

# **COPYRIGHT IN A GLOBAL INFORMATION ECONOMY**

## **2016 Case Supplement**

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# Contents

Chapter 2. Requirements for Copyright Protection.....	1
A. The Elements of Copyrightable Subject Matter .....	1
B. Two Special Cases: Derivative Works and Compilations.....	1
Chapter 5. The Reproduction Right and the Right to Prepare Derivative Works.....	3
C. Fictional Characters and the Reproduction and Derivative Work Rights.....	3
DC Comics v. Towle .....	3
Chapter 6. The Right of Distribution, Public Performance, and Public Display .....	8
A. Distribution of Copies.....	8
Chapter 7. Copyright in Musical Works and Sound Recordings .....	9
C. Sampling .....	9
VMG Salsoul, LLC v. Ciccone .....	9
Chapter 8. Moral Rights and Performers' Rights .....	21
B. Performers' Rights and Related Treaty Obligations .....	21
Chapter 9. The Different Faces of Infringement .....	22
C. Online Service Providers Liability .....	22
Lenz v. Universal Music Corp.....	22
Chapter 10. Fair Use.....	30
B. Transformative Use Revisited .....	30
Chapter 13. Copyright Litigation.....	32
F. Civil Remedies .....	32
Kirtsaeng v. John Wiley & Sons, Inc. ....	33
Chapter 14. Technological Protections .....	39
B. The Digital Millennium Copyright Act and Circumvention of Technological Protections .....	39

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## Chapter 2. Requirements for Copyright Protection

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### A. The Elements of Copyrightable Subject Matter

**Page 78. At the end of Note 2, add the following:**

3. Section 102 provides that copyright protection is available for “original works of authorship.” What, exactly, constitutes a work of authorship? While section 102 contains a list of types of works that are protectable, is there a particular quantum of content that something must have to qualify as a work? Consider, for example, a single scene in a movie; the movie can be protected, but is the scene, itself, a separate work of authorship? How about a particular actor’s performance in that scene? The Ninth Circuit addressed the latter issue in a case involving the assertion of copyright in a five-second performance contained in a 14-minute motion picture. *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc). The Copyright Office had rejected an actress’ attempt to register copyright in her performance, explaining that its “longstanding practices do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture.” *Id.* at 741. Instead, the Copyright Office viewed the motion picture as a single integrated work. *Id.* The Ninth Circuit agreed, reasoning that “treating every acting performance as an independent work would not only be a logistical and financial nightmare, it would turn cast of thousands into a new mantra: copyright of thousands.” *Id.* at 742.

### B. Two Special Cases: Derivative Works and Compilations

**Page 136. At the end of Note 3, add the following:**

4. Remember that while compilations are eligible for copyright protection, the compilation must meet the requirements for copyrightability, including the negative requirement of section 102(b) that “in no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . .” Keeping that principle in mind, is a sequence of physical exercises a copyrightable compilation?

Relying on the idea/expression distinction, the Ninth Circuit rejected an assertion of copyright in a sequence of yoga poses, on the ground that the sequence was an uncopyrightable process or system. *Bikram’s Yoga Coll. of India, L.P. v. Evolation Yoga, LLC*, 803 F.3d 1032 (9th Cir. 2015). The court rejected the plaintiff’s argument that the sequence of poses was, at least in part, beautiful and aesthetically pleasing:

the beauty of the process does not permit one who describes it to gain, through copyright, the monopolistic power to exclude all others from practicing it. This is true even where, as here, the process was conceived with at least some aesthetic considerations in mind.

*Id.* at 1040. In addressing whether the selection and arrangement of the poses made the sequence a copyrightable compilation, the court reasoned that even though the plaintiff “could have chosen from ‘hundreds of postures’ and ‘countless arrangements of these postures,’” the sequence of poses that the plaintiff had selected were still a system or process and thus the sequence was not eligible for copyright protection. *Id.* at 1042.

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## Chapter 5. The Reproduction Right and the Right to Prepare Derivative Works

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### C. Fictional Characters and the Reproduction and Derivative Work Rights

**Page 335.** *The following case may be used as a supplement or as an alternative to Warner Brothers Entertainment v. X One X Productions.*

**DC Comics v. Towle**  
802 F.3d 1012 (9th Cir. 2015)

IKUTA, C.J.: DC Comics (DC) is the publisher and copyright owner of comic books featuring the story of the world-famous character, Batman. Since his first comic book appearance in 1939, the Caped Crusader has protected Gotham City from villains with the help of his sidekick Robin the Boy Wonder, his utility belt, and of course, the Batmobile.

. . . [T]he Batmobile is a fictional, high-tech automobile that Batman employs as his primary mode of transportation. The Batmobile has varied in appearance over the years, but its name and key characteristics as Batman’s personal crime-fighting vehicle have remained consistent. Over the past eight decades, the comic books have continually depicted the Batmobile as possessing bat-like external features, ready to leap into action to assist Batman in his fight against Gotham’s most dangerous villains, and equipped with futuristic weaponry and technology . . . .

Since its creation in the comic books, the Batmobile has also been depicted in numerous television programs and motion pictures. Two of these depictions are relevant to this case: the 1966 television series *Batman*, starring Adam West, and the 1989 motion picture *BATMAN*, starring Michael Keaton.

The 1966 *Batman* television series was the product of a licensing agreement between DC’s predecessor, National Periodical Publications, Inc. (National Periodical) and the American Broadcasting Company (ABC). . . . Under this agreement, ABC . . . produced the 1966 television show . . . . In addition to Batman, Robin, and the use of visual onomatopoeia that flashed on screen during fight scenes . . . the television series featured the Batmobile. The design of the Batmobile did not directly copy any iterations of the Batmobile as it appeared in the comic books. As in the comic books, however, the Batmobile in the 1966 television show maintained a bat-like appearance and was equipped with state-of-the-art weaponry and technology.

In 1979, DC again licensed its rights in the Batman literary property . . . to Batman Productions, Inc. (BPI). . . .

BPI subsequently sub-licensed its rights to Warner Bros., Inc., who eventually . . . produced the 1989 motion picture *BATMAN*. . . . Like the 1966 television series, the 1989 motion picture featured a Batmobile that was physically distinct from the Batmobile portrayed in the comic books and the 1966 television series. Nonetheless, the Batmobile as portrayed in the motion picture retained a bat-like physical appearance and was again equipped with futuristic technology and crime-fighting weaponry.

Defendant Mark Towle produces replicas of the Batmobile as it appeared in both the 1966 television show and 1989 motion picture as part of his business at Gotham Garage, where he manufactures and sells replicas of automobiles featured in motion pictures or television programs. Towle concedes that these replicas copy the designs of the Batmobile as depicted on television and in the motion picture, though they do not copy every feature. Towle then sells these vehicles for approximately \$90,000 to “avid car collectors” who “know the entire history of the Batmobile.” Towle also sells kits that allow customers to modify their cars to look like the Batmobile, as it appeared in the 1966 television show and the 1989 motion picture. . . .

In May 2011, DC filed this action against Towle, alleging, among other things . . . copyright infringement . . . arising from Towle’s manufacture and sale of the Batmobile replicas. Towle . . . claimed that the Batmobile as it appeared in the 1966 television show and 1989 motion picture was not subject to copyright protection. . . . The parties subsequently filed cross motions for partial summary judgment . . . .

. . . [T]he district court granted in part and denied in part DC’s motion for summary judgment, and denied Towle’s cross motion for summary judgment. *DC Comics v. Towle*, 989 F.Supp.2d 948 (C.D.Cal.2013). . . .

After the district court issued its decision, the parties entered into a joint stipulation in which they agreed that the district court would enter a judgment against Towle on DC’s copyright infringement and other claims. . . . The district court entered a judgment consistent with this stipulation on February 22, 2013, and Towle timely appealed. . . .

## II. A

We begin with the question whether the Batmobile, as it appears in the comic books, television series, and motion picture, is entitled to copyright protection. . . .

Courts have recognized that copyright protection extends not only to an original work as a whole, but also to “sufficiently distinctive” elements, like comic book characters, contained within the work. *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir.2008). Although comic book characters are not listed in the Copyright Act, we have long held that such characters are afforded copyright protection. *See Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir.1978). . . .

Not every comic book, television, or motion picture character is entitled to copyright protection. We have held that copyright protection is available only “for characters that are especially distinctive.” *Halicki*, 547 F.3d at 1224. To meet this standard, a character must be “sufficiently delineated” and display “consistent, widely identifiable traits.” *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170 (9th Cir.2003) (citing

*Toho Co., Ltd. v. William Morrow & Co., Inc.*, 33 F.Supp.2d 1206, 1215 (C.D.Cal.1998) (Godzilla)). . . .

We have previously determined that an automotive character can be copyrightable. *See Halicki*, 547 F.3d at 1224. . . .

As indicated in *Halicki*, a character may be protectable if it has distinctive character traits and attributes, even if the character does not maintain the same physical appearance in every context. As the Eighth Circuit has recognized, “the presence of distinctive qualities apart from visual appearance can diminish or even negate the need for consistent visual appearance.” *Warner Bros. Entm’t, Inc. v. X One X Prods.*, 644 F.3d 584, 599 n. 8 (8th Cir.2011). . . .

Similarly, district courts have determined that James Bond, Batman, and Godzilla are characters protected by copyright, despite their changes in appearance. In each instance, courts have deemed the persistence of a character’s traits and attributes to be key to determining whether the character qualifies for copyright protection. The character “James Bond” qualifies for copyright protection because, no matter what the actor who portrays this character looks like, James Bond always maintains his “cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his marksmanship; his ‘license to kill’ and use of guns; his physical strength; [and] his sophistication.” *Metro–Goldwyn–Mayer [v. Am. Honda Motor Co.]*, 900 F.Supp. [1287] at 1296. Similarly, while the character “Godzilla” may have a different appearance from time to time, it is entitled to copyright protection because it “is always a pre-historic, fire-breathing, gigantic dinosaur alive and well in the modern world.” *Toho Co.*, 33 F.Supp.2d at 1216. In short, although James Bond’s, Godzilla’s, and Batman’s “costume and character have evolved over the years, [they have] retained unique, protectable characteristics” and are therefore entitled to copyright protection as characters. *Sapon [v. DC Comics]*, 2002 WL 485730, at \*3–4.

We read these precedents as establishing a three-part test for determining whether a character in a comic book, television program, or motion picture is entitled to copyright protection. First, the character must generally have “physical as well as conceptual qualities.” *Air Pirates*, 581 F.2d at 755. Second, the character must be “sufficiently delineated” to be recognizable as the same character whenever it appears. *See Rice*, 330 F.3d at 1175. Considering the character as it has appeared in different productions, it must display consistent, identifiable character traits and attributes, although the character need not have a consistent appearance. *See Halicki*, 547 F.3d at 1224. Third, the character must be “especially distinctive” and “contain some unique elements of expression.” *Halicki*, 547 F.3d at 1224. It cannot be a stock character such as a magician in standard magician garb. *Rice [v. Fox Broadcasting Co.]*, 330 F.3d 1170] at 1175 [9th Cir. 2003]. Even when a character lacks sentient attributes and does not speak (like a car), it can be a protectable character if it meets this standard. *Halicki*, 547 F.3d at 1224.

We now apply this framework to this case. . . . First, because the Batmobile has appeared graphically in comic books, and as a three-dimensional car in television series and motion pictures, it has “physical as well as conceptual qualities,” and is thus not a mere literary character. *Air Pirates*, 581 F.2d at 755.

