

It’s De Minimis, but Wait! It’s Also Fair Use: *Faulkner v. Sony Pictures* and Why Courts Should Focus on Developing the De Minimis Doctrine To Streamline Copyright Infringement Analysis

I. INTRODUCTION 301
II. BACKGROUND 302
III. THE COURT’S DECISION 306
IV. ANALYSIS 309

I. INTRODUCTION

The case at hand arose as a result of the paraphrase of a single line from William Faulkner’s novel *Requiem for a Nun* (*Requiem*) by the protagonist in Woody Allen’s recent film *Midnight in Paris* (*Midnight*).¹ Faulkner’s novel, *Requiem*, a sequel to *Sanctuary*, focuses on the events surrounding the death sentence of Nancy, the nanny of Temple Drake’s child.² The theme of the past exists throughout the novel and is at one point succinctly expressed during an interaction between Temple and Nancy’s defense attorney, Gavin Stevens.³ Upon Temple’s resistance to pleading clemency for Nancy, Gavin counters with the response: “The past is never dead. It’s not even past.”⁴

Woody Allen’s film *Midnight* also features an ongoing theme of the past. Gil Pender, the movie’s protagonist, travels through time to meet and to interact with various literary figures.⁵ Gil discovers that living in a current, seemingly less glamorous time period is not necessarily worse than living in the romanticized past.⁶ In the film, Gil paraphrases Faulkner’s quote in an argument with his fiancée, quipping: “The past is not dead. Actually, it’s not even past. You know who said that? Faulkner, and he was right. And I met him too. I ran into him at a dinner party.”⁷ In response to this paraphrase of a single line in *Requiem*, Faulkner Literary Rights, LLC (Faulkner), sued Sony Pictures Classics, Inc.

1. Faulkner Literary Rights, LLC v. Sony Pictures Classics, Inc., No. 3:12-cv-100, 2013 WL 3762270, at *1 (N.D. Miss. July 18, 2013).

2. *Id.* at *2.

3. *Id.*

4. *Id.*

5. *Id.* at *1-2.

6. *Id.* at *2.

7. *Id.*

(Sony), for copyright infringement, violation of the Lanham Act, and commercial misappropriation.⁸ Sony filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the de minimis doctrine and the affirmative defense of fair use protected the film's use of the paraphrased quote.⁹ The United States District Court for the Northern District of Mississippi *held* that the use of a novel's line, paraphrased and attributed, in a motion picture was de minimis infringement and fair use, and thus did not constitute actionable copyright infringement. *Faulkner Literary Rights, LLC v. Sony Pictures Classics, Inc.*, No. 3:12-cv-100, 2013 WL 3762270, at *8-9 (N.D. Miss. July 18, 2013).

II. BACKGROUND

The Copyright Act of 1976 (Copyright Act) extends protection to various forms of cultural works, including literary works.¹⁰ To qualify for protection, a work must be original and fixed in a tangible medium of expression.¹¹ The owner of a copyrighted work receives certain exclusive rights, including the right to reproduction and the right to prepare derivative works.¹² For works created on or after January 1, 1978, exclusive rights extend for seventy years after the death of the author.¹³ For works created and copyrighted before January 1, 1978, the term subsists for twenty-eight years from the date the copyright was secured, subject to renewal and extension.¹⁴ Thus, these exclusive rights generally extend for 95 years after the date of initial copyright protection.¹⁵

In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the United States Supreme Court outlined the two requirements necessary to prove copyright infringement: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."¹⁶ In *Bridgmon v. Array Systems Corp.*, the United States Court of Appeals for the Fifth Circuit held that actionable copyright infringement (as they termed the second requirement) includes (1) actual use of the copyrighted work in the allegedly infringing work, and (2) "substantial

8. *Id.* at *1.

9. *Id.* at *1, *4.

10. 17 U.S.C. § 102(a)(1) (2012).

11. *Id.* § 102(a).

12. *Id.* § 106.

13. *Id.* § 302.

14. *Id.* § 304.

