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DE MINIMIS COPYING: AN EMPIRICAL STUDY

JESSICA SILBEY* & SAMANTHA ZYONTZ**

In the internet age, the copyright de minimis *defense has increased in relevance as copyright lawsuits (and IP generally) are more mainstream and infringement liability more widespread. This Article is the first empirical analysis of copyright* de minimis *defense cases, collecting and analyzing all such decisions since the mid-19th century. It traces the doctrine's development over the past century and its evolution in the digital era, when copying has become even more ubiquitous but its triviality remains widely disputed. The Article's aim is not only to map the* de minimis *defense to learn more about it doctrinally—asking when is copying "too little" and how is that evaluated—but also asks the deeper, unresolved question about the harm copyright law aims to prevent and the benefits towards which it aims. In doing so, it proposes new rules for the* de minimis *defense designed to revive its appropriate function and filter out unmeritorious and inefficient copyright cases.*

The Article begins with the hypothesis that, in the digital era, the copyright de minimis *defense should be more relevant and more successful: as much as there is more*

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copying on the internet, most of it is trivial. The data shows the first to be true (rise in relevance) but not necessarily the second (litigation success rates). Indeed, invocation of the de minimis *defense has grown, but not its success in litigation, suggesting judicial skepticism toward the idea of trivial copying. That skepticism bodes poorly for the information age in which copying small bits of expression (or whole works momentarily) is essential for communication. The Article's deep dive into the* de minimis *defense further explains how its evolution affects other aspects of copyright law, opening opportunities and exposing pitfalls in the context of strategic litigation. In the end, freedom of expression and the progress of science are at stake, and revitalization of the* de minimis *doctrine is a key to preserving these fundamental tenets of U.S. copyright law.*

Introduction

De minimis non curat lex. The law does not concern itself with trifles.[1]It is a centuries' old legal defense across many areas of law and essential to efficient dispute resolution.[2] Despite its ubiquity and importance, little scholarship or theoretical analysis exists elucidating the nature of a "trifle" or the circumstances when the rule is best applied in specific legal fields.[3] The challenge of studying the *de minimis* doctrine may arise because of the nature of the defense: in the face of an insubstantial injury, courts dismiss claims with little analysis or reasoning.[4] What is there to learn from these terse decisions except that judges appear to know a trifle when they see one?[5]

In the age of artificial intelligence scooping up massive amounts of information, the meme-ification of digital communication on social media, and the ubiquity of copy/paste technology embedded in all of our electronic devices, the *de minimis* doctrine is (or should be) having a heyday, especially for copyright law. What counts as "too little" or "insignificant" copying to stall a frivolous lawsuit? The answer may be dramatically different from what counted as insignificant over a century ago when the *de minimis* doctrine entered copyright law. The *de minimis*

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[1] *De Minimis Non Curat Lex*, Black's Law Dictionary(11th ed. 2019).

[2] Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 Mich. L. Rev. 537, 537 (1947). *See* Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) ("[T]he venerable maxim de minimis non curat lex … is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept."). David Seipp uncovered references to the *de minimis* defense in 1367 and 1368 in the context of unauthorized copying of particular texts. E-mail from David Seipp, Professor of L. Emeritus, B.U. Sch. of L., to Jessica Silbey, Assoc. Dean of Intell. Life, B.U. Sch. of L. (March 23, 2024, at 21:24 ET) (on file with author and journal) (referencing Mich. 41 Edw. 2, Statham's Abridgement, Traverse, pl. 9, fol. 158a (1367) and Pasch. 42 Edw. 3, pl. 22, fol. 13b (1368)).

