permission from a copyright owner to use a copyrighted work in a commercially released new derivative work—is a functioning part of the music industry, the practice should be limited to instances where an artist's sampled work is ready to be commercially exploited or distributed in a way that no longer constitutes fair use.[182] It is only appropriate to force artists to comply with

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178 Harper, *supra* note 11, at 438.

179 *See* Chused, *supra* note 13, at 181.

180 *Id.* at 180.

181 *See id.* at 203.

182 Some argue that the way in which music licensing functions today—requiring a license for basically any borrowing or copying for commercial use—is a direct result of

the considerable burdens of the music licensing process once they have experimented with copyrighted material to the extent that they are ready to seek a license for permission to commercially release the new work. When a copyright holder's exclusive rights are "used more as a weapon than as a tool of innovation," copyright law is not doing its job.[183]

B. Fair Use, Creativity, and Innovation

It is "universally agreed" that the promotion of creativity is at the core of copyright law's purpose.[184] The enforcement of copyright law, therefore, must seek to encourage creativity rather than stifle it. The fair use doctrine, which has been applied to a wide variety of situations since its inception, is necessary to the copyright regime's purpose of encouraging innovation and creativity.[185] It is especially vital in "balancing the rights of current artists and the rights of future artists" so that when a use "facilitate[s] the progress of the arts," a future artist can reference, employ, and develop the works of previous ones.[186]

The fair use limitation plays a fundamental role in the development of creativity and innovation in the music industry. If an infringing use is not harmful to an artist and it functions to enable the progression of the arts in some way, it should be considered fair.[187] Use of copyrighted works for the purpose of experimentation with the intent to obtain a license, as *Chapman* indicates, does just that.[188]

If the fair use doctrine had not been interpreted the way it was by the court in *Chapman*, copyright law would, to a great extent, "inhibit the creation of works of art and the advancement of art at all" which is "directly contrary to the fundamental purpose of copyright law."[189] In fact, the "concept of stifling creativity" came from early courts' rationale for using the fair use defense "to allow certain creative uses of works which

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"risk-averse" individuals who prefer to license their use of copyrighted work just in case, which has led to an expansion of copyright's reach inadvertently, creating a copyright regime that values compensation to copyright owners over innovation and creativity. *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 889 (2007). This argument, while interesting, falls outside the scope of this Note.

183 *See* Evans, *supra* note 64, at 904 (suggesting that *Bridgeport* should be overturned in favor of allowing unlicensed uses of sampling in some circumstances).

184 Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1151 (2007).

185 *See* Leval, *supra* note 60, at 1110.

186 Pote, *supra* note 18, at 669.

187 *See id.* at 687 (citing 17 U.S.C. § 107)).

188 Chapman v. Maraj, No. 2:18-cv-09088, 11 (C.D. Cal. Sept. 16, 2020).

189 *See* Pote, *supra* note 18, at 651 (citing Noah Balch, *The Grey Note*, 24 REV. LITIG. 581, 603 (2005)).

copyright law did not technically permit."[190] Thus, the idea that there are some infringements of copyright law that should be allowed because they encourage innovation and foster creativity is central to the notion of fair use. As many proponents of a flexible fair use standard argue, copyright law "should demonstrate flexibility and adaptation" to innovation, and a fair use interpretation that limits the ability to innovate "contradict[s] the purpose of copyright law: a stifling of music, culture, and creativity."[191]

Creative works are "important components of collective cultural landscapes," and those who wish to contribute to the progression of culture "must engage with what is already there."[192] Referencing, building upon, and using copyrighted works is quite prevalent in the music industry, and, "in order for art to advance, artists must be able to build off of previous works, to some extent."[193] And, "[t]he pervasive nature of borrowing in music suggests that more careful consideration needs to be given to the extent to which copying and borrowing have been, and can be, a source of innovation within music."[194] If experimentation were policed to the extent suggested by Chapman in this case, artists would be discouraged from referencing preexisting copyrighted material which, in turn, would stifle the progress of creativity and the development of the arts. Many have argued that "overly rigid control of access to and manipulation of cultural goods stifles artistic and cultural innovation," creating what some have deemed a "permission culture."[195] And in such a world, "[t]he opportunity to create and transform becomes weakened."[196] Thus, permission should only be required when an artist's use of copyrighted material impedes a copyright holder's ability to exploit the work being used. The fair use limitation is, therefore, an important mechanism in balancing the interests of artists in using preexisting work when the use contributes to the advancement of the arts with the interests of the work's copyright holder in receiving the appropriate reward for the creation of their work in the market.[197]

If the *Chapman* court had held differently—that Minaj's use of Chapman's composition was not fair and thus infringing—experimentation and innovation in the music industry would be severely

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190 *Id.* at 651.