15. *Id.*

16. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

similarity” in nature to the original work.¹⁷ Furthermore, in *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, the United States Court of Appeals for the Fifth Circuit adopted other circuits’ definition of “substantial similarity” to include analysis in both qualitative and quantitative terms.¹⁸

The legal principle *de minimis non curat lex* (“the law does not concern itself with trifles”) applies to copyright infringement cases where the amount of copyrighted work taken is so insubstantial that the court will not enforce legal consequences.¹⁹ In general, courts have imposed a requirement that, to be *de minimis*, the infringement must be so small and inconsequential that the average audience would not be able to recognize the taking.²⁰ Notably, however, the Fifth Circuit has not explicitly addressed or applied the requirement in such a way as to clarify its role in the infringement analysis.²¹

The *de minimis* doctrine can be applied in three contexts: technical *de minimis*, trivial *de minimis*, and *de minimis* as it is relevant to the third factor of the fair use affirmative defense.²² Technical *de minimis* refers to literal infringement that is so insignificant that it does not warrant legal consequences.²³ In *Knickerbocker Toy Co. v. Azrak-Hamway International, Inc.*, the United States Court of Appeals for the Second Circuit held that the defendant’s use of a photograph of their product on an unused promotional display card that also displayed the plaintiff’s product constituted *de minimis* infringement because the use was internal and was never meant for public display.²⁴

Trivial *de minimis* refers to infringement that is so insignificant that it does not reach the level of substantial similarity required for an

17. *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 576 (5th Cir. 2003).

18. *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 373 n.12 (5th Cir. 2004), *abrogated on separate grounds by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 (2010).

19. *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997); Deborah F. Buckman, *Application of “De Minimis Non Curat Lex” to Copyright Infringement Claims*, 150 A.L.R. FED. 661 (1998).

20. *See, e.g., Fisher v. Dees*, 794 F.2d 432, 434-35 n.2 (9th Cir. 1986) (“[A] taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation.”).

21. *Faulkner Literary Rights, LLC v. Sony Pictures Classics, Inc.*, No. 3:12-cv-100, 2013 WL 3762270, at *4 (N.D. Miss. July 18, 2013).

22. *Ringgold*, 126 F.3d at 74-75; Buckman, *supra* note 19.

23. *Ringgold*, 126 F.3d at 74; Buckman, *supra* note 19; *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983) (defining the *de minimis* doctrine as allowing “the literal copying of a small and usually insignificant portion of the plaintiff’s work”).

24. *Knickerbocker Toy Co. v. Azrak-Hamway Int’l, Inc.*, 668 F.2d 699, 700-01, 703 (2d Cir. 1982).

actionable infringement.²⁵ In *Ringgold v. Black Entertainment Television, Inc.*, the Second Circuit held that the defendant's brief, repeated shots of the plaintiff's copyrighted artwork during a television program did not constitute de minimis infringement because the most important aspects of the plaintiff's artistic style remained recognizable to the "average lay observer."²⁶ Thus, these brief shots possessed a qualitative and quantitative substantial similarity sufficient to constitute actionable infringement.²⁷

De minimis can also be relevant to the third factor of the fair use affirmative defense, which considers "the amount and substantiality of the portion used [in the infringing work] in relation to the copyrighted work as a whole."²⁸ The third factor of the fair use affirmative defense will be further discussed below; however, it is important to note that application of the de minimis doctrine in this context is not a settled issue. In particular, the Second Circuit has rejected this third application as inappropriate for the de minimis concept, arguing that the analysis in all the fair use factors "concerns a quantitative continuum," whereas the legal concept of de minimis involves a threshold below which copying is considered nonactionable.²⁹

With regard to the fair use affirmative defense, in the event that the amount of work taken is substantial enough to constitute actionable infringement, several fair use exceptions exist.³⁰ The Copyright Act outlines the categories of infringing uses that qualify for this exception, including infringement "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research."³¹ In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court held that this affirmative defense should be analyzed on a case-by-case basis, utilizing the four, nonexclusive factors found in section 107 of the Copyright Act to determine whether the infringing work qualifies as a fair use.³² These factors include analysis of (1) the infringing work's purpose and character; (2) the original work's nature; (3) the amount and substantiality of the original work used in the infringing work, viewed in relation to the original work as a whole; and (4) the effect of the

25. *Ringgold*, 126 F.3d at 74; Buckman, *supra* note 19.