[3] Research turned up only these articles on the topic in general and regarding copyright in particular: Frederick G. McKean Jr., *De Minimis Non Curat Lex*, 75 U. Pa. L. Rev. 429 (1927); Veech & Moon, *supra* note 2; Jeff Nemerofsky, *What is a "Trifle" Anyway?*, 37 Gonz. L. Rev. 315 (2001); Andrew Inesi, *A Theory of De Minimis and A Proposal For Its Application in Copyright*, 21 Berkeley Tech. L.J. 945 (2006); Oren Bracha, *Not De Minimis: (Improper) Appropriation in Copyright*, 68 Am. U. L. Rev. 139 [hereinafter Bracha, *Not De Minimis*]; Julie Cromer, *Harry Potter and the Three-Second Crime: Are We Vanishing the De Minimis Defense from Copyright Law?*, 36 N.M. L. Rev. 261 (2006); Deborah Buckman, Annotation, *Application of "De Minimis Non Curat Lex" to Copyright Infringement Claims*, 150 A.L.R. Fed. 661, §2(b) (1998–2004).

[4] Inesi, *supra* note 3, at 949–50.

[5] As one commentator wrote, "the de minimis case law seems both contradictory and confusing; it is no wonder that one court called de minimis 'an exercise of judicial power, and nothing else.' " Inesi, *supra* note 3, at 950 (quoting State v. Park, 525 P.2d 586, 592 (Haw. 1974)).

doctrine is the difference between a lawsuit quickly dismissed (or never instigated) and one that costs millions of dollars to litigate. The line should be clearer, but it's not. This Article investigates the changes in that line over a century, grounding the doctrine to its ancient roots in the common law.

De minimis injuries range from quantitatively small harms to those that are qualitatively insignificant.[6] Intriguingly, some kinds of cases appear to be less susceptible to a *de minimis* defense, such as those concerning trespass and real property, and fiduciary law.[7] Other kinds of claims, such as defamation and nuisance, more frequently elicit a *de minimis* defense.[8] What makes one type of complaint *de minimis* and another worthy of adjudication within a specific field of law?

Within copyright law, plaintiffs launch time-consuming and costly legal claims presumably because they believe their copyright injuries deserve redress.[9] And yet the *de minimis* defense succeeds because a court determines the injury is not cognizable. Frustrated copyright plaintiffs are told that despite defendant's technical legal violations—an unauthorized copy was made—the court "does not concern itself with trifles."[10] At the heart of many cases resolved on *de minimis* grounds is a fundamental disagreement about the seriousness of the plaintiff's harm and the importance of judicial efficiency to justice writ large.

When a court balances the call to adjudicate a cognizable copyright injury with preserving necessary judicial resources, the question presented is the nature and extent of the copying, not whether copying has occurred. Copying is not infringement. It's the nature of the copying that matters.[11] The copyright *de minimis* analysis thus becomes a question of the kind of harm copyright law aims to prevent, because copying *per se* is not unlawful.[12] This is a harder question than might

[6] *See generally* Nemerofsky, *supra* note 3 (collecting cases).

[7] *Id.* at 330–40 (listing cases and categories).

[8] McKean Jr., *supra* note 3, at 431–33.

[9] They could also be looking for payment, be it a windfall or otherwise.

[10] *See supra* note 1.

[11] *See* 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13D.10 (Matthew Bender, Rev. Ed.) ("[E]ven where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.").

[12] *Id.*

appear.[13] In copyright law, what matters is the *use* to which the copying is put, not the fact of copying.[14] A study of *de minimis* copyright may thus be helpful to clarify the nature and scope of cognizable copyright harms, which have been enduring and evolving questions in the field.[15]

The copyright *de minimis* doctrine has a long history that has shapeshifted over time.[16] In the internet age, the copyright *de minimis* defense has increased in relevance as copyright lawsuits (and IP generally) are more mainstream and infringement liability more widespread.[17] The digital age has made the copyright *de minimis* defense more relevant than ever. As artificial intelligence trained on copyrighted works has begun to dominate all areas of technology and society, whether those AI systems are making *de minimis* copies or causing substantial copyright harms is a question that could make or break the technology.[18] In everyday life, we copy whole photographs and articles to send to friends and