Second, the Batmobile is “sufficiently delineated” to be recognizable as the same character whenever it appears. *See Rice*, 330 F.3d at 1175. As the district court

determined, the Batmobile has maintained distinct physical and conceptual qualities since its first appearance in the comic books in 1941. In addition to its status as “a highly-interactive vehicle, equipped with high-tech gadgets and weaponry used to aid Batman in fighting crime,” the Batmobile is almost always bat-like in appearance, with a bat-themed front end, bat wings extending from the top or back of the car, exaggerated fenders, a curved windshield, and bat emblems on the vehicle. This bat-like appearance has been a consistent theme throughout the comic books, television series, and motion picture, even though the precise nature of the bat-like characteristics have changed from time to time.

The Batmobile also has consistent character traits and attributes. No matter its specific physical appearance, the Batmobile is a “crime-fighting” car with sleek and powerful characteristics that allow Batman to maneuver quickly while he fights villains. In the comic books, the Batmobile is described as waiting “[l]ike an impatient steed straining at the reins ... shiver[ing] as its super-charged motor throbs with energy” before it “tears after the fleeing hoodlums” an instant later. Elsewhere, the Batmobile “leaps away and tears up the street like a cyclone,” and at one point “twin jets of flame flash out with thunderclap force, and the miracle car of the dynamic duo literally flies through the air!” Like its comic book counterpart, the Batmobile depicted in both the 1966 television series and the 1989 motion picture possesses “jet engine[s]” and flame-shooting tubes that undoubtedly give the Batmobile far more power than an ordinary car. Furthermore, the Batmobile has an ability to maneuver that far exceeds that of an ordinary car. In the 1966 television series, the Batmobile can perform an “emergency bat turn” via reverse thrust rockets. Likewise, in the 1989 motion picture, the Batmobile can enter “Batmissile” mode, in which the Batmobile sheds “all material outside [the] central fuselage” and reconfigures its “wheels and axles to fit through narrow openings.”

Equally important, the Batmobile always contains the most up-to-date weaponry and technology. At various points in the comic book, the Batmobile contains a “hot-line phone ... directly to Commissioner Gordon’s office” maintained within the dashboard compartment, a “special alarm” that foils the Joker’s attempt to steal the Batmobile, and even a complete “mobile crime lab” within the vehicle. Likewise, the Batmobile in the 1966 television series possesses a “Bing–Bong warning bell,” a mobile Bat-phone, a “Batscope, complete with [a] TV-like viewing screen on the dash,” and a “Bat-ray.” Similarly, the Batmobile in the 1989 motion picture is equipped with a “pair of forward-facing Browning machine guns,” “spherical bombs,” “chassis-mounted shinbreakers,” and “side-mounted disc launchers.”

Because the Batmobile, as it appears in the comic books as well as in the 1966 television show and 1989 motion picture, displays “consistent, identifiable character traits and attributes,” the second prong of the character analysis is met here.

Third, the Batmobile is “especially distinctive” and contains unique elements of expression. In addition to its status as Batman’s loyal bat-themed sidekick complete with the character traits and physical characteristics described above, the Batmobile also has its unique and highly recognizable name. It is not merely a stock character.

Accordingly, applying our three-part test, we conclude that the Batmobile is a character that qualifies for copyright protection.

Towle raises two arguments against this conclusion. First, he points out that the Batmobile has at times appeared without its signature sleek “bat-like” features. He notes that in a 1988 comic book rendition, the Batmobile appears as a heavily armored tank

with large tires and a rocket launcher. The Batmobile portrayed in the 1989 motion picture could also transform into a Batmissile. As we have noted, however, a consistent appearance is not as significant in our analysis as consistent character traits and attributes. The changes in appearance cited by Towle resemble costume changes that do not alter the Batmobile's innate characteristics, any more than James Bond's change from blue swimming trunks (in *Casino Royale*) to his classic tuxedo affects his iconic character. In context, the depictions of the Batmobile as a tank or missile promote its character as Batman's crime-fighting super car that can adapt to new situations as may be necessary to help Batman vanquish Gotham City's most notorious evildoers. See *Halicki*, 547 F.3d at 1224–25.

Second, Towle argues that a jury should decide the question whether the Batmobile displayed unique elements of expression and consistent, widely identifiable traits. We disagree. We have previously recognized that “[w]hether a particular work is subject to copyright protection is a mixed question of fact and law subject to de novo review.” *Societe Civile Succession Guino v. Renoir*, 549 F.3d 1182, 1185 (9th Cir.2008). Neither party disputes the relevant facts regarding the Batmobile here. Accordingly, we are well-equipped to determine whether, as a matter of law, these undisputed facts establish that the Batmobile is an “especially distinctive” character entitled to copyright protection. . . .

#### IV

As Batman so sagely told Robin, “In our well-ordered society, protection of private property is essential.” *Batman: The Penguin Goes Straight*, (Greenway Productions television broadcast March 23, 1966). Here, we conclude that the Batmobile character is the property of DC, and Towle infringed upon DC's property rights when he produced unauthorized derivative works of the Batmobile as it appeared in the 1966 television show and the 1989 motion picture. Accordingly, we affirm the district court.

### NOTES AND QUESTIONS

1. Under what §102 category of work is the Batmobile copyrightable? Is it a literary work? A pictorial or graphic work? Does it matter? What arguments would you make to counter the court's assertion that the Batmobile is copyrightable “as a matter of law”? In *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc), the court endorsed the Copyright Office's longstanding practice of denying copyright to an actor or actress for his or her performance embodied in a motion picture, reasoning that the copyright subsists in the motion picture as a single integrated work. If a performance in a motion picture is ineligible for separate copyright, why is the Batmobile eligible?

2. Do you agree with the court that the Batmobile is a character just as much as James Bond? Review the characteristics of the Batmobile that the court identifies as consistent and sufficiently distinctive. How different is the Batmobile from modes of transportation used by other super heroes? Is the “especially distinctive” standard a higher threshold than that of originality? Is it a different standard altogether?

3. As you learned in Chapter 4, copyright protection for useful articles, architectural works and computer software is subject to certain limits. Should copyright protection for characters be subject to any limits and, if so, what should those limits be?

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## Chapter 6. The Right of Distribution, Public Performance, and Public Display

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### A. Distribution of Copies

***Page 352. At the end of Note 1, add the following:***

In February, 2016, the Register of Copyrights issued a report that stated:

While some courts have failed to find distribution in the absence of evidence of completed transfers, and therefore declined to recognize claims based solely on making copies available to the public for download, the Copyright Office concludes that the appropriate reading of Section 106(3) in the context of making available claims is that it covers offers of access.

*The Making Available Right in the United States: A Report of the Register of Copyrights* 4 (February 2016). [http://copyright.gov/docs/making\\_available/making-available-right.pdf](http://copyright.gov/docs/making_available/making-available-right.pdf). Given the reasoning of *Capital Records*, what do you make of the Register's statement?

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## Chapter 7. Copyright in Musical Works and Sound Recordings

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### C. Sampling

**Page 419. Replace Chapter 7.C with the following:**

In certain musical genres, such as rap, hip hop, and dubstep, “sampling” is a common practice. Sampling involves digitally copying and remixing sounds from previously recorded albums. As you now know, this practice may implicate two copyrights. When should sampling require the permission of the musical work copyright owner? When should it require the permission of the sound recording copyright owner?

**VMG Salsoul, LLC v. Ciccone**  
2016 WL 3090780 (9th Cir. June 2, 2016)

GRABER, J.:

In the early 1990s, pop star Madonna Louise Ciccone, commonly known by her first name only, released the song *Vogue* to great commercial success. In this copyright infringement action, Plaintiff VMG Salsoul, LLC, alleges that the producer of *Vogue*, Shep Pettibone, copied a 0.23-second segment of horns from an earlier song, known as *Love Break*, and used a modified version of that snippet when recording *Vogue*. Plaintiff asserts that Defendants Madonna, Pettibone, and others thereby violated Plaintiff’s copyrights to *Love Break*. . . .

**FACTUAL AND PROCEDURAL HISTORY**

Because this case comes to us on appeal from a grant of summary judgment to Defendants, we recount the facts in the light most favorable to Plaintiff.

In the early 1980s, Pettibone recorded the song *Ooh I Love It (Love Break)*, which we refer to as *Love Break*. In 1990, Madonna and Pettibone recorded the song *Vogue*, which would become a mega-hit dance song after its release on Madonna’s albums. Plaintiff alleges that, when recording *Vogue*, Pettibone “sampled” certain sounds from the recording of *Love Break* and added those sounds to *Vogue*. “Sampling” in this context means the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo. *See Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004).

Plaintiff asserts that it holds copyrights to the composition and to the sound recording of *Love Break*. Plaintiff argues that . . . [w]hen creating two commercial versions of *Vogue*, Pettibone sampled a “horn hit” from *Love Break*, violating Plaintiff’s copyrights to both the composition and the sound recording of *Love Break*.

The horn hit appears in *Love Break* in two forms. A “single” horn hit in *Love Break* consists of a quarter-note chord comprised of four notes—E-flat, A, D, and F—in the key of B-flat. The single horn hit lasts for 0.23 seconds. A “double” horn hit in *Love Break* consists of an eighth-note chord of those same notes, followed immediately by a quarter-note chord of the same notes. Plaintiff’s expert identified the instruments as “predominantly” trombones and trumpets.

The alleged source of the sampling is the “instrumental” version of *Love Break*, which lasts 7 minutes and 46 seconds. The single horn hit occurs 27 times, and the double horn hit occurs 23 times. The horn hits occur at intervals of approximately 2 to 4 seconds in two different segments: between 3:11 and 4:38, and from 7:01 to the end, at 7:46. The general pattern is single-double repeated, double-single repeated, single-single-double repeated, and double-single repeated. Many other instruments are playing at the same time as the horns.

The horn hit in *Vogue* appears in the same two forms as in *Love Break*: single and double. A “single” horn hit in *Vogue* consists of a quarter-note chord comprised of four notes—E, A-sharp, D-sharp, and F-sharp—in the key of B-natural.<sup>3</sup> A double horn hit in *Vogue* consists of an eighth-note chord of those same notes, followed immediately by a quarter-note chord of the same notes.

The two commercial versions of *Vogue* that Plaintiff challenges are known as the “radio edit” version and the “compilation” version. The radio edit version of *Vogue* lasts 4 minutes and 53 seconds. The single horn hit occurs once, the double horn hit occurs three times, and a “breakdown” version of the horn hit occurs once.<sup>4</sup> They occur at 0:56, 1:02, 3:41, 4:05, and 4:18. The pattern is single-double-double-double-breakdown. As with *Love Break*, many other instruments are playing at the same time as the horns.

The compilation version of *Vogue* lasts 5 minutes and 17 seconds. The single horn hit occurs once, and the double horn hit occurs five times. They occur at 1:14, 1:20, 3:59, 4:24, 4:40, and 4:57. The pattern is single-double-double-double-double-double. Again, many other instruments are playing as well.

One of Plaintiff’s experts transcribed the composition of the horn hits in the two songs as follows. *Love Break*’s single horn hit:



*Vogue*’s single horn hit:



*Love Break*’s double horn hit:



*Vogue*’s double horn hit:



<sup>3</sup> In musical terms, assuming that the composition was copied, Pettibone “transposed” the horn hit in *Love Break* by one-half step, resulting in notes that are half a step higher in *Vogue*.

<sup>4</sup> The record does not appear to disclose the meaning of a “breakdown” version of the horn hit, and neither party attributes any significance to this form of the horn hit.

