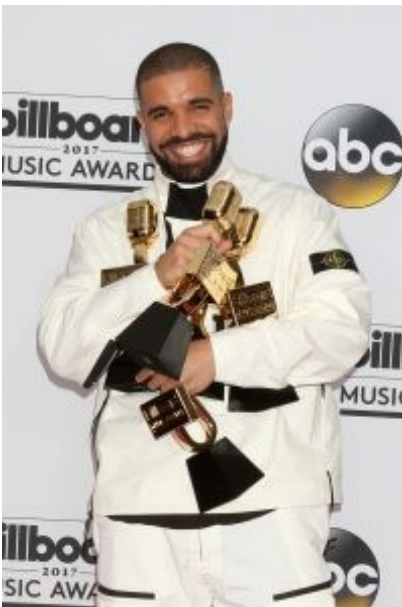


Hip-Hop Artist Drake Fairly Used Anti-Hip Hop Song Sample

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by Lindsey Sadler



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In an apparent win for musicians seeking to sample other's works, on February 3, 2020, the Second Circuit declined to revive a copyright lawsuit against hip-hop musician Drake for his sampling of a 1980s spoken-word jazz recording, allowing the district court's ruling to stand.

Back in April of 2014, the estate of musician Jimmy Smith sued Drake for copyright infringement, alleging Drake's 2013 hit "Pound Cake" improperly incorporated a 35-second sound clip from Jimmy's spoken-word jazz track, "Jimmy Smith Rap." The key line from each song is:

Jimmy Smith's Rap: "Jazz is the only real music that's gonna last. All that other bullshit is here today and gone tomorrow. But jazz was, is and always will be.

Pound Cake: "Only real music's gonna last. All that other bullshit is here today

and gone tomorrow.”

The district court ruled in Drake’s favor, finding his sampling constitutes fair use. Most notable is *why*—i.e., the district court found fair use by comparing the underlying messages contained in the musical numbers, and found Drake’s version transformed the character of the original by adding a new meaning. Specifically, the district court found Jimmy Smith’s lyric touts the supremacy of jazz to the derogation of all other musical genres, while Drake’s makes a countervailing point that jazz is not king, and instead, “real music” reigns supreme, regardless of genre. Therefore, the district court found that the purpose of Drake’s song is “sharply different” from that of Jimmy Smith’s. And as a result, Drake’s use “adds something new, with a further purpose or different character, altering the first work with new expression, meaning, and message.”

Jimmy Smith’s estate nonetheless argued “Pound Cake” could not be fair use because Drake’s fans and other listeners would not be able to recognize Jimmy Smith’s sample in Drake’s version, and thus, these listeners would not immediately identify the criticism or commentary. But the district court dismissed this argument, noting that, while the average observer needs to identify the target of mockery for parody cases, that is not a universal prerequisite for determining transformative use. The critical question remains how the work in question appears to the reasonable observer, not the quality or accessibility of the commentary.

Although Drake had attempted to fully clear his right to use the “Jimmy Smith Rap,” he was only able to secure a copyright license to the sound recording, but not one for the written music. Importantly, the license for the written music proved problematic because Jimmy Smith’s estate refused to grant it, claiming Jimmy “wasn’t a fan of hip hop.” The district court noted that this refusal to grant the license reinforced Jimmy Smith’s bias against hip-hop, and further justifying Drake’s fair use.

Rather ironically, based on the district court’s ruling, this anti-hip hop bias seems to be one of the reasons hip-hop artist Drake was found to be justified in using the sample for his own message.