[13] *See generally* Wendy J. Gordon, *Copyright as Tort Law's Mirror Image: "Harms," "Benefits" and the Uses and Limits of Analogy*, 34 McGeorge L. Rev. 533 (2003) (exploring harms and benefits in copyright law and the challenges those terms present for intangible rights) [hereinafter Gordon, *Copyright as Tort Law's Mirror Image*]. *See also* Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 Harv. L. Rev. F. 62 (2009) [hereinafter Gordon, *Trespass-Copyright Parallels*] (same but in the context of real property); Jessica Litman, *Lawful Personal Uses*, 85 Tex. L. Rev. 1871 (2007) (interrogating "harms" from non-commercial personal uses).

[14] *Id*. *See also* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 533–35 (2023).

[15] *See infra* note 13 and articles cited therein.

[16] *See, e.g.*, Bracha, *Not De Minimis*, 68 Am. U. L. Rev. 139 (2018); Inesi, *supra* note 13.

[17] Collected data from LexMachina shows 2,224 copyright cases filed in 2009, 5,187 in 2015, then a 24 year high of 7,639 in 2024. We collected the number of U.S. District Court copyright cases from LexMachina, owned by LexisNexis, available at https://law.lexmachina.com/. All cases are either filed or pending between January 1, 2000 through February 1, 2025 and include at least one copyright claim. The search is available with a subscription at: https://law.lexmachina.com/shared/eyJzaGFyZWRfcGFnZV9pZCI6MTIwMjcwfQ.Z555sQ.48WvaQVxJQh_1YNuxe9GhKdkcc0. Otherwise, go to https://law.lexmachina.com/ and click on the Federal tab; then under Filter, go to Case Types and click the plus sign next to Copyright; then under Filter, go to Filed On and enter From = 2000-01-01 and To = 2025-02-0, then under Filter go to Pending and enter From = 2000-01-01 and To = 2025-02-01, then click Apply. A summary chart of case counts by year will appear in the center of the page). *See also Just the Facts: Intellectual Property Cases – Patent, Copyright and Trademark*, United States Courts (Feb. 13, 2020), https://www.uscourts.gov/data-news/judiciary-news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark#figures_map [https://perma.cc/48E5-WK2Y].

[18] *See* Kate Knibbs, *Every AI Copyright Lawsuit in the US, Visualized*, Wired (Dec 19, 2024, at 13:41 ET), https://www.wired.com/story/ai-copyright-case-tracker/ [https://perma.cc/YDZ7-FBQA] (visualizing all the AI/copyright lawsuits currently on-going). Many of these cases are being decided on fair use grounds, but there is no reason they can't be decided on *de minimis* grounds if copying is conceded but the nature of the use is trivial. *See also* Pamela Samuelson, *How to Think About Remedies in the Generative AI Copyright*

colleagues via email, text, and social media as essential forms of communication and discussion. When engaging in research, making our own art, and writing about the world around us, we inevitably copy bits of other copyrighted work; sometimes we copy the whole work and put it to productive and non-harmful uses. All these ubiquitous and quotidian activities implicate the copyright *de minimis* defense. This Article examines the patterns in assertions and analyses of the copyright *de minimis* defense over the past century and specifically in our digital era when copying is omnipresent but its triviality widely disputed. The Article's aim is three-fold: (1) to map the *de minimis* defense as a way to learn more about it doctrinally—when is copying too much?; (2) to clarify the standard for the *de minimis* defense to better achieve its goal of judicial economy; and in doing so (3) to address the deeper questions about the harm copyright law aims to prevent in order to facilitate (and not chill) more communication and authorship in the digital age.[19]

This is the first empirical study of copyright lawsuits in which courts engage in some analysis of the *de minimis* defense.[20] The study begins with the hypothesis that in the digital era the copyright *de minimis* defense should be more relevant and more successful because, as much as there is more copying on the internet, most of it is trivial.[21] The data shows the first to be true (more relevant) but not the second (litigation success rate). There is indeed a rise in the use of the *de minimis* defense in litigation, but not of its success in court.[22] Under what circumstances does the defense succeed? This Article answers this question within the range of contexts reflected in the diversity of cases.