In a written order, the district court granted summary judgment to Defendants on two alternative grounds. First, neither the composition nor the sound recording of the horn hit was “original” for purposes of copyright law. Second, the court ruled that, even if the horn hit was original, any sampling of the horn hit was “de minimis or trivial.” . . .

### DISCUSSION

Plaintiff has submitted evidence of actual copying. In particular, Tony Shimkin has sworn that he, as Pettibone’s personal assistant, helped with the creation of *Vogue* and that, in Shimkin’s presence, Pettibone directed an engineer to introduce sounds from *Love Break* into the recording of *Vogue*. Additionally, Plaintiff submitted reports from music experts who concluded that the horn hits in *Vogue* were sampled from *Love Break*. Defendants do not concede that sampling occurred, and they have introduced much evidence to the contrary.<sup>5</sup> But for purposes of summary judgment, Plaintiff has introduced sufficient evidence (including direct evidence) to create a genuine issue of material fact as to whether copying in fact occurred. . . .

Our leading authority on actual copying is *Newton*, 388 F.3d 1189. We explained in *Newton* that proof of actual copying is insufficient to establish copyright infringement:

For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement. *See Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74–75 (2d Cir. 1997). This means that even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.

...

*Newton*, 388 F.3d at 1192–93. In other words, to establish its infringement claim, Plaintiff must show that the copying was greater than de minimis.

Plaintiff’s claim encompasses two distinct alleged infringements: infringement of the copyright to the *composition* of *Love Break* and infringement of the copyright to the *sound recording* of *Love Break*. . . . We squarely held in *Newton*, 388 F.3d at 1193, that the de minimis exception applies to claims of infringement of a copyrighted composition. But it is an open question in this circuit whether the exception applies to claims of infringement of a copyrighted sound recording.

Below, we address (A) whether the alleged copying of the composition or the sound recording was de minimis, [and] (B) whether the de minimis exception applies to alleged infringement of copyrighted sound recordings . . . .<sup>6</sup>

#### **A. Application of the De Minimis Exception**

A “use is de minimis only if the average audience would not recognize the appropriation.” *Newton*, 388 F.3d at 1193; *see id.* at 1196 (affirming the grant of summary judgment because “an average audience would not discern Newton’s hand as a composer ... from Beastie Boys’ use of the sample”). Accordingly, we must determine whether a reasonable juror could conclude that the average audience would recognize the

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<sup>5</sup> For example, Plaintiff hired Shimkin and then brought this action, raising doubts about Shimkin’s credibility; Pettibone and others testified that Shimkin was not present during the creation of *Vogue* and was not even employed by Pettibone at that time; and Defendants’ experts dispute the analysis and conclusions of Plaintiff’s experts.

<sup>6</sup> Because we affirm the judgment on the ground that any copying was de minimis, we do not reach Defendants’ alternative arguments. Accordingly, we assume without deciding that the horn hits are “original.” *See Newton*, 388 F.3d at 1192 (assuming originality). . . .

appropriation. We will consider the composition and the sound recording copyrights in turn.

### **1. Alleged Infringement of the Composition Copyright**

When considering an infringement claim of a copyrighted musical composition, what matters is not how the musicians actually played the notes but, rather, a “generic rendition of the composition.” *Newton*, 388 F.3d at 1194; *see id.* at 1193 (holding that, when considering infringement of the composition copyright, one “must remove from consideration all the elements unique to [the musician’s] performance”). That is, we must compare the written compositions of the two pieces.

Viewing the evidence in the light most favorable to Plaintiff, Defendants copied two distinct passages in the horn part of the score for *Love Break*. First, Defendants copied the quarter-note single horn hit. But no additional part of the score concerning the single horn hit is the same, because the single horn hit appears at a different place in the measure. In *Love Break*, the notes for the measure are: half-note rest, quarter-note rest, single horn hit. In *Vogue*, however, the notes for the measure are: half-note rest, eighth-note rest, single horn hit, eighth-note rest. Second, Defendants copied a full measure that contains the double horn hit. In both songs, the notes for the measure are: half-note rest, eighth-note rest, eighth-note horn hit, quarter-note horn hit. In sum, Defendants copied, at most, a quarter-note single horn hit and a full measure containing rests and a double horn hit.

After listening to the recordings, we conclude that a reasonable jury could *not* conclude that an average audience would recognize the appropriation of the composition. Our decision in *Newton* is instructive. That case involved a copyrighted composition of “a piece for flute and voice.” *Newton*, 388 F.3d at 1191. The defendants used a six-second sample that “consist[ed] of three notes, C—D flat—C, sung over a background C note played on the flute.” *Id.* The composition also “require[d] overblowing the background C note that is played on the flute.” *Id.* The defendants repeated a six-second sample “throughout [the song], so that it appears over forty times in various renditions of the song.” *Id.* at 1192. After listening to the recordings, we affirmed the grant of summary judgment because “an average audience would not discern [the composer’s] hand as a composer.” *Id.* at 1196.

The snippets of the composition that were (as we must assume) taken here are much smaller than the sample at issue in *Newton*. The copied elements from the *Love Break* composition are very short, much shorter than the six-second sample in *Newton*. The single horn hit lasts less than a quarter-second, and the double horn hit lasts—even counting the rests at the beginning of the measure—less than a second. Similarly, the horn hits appear only five or six times in *Vogue*, rather than the dozens of times that the sampled material in *Newton* occurred in the challenged song in that case. Moreover, unlike in *Newton*, in which the challenged song copied *the entire composition* of the original work for the given temporal segment, the sampling at issue here involves only *one instrument group* out of many. As noted above, listening to the audio recordings confirms what the foregoing analysis of the composition strongly suggests: A reasonable jury could not conclude that an average audience would recognize an appropriation of the *Love Break* composition.

### **2. Alleged Infringement of the Sound Recording Copyright**

When considering a claimed infringement of a copyrighted sound recording, what matters is how the musicians *played* the notes, that is, how their rendition distinguishes

the recording from a generic rendition of the same composition. *See Newton*, 388 F.3d at 1193 (describing the protected elements of a copyrighted sound recording as “the elements unique to [the musician’s] performance”). Viewing the evidence in the light most favorable to Plaintiff, by accepting its experts’ reports, Pettibone sampled one single horn hit, which occurred at 3:35 in *Love Break*. Pettibone then used that sampled single horn hit to create the double horn hit used in *Vogue*.

The horn hit itself was not copied precisely. According to Plaintiff’s expert, the chord “was modified by transposing it upward, cleaning up the attack slightly in order to make it punchier [by truncating the horn hit] and overlaying it with other sounds and effects. One such effect mimicked the reverse cymbal crash.... The reverb/delay ‘tail’ ... was prolonged and heightened.” Moreover, as with the composition, the horn hits are not isolated sounds. Many other instruments are playing at the same time in both *Love Break* and *Vogue*.

In sum, viewing the evidence in the light most favorable to Plaintiff, Pettibone copied one quarter-note of a four-note chord, lasting 0.23 seconds; he isolated the horns by filtering out the other instruments playing at the same time; he transposed it to a different key; he truncated it; and he added effects and other sounds to the chord itself. For the double horn hit, he used the same process, except that he duplicated the single horn hit and shortened one of the duplicates to create the eighth-note chord from the quarter-note chord. Finally, he overlaid the resulting horn hits with sounds from many other instruments to create the song *Vogue*.

After listening to the audio recordings submitted by the parties, we conclude that a reasonable juror could *not* conclude that an average audience would recognize the appropriation of the horn hit. That common-sense conclusion is borne out by dry analysis. The horn hit is very short—less than a second. The horn hit occurs only a few times in *Vogue*. Without careful attention, the horn hits are easy to miss. Moreover, the horn hits in *Vogue* do not sound identical to the horn hits from *Love Break*. . . .

#### **B. The De Minimis Exception and Sound Recordings**

Plaintiff argues, in the alternative, that even if the copying here is trivial, that fact is irrelevant because the de minimis exception does not apply to infringements of copyrighted sound recordings. Plaintiff urges us to follow the Sixth Circuit’s decision in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), which adopted a bright-line rule: For copyrighted sound recordings, any unauthorized copying—no matter how trivial—constitutes infringement.

The rule that infringement occurs only when a substantial portion is copied is firmly established in the law. The leading copyright treatise traces the rule to the mid-1800s. 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[A][2][a], at 13-56 to 13-57, 13-57 n.102 (2013) (citing *Folsom v. Marsh*, 9 F.Cas. 342, No. 4901 (C.C. Mass. 1841)); *id.* § 13.03[E][2], at 13-100 & n.208 (citing *Daly v. Palmer*, 6 F.Cas. 1132, No. 3,552 (C.C.S.D.N.Y. 1868)) . . . . The reason for the rule is that the “plaintiff’s legally protected interest [is] the potential financial return from his compositions which derive from the lay public’s approbation of his efforts.” [*Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977)]. If the public does not recognize the appropriation, then the copier has not benefitted from the original artist’s expressive content. Accordingly, there is no infringement.

Other than *Bridgeport* and the district courts following that decision, we are aware of no case that has held that the de minimis doctrine does not apply in a copyright

infringement case. Instead, courts consistently have applied the rule in *all* cases alleging copyright infringement. . . .

Plaintiff nevertheless argues that Congress intended to create a special rule for copyrighted sound recordings, eliminating the *de minimis* exception. We begin our analysis with the statutory text.

Title 17 U.S.C. § 102, titled “Subject matter of copyright: In general,” . . . treats sound recordings identically to all other types of protected works; nothing in the text suggests differential treatment, for any purpose, of sound recordings compared to, say, literary works. Similarly, nothing in the neutrally worded statutory definition of “sound recordings” suggests that Congress intended to eliminate the *de minimis* exception. . . .

Title 17 U.S.C. § 106, titled “Exclusive rights in copyrighted works,” . . . [does not] suggest[] differential treatment of *de minimis* copying of sound recordings compared to, say, sculptures. Although subsection (6) deals exclusively with sound recordings, that subsection concerns public performances; nothing in its text bears on *de minimis* copying.

Instead, Plaintiff’s statutory argument hinges on the third sentence of 17 U.S.C. § 114(b), which states:

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

Like all the other sentences in § 114(b), the third sentence imposes an express *limitation* on the rights of a copyright holder: “The exclusive rights of the owner of a copyright in a sound recording . . . *do not extend* to the making or duplication of another sound recording [with certain qualities].” *Id.* (emphasis added); *see id.* (first sentence: “exclusive rights . . . do not extend” to certain circumstances; second sentence: “exclusive rights . . . do not extend” to certain circumstances; fourth sentence: “exclusive rights . . . do not apply” in certain circumstances). We ordinarily would hesitate to read an *implicit expansion* of rights into Congress’ statement of an *express limitation* on rights. Given the considerable background of consistent application of the *de minimis* exception across centuries of jurisprudence, we are particularly hesitant to read the statutory text as an unstated, implicit elimination of that steadfast rule. . . .

Even if there were some ambiguity as to congressional intent with respect to § 114(b), the legislative history clearly confirms our analysis on each of the above points. Congress intended § 114 to limit, not to expand, the rights of copyright holders: “The approach of the bill is to set forth the copyright owner’s exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made ‘subject to sections 107 through 118,’ and must be read in conjunction with those provisions.” H.R. Rep. No. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674.

With respect to § 114(b) specifically, a House Report stated:

Subsection (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, infringement takes place whenever all *or any substantial portion* of the actual sounds that go to make up a copyrighted sound

recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.

*Id.* at 106, *reprinted in* 1976 U.S.C.C.A.N. at 5721 (emphasis added). That passage strongly supports the natural reading of § 114(b), discussed above. . . .