26. *Ringgold*, 126 F.3d at 77.

27. *Id.*

28. *Id.* at 75 (citing 17 U.S.C. § 107(3) (2012)).

29. *Id.* at 75-76.

30. 17 U.S.C. § 107.

31. *Id.*

32. *Harper & Row Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 549, 560 (1985).

infringing work on the market for the original copyrighted work.³³ These four factors, when weighed together “in light of the purposes of copyright . . . to promote science and the arts,” help to determine whether an infringing use should be allowed under the fair use doctrine.³⁴

In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court applied section 107’s four factors to analyze the defendant’s infringing use of lyrics and melody from the plaintiff’s song “Pretty Woman” in their own song “Oh Pretty Woman,” to hold that the defendant’s infringement constituted a transformative fair use for parody.³⁵ With respect to the first factor, the Supreme Court held that the lyrical play on words, among other aspects of the defendant’s song, supported a finding that the defendant’s purpose was to transform the original content to comment on and to criticize the plaintiff’s original song.³⁶ With respect to the second factor, the Supreme Court held that the plaintiff’s song was well within the scope of protected copyright, but noted that this did not weigh significantly in the plaintiff’s favor because parodies generally critique well-known works.³⁷

With respect to the third factor, the Supreme Court held that the defendant’s song incorporated a qualitatively significant portion of the plaintiff’s song by appropriating lyrics that were of central importance to the song; however, this did not weigh in the plaintiff’s favor.³⁸ The Court determined that parodies by their nature must be able to “conjure up” enough of the original work to make it recognizable and to allow for a successful critique.³⁹ With respect to the fourth factor, the Supreme Court held that the defendant’s song did not adversely affect the value of and the market for the plaintiff’s song.⁴⁰ The defendant’s parody not only existed in a different genre, but also served the different market purpose of critique, which is not a protected market for the original work under the Copyright Act.⁴¹

In *Harper & Row*, the Supreme Court held that the defendant’s use in a news publication of excerpts from the plaintiff’s book containing

33. 17 U.S.C. § 107; *Harper & Row*, 471 U.S. at 560-61.

34. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994).

35. *Id.* at 576-77, 579, 594.

36. *Id.* at 581-84 (noting that the commercial nature of the work was a nondeterminative element of the first factor, therefore the commercial success of the defendant’s song did not preclude it from receiving protection under the fair use exception).

37. *Id.* at 586.

38. *Id.* at 586-89 (declining to make a determination with respect to the music and instead opting to remand this issue to a lower court for a final decision).

39. *Id.*

40. *Id.* at 590-94.

41. *Id.*

President Ford's Watergate memoirs before the plaintiff's book was published did not constitute fair use. Applying the four fair use factors to the facts of the case, the Supreme Court held that although the infringing excerpts equated to only approximately 300 of the 75,000 words in the plaintiff's work, these words qualitatively represented "the heart" of the original work, and thus constituted unfair appropriation.⁴²

The fair use affirmative defense can be raised on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) if a successful defense appears on the face of the pleadings.⁴³ The purpose of a 12(b)(6) motion to dismiss is to challenge the viability of a complaint by showing that it does not outline a legal theory that warrants relief.⁴⁴ In considering this pretrial motion, the court considers all facts offered in the complaint as true and views these facts in the light most favorable to the plaintiff.⁴⁵ The complaint must present enough evidence on its face to cross "the line from conceivable to plausible."⁴⁶

III. THE COURT'S DECISION

In the noted case, the United States District Court for the Northern District of Mississippi utilized the fair use affirmative defense analysis to determine whether the taking constituted a de minimis, nonactionable infringement.⁴⁷ Chief Judge Michael P. Mills reviewed the facts of the case and the legal principles surrounding Rule 12(b)(6) motions to dismiss, concluding that Sony was allowed to raise an affirmative defense on a motion to dismiss, particularly because the ruling was disposed of on separate grounds.⁴⁸ The court responded to the lack of precedent in the Fifth Circuit regarding the de minimis doctrine by considering the de minimis analysis to be "wholly encompassed" within the fair use analysis, and therefore employing it to determine that Sony's use of a single line from Faulkner's novel *Requiem* in its film *Midnight* constituted de minimis, nonactionable infringement.⁴⁹ The court then dismissed Faulkner's Lanham Act claim as baseless.⁵⁰ Finally, the court declined to rule on Faulkner's commercial misappropriation claim, citing

42. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 542, 565, 569 (1985).