Cases, 67 Comm. ACM 27 (July 2024), https://dl.acm.org/doi/10.1145/3654699 [https://doi.org/10.1145/3654699].

[19] For discussion of copyright harms and benefits, *see* Gordon, *Copyright as Tort Law's Mirror Image*, *supra* note 13; Gordon, *Trespass-Copyright Parallels*, *supra* note 13.

[20] The manner of empirically analyzing the court decisions is discussed in Part III.

[21] Inesi, *supra* note 3, at 946 ("copyright invites trivial violations"). The background assumption here does not consider the ease of mass piracy or peer-to-peer file sharing the internet has made possible. Instead, the kind of copying we mean that is more common but trivial is the kind of cut/paste copying from websites, email attachments, or other digital files, personal non-commercial sharing of copyrighted works, all sorts of sharing of content on social media, and digital mash-ups. *See, e.g.*, Amy Adler & Jeanne Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. Rev. 453 (2022); Andrew S. Long, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, 60 Okla. L. Rev. 317 (2007); Emily Harper, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, 39 Hofstra L. Rev. 405 (2019).

[22] *See infra* Part III.

In doing so, related copyright doctrines also come under scrutiny, such as: the "substantial similarity test" for reproduction infringement; the fair use defense, which unlike the *de minimis* defense, arises after a finding of infringement; and the anti-aesthetic discrimination principle, which counsels courts to avoid aesthetic judgment when evaluating copyright infringement claims.[23] Each of these copyright rules relate to the evolution of the *de minimis* doctrine in some way. And, thus, mapping the *de minimis* doctrine over the past century adds to our understanding of these core and more common copyright doctrines.

As copyright adapts to technology that enables promiscuous copying and prolific collage, the vitality of the *de minimis* defense needs closer inspection. Doing so reveals opportunities to clarify the *de minimis* doctrine for future application, reestablishing its independence from infringement and fair use analyses and making *de minimis* a more useful defense. Because copying *per se* is not necessarily copyright infringement, there must be some copying less than "substantial" that is beyond copyright law's reach. As this Article demonstrates, courts have long been engaging in some form of quantitative or qualitative analysis of copying when applying the *de minimis* defense. Analyzing the features and trends of those assessments may help preserve the tort-like nature of copyright, whereby threshold liability does not depend on proving the act occurred (copying) but instead on balancing harms from copying with benefits of dissemination and use.[24] Doing so also sharpens our focus on other critical aspects of copyright law, such as a bloated substantial similarity test or a stingy fair use analysis, which may

[23] The structure and quality of the court's aesthetic analysis is subject to some controversy, given the abdication of such an analysis for the purposes of copyright protection. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903). The necessity of such an analysis for infringement and the fair use purposes makes such an abdication illusory. A recent case reaffirmed Bleistein's anti-aesthetic-discrimination principle, reminding courts to tread lightly when engaging in an aesthetic analysis for the purposes of fair use, see Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2021), and yet the inevitability of such an analysis seems foregone given the comparative aspects of an infringement determination concerning aesthetic works. *See also* Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. Cal. L. Rev. 247, 301 (1998) ("[T]he existence of copyright makes subjective judicial pronouncements of aesthetic taste necessary."); Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standards*, 109 N.W. U. L. Rev. 344 (2015).