Perhaps more importantly, the quoted passage articulates the principle that “infringement takes place whenever all *or any substantial portion* of the actual sounds ... are reproduced.” *Id.* (emphasis added). That is, when enacting this specific statutory provision, Congress clearly understood that the de minimis exception applies to copyrighted sound recordings, just as it applies to all other copyrighted works. . . .

In coming to a different conclusion, the Sixth Circuit reasoned as follows:

[T]he rights of sound recording copyright holders under clauses (1) and (2) of section 106 “do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.” 17 U.S.C. § 114(b) (emphasis added). The significance of this provision is amplified by the fact that the Copyright Act of 1976 added the word “entirely” to this language. *Compare* Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 (Oct. 15, 1971) (adding subsection (f) to former 17 U.S.C. § 1) (“does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds”). In other words, a sound recording owner has the exclusive right to “sample” his own recording.

*Bridgeport*, 410 F.3d at 800–01.

We reject that interpretation of § 114(b). *Bridgeport* ignored the statutory structure and § 114(b)'s express *limitation* on the rights of a copyright holder. *Bridgeport* also declined to consider legislative history on the ground that “digital sampling wasn't being done in 1971.” 410 F.3d at 805. But the state of technology is irrelevant to interpreting Congress' intent as to statutory structure. Moreover, as Nimmer points out, *Bridgeport*'s reasoning fails on its own terms because contemporary technology plainly allowed the copying of small portions of a protected sound recording. Nimmer § 13.03[A][2][b], at 13-62 n.114.16.

Close examination of *Bridgeport*'s interpretive method further exposes its illogic. In effect, *Bridgeport* inferred from the fact that “exclusive rights ... *do not extend* to the making or duplication of another sound recording that *consists* entirely of an independent fixation of other sounds,” 17 U.S.C. § 114(b) (emphases added), the conclusion that exclusive rights *do extend* to the making of another sound recording that *does not consist* entirely of an independent fixation of other sounds. As pointed out by Nimmer, *Bridgeport*'s interpretive method “rests on a logical fallacy.” Nimmer § 13.03[A][2][b], at 13-61. A statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances. In logical terms, it is a fallacy to infer the inverse of a conditional from the conditional. *E.g.*, Joseph G. Brennan, *A Handbook of Logic* 79–80 (2d ed. 1961).

For example, take as a given the proposition that “if it has rained, then the grass is not dry.” It does not necessarily follow that “if it has not rained, then the grass is dry.”

Someone may have watered the lawn, for instance. We cannot infer the second if-then statement from the first. The first if-then statement does not tell us *anything* about the condition of the grass if it has not rained. Accordingly, even though it is true that, “if the recording consists entirely of independent sounds, then the copyright does not extend to it,” that statement does not necessarily mean that “if the recording does not consist entirely of independent sounds, then the copyright does extend to it.”

The Sixth Circuit also looked beyond the statutory text, to the nature of a sound recording, and reasoned:

[E]ven when a small part of a sound recording is sampled, the part taken is something of value. No further proof of that is necessary than the fact that the producer of the record or the artist on the record intentionally sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both. For the sound recording copyright holder, it is not the “song” but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.

*Bridgeport*, 410 F.3d at 801–02 (footnote omitted).

We disagree for three reasons. *First*, the possibility of a “physical taking” exists with respect to other kinds of artistic works as well, such as photographs, as to which the usual de minimis rule applies. *See, e.g., Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 216 (2d Cir. 1998) (affirming summary judgment to the defendant because the defendant’s use of the plaintiff’s photographs in a movie was de minimis). A computer program can, for instance, “sample” a piece of one photograph and insert it into another photograph or work of art. We are aware of no copyright case carving out an exception to the de minimis requirement in that context, and we can think of no principled reason to differentiate one kind of “physical taking” from another. *Second*, even accepting the premise that sound recordings differ qualitatively from other copyrighted works and therefore *could warrant* a different infringement rule, that theoretical difference does not mean that Congress *actually adopted* a different rule. *Third*, the distinction between a “physical taking” and an “intellectual one,” premised in part on “sav[ing] costs” by not having to hire musicians, does not advance the Sixth Circuit’s view. The Supreme Court has held unequivocally that the Copyright Act protects only the expressive aspects of a copyrighted work, and *not* the “fruit of the [author’s] labor.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991). . . .

Because we conclude that Congress intended to maintain the “de minimis” exception for copyrights to sound recordings, we take the unusual step of creating a circuit split by disagreeing with the Sixth Circuit’s contrary holding in *Bridgeport*. . . . We acknowledge that our decision has consequences. But the goal of avoiding a circuit split cannot override our independent duty to determine congressional intent. Otherwise, we would have no choice but to blindly follow the rule announced by whichever circuit court decided an issue first, even if we were convinced, as we are here, that our sister circuit erred. . . .

Additionally, as a practical matter, a deep split among the federal courts *already exists*. Since the Sixth Circuit decided *Bridgeport*, almost every district court not bound by that decision has declined to apply *Bridgeport*’s rule. Although we are the first circuit court to follow a different path than *Bridgeport*’s, we are in well-charted territory. . . .

Finally, Plaintiff advances several reasons why *Bridgeport*’s rule is superior *as a*

*matter of policy*. For example, the Sixth Circuit opined that its bright-line rule was easy to enforce; that “the market will control the license price and keep it within bounds”; and that “sampling is never accidental” and is therefore easy to avoid. *Bridgeport*, 410 F.3d at 801. Those arguments are for a legislature, not a court. They speak to what Congress *could* decide; they do not inform what Congress *actually* decided.<sup>11</sup>

We hold that the “de minimis” exception applies to actions alleging infringement of a copyright to sound recordings. . . .

SILVERMAN, J., dissenting:

The plaintiff is the owner of a copyright in a fixed sound recording. This is a valuable property right, the stock-in-trade of artists who make their living recording music and selling records. The plaintiff alleges that the defendants, without a license or any sort of permission, physically copied a small part of the plaintiff’s sound recording—which, to repeat, is property belonging to the plaintiff—and, having appropriated it, inserted into their *own* recording. If the plaintiff’s allegations are to be believed, the defendants deemed this maneuver preferable to paying for a license to use the material, or to hiring their own musicians to record it. In any other context, this would be called theft. It is no defense to theft that the thief made off with only a “de minimis” part of the victim’s property. . . .

. . . [B]y statute, sound recording copyright holders have an *exclusive* right to sample their *own* recordings. It’s an exclusive right; the statute does not give that right to others. [*Bridgeport*,] 410 F.3d at 800–01. Under 17 U.S.C. §§ 106 and 114, the holder of a copyright in a sound recording (but not others) has the exclusive right to reproduce the work in copies or records “that directly or indirectly recapture the actual sounds fixed in the recording,” as well as the exclusive right to prepare derivative works “in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.” 17 U.S.C. §§ 106(1) and (2); 114(b). Congress clearly qualified these exclusive rights, writing that “another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording” are not within the scope of the copyright holder’s exclusive rights. 17 U.S.C. § 114(b). In other words, the world at large is free to imitate or simulate the creative work fixed in the recording (like a tribute band, for example) so long as an actual copy of the sound recording itself is not made.

The majority rejects this straightforward reading, explaining by way of a rhetorical exercise that *Bridgeport*’s reading of § 114(b) is a logical fallacy, expanding the rights of copyright holders beyond that allowed under the judicial de minimis rule. As I see it, it is the majority that tortures the natural reading of these provisions. Bear in mind that §

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<sup>11</sup> It also is not clear that the cited policy reasons are necessarily persuasive. For example, this particular case presents an example in which there is uncertainty as to enforcement—musical experts disagree as to whether sampling occurred. As another example, it is not necessarily true that the market will keep license prices “within bounds”—it is possible that a bright-line rule against sampling would unduly stifle creativity in certain segments of the music industry because the licensing costs would be too expensive for the amateur musician. In any event, even raising these counter-points demonstrates that the arguments, as Plaintiff concedes, rest on policy considerations, not on statutory interpretation. One cannot answer questions such as how much licensing cost is too much without exercising value judgments—matters generally assigned to the legislature.

114(b) simply explains the scope of exclusive rights already granted to copyright holders under § 106. These two provisions must be read together, as the Sixth Circuit did. . . .

The second reason the Sixth Circuit gave for not adopting the de minimis rule is that sound recordings are different than their compositional counterparts: when a defendant copies a recording, he or she takes not the song but the sounds as they are fixed in the medium of the copyright holders' choice. [*Bridgeport*, 410 F.3d] at 801–02. In other words, the very nature of digital sampling makes a de minimis analysis inapplicable, since sampling or pirating necessarily involves copying a fixed performance. *See id.* at 801 n.13. The defendants wanted horns to punctuate their song, so they took the plaintiff's copyrighted recording of horns. The horn hit is brief, but clearly perceptible and does its job. This is unlike indiscernible photographs used, not for their content (which cannot be made out), but to dress a movie set. *See Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 218 (2d Cir. 1998).

This is a physical taking, not an intellectual one. [*Bridgeport*, 410 F.3d] at 802. Sampling is never accidental. *Id.* at 801. As the Sixth Circuit observed, it is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another that he has heard before. *Id.* When you sample a sound recording you know you are taking another's work product. *Id.* Accordingly, the pertinent inquiry in a sampling case is not whether a defendant sampled a little or a lot, but whether a defendant sampled at all. *Id.* at 798 n.6, 801–02 and n.13. .

. . . *Bridgeport* provides in the case of a fixed sound recording a bright-line rule, and I quote: "Get a license or do not sample." 410 F.3d at 801. True, *Get a license or do not sample* doesn't carry the same divine force as *Thou Shalt Not Steal*, but it's the same basic idea. I would hold that the de minimis exception does not apply to the sampling, copying, stealing, pirating, misappropriation—call it what you will—of copyrighted fixed sound recordings. Once the sound is fixed, it is tangible property belonging to the copyright holder, and no one else has the right to take even a little of it without permission. I therefore respectfully dissent.

## NOTES AND QUESTIONS

1. The *VMG Salsoul* court's articulation of the "de minimis use" standard incorporates its prior description of that standard in *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005). How well did the *Newton* court define the line between permissible copying and improper appropriation? (If you would like to review *Newton* in greater detail, it is excerpted at pp. 419-25 of the casebook.)

2. Do you agree with the *VMG Salsoul* court's conclusion that the sampled portions of the *Love Break* musical composition were de minimis as a matter of law?

3. The owners of the two copyrights implicated by sampling usually will be different entities. Sometimes, the defendant will have licensed one copyright but not the other. *Newton* is an example: defendants had licensed the sound recording from Newton's record label but had neglected to license the composition from Newton himself. In *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), the defendant had licensed the musical composition but had not obtained authorization for the sound recording. Should that fact one copyright was licensed but the other was not affect resolution of the dispute as to the unlicensed copyright? How? Should it matter

which of the two layers of music copyright was the licensed one, and which was the unlicensed one?

4. Was the court right to conclude that the sampled portions of the *Love Break* sound recording also were de minimis as a matter of law? As the court notes, in *Bridgeport*, the Sixth Circuit interpreted §114 to preclude application of the de minimis use standard to sound recording sampling. Which reading of the statute do you find more persuasive? Is §114 meant to limit or expand the rights granted in §106? (If you would like to review the Sixth Circuit's opinion in *Bridgeport*, it is excerpted at pp. 425-29 of the casebook.)

5. As you learned in Chapters 5 (pp. 253-57) and 6 (pp. 396-98), the de minimis use standard is well established in copyright law—but, there is also a well established practice in certain industries of clearing rights in recognizable content. (See Question 4, p. 257.) Is explicit recognition of a “de minimis use” shelter for sampling a good idea? Why, or why not?