43. Clark v. Amoco Prod. Co., 794 F.2d 967, 970 (5th Cir. 1986).

44. FED. R. CIV. P. 12(b)(6).

45. Clark, 794 F.2d at 970.

46. Bell Atl. v. Twombly, 550 U.S. 554, 570 (5th Cir. 2003).

47. Faulkner Literary Rights, LLC v. Sony Pictures Classics, Inc., No. 3:12-cv-100, 2013 WL 3762270, at *4 (N.D. Miss. July 18, 2013).

48. *Id.* at *3, *4 n.4 (citing Clark, 794 F.2d at 970).

49. *Id.* at *4, *9.

50. *Id.* at *9-10.

the general rule that district courts do not exercise jurisdiction over state claims when all federal claims have been eliminated before the outset of trial.⁵¹ Ultimately, the court granted Sony's motion to dismiss.⁵²

The court began its analysis by addressing the issue of de minimis copyright infringement.⁵³ After establishing the Fifth Circuit's adoption of the Second Circuit's qualitative and quantitative definition for substantial similarity as a requirement of actionable infringement, the court highlighted the lack of consensus among the circuits as to the proper location of de minimis infringement in copyright infringement analysis.⁵⁴ The court further noted that the Fifth Circuit offers very little precedent on the de minimis doctrine in copyright infringement.⁵⁵ Therefore, the court declared that it would employ the fair use infringement analysis to make its de minimis infringement determination because de minimis analysis and fair use analysis, while distinct inquiries, are nonetheless related in that de minimis analysis is "wholly encompassed" within the fair use analysis.⁵⁶

The court proceeded to apply each of the four fair use factors to Sony's use of Faulkner's quote to determine that Sony's infringement constituted fair use.⁵⁷ Beginning with the first factor, the court determined that the purpose and character of Sony's paraphrase of Faulkner's quote weighed heavily in favor of transformative use because of the extensive differences between the two works' speakers, times, places, purposes, and mediums of expression.⁵⁸ The court dismissed *Midnight's* commercial success as insignificant in light of the prior factors that weighed so heavily in Sony's favor.⁵⁹

The court then analyzed the second factor, determining that the nature of Faulkner's *Requiem* versus Sony's *Midnight* was neutral within the framework of the fair use analysis.⁶⁰ In consideration of *Midnight's* highly transformative purpose and character, the court declined to decide whether the infringement constituted a parody of Faulkner's work.⁶¹

51. *Id.* at *10.

52. *Id.*

53. *Id.* at *3-4.

54. *Id.*

55. *Id.* at *4.

56. *Id.*

57. *Id.* at *5-9.

58. *Id.* at *5.

59. *Id.*

60. *Id.* at *6.

61. *Id.*

Instead, the court determined this factor was neutral in weight for or against fair use.⁶²

The court then addressed the third factor, analyzing the substantiality of the amount of *Requiem* used in *Midnight*, and determined that no substantial similarities existed between the two works.⁶³ The court first addressed the quantitative aspect of the infringement, confirming that the quantitative amount of *Requiem* used in *Midnight* was not at issue because the parties agreed that only nine words out of the entire novel were at issue.⁶⁴ The court then addressed the qualitative aspect of the infringement.⁶⁵ Here, the court reasoned that the quote at issue in *Requiem*, while succinctly and eloquently stating a key theme that is present throughout the entire novel, only “constitute[d] a small portion of the expression of [the novel’s theme of the past].”⁶⁶ Thus, the court concluded that the quote was not of qualitative importance to *Requiem* as a whole and that the third factor weighed in favor of fair use.⁶⁷