[24] Patrick Goold, *Unbundling the 'Tort' of Copyright Infringement*, 102 Va. L. Rev. 1833 (2016); Wendy Gordon, *Copyright Owners' Putative Interests in Privacy, Reputation, and Control: A Reply to Goold*, 103 Va. L. Rev. Online 36 (2017). In contrast to tort liability, criminal liability would reject any *de minimis* defense and subject a determination of wrongdoing to proof of the prima facie case of committing the act with the requisite mental state.

both be causing trouble for copyright's constitutional prerogative of promoting the progress of science.[25]

There are only four scholarly analyses of the copyright *de minimis* doctrine, but none are empirical.[26] A few court cases from the past two decades discuss the copyright *de minimis* defense in detail and have become doctrinal benchmarks for its initial assessment.[27] The facts of those cases range widely, from a fleeting glimpse of a *whole* copyrighted pictorial work in the background of a film to the use of a musical *fragment* from one musical work in another.[28] But whether they reflect long-standing past practice or a change is unclear without the bigger picture. This Article will for the first time combine doctrinal, historical, and empirical perspectives on the copyright *de minimis* defense to put these more recent cases in perspective.

In the end, the Article concludes with a prescriptive proposal for the application of the *de minimis* defense that tracks the dominant trends in the cases and conforms with the doctrine's 19th century origins. The *de minimis* defense should be green-lighted at the motion to dismiss stage when copying is quantitatively or qualitatively insignificant as compared to the benefits normally derived from the exploitation of the copyrighted work. As described more fully in the Article, with some outlier exceptions, this is how the *de minimis* defense has been applied, but not always at the motion to dismiss stage and too often (most recently) with additional and unnecessary complexity. This Article cuts through the

[25] Zahr Said, *Jury-Related Errors in Copyright*, 98 Ind. L.J. 749, 790 (2023) ("Copyright's user-unfriendliness comes to a head in substantial similarity analysis, where judges, juries, and litigants all at times display outcome-relevant confusion."); Bruce Boyden, *The Grapes of Roth*, 99 Wash. L. Rev. 1093 (2024) ("The phrase ['total concept and feel'] as a whole encourages 'judges and juries … to find infringement in dubious circumstances,' is internally inconsistent, invites an abdication of analysis that provides 'constrained space for the impressions of the judge or jury,' and leads to unpredictable, unreviewable similarity determinations; it is, in short an 'I know it when I see it' for copyright infringement.") Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 533–35 (2023) (for stingy fair use). U.S. Const. art. I, § 8, cl. 8.

[26] Inesi, *supra* note 3, at 50; Cromer, *supra* note 3; Bracha, *Not De Minimis*, *supra* note 3. *See also* Guy Forte, *Just a Little Bit: Comparing the De Minimis Doctrine in U.S. and German Copyright Regimes*, 39 Ariz. J. Int'l & Compar. L. 415, 429 (2022).

[27] *See, e.g.* Gottlieb Dev't LLC v. Paramount Pictures Corp., 590 F. Supp. 2d. 625 (S.D.N.Y. 2008); Ringgold v. Black Ent. Television, Inc., 126 F.3d 70 (1997); Sandoval v. New Line Cinema Corp., 147 F.3d 215 (1998); VMG Salsoul v Ciccone, 824 F. 3d 871 (9th Cir. 2016). *See infra* Part II.

[28] *Supra* note 27 (citing cases; only *SalSoul* is the musical work case).

complexity, resets the *de minimis* defense for effective use by courts and litigants, and leaves the thornier questions of copyright infringement and fair use defenses for more involved copyright disputes.