The *Bridgeport* court concluded that the bright-line rule it derived from the statute, “[g]et a license or do not sample,” was also sound policy. What are the costs and benefits of that bright-line rule?

6. In deciding the policy questions that surround sampling, would it be important to understand why recording artists sample when, as the court notes, they are free to make sound-alike recordings? Consider the following excerpt:

Cultural judgments about borrowing, repetition and originality are central to understanding legal evaluations of both sampling and hip hop. Repetition expressed through sampling and looping has been, for much of the history of hip hop, an inherent part of what makes hip hop music identifiably hip hop. Consequently, the question of whether and how sampling should be permitted is in some measure an inquiry about how and to what extent hip hop can and should continue to exist as a musical form. Copyright standards, particularly in the music area, must have greater flexibility to accommodate varying styles and types of musical production, whether based on an African American aesthetic of repetition and revision, a postmodern style, transformative imitation and borrowing in the manner of Handel, allusion as practiced by Brahms or another aesthetic that fails to conform to the Romantic author ideal that has to this point been integral to copyright.

Musical borrowing is not necessarily antithetical to originality or creativity. The conceptions of creativity and originality that pervade copyright discussions are incomplete or inaccurate models of actual musical production, particularly the collaborative aspects of musical practice evident in borrowing. Similarly, views of past musical composition should be tempered with a recognition of the operation of invented traditions and cultural ideals that play a powerful role in shaping both representations and contemporary beliefs and attitudes.

Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright, and Cultural Context*, 84 N.C. L. Rev. 547, 630-31 (2006); see also K. J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 Hastings Comm. & Ent. L.J. 339 (1999) (arguing that copyright rules have routinely functioned to deny protection to African American music artists). Should Professor Arewa's analysis inform the legal treatment of sampling? If so, in what way?



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## Chapter 8. Moral Rights and Performers' Rights

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### B. Performers' Rights and Related Treaty Obligations

*Page 480. At the end of Note 2, add the following:*

In *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc), the Ninth Circuit rejected a claim of copyright in a performance by an actress in a motion picture. The majority found inapposite the dissent's reliance on a report issued by the United States Patent and Trademark Office that asserted U.S. law is "generally compatible" with the Beijing Treaty, as "actors and musicians are considered to be 'authors' of their performances providing them with copyright rights." U.S. Patent & Trademark Office, Background and Summary of the 2012 WIPO Audiovisual Performances Treaty 2 (2012). The majority noted that the "Patent and Trademark Office, . . . unlike the Copyright Office[,] lacks legal authority to interpret and administer the Copyright Act." *Garcia*, 786 F.3d. at 742. The Copyright Office does "not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture." *Id.* at 741.

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## Chapter 9. The Different Faces of Infringement

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### C. Online Service Providers Liability

**Page 527. Replace *Lenz v. Universal Music Corp. and the Notes And Questions on page 532, with the following:***

#### **Lenz v. Universal Music Corp.**

815 F.3d 1145 (9th Cir. 2016)

TALLMAN, J.: Stephanie Lenz filed suit under 17 U.S.C. § 512(f)—part of the Digital Millennium Copyright Act (“DMCA”)—against Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group (collectively “Universal”). She alleges Universal misrepresented in a takedown notification that her 29–second home video (the “video”) constituted an infringing use of a portion of a composition by the Artist known as Prince, which Universal insists was unauthorized by the law. Her claim boils down to a question of whether copyright holders have been abusing the extrajudicial takedown procedures provided for in the DMCA by declining to first evaluate whether the content qualifies as fair use. We hold that the statute requires copyright holders to consider fair use before sending a takedown notification, and that in this case, there is a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law. We affirm the denial of the parties’ cross-motions for summary judgment.

#### I

. . . On February 7, 2007, Lenz uploaded to YouTube a 29–second home video of her two young children in the family kitchen dancing to the song *Let’s Go Crazy* by Prince. Available at <https://www.youtube.com/watch?v=N1KfJHFWlhQ> (last visited September 4, 2015). She titled the video “‘Let’s Go Crazy’ # 1.” About four seconds into the video, Lenz asks her thirteen month-old son “what do you think of the music?” after which he bobs up and down while holding a push toy.

At the time Lenz posted the video, Universal was Prince’s publishing administrator responsible for enforcing his copyrights. To accomplish this objective with respect to YouTube, Robert Allen, Universal’s head of business affairs, assigned Sean Johnson, an assistant in the legal department, to monitor YouTube on a daily basis. Johnson searched YouTube for Prince’s songs and reviewed the video postings returned by his online search query. When reviewing such videos, he evaluated whether they “embodied a Prince composition” by making “significant use of . . . the composition, specifically if the song was recognizable, was in a significant portion of the video or was the focus of the video.” According to Allen, “[t]he general guidelines are that . . . we review the video to ensure

that the composition was the focus and if it was we then notify YouTube that the video should be removed.”

Johnson contrasted videos that met this criteria to those “that may have had a second or less of a Prince song, literally a one line, half line of Prince song” or “were shot in incredibly noisy environments, such as bars, where there could be a Prince song playing deep in the background . . . to the point where if there was any Prince composition embodied . . . in those videos that it was distorted beyond reasonable recognition.” None of the video evaluation guidelines explicitly include consideration of the fair use doctrine.

When Johnson reviewed Lenz’s video, he recognized *Let’s Go Crazy* immediately. He noted that it played loudly in the background throughout the entire video. Based on these details, the video’s title, and Lenz’s query during the video asking if her son liked the song, he concluded that Prince’s song “was very much the focus of the video.” As a result, Johnson decided the video should be included in a takedown notification sent to YouTube that listed more than 200 YouTube videos Universal believed to be making unauthorized use of Prince’s songs. The notice included a “good faith belief” statement as required by 17 U.S.C. § 512(c)(3)(A)(v): “We have a good faith belief that the above-described activity is not authorized by the copyright owner, its agent, or the law.”

After receiving the takedown notification, YouTube removed the video and sent Lenz an email on June 5, 2007, notifying her of the removal. On June 7, 2007, Lenz attempted to restore the video by sending a counter-notification to YouTube pursuant to § 512(g)(3). After YouTube provided this counter-notification to Universal per § 512(g)(2)(B), Universal protested the video’s reinstatement because Lenz failed to properly acknowledge that her statement was made under penalty of perjury, as required by § 512(g)(3)(C). Universal’s protest reiterated that the video constituted infringement because there was no record that “either she or YouTube were ever granted licenses to reproduce, distribute, publicly perform or otherwise exploit the Composition.” The protest made no mention of fair use. After obtaining *pro bono* counsel, Lenz sent a second counter-notification on June 27, 2007, which resulted in YouTube’s reinstatement of the video in mid-July. . . .

#### IV . . .

##### A . . .

If an entity abuses the DMCA, it may be subject to liability under § 512(f). That section provides: “Any person who knowingly materially misrepresents under this section—(1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages. . . .” *Id.* § 512(f). Subsection (1) generally applies to copyright holders and subsection (2) generally applies to users. Only subsection (1) is at issue here.

##### B

We must first determine whether 17 U.S.C. § 512(c)(3)(A)(v) requires copyright holders to consider whether the potentially infringing material is a fair use of a copyright under 17 U.S.C. § 107 before issuing a takedown notification. Section 512(c)(3)(A)(v) requires a takedown notification to include a “statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.” The parties dispute whether fair use is an authorization under the law as contemplated by the statute—which is so far as we know

an issue of first impression in any circuit across the nation. . . . We agree with the district court and hold that the statute unambiguously contemplates fair use as a use authorized by the law.

Fair use is not just excused by the law, it is wholly authorized by the law. . . . The statute explains that the fair use of a copyrighted work is permissible because it is a non-infringing use.

. . . Black’s Law Dictionary defines “authorize” as “1. To give legal authority; to empower” and “2. To formally approve; to sanction.” *Authorize*, Black’s Law Dictionary (10th ed.2014). Because 17 U.S.C. § 107 both “empowers” and “formally approves” the use of copyrighted material if the use constitutes fair use, fair use is “authorized by the law” within the meaning of § 512(c). *See also* 17 U.S.C. § 108(f)(4) (“Nothing in this section in any way affects the *right* of fair use as provided by section 107. . . .” (emphasis added)).

Universal’s sole textual argument is that fair use is not “authorized by the law” because it is an affirmative defense that excuses otherwise infringing conduct. Universal’s interpretation is incorrect as it conflates two different concepts: an affirmative defense that is labeled as such due to the procedural posture of the case, and an affirmative defense that excuses impermissible conduct. Supreme Court precedent squarely supports the conclusion that fair use does not fall into the latter camp: “[A]nyone who . . . makes a fair use of the work is not an infringer of the copyright with respect to such use.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433, 104 S.Ct. 774 (1984). . . .

Given that 17 U.S.C. § 107 expressly authorizes fair use, labeling it as an affirmative defense that excuses conduct is a misnomer:

Although the traditional approach is to view “fair use” as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right. Regardless of how fair use is viewed, it is clear that the burden of proving fair use is always on the putative infringer.

*Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n. 22 (11th Cir. 1996) (Birch, J.). We agree. *Cf. Lydia Pallas Loren, Fair Use: An Affirmative Defense?*, 90 Wash. L.Rev. 685, 688 (2015) (“Congress did not intend fair use to be an affirmative defense—a defense, yes, but not an affirmative defense.”). Fair use is therefore distinct from affirmative defenses where a use infringes a copyright, but there is no liability due to a valid excuse, e.g., misuse of a copyright.

Universal concedes it must give due consideration to other uses authorized by law such as compulsory licenses. The introductory language in 17 U.S.C. § 112 for compulsory licenses closely mirrors that in the fair use statute. *Compare* 17 U.S.C. § 112(a)(1) (“Notwithstanding the provisions of section 106, . . . it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work . . . to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display. . . .”), *with id.* § 107 (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.”). That fair use may be labeled as an affirmative defense due

to the procedural posture of the case is no different than labeling a license an affirmative defense for the same reason. . . .

. . . We conclude that because 17 U.S.C. § 107 created a type of non-infringing use, fair use is “authorized by the law” and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).

## C

We must next determine if a genuine issue of material fact exists as to whether Universal knowingly misrepresented that it had formed a good faith belief the video did not constitute fair use. This inquiry lies not in whether a court would adjudge the video as a fair use, but whether Universal formed a good faith belief that it was not. Contrary to the district court’s holding, Lenz may proceed under an actual knowledge theory, but not under a willful blindness theory.

## 1

Though Lenz argues Universal should have known the video qualifies for fair use as a matter of law, we have already decided a copyright holder need only form a subjective good faith belief that a use is not authorized. *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000 (9th Cir.2004). In *Rossi*, we explicitly held that “the ‘good faith belief’ requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective standard,” and we observed that “Congress understands this distinction.” *Id.* at 1004. We further held:

When enacting the DMCA, Congress could have easily incorporated an objective standard of reasonableness. The fact that it did not do so indicates an intent to adhere to the subjective standard traditionally associated with a good faith requirement. . . .

In § 512(f), Congress included an expressly limited cause of action for improper infringement notifications, imposing liability only if the copyright owner’s notification is a knowing misrepresentation. A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.

*Id.* at 1004–05 (citations omitted). . . . We therefore judge Universal’s actions by the subjective beliefs it formed about the video.