Finally, the court addressed the fourth factor, determining that *Midnight’s* effect on *Requiem’s* potential market value was unlikely to be adverse and, in fact, could actually have been helpful because of its friendly appreciation for the work.⁶⁸ The court further reasoned that Faulkner’s complaint alleged no actual injury other than statutory entitlement to an award, and that Faulkner’s bad faith argument was baseless.⁶⁹ Thus, the court also found this factor to weigh in favor of fair use.⁷⁰

After completing the fair use analysis and determining that *Midnight’s* use of content from *Requiem* constituted fair use, the court held that Sony’s infringement was de minimis and was therefore nonactionable, dismissing the claim.⁷¹ The court took a brief moment to address Faulkner’s Lanham Act claims and state law claim for commercial misappropriation, but quickly disposed of them.⁷² The court dismissed Faulkner’s Lanham Act claims, holding not only that Sony’s First Amendment interest outweighed Faulkner’s interest in pursuing a

62. *Id.*

63. *Id.* at *6-7.

64. *Id.* at *6.

65. *Id.* at *6-7.

66. *Id.* at *7.

67. “[T]he quote in dispute . . . is a fragment of the idea’s expression Qualitative importance to society of a nine-word quote is not the same as qualitative importance to the originating work as a whole.” *Id.*

68. *Id.* at *7-9.

69. *Id.* at *8.

70. *Id.* at *8-9.

71. *Id.* at *9.

72. *Id.* at *9-10.

Lanham Act claim, but also that no actual claim under the Lanham Act had been established within Faulkner's pleadings.⁷³ The court declined to decide Faulkner's state law claim of commercial misappropriation, stating that a district court typically refuses to decide state law claims when all federal claims have been eliminated before trial.⁷⁴ Therefore, the court granted Sony's motion and dismissed the case.⁷⁵

IV. ANALYSIS

The district court's decision is the latest to devote time and energy unnecessarily to applying the fair use analysis to a case that should have been decided solely on the de minimis doctrine. There are two reasons behind the court's decision. First, the court explicitly highlighted the fact that the de minimis doctrine remains largely underdeveloped in the Fifth Circuit.⁷⁶ Second, the de minimis doctrine that does exist requires an average observer to be unable to recognize the appropriation before it can constitute de minimis infringement.⁷⁷ Therefore, the court in the noted case was understandably reluctant to rule based on the de minimis doctrine alone, without also employing the fair use analysis to back up its reasoning for allowing the infringement.⁷⁸ In light of this outcome, courts should follow the Second Circuit's lead and begin focusing on refining the de minimis doctrine and solidifying its place in copyright infringement analysis.⁷⁹ Furthermore, courts should revise the element of recognition to become one factor out of many in the overall de minimis infringement analysis.⁸⁰ Until this happens, lower courts will be compelled to apply the separate and distinct fair use infringement analysis to back up their de minimis infringement rulings.

The court in the noted case had very little direct guidance from the Fifth Circuit in outlining the use of de minimis analysis within copyright infringement cases. Furthermore, what little guidance they did have reflected de minimis analysis either employed in tandem with fair use or as one of several theories utilized in deciding the case. In *Compaq*

73. *Id.*

74. *Id.* at *10.

75. *Id.*

76. *Id.* at *4.

77. Rebecca Tushnet, *The Past Is Never Dead, but It Is De Minimis*, REBECCA TUSHNET'S 43(B)LOG (July 19, 2013, 9:14 AM), <http://tushnet.blogspot.com/2013/07/the-past-is-never-dead-but-it-is-de.html>; *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 77 (2d Cir. 1997).

78. *Faulkner*, 2013 WL 3762270, at *4.

79. *See* Tushnet, *supra* note 77.

80. *See id.*

Computer Corp. v. Ergonome, Inc., the Fifth Circuit upheld the lower court's ruling that the defendant's appropriation of text from the plaintiff's publication on the prevention of repetitive stress injuries was de minimis infringement that also constituted fair use.⁸¹ The lower court considered both de minimis infringement and fair use to come to its conclusion.⁸² In *Vault Corp. v. Quaid Software Ltd.*, the Fifth Circuit held that the defendant's taking of thirty characters out of approximately fifty pages of source code constituted de minimis infringement because it was qualitatively and quantitatively insignificant.⁸³ However, the Fifth Circuit did not decide this case solely on the defendant's de minimis infringement; it also employed theories of contributory infringement and the software archival use exception.⁸⁴ Thus, the Fifth Circuit provided little guidance to the court in the noted case for navigating a copyright infringement ruling solely on de minimis infringement.