191 Golosker, *supra* note 64, at 400 (reasoning that interpreting the fair use doctrine to *not* cover mash-ups would be contradictory to the purpose of copyright law).

192 Cohen, *supra* note 184, at 1202.

193 Pote, *supra* note 18, at 652.

194 Olufunmilayo, *supra* note 2, at 547.

195 Cohen, *supra* note 184, at 1193.

196 Hart, *supra* note 44, at 846 (quoting Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down and Control Creativity* 19 (2004)).

197 17 U.S.C. § 107.

thwarted. Notably, the holding would have essentially suggested that anyone sampling or replaying songs at home for noncommercial purposes could be liable for copyright infringement.[198] Such a holding would not have furthered the goals of copyright. In fact, it would have gone far beyond the purpose of copyright law, unnecessarily tipping the delicate balance in favor of the interests of copyright owners and against the general public in accessing new music and promoting innovation in the industry. Instead of providing copyright holders with the appropriate level of exclusive right over the use of their works, the copyright regime for which Chapman argued would give copyright holders absolute and unequivocal control over the use of their work, even in instances when the use does utterly no harm to the copyright holder.

The purpose of the fair use exception is "to protect existing work from misappropriation while not hindering the introduction of new works to the public."[199] Derivative works that are not yet commercially accessible and are merely created with the intention of obtaining permission from the original copyright owner do not threaten the market for the original work, thus they do not infringe upon the original copyright owner's exclusive rights. Prohibiting experimentation with existing copyrighted material would considerably hinder the introduction of new works to the public, as artists would be discouraged from performing any referential activity in the creation of new music for fear of legal repercussions. Preventing artists from fully engaging in the creative process threatens the progress of science[200]—the cornerstone of copyright law, as stated in the Constitution.[201]

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[198] The threat of being liable for copyright infringement in this context, however, is insignificant without the original copyright holder's awareness of the use: "[T]he borrower's awareness that something has been borrowed" affects whether or not there is a licensing issue. Gibson, *supra* note 182, at 904. In *Chapman*, if Minaj's song had not been leaked, Chapman may not have sued Minaj for infringement even though she was fully aware of Minaj's intention to use her song due to Minaj's excessive licensing requests because the song never moved from creation to distribution (though this was complicated by the issue of the radio leak).

[199] Cynthia M. Cimino, *Fair Use in the Digital Age: Are We Playing Fair?*, 4 TUL. J. TECH. & INTELL. PROP. 203, 220 (2002) (citing Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 146 (2001)).

[200] Note that the term "science" in the Progress Clause has been interpreted a number of ways, but modern interpretations generally define it as "artistic creativity." *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[201] *See* U.S. CONST. art. I, § 8, cl. 8.

V. CONCLUSION

The Central District of California's interpretation of the fair use doctrine and thus its holding in *Chapman v. Maraj* concretely allows artists to experiment with preexisting copyrighted material without permission before seeking a license, even if the artist's purpose in doing so is incidentally commercial. If the court had determined that Nicki Minaj's use of Tracy Chapman's musical composition did not constitute fair use of Chapman's copyrighted work, artists would be discouraged from building off of existing music due to the high financial and transactional costs of licensing any potential sample and for fear of the legal consequence, which severely stifles creativity and innovation in the music industry. The fair use doctrine—an essential limitation to a copyright holder's exclusive control over the use of their works—helps support the goals of copyright law in contributing to the progress of music. Although Nicki Minaj did experiment with the "Sorry" cover of Tracy Chapman's song, recorded a derivative work, and repeatedly sought Chapman's permission to include it on her album, her use was a fair one. She never released it, so she is certainly not "Sorry."