## 2

Universal faces liability if it knowingly misrepresented in the takedown notification that it had formed a good faith belief the video was not authorized by the law, i.e., did not constitute fair use. Here, Lenz presented evidence that Universal did not form any subjective belief about the video’s fair use—one way or another—because it failed to consider fair use at all, and knew that it failed to do so. Universal nevertheless contends that its procedures, while not formally labeled consideration of fair use, were tantamount to such consideration. Because the DMCA requires consideration of fair use prior to sending a takedown notification, a jury must determine whether Universal’s actions were sufficient to form a subjective good faith belief about the video’s fair use or lack thereof.<sup>3</sup>

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<sup>3</sup> Although the panel agrees on the legal principles we discuss herein, we part company with our dissenting colleague over the propriety of resolving on summary judgment Universal’s claim to subjective belief that the copyright was infringed. The dissent would find that no triable

To be clear, if a copyright holder ignores or neglects our unequivocal holding that it must consider fair use before sending a takedown notification, it is liable for damages under § 512(f). If, however, a copyright holder forms a subjective *good faith* belief the allegedly infringing material does not constitute fair use, we are in no position to dispute the copyright holder’s belief even if we would have reached the opposite conclusion. A copyright holder who pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary is still subject to § 512(f) liability. *Cf. Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1995, 1204-05 (N.D. Cal. 2004). . . .

### 3

We hold the willful blindness doctrine may be used to determine whether a copyright holder “knowingly materially misrepresent[ed]” that it held a “good faith belief” the offending activity was not a fair use. . . . But, based on the specific facts presented during summary judgment, we reject the district court’s conclusion that Lenz may proceed to trial under a willful blindness theory.

To demonstrate willful blindness a plaintiff must establish two factors: “(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S.Ct. 2060, 2070 (2011). “Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.” *Id.* at 2070–71. . . .

On summary judgment Lenz failed to meet a threshold showing of the first factor. To make such a showing, Lenz must provide evidence from which a juror could infer that Universal was aware of a high probability the video constituted fair use. But she failed to provide any such evidence. . . . Yet the district court improperly denied Universal’s motion for summary judgment on the willful blindness theory because Universal “has not shown that it *lacked* a subjective belief.” By finding blame with Universal’s inability to show that it “*lacked* a subjective belief,” the district court improperly required Universal to meet its burden of persuasion, even though Lenz had failed to counter the initial burden of production that Universal successfully carried. Lenz may not therefore proceed to trial on a willful blindness theory. . . .

SMITH, J., concurring in part and dissenting in part:

I concur in all but Part IV.C of the majority opinion. However, I disagree with the majority’s conclusion that “whether Universal’s actions were sufficient to form a subjective good faith belief about the video’s fair use or lack thereof” presents a triable issue of fact. Universal admittedly did not consider fair use before notifying YouTube to

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issue of fact exists because Universal did not specifically and expressly consider the fair-use elements of 17 U.S.C. § 107. But the question is whether the analysis Universal did conduct of the video was sufficient, not to conclusively establish as a matter of law that the video’s use of *Let’s Go Crazy* was fair, but to form a subjective good faith belief that the video was infringing on Prince’s copyright. And under the circumstances of this case, that question is for the jury, not this court, to decide.

take down Lenz’s video. It therefore could not have formed a good faith belief that Lenz’s video was infringing, and its notification to the contrary was a knowing material misrepresentation. Accordingly, I would hold that Lenz is entitled to summary judgment.

...

... I part ways with the majority on two issues. First, I would clarify that § 512(f)’s requirement that a misrepresentation be “knowing [ ]” is satisfied when the party knows that it is ignorant of the truth or falsity of its representation. Second, I would hold that Universal’s actions were insufficient as a matter of law to form a subjective good-faith belief that Lenz’s video was not a fair use.

## I

Section 512(f) requires that a misrepresentation be “knowing[ ]” to incur liability. In my view, when the misrepresentation concerns § 512(c)(3)(A)(v), the knowledge requirement is satisfied when the party knows that it has not considered fair use. That is, Universal need not have known that the video was a fair use, or that its actions were insufficient to form a good-faith belief about fair use. It need only have known that it had not considered fair use as such.<sup>1</sup>

As the majority explains, we have previously held in *Rossi v. Motion Picture Ass’n of Am. Inc.* that “the ‘good faith belief’ requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective, standard.” 391 F.3d 1000, 1004 (9th Cir. 2004). *Rossi* reasoned that a subjective standard comported with § 512(f)’s requirement that actionable misrepresentations be “knowing[ ]”, and ultimately held that liability under § 512(f) requires “a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.” 391 F.3d at 1005.

Universal urges us to construe *Rossi* to mean that liability attaches under § 512(f) only if a party subjectively believes that its assertion is false. But under long-settled principles of deceit and fraudulent misrepresentation, a party need only know that it is ignorant of the truth or falsity of its representation for its misrepresentation to be knowing. For example, in *Cooper v. Schlesinger*, 111 U.S. 148, 155 (1884), the Supreme Court explained that “a statement recklessly made, without knowledge of its truth, [is] a false statement knowingly made, within the settled rule.” Similarly, under the common law, “[a] misrepresentation is fraudulent if the maker . . . knows or believes that the matter is not as he represents it to be, . . . [or] *knows that he does not have the basis for his representation that he states or implies.*” Restatement (Second) of Torts § 526 (emphasis added).

One who asserts a belief that a work is infringing without considering fair use lacks a basis for that belief. It follows that one who *knows* that he has not considered fair use *knows* that he lacks a basis for that belief. That is sufficient “actual knowledge of misrepresentation” to meet the scienter requirement of § 512(f). . . .

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<sup>1</sup> I do not believe that, in this regard, my construction conflicts with that of the majority. Although the majority does not squarely address § 512(f)’s scienter requirement, it leaves for the jury only the question “whether Universal’s actions were sufficient to form a subjective good faith belief about the video’s fair use or lack thereof.”

## II

It is undisputed that Universal’s policy was to issue a takedown notice where a copyrighted work was used as “the focus of the video” or “prominently featured in the video.” By Universal’s own admission, its agents were not instructed to consider whether the use was fair. Instead, Universal directed its agents to spare videos that had “a second or less of a Prince song” or where the song was “distorted beyond reasonable recognition.” And yet, from this, the majority concludes that “whether Universal’s actions were sufficient to form a subjective good faith belief about the video’s fair use or lack thereof” presents a triable issue of fact.

I respectfully disagree. The Copyright Act explicitly enumerates the factors to be considered in assessing whether use of copyrighted material is fair. 17 U.S.C. § 107. Universal’s policy was expressly to determine whether a video made “significant use”—not *fair* use—of the work. Nothing in Universal’s methodology considered the purpose and character of the use, the commercial or noncommercial nature of the use, or whether the use would have a significant impact on the market for the copyrighted work.<sup>4</sup> See § 107. There is therefore no disputed issue of fact: Universal did *not* consider fair use before issuing a takedown notice.

Moreover, Universal *knew* it had not considered fair use, because § 107 explicitly supplies the factors that “shall” be considered in determining whether a use is fair. *Id.* I see no reason in law or logic to excuse copyright holders from the general principle that knowledge of the law is presumed. . . .

Based on *Rossi*’s holding that a subjective good-faith belief in infringement is sufficient to satisfy § 512(c)(3)(A)(v), 391 F.3d at 1005, the majority disagrees. But the majority’s reading of *Rossi* would insulate from liability *any* subjective belief in infringement, no matter how poorly formed. *Rossi* did not abrogate the statutory requirement that the belief be held in good faith. I would therefore hold that a belief in infringement formed consciously without considering fair use is no good-faith belief at all. See *Cooper*, 111 U.S. at 155 (holding that such a belief is a knowing misrepresentation).

...

The majority’s unfortunate interpretation of § 512(f) would permit a party to avoid liability with only the most perfunctory attention to fair use. Such a construction eviscerates § 512(f) and leaves it toothless against frivolous takedown notices. And, in an era when a significant proportion of media distribution and consumption takes place on third-party safe harbors such as YouTube, if a creative work can be taken down without meaningfully considering fair use, then the viability of the concept of fair use itself is in jeopardy. Such a construction of § 512(f) cannot comport with the intention of Congress.

...

## NOTES AND QUESTIONS

1. *Lenz* involves the intersection of §512(c)(3)(A)(v)’s requirement of “good faith belief” that material is infringing with §512(f)’s requirement that a user seeking damages

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<sup>4</sup> Had Universal properly considered the statutory elements of fair use, there is no doubt that it would have concluded that *Lenz*’s use of *Let’s Go Crazy* was fair. . . .

must show that the copyright owner “knowingly materially misrepresent[ed]” the material’s infringing status. The court indicates that the standard for “good faith belief” is a subjective one. Does §512(f) similarly indicate a subjective standard of knowledge?

Recall that, according to both the Second Circuit (in *Viacom v. YouTube*, pp. 513-24 in the casebook) and the Ninth Circuit (in *UMG Recordings v. Shelter Capital Partners*, discussed by the Second Circuit), §512(c)(1)(A)(i)’s requirement that an OSP not have “actual knowledge of infringing conduct” calls for a subjective standard of knowledge, while §512(c)(1)(A)(ii)’s requirement that the OSP also “is not aware of facts or circumstances from which infringing activity is apparent” calls for an objective assessment of what the OSP reasonably should have known based on the facts available to it. Do those interpretations shed any light on the proper approach to §512(f)?

2. An earlier decision by a district court in the Ninth Circuit, *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004), had concluded that §512(f) calls for an objective interpretation. *See id.* at 1204-05. Diebold, a manufacturer of electronic voting machines, had invoked §512(c) to demand takedown of copied portions of an archive of email exchanged among its employees that revealed serious technical problems with Diebold’s machines. In concluding that Diebold had violated §512(f), the court reasoned that “[n]o reasonable copyright holder could have believed that [the material] was protected by copyright” and that “Diebold sought to use [§512] . . . as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.” *Id.* The *Lenz* majority cites *Diebold* as indirect support for the proposition that “A copyright holder who pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary is still subject to § 512(f) liability” under the willful blindness doctrine. Does that characterization satisfactorily address the *Diebold* fact pattern? How does the willful blindness doctrine differ from a more general reasonableness standard?

3. According to Judge Smith, a party that knows it has not considered fair use is ineligible to assert good faith, and therefore, on these facts, the question of Universal’s good faith can be decided as a matter of law. Is that resolution preferable? How does Judge Smith’s articulation of the “knowing ignorance” standard differ from the majority’s articulation of the willful blindness standard?

4. The parties in *Lenz* have been mired in discovery, pretrial motions, and interlocutory appeals for years. If the case ever proceeds to trial, where a preponderance-of-the-evidence standard applies, who should prevail on the question of subjective bad faith?

5. Note that YouTube took six weeks to restore Lenz’s video, rather than the statutorily provided 10 to 14 business days. What do you think explains the delay? From the perspective of an Internet user, what do you make of the notification and counternotification procedures established by §512? Do they reflect an appropriate balancing of the various interests affected? If not, what changes would you recommend?

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## Chapter 10. Fair Use

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### B. Transformative Use Revisited

**Page 622. Replace Note 5 with the following:**

5. As part of the program described in the *HathiTrust* opinion, Google scanned more than 20 million books and created its own publicly available, searchable database, Google Books. There are two main differences between the HathiTrust book search service and that offered by Google Books. First, when a user inputs a search term, Google Books, unlike the HathiTrust search engine, returns snippets of texts from copyrighted works in which the term appears. Second, although Google provides the public access to the database without charge and without advertising, Google is a for-profit company that derives revenue from its other search engine activities.

