

Estate of James Oscar Smith v. Cash Money Records, Inc., et al.
No. 1:14-cv-02703 (S.D.N.Y. May 30, 2017)

Year	2017
Court	United States District Court for the Southern District of New York
Key Facts	Plaintiffs, the Estate of James Oscar Smith (“Estate”) and Hebrew Hustle, Inc. (“Hebrew Hustle”), assert that they co-own the rights to a spoken word recording on Jimmy Smith’s 1982 album <i>Off the Top</i> . On the track, titled “Jimmy Smith Rap” (“JSR”), Jimmy Smith discusses jazz music and its relative superiority over other types of music, its pivotal line being: “Jazz is the only real music that’s gonna last. All that other bullshit is here today and gone tomorrow. But jazz was, is and always will be.” In 2013, Defendants released an album by Aubrey Drake Graham (“Drake”). The last song, entitled “Pound Cake/Paris Morton Music 2” (“Pound Cake”) sampled 35 seconds of JSR, deleting and rearranging words from the original lyrics to say, in part, “Only real music is gonna last, all that other bullshit is here today and gone tomorrow.” Defendant Cash Money Records, Inc. obtained a license for the JSR recording, but not for the composition, which was not registered with the U.S. Copyright Office. After the album was released, the Estate entered into a co-publishing agreement with Hebrew Hustle, registered the JSR composition with the Copyright Office, and then sent Defendants a cease and desist letter.
Issue	Whether it was a fair use to alter a recording of a rap song and place it into a hip hop song with a different message, without authorization to use the musical composition.
Holding	On cross motions for summary judgment, the district court held that, because there is a genuine dispute of material fact as to ownership and copying, neither party was entitled to summary judgment on Plaintiffs’ infringement claims: there was not enough evidence that Jimmy Smith actually authored JSR, and substantial similarity would be better assessed by a jury. But the court also found that any liability for Defendants’ appropriation of JSR is barred because Defendants’ use of it was a fair use. As to the first factor, purpose and character of the use, the court found that some of Defendants’ arguments “conflate the nature of a fair use with that of a derivative work,” but Defendants’ alteration of the message of the JSR track—from “Jazz is the only real music that’s gonna last” to “Only real music is gonna last”—sufficiently transformed the song, since Defendants’ “purpose is ‘sharply different’ from Jimmy Smith’s purpose in creating the original track.” The court held that the second factor, the nature of the copyrighted work, weighed against a finding of fair use, but was of “limited usefulness” because it had already found the use transformative. As to the third factor, the amount of work used, the court held that “the amount taken by Defendants [was] reasonable in proportion to the needs of the intended transformative use,” and the use of some of the lines “serve[d] to drive the point home.” Lastly, as to fourth factor, the effect on the market for the copyrighted work, the court found there to be “no evidence in the record to suggest that Pound Cake usurps any potential market for JSR or its derivatives.” Defendants’ track “targets a sharply different primary market,” and Plaintiffs “never attempted to establish a market for licensed derivative uses of the JSR composition copyright until Defendants used the recording.”
Tags	Second Circuit; Music
Outcome	Fair use found

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