The Article proceeds as follows. Part I discusses the early history of the *de minimis* doctrine and its 19th century origins in equity, situating its essential role outside the statutory framework to maximize judicial resources and shortcut wasteful lawsuits. Part II puts this history in context of three eras of *de minimis* cases, "the Early Era," the "Transition Era," and the "Contemporary Era." It explains the various characteristics of the cases from each of these eras and describes several exemplary cases to illuminate each time period. In doing so it highlights patterns that eventually resolve into a *de minimis* defense that is clearer and more efficacious. Part III describes the *de minimis* data set as a whole, the method for collecting and analyzing the cases, and notable trends among the three eras, further explaining the patterns in Part II. The analysis in Part III specifically connects the themes of the "Eras Tour" in Part II with a quantitative analysis of the data, including focus on the characteristics of the cases.[29] Surprising features of more recent *de minimis* cases emerge from this analysis, some are detrimental to judicial efficiency and others support it. Detrimental features include a wider variety of *de minimis* standards that complicate the terrain. Also, some standards improperly confound *de minimis* with substantial similarity, thwarting early dismissal and rendering the defense ineffective. Beneficial features include reviving the "technical use" standard for the *de minimis* defense (a non-actionable copying of a whole work), which is a historical anchor of the defense. Another beneficial trend is courts' frequent countenance of defendant's copying *whole* pictorial works in the internet age when images are more essential than ever to communication.

Part IV combines these trends and their features to propose a clarified *de minimis* standard to strengthen the efficacy of the defense. It explains that the narrowing and complicating of the *de minimis* defense is a recent trend only in the "contemporary era," when copying has become ubiquitous and harm from *de minimis* copying is debatable. But laudable patterns preserving the historic defense

[29] Those case characteristics include: forms of *de minimis* alleged; the kinds of works at issue; the identity of the parties; the change in evaluative factors and legal standards for a *de minimis* analysis; and the disposition of cases (including the presence or absence of fair use). *See* Part III.

are worth highlighting and strengthening for a revamped and clarified standard to serve judicial economy. The *de facto* narrowing of the *de minimis* defense through more complicated standards and broader liability for even insignificant copying needs to stop. Instead, a standard available on motion to dismiss, either *sua sponte* or by defendant's motion, would combine quantitatively small amounts of copying with whole copies that are qualitatively insignificant as within the scope of the *de minimis* defense. This embraces and facilitates the digital era's new modes of communication that rely on whole visual works such as photographs, images, and graphic art (think emojis, memes, and background visuals) which are and should continue to elude copyright liability when used referentially, informationally, in transitory or minimized fashion, or are otherwise substantively insignificant to the Defendant's work. This comports with copyright policy and, we argue, can be solidified with modest practical changes that are anchored in the already established doctrinal framework for the defense. Doing so will revitalize the *de minimis* copyright defense for the digital age so that it assures judicial efficiency and aligns with purposes of copyright in the 21st century.

In a case decided in the first year of the 21st century, the copyright *de minimis* defense did not prevail but the Court of Appeals for the Second Circuit nonetheless explained its importance.

> The *de minimis* doctrine is rarely discussed in copyright opinions because suits are rarely brought over trivial instances of copying. Nonetheless, it is an important aspect of the law of copyright. Trivial copying is a significant part of modern life. Most honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, but for the *de minimis* doctrine, would technically constitute a violation of law. We do not hesitate to make a photocopy of a letter from a friend to show to another friend, or of a favorite cartoon to post on the refrigerator. … Waiters at a restaurant sing "Happy Birthday" at a patron's table. When we do such things, it is not that we are breaking the law but unlikely to be sued given the high cost of litigation. Because of the *de minimis* doctrine, in trivial instances of copying, we are in fact not breaking the law. If a copyright owner were to sue the makers of

> trivial copies, judgment would be for the defendants. The case would be dismissed because trivial copying is not an infringement.[30]

This Article explores three eras of *de minimis* cases in light of the above statement of doctrine. It improves our understanding of copyright's *de minimis* defense, which enhances judicial efficiency by cabining actionable claims to non-trivial copyright infractions. The Article thereby elucidates the contemporary harm copyright law aims to prevent and the benefits that non-actionable copying promotes. Doing so advantageously adjusts copyright's contours for its optimal application in the digital age.