The Authors Guild filed a class action against Google in 2004. After a failed settlement and protracted battle over class certification, the district court ruled Google's use fair and the Second Circuit upheld that decision. *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 2016 WL 1551263 (U.S. Apr. 18, 2016) (No. 15-849). The Second Circuit emphasized limitations Google had placed on the snippets:

These include the small size of the snippets (normally one eighth of a page), the blacklisting of one snippet per page and of one page in every ten, the fact that no more than three snippets are shown – and no more than one per page – for each term searched, and the fact that the same snippets are shown for a searched term no matter how many times, or from how many different computers, the term is searched. In addition, Google does not provide snippet view for types of books, such as dictionaries and cookbooks, for which viewing a small segment is likely to satisfy the searcher's need. . . .

*Id.* at 222.

The plaintiffs argued that Google's use should not be considered fair in part because "Google is profit-motivated and seeks to use its dominance of book search to fortify its overall dominance of the Internet search market, . . . thereby . . . indirectly reap[ing] profits . . ." *Id.* at 218. The court, however, saw "no reason why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose, together with the absence of significant substitutive competition, as reasons for granting fair use." *Id.* at 219. It noted that given the limitations on snippet view, rights holders were not threatened with "any significant harm to the value of their copyrights or diminish[ment of] their harvest of copyright revenue." *Id.* at 224. Finally, the court held that the plaintiffs' copyrights do "not include an exclusive right to furnish the kind of information about the[ir] works that Google's programs provide to the public.

[Thus,] the copyright that protects [p]laintiffs' works does not include an exclusive derivative right to supply such information through query of a digitized copy." *Id.* at 225.

Do you agree that Google's use was fair? Would your answer change if the book search function were directly supported by sales of advertising?

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## Chapter 13. Copyright Litigation

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### F. Civil Remedies

**Page 810.** *At the end of Note 2, add the following:*

3. The Ninth Circuit has held that when analyzing irreparable harm, the “harm must stem from copyright—namely, harm to [the putative author’s] legal interests *as an author*.” *Garcia v. Google, Inc.*, 786 F.3d 733, 744 (9th Cir. 2015) (en banc). *Garcia* involved an actress’ performance in what, unbeknownst to her, was an anti-Muslim film. Once the film was posted to YouTube and translated into Arabic, the actress, Cindy Lee Garcia, received multiple death threats. *Id.* at 738. Garcia sought an injunction requiring YouTube to remove the film. With respect to irreparable harm, Garcia argued that “[t]he injuries she seeks to avoid—damage to her reputation, unfair[,] forced promotion of a hateful film, and death—will be avoided if any injunction issues.” *Id.* at 744. The court concluded:

This relief is not easily achieved under copyright law. Although we do not take lightly threats to life or the emotional turmoil Garcia has endured, her harms are untethered from—and incompatible with—copyright and copyright’s function as the engine of expression.

In broad terms, “the protection of privacy is not a function of the copyright law. . . . To the contrary, the copyright law offers a limited monopoly to encourage ultimate *public access* to the creative work of the author.” *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003).

Likewise, authors cannot seek emotional distress damages under the Copyright Act, because such damages are unrelated to the value and marketability of their works. . . .

Privacy laws, not copyright, may offer remedies tailored to Garcia’s personal and reputational harms. On that point, we offer no substantive view. Ultimately, Garcia would like to have her connection to the film forgotten and stripped from YouTube. Unfortunately for Garcia, such a “right to be forgotten,” although recently affirmed by the Court of Justice for the European Union, is not recognized in the United States. See Case C–131/12, *Google Spain SL v. Agencia Española de Protección de Datos* (AEPD), ECLI:EU:C:2014:616 (May 13, 2014) (requiring Google to consider individual requests to remove personal information from its search engine); *Internet Law—Protection of Personal Data—Court of Justice of the European Union Creates Presumption that Google Must Remove Links to Personal Data Upon Request*, 128 Harv. L.Rev. 735 (2014).

Nor is Garcia protected by the benefits found in many European countries, where authors have “moral rights” to control the integrity of their works and to guard against distortion, manipulation, or misappropriation. Except for a limited universe of works of visual art, such as paintings and drawings protected under the Visual Artists Rights Act of 1990, United States copyright law generally does not recognize moral rights. 17 U.S.C. § 106A. Motion pictures specifically are excluded from moral rights protection.

In short, Garcia’s harms are too attenuated from the purpose of copyright. We do not foreclose that in a different circumstance with a strong copyright claim, a court could consider collateral consequences as part of its irreparable harm analysis and remedy. 17 U.S.C. § 502 (providing that the court may grant injunctions “as it may deem reasonable to prevent or restrain infringement of a copyright”). But such a case is not before us.

Should an injunction under copyright law be available to protect an author from dignitary harms?

***Pages 840-47. Replace the cases and Notes and Questions with the following:***

**Kirtsaeng v. John Wiley & Sons, Inc.**

136 S.Ct. 1979 (2016)

KAGAN, J.: Section 505 of the Copyright Act provides that a district court “may . . . award a reasonable attorney’s fee to the prevailing party.” 17 U. S. C. §505. The question presented here is whether a court, in exercising that authority, should give substantial weight to the objective reasonableness of the losing party’s position. The answer, as both decisions below held, is yes--the court should. But the court must also give due consideration to all other circumstances relevant to granting fees; and it retains discretion, in light of those factors, to make an award even when the losing party advanced a reasonable claim or defense. Because we are not certain that the lower courts here understood the full scope of that discretion, we return the case for further consideration of the prevailing party’s fee application.

I

[Review the facts on pp. 366-67 of the casebook from the earlier Supreme Court decision in this case.]

At the time [Wiley sued Kirtsaeng for copyright infringement], courts were in conflict on th[e] issue [of the proper interpretation of the first-sale doctrine. *See* 17 U.S.C. §§106(3), 602(a)(1)]. Some thought, as Kirtsaeng did, that the first-sale doctrine permitted the resale of foreign-made books; others maintained, along with Wiley, that it did not. And this Court, in its first pass at the issue, divided 4 to 4. *See Costco Wholesale Corp. v. Omega, S. A.*, 562 U. S. 40 (2010) (*per curiam*). In this case, the District Court sided with Wiley; so too did a divided panel of the Court of Appeals for the Second Circuit. *See* 654 F. 3d 210, 214, 222 (2011). To settle the continuing conflict, this Court granted Kirtsaeng’s petition for certiorari and reversed the Second Circuit in a 6-to-3 decision, thus establishing that the first-sale doctrine allows the resale of foreign-made books, just as it does domestic ones. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U. S. \_\_\_\_, \_\_\_\_ (2013).

Returning victorious to the District Court, Kirtsaeng invoked §505 to seek more than \$2 million in attorney’s fees from Wiley. The court denied his motion. Relying on Second Circuit precedent, the court gave “substantial weight” to the “objective reasonableness” of Wiley’s infringement claim. In explanation of that approach, the court stated that “the imposition of a fee award against a copyright holder with an objectively reasonable”—although unsuccessful—“litigation position will generally not promote the

purposes of the Copyright Act.” Here, Wiley’s position was reasonable: After all, several Courts of Appeals and three Justices of the Supreme Court had agreed with it. And according to the District Court, no other circumstance “overr[ide]” that objective reasonableness, so as to warrant fee-shifting. The Court of Appeals affirmed, concluding in a brief summary order that “the district court properly placed “substantial weight” on the reasonableness of [Wiley’s] position” and committed no abuse of discretion in deciding that other “factors did not outweigh” the reasonableness finding. 605 Fed. Appx. 48, 49, 50 (CA2 2015).

We granted certiorari, 577 U. S. \_\_\_\_ (2016), to resolve disagreement in the lower courts about how to address an application for attorney’s fees in a copyright case.

## II

Section 505 states that a district court “may . . . award a reasonable attorney’s fee to the prevailing party.” It thus authorizes fee-shifting, but without specifying standards that courts should adopt, or guideposts they should use, in determining when such awards are appropriate.

In *Fogerty v. Fantasy, Inc.*, 510 U. S. 517 (1994), this Court recognized the broad leeway §505 gives to district courts--but also established several principles and criteria to guide their decisions. The statutory language, we stated, “clearly connotes discretion,” and eschews any “precise rule or formula” for awarding fees. *Id.*, at 533, 534. Still, we established a pair of restrictions. First, a district court may not “award [ ] attorney’s fees as a matter of course”; rather, a court must make a more particularized, case-by-case assessment. *Id.*, at 533. Second, a court may not treat prevailing plaintiffs and prevailing defendants any differently; defendants should be “encouraged to litigate [meritorious copyright defenses] to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Id.*, at 527. In addition, we noted with approval “several nonexclusive factors” to inform a court’s fee-shifting decisions: “frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence.” *Id.*, at 534, n. 19. And we left open the possibility of providing further guidance in the future, in response to (and grounded on) lower courts’ evolving experience.

The parties here, though sharing some common ground, now dispute what else we should say to district courts. Both Kirtsaeng and Wiley agree--as they must-- that §505 grants courts wide latitude to award attorney’s fees based on the totality of circumstances in a case. Yet both reject the position . . . that *Fogerty* spelled out the only appropriate limits on judicial discretion--in other words, that each district court should otherwise proceed as it sees fit, assigning whatever weight to whatever factors it chooses. Rather, Kirtsaeng and Wiley both call, in almost identical language, for “[c]hanneling district court discretion towards the purposes of the Copyright Act.” Brief for Petitioner 16; see Brief for Respondent 21. But at that point, the two part ways. Wiley argues that giving substantial weight to the reasonableness of a losing party’s position will best serve the Act’s objectives. By contrast, Kirtsaeng favors giving special consideration to whether a lawsuit resolved an important and close legal issue and thus “meaningfully clarifie[d]” copyright law.

We join both parties in seeing a need for some additional guidance respecting the application of §505. In addressing other open-ended fee-shifting statutes, this Court has

emphasized that “in a system of laws discretion is rarely without limits.” *Flight Attendants v. Zipes*, 491 U. S. 754, 758 (1989). Without governing standards or principles, such provisions threaten to condone judicial “whim” or predilection. *Martin[ v. Franklin Capital Corp.]*, 546 U.S. 132, 139 (2005)]. At the least, utterly freewheeling inquiries often deprive litigants of “the basic principle of justice that like cases should be decided alike,” [*id.*]--as when, for example, one judge thinks the parties’ “motivation[s]” determinative and another believes the need for “compensation” trumps all else. And so too, such unconstrained discretion prevents individuals from predicting how fee decisions will turn out, and thus from making properly informed judgments about whether to litigate. For those reasons, when applying fee-shifting laws with “no explicit limit or condition,” *Halo [Elec. v. Pulse Elecs.]*, 136 S. Ct. \_\_\_, 2016 WL 3221515 (June 13, 2016)], we have nonetheless “found limits” in them--and we have done so, just as both parties urge, by looking to “the large objectives of the relevant Act,” *Zipes*, 491 U. S., at 759.

In accord with such precedents, we must consider if either Wiley’s or Kirtsaeng’s proposal well advances the Copyright Act’s goals. Those objectives are well settled. As *Fogerty* explained, “copyright law ultimately serves the purpose of enriching the general public through access to creative works.” 510 U. S., at 527; see U. S. Const., Art. I, §8, cl. 8 (“To promote the Progress of Science and useful Arts”). The statute achieves that end by striking a balance between two subsidiary aims: encouraging and rewarding authors’ creations while also enabling others to build on that work. Accordingly, fee awards under §505 should encourage the types of lawsuits that promote those purposes. (That is why, for example, *Fogerty* insisted on treating prevailing plaintiffs and prevailing defendants alike--because the one could “further the policies of the Copyright Act every bit as much as” the other. 510 U. S., at 527.) On that much, both parties agree. The contested issue is whether giving substantial weight to the objective (un)reasonableness of a losing party’s litigating position--or, alternatively, to a lawsuit’s role in settling significant and uncertain legal issues--will predictably encourage such useful copyright litigation.