In addition, the court in the noted case had to tackle the requirement that de minimis appropriation can only be considered as such if it is "so meager and fragmentary that the average audience would not recognize [it as appropriation]."⁸⁵ The noted case dealt with infringing material specifically attributed to Faulkner, the original author.⁸⁶ Therefore, if this current lack-of-recognition requirement had been followed, there would have been no way that this appropriation could have constituted de minimis infringement because the average viewer would have been able to recognize that the content came from Faulkner.⁸⁷ However, it is clear from the fact pattern and the court's reasoning that this paraphrase of a nine-word quote from a lengthy novel constituted quantitatively and qualitatively insignificant de minimis infringement.⁸⁸ Thus, the court in the noted case likely applied the fair use analysis to side-step the recognition requirement and to provide further support for its ruling on de minimis infringement.⁸⁹

81. *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 406-07 (5th Cir. 2004); see also *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1177 (5th Cir. 1980) (reversing the lower court's rejection of the fair use defense because harm suffered, for the purposes of the fourth factor, was de minimis).

82. *Compaq Computer Corp. v. Ergonome, Inc.*, 137 F. Supp. 2d 768, 779-80 (S.D. Tex. 2001), *aff'd in part, rev'd in part*, 387 F.3d 403 (5th Cir. 2004).

83. *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267 (5th Cir. 1988).

84. *Id.* at 259-62.

85. *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

86. *Faulkner Literary Rights, LLC v. Sony Pictures Classics, Inc.*, No. 3:12-cv-100, 2013 WL 3762270, at *2 (N.D. Miss. July 18, 2013).

87. Tushnet, *supra* note 77.

88. *Id.*; *Faulkner*, 2013 WL 3762270, at *1.

89. Tushnet, *supra* note 77.

The court in the noted case should have followed the Second Circuit, whose definition of substantial similarity had already been adopted, and solidified the de minimis infringement analysis as an initial step in copyright infringement analysis that is capable of standing alone as reasoning for a court's final judgment.⁹⁰ In *Ringgold*, the Second Circuit explicitly stated that the de minimis infringement analysis should be situated at the outset of the court's copyright infringement analysis, reasoning, "[I]t makes more sense to reject the claim on [the] basis [of de minimis] and find no infringement, rather than undertake an elaborate fair use analysis in order to uphold a defense."⁹¹ In contrast, in the noted case, the court determined that the defendant's taking constituted actionable infringement and employed the fair use analysis as a distinct second step in its copyright infringement analysis, but only after having fully analyzed the de minimis issue.⁹² If the court in the noted case had adopted the Second Circuit's precedent, it would have been able to dismiss the entire infringement issue without taking on the laborious task of analyzing fair use.⁹³

In light of the lack of precedent in the Fifth Circuit using the de minimis standard on its own and the lack-of-recognition standard currently employed in the de minimis infringement analysis, it follows that the District Court for the Northern District of Mississippi likely felt compelled to utilize the fair use analysis to bolster its ruling that Sony's infringement of Faulkner's content constituted a nonactionable, de minimis infringement.⁹⁴ However, this application of the fair use doctrine is ultimately unnecessary in a case where the de minimis doctrine should be capable of standing on its own.⁹⁵ Furthermore, courts will be unlikely to employ the de minimis doctrine if it has not been developed and it does not fit their needs. Therefore, courts should work to revise the de minimis doctrine and to tailor the element of recognition to serve as an indication of possible infringement, not a deciding factor, in order to streamline future cases of this kind.

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90. *Faulkner*, 2013 WL 3762270, at *3.

91. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 75-76 (2d Cir. 1997).

92. *Id.* at 77-81.

93. Tushnet, *supra* note 77.

94. *Id.*

95. *Ringgold*, 126 F.3d at 75-76.

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