I
Historical Origins

Webb v. Powers (1847) may be the earliest incarnation of the *de minimis* doctrine in U.S. copyright law.[31] It is the oldest case we identified that expressly uses the term "*de minimis*" in a context separate from fair use. Although fair use arose several years earlier in 1841, and was present in fair abridgement cases even earlier, *Webb* marks a distinct development.[32] Notably, both *Folsom v. Marsh*, which is credited with creating the modern fair use doctrine,[33] and *Webb v. Powers*, the first U.S. copyright case we identified as relying on the *de minimis* defense, were decided by the same court in the same decade.

Webb quotes *Folsom* only once, yet the court's analysis proceeds like a modified fair use analysis, focusing exclusively on the quantity and significance of the material copied.[34] From this decision, we see the origins of the copyright *de minimis* doctrine as an independent defense to infringement. At this early stage, the *de minimis* inquiry centered on at the "nature and value of the parts copied"

[30] Davis v. Gap, Inc., 246 F.3d 152, 172 (2d Cir. 2001).

[31] Webb v. Powers, 29 F. Cas. 511 (C.C.D. Mass. 1847). *See* Bracha, *Not De Minimis*, *supra* note 3, at 184 (confirming the view that *Webb* is the earliest case).

[32] *See* Matthew Sag, *The Pre-History of Fair Use*, 76 Brook. L. Rev. 1371 (2011) (showing the pre-history of *Folsom* as including fair abridgement cases that are consistent with *Folsom* and fair use cases thereafter); Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841).

[33] *See* L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. Intell. Prop. L. 431, 431 (1998).

[34] The court bases its decision on the Master's written analysis. The court considers the "nature and value of the parts copied, being chiefly definitions and descriptive epithets" and that are "so few and unimportant in number and value compared to the whole work." This resembles what eventually becomes fair use factors one and three. *Webb*, 29 F. Cas. at 519 (paragraph beginning "Believing").

and whether they are "so few and unimportant in number and value compared to the whole work."[35] That formulation remained the central inquiry well into the late twentieth century.[36]

In *Webb*, publisher of the book *Flora's Interpreter* alleged that the defendant's *The Flower Vase* infringed his copyright. Both books were botanical references containing categorizations and descriptions of flowers. The plaintiff alleged, in particular, that the defendant copied 20 of 148 definitions, about 156 words in total, from *Flora's Interpreter*.[37] The defendant admitted she relied on and "meant to use the plaintiff's book."[38] The court nonetheless found no infringement, in part because the defendant's book was "suited for a different class of readers."[39] The court further explained that plaintiff's own work clearly derived from other botany books, and many of the flowers "could not be described in any other way, if described naturally and truly."[40] Beyond what may be considered imperceptible market harm and copying of uncopyrightable subject matter, the court confirmed that defendant did copy some "small part of the novelty in the arrangement" and "though small in value, such an imitation or appropriation … may be actionable … and the subject of an injunction, perhaps if easily separated from the rest of the book."[41] The court nonetheless determined that no separation was possible (on account that the copying of original material was based on organizational features), and that not only was the Master correct to refuse an injunction, but no damages would issue either.

> [T]he part of the arrangement claimed to be original by the plaintiffs … was hardly sufficient to justify an injunction. A novelty in arrangement, especially so trifling as this, without any new material connected with it, seemed … to be of questionable sufficiency to be protected by a copyright. The Master seemed to be of the same opinion, on the grounds of '*de minimis* non curat lex.' ldots. It would generally be equitable and just to let the party, under such circumstances, seek

[35] *Webb*, 29 F. Cas. at 519.
[36] *See infra* Part II.A and accompanying notes.
[37] *Id*. at 516–17.
[38] *Id*. at 520.
[39] *Id*. at 518.
[40] *Id*. at 519.
[41] *Id*. at 519.

> redress for it by damages in a suit at law. It is not a suitable case for the exercise of a peremptory injunction, which is chiefly to aid legal rights, and in cases of copyrights runs against specific parts copied. It is usually done to work substantial justice between the parties, rather than destroy the whole book of the defendants for the small infringement in the arrangement, if otherwise it was novel, and unexceptionable, and useful to the community. This conclusion renders it unnecessary to decide on the point how far the conduct of the plaintiffs … should bar this application, though redress might perhaps be still had at law.[42]

In this passage, we see combined four related observations: (1) minimal copyrightable subject matter, (2) no substitutional market harm, (3) quantitatively small and qualitatively insignificant amounts of copying, and (4) the problem of enjoining the distribution of a whole work based on "unexceptional" and "useful" similarities. The decision refers throughout (and cites in full) to the Master's report, the crucial part of which says "whether I regard quantity or value, I am compelled to conclude that the part of the materials copied by the defendants, is too insignificant in character for the law to notice. I therefore find that there is in no respect an infringement, by the defendants, of the copyright of the plaintiffs."[43] It is a rich case to inaugurate the *de minimis* defense in copyright, tied as it is to the many other reasons a copyright infringement claim could fail. Notably, it *lacks* an analysis of substantial similarity because, of course, the plaintiff's and defendant's books did not resemble each other at all. The case concerned copying only very small parts, not a whole work, and thus it challenged existing conceptions of how copyright law protects authors.

Note how in *Webb*, the court accepts the Master's determination in large part because injunctive relief was sought to bar the publication and distribution of Defendant's book for the cause of reproducing only 156 words. The court also accepts that there might have been an action in law for nominal damages – which means there is perhaps a technical violation of copyright – but that the infringement was "too insignificant in character for the law to notice."[44] Legal damages were

[42] *Id*. at 520.

[43] *Id*. (Master's Report, note 2 of Synopsis on Westlaw). This origin of the *de minimis* doctrine as a defense to infringement may have even older roots in debates over the quantum of creativity required for a copyright to subsist.

[44] *Id*.

not usually available in a court of equity, and the case was dismissed. That the court seemed limited by the injunctive remedy, which was the means of copyright enforcement at the time, reinforces the conclusion that defendant committed no cognizable copyright harm.[45] Scant remedies at law – nominal monetary damages – may still have been feasible in this case "only to the extent or value of the encroachment"[46] by the defendant although both the Master and the court seemed doubtful given the very small amount of copying.

In the 1840s and earlier, copyright largely extended only to books as published; abridging or quoting from books was not infringement.[47] *Webb v. Powers* is therefore an odd infringement case, except that it comes on the heels of *Folsom v. Marsh*, in which Justice Story held that an abridgement was an infringement.[48] That case concerned defendant's 866 page abridgment, which copied 353 pages from a 6,763 page biography of George Washington.[49] L. Ray Patterson writes convincingly that the legacy of *Folsom v. Marsh* is to *expand* copyright's monopoly by redefining infringement to include some abridgments, despite the court admitting that "a fair and bona fide abridgment of an original work is not a piracy of the copyright of the author."[50]

[45] Before the 1909 Act, monetary damages for infringement were small, usually base on "per sheet" copying of whole works and injunctions not damages were the main form of remedies. "During the late eighteenth and throughout the nineteenth centuries, U.S. law allowed copyright owners to be awarded a statutorily set penalty of 50 cents, later increased to $1, per infringing sheet found in the defendant's possession. For several decades, the per sheet penalty was the only monetary remedy that could be obtained from common law courts, although later amendments generally enabled copyright owners to recover actual damages in common law courts, or if the suit was brought in equity, an accounting of the defendant's profits along with injunctive relief. The legislative history of the Copyright Act of 1909 is replete with expressions of dissatisfaction with the per sheet remedy. This dissatisfaction was due in part to the penal character of this remedy which caused courts to construe it narrowly, and in part to the rigidity of rules about which remedies for infringement were available at law or in equity." Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 447–78 (2009).

[46] Webb v. Powers, 29 F. Cas. 511, 520 (C.C.D. Mass. 1847).

[47] Patterson, *supra* note 33, at 431.

[48] Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

[49] *Id*.

[50] *See* Patterson, *supra* note 33