The objective-reasonableness approach that Wiley favors passes that test because it both encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation. When a litigant--whether plaintiff or defendant--is clearly correct, the likelihood that he will recover fees from the opposing (*i.e.*, unreasonable) party gives him an incentive to litigate the case all the way to the end. The holder of a copyright that has obviously been infringed has good reason to bring and maintain a suit even if the damages at stake are small; and likewise, a person defending against a patently meritless copyright claim has every incentive to keep fighting, no matter that attorney’s fees in a pro-tracted suit might be as or more costly than a settlement. Conversely, when a person (again, whether plaintiff or defendant) has an unreasonable litigating position, the likelihood that he will have to pay two sets of fees discourages legal action. The copyright holder with no reasonable infringement claim has good reason not to bring suit in the first instance (knowing he cannot force a settlement and will have to proceed to judgment); and the infringer with no reasonable defense has every reason to give in quickly, before each side’s litigation costs mount. All of those results promote the Copyright Act’s purposes, by enhancing the probability that both creators and users (*i.e.*, potential plaintiffs and defendants) will enjoy the substantive rights the statute provides.

By contrast, Kirtsaeng’s proposal would not produce any sure benefits. We accept his premise that litigation of close cases can help ensure that “the boundaries of copyright

law [are] demarcated as clearly as possible,” thus advancing the public interest in creative work. Brief for Petitioner 19 (quoting *Fogerty*, 510 U. S., at 527). But we cannot agree that fee-shifting will necessarily, or even usually, encourage parties to litigate those cases to judgment. Fee awards are a double-edged sword: They increase the reward for a victory--but also enhance the penalty for a defeat. And the hallmark of hard cases is that no party can be confident if he will win or lose. That means Kirtsaeng’s approach could just as easily discourage as encourage parties to pursue the kinds of suits that “meaningfully clarif[y]” copyright law. It would (by definition) raise the stakes of such suits; but whether those higher stakes would provide an incentive--or instead a disincentive--to litigate hinges on a party’s attitude toward risk. Is the person risk-preferring or risk-averse--a high-roller or a penny-ante type? Only the former would litigate more in Kirtsaeng’s world. See Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Studies 399, 428 (1973) (fees “make[ ] the expected value of litigation less for risk-averse litigants, which will encourage [them to] settle[ ]”). And Kirtsaeng offers no reason to think that serious gamblers predominate. So the value of his standard, unlike Wiley’s, is entirely speculative.<sup>2</sup>

What is more, Wiley’s approach is more administrable than Kirtsaeng’s. A district court that has ruled on the merits of a copyright case can easily assess whether the losing party advanced an unreasonable claim or defense. That is closely related to what the court has already done: In deciding any case, a judge cannot help but consider the strength and weakness of each side’s arguments. By contrast, a judge may not know at the conclusion of a suit whether a newly decided issue will have, as Kirtsaeng thinks critical, broad legal significance. The precedent-setting, law-clarifying value of a decision may become apparent only in retrospect--sometimes, not until many years later. And so too a decision’s practical impact (to the extent Kirtsaeng would have courts separately consider that factor). District courts are not accustomed to evaluating in real time either the jurisprudential or the on-the-ground import of their rulings. Exactly how they would do so is uncertain (Kirtsaeng points to no other context in which courts undertake such an analysis), but we fear that the inquiry would implicate our oft-stated concern that an application for attorney’s fees “should not result in a second major litigation.” *Zipes*, 491 U. S., at 766. And we suspect that even at the end of that post-lawsuit lawsuit, the results would typically reflect little more than educated guesses.

Contrary to Kirtsaeng’s view, placing substantial weight on objective reasonableness also treats plaintiffs and defendants even-handedly, as *Fogerty* commands. No matter which side wins a case, the court must assess whether the other side’s position was (un)reasonable. And of course, both plaintiffs and defendants can (and

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<sup>2</sup> This case serves as a good illustration. Imagine you are Kirtsaeng at a key moment in his case--say, when deciding whether to petition this Court for certiorari. And suppose (as Kirtsaeng now wishes) that the prevailing party in a hard and important case--like this one--will probably get a fee award. Does that make you more likely to file, because you will recoup your own fees if you win? Or less likely to file, because you will foot Wiley’s bills if you lose? Here are some answers to choose from (recalling that you cannot confidently predict which way the Court will rule): (A) Six of one, half a dozen of the other. (B) Depends if I’m feeling lucky that day. (C) Less likely--this is getting scary; who knows how much money Wiley will spend on Supreme Court lawyers? (D) More likely--the higher the stakes, the greater the rush. Only if lots of people answer (D) will Kirtsaeng’s standard work in the way advertised. Maybe. But then again, maybe not.

sometimes do) make unreasonable arguments. Kirtsaeng claims that the reasonableness inquiry systematically favors plaintiffs because a losing defendant “will virtually *always* be found to have done something culpable.” But that conflates two different questions: whether a defendant in fact infringed a copyright and whether he made serious arguments in defense of his conduct. Courts every day see reasonable defenses that ultimately fail (just as they see reasonable claims that come to nothing); in this context, as in any other, they are capable of distinguishing between those defenses (or claims) and the objectively unreasonable variety. And if some court confuses the issue of liability with that of reasonableness, its fee award should be reversed for abuse of discretion.

All of that said, objective reasonableness can be only an important factor in assessing fee applications--not the controlling one. As we recognized in *Fogerty*, §505 confers broad discretion on district courts and, in deciding whether to fee-shift, they must take into account a range of considerations beyond the reasonableness of litigating positions. That means in any given case a court may award fees even though the losing party offered reasonable arguments (or, conversely, deny fees even though the losing party made unreasonable ones). For example, a court may order fee-shifting because of a party’s litigation misconduct, whatever the reasonableness of his claims or defenses. Or a court may do so to deter repeated instances of copyright infringement or overaggressive assertions of copyright claims, again even if the losing position was reasonable in a particular case. Although objective reasonableness carries significant weight, courts must view all the circumstances of a case on their own terms, in light of the Copyright Act’s essential goals.

And on that score, Kirtsaeng has raised serious questions about how fee-shifting actually operates in the Second Circuit. To be sure, the Court of Appeals’ framing of the inquiry resembles our own: It calls for a district court to give “substantial weight” to the reasonableness of a losing party’s litigating positions while also considering other relevant circumstances. But the Court of Appeals’ language at times suggests that a finding of reasonableness raises a presumption against granting fees--and that goes too far in cabining how a district court must structure its analysis and what it may conclude from its review of relevant factors. Still more, district courts in the Second Circuit appear to have overly learned the Court of Appeals’ lesson, turning “substantial” into more nearly “dispositive” weight. . . . For these reasons, we vacate the decision below so that the District Court can take another look at Kirtsaeng’s fee application. In sending back the case for this purpose, we do not at all intimate that the District Court should reach a different conclusion. Rather, we merely ensure that the court will evaluate the motion consistent with the analysis we have set out--giving substantial weight to the reasonableness of Wiley’s litigating position, but also taking into account all other relevant factors. . . .

## NOTES AND QUESTIONS

1. In *Kirtsaeng*, the Court discusses the factors relevant to an award of attorneys’ fees under its earlier ruling in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). What does *Kirtsaeng* add to *Fogerty*? If you were the district court judge ruling on Kirtsaeng on remand, how would you analyze the case, and what sorts of evidence would you expect the attorneys to provide?

2. Given the court's insistence on a unitary standard for awards to both prevailing plaintiffs and prevailing defendants, how much guidance do its factors really provide? Which rule seems best calculated to encourage investment in and access to creative works: supporting good faith claims of infringement by awarding attorneys' fees to the prevailing plaintiff; refusing to award attorneys' fees to either party when there is a bona fide dispute about the legitimacy of the defendant's conduct; or supporting good faith defenses by awarding attorneys' fees to the prevailing defendant? Should lack of good faith also play a role in the decision whether to award attorneys' fees?

3. Does the Court's decision achieve predictability (and constraints on judicial discretion) regarding the award of attorneys' fees? How would you advise clients involved in copyright infringement disputes?

4. Prior to *Kirtsaeng*, the Seventh Circuit had attempted to craft a set of presumptive rules to structure disposition of claims for attorneys' fees. See *Gonzales v. Transfer Techs., Inc.*, 301 F.3d 608, 610 (7th Cir. 2002) (“[T]he smaller the damages, provided there is a real, and especially a willful, infringement, the stronger the case for an award of attorneys' fees. . . . [T]he prevailing party in a copyright case in which the monetary stakes are small should have a presumptive entitlement of an award of attorneys' fees.”); *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 361 F.3d 434, 436-37 (7th Cir. 2004) (“If the case was a toss-up and the prevailing party obtained generous damages, or injunctive relief of substantial monetary value, there is no urgent need to add an award of attorneys' fees. . . . But if at the other extreme the claim or defense was frivolous and the prevailing party obtained no relief at all, the case for awarding him attorneys' fees is compelling.”).

Do these cases survive *Kirtsaeng*?

5. The TRIPS Agreement requires judicial authorities in Member States to have the authority to indemnify a defendant wrongfully enjoined or restrained by a plaintiff “who has abused enforcement procedures.” TRIPS Agreement, art. 48 (1). Indemnification in this setting means that the plaintiff is ordered to pay “adequate compensation” for the injury suffered because of the abuse of process. Article 48 (1) also requires judicial authorities to have the authority to order payment of the defendant's expenses, which may include attorneys' fees.

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## Chapter 14. Technological Protections

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### B. The Digital Millennium Copyright Act and Circumvention of Technological Protections

**Page 882.** *In the chart summarizing Library of Congress Rulemakings Under §1201, insert a new row at the end:*

Year	Exemptions Granted
2015	<p>Audiovisual works via screen-capture technology or on DVD or Blu-Ray disc when screen-capture technology can't produce the required level of high-quality content, for use in documentary filmmaking, noncommercial videos, and nonfiction ebooks offering film analysis, and by college and university faculty and students, faculty in MOOCs, K-12 educators, and educators at libraries and museums, subject to additional requirements;</p> <p>Literary works when ebook editions prevent enabling of accessibility for visually-impaired users;</p> <p>Computer programs that enable mobile phones, tablets, portable hotspots, and wearable devices to connect to wireless telecommunications networks, for the sole purpose of making an authorized connection;</p> <p>Computer programs on mobile phones and "portable all-purpose mobile computing devices," for the sole purpose of enabling interoperability with third-party software applications or to permit removal of such applications;</p> <p>Computer programs on smart televisions, for the sole purpose of enabling interoperability with lawfully obtained software applications;</p> <p>Computer programs that control the functioning of a motorized land vehicle, for the sole purpose of enabling diagnosis, repair, or lawful modification;</p> <p>Computer programs on voting machines, motorized land vehicles, or medical devices, for the sole purpose of good faith security research;</p> <p>Video games lawfully acquired as complete games when the copyright owner has ceased to provide server access for authentication, for the sole purpose of enabling personal gameplay or preservation in playable form by an eligible library, museum, or archive;</p> <p>Computer programs that operate 3D printers, for the sole purpose of using alternative feedstock;</p> <p>Literary works consisting of compilations of data generated by medical devices that are wholly or partially implanted in the body or by their monitoring systems, for the sole purpose of enabling a patient to access his or her own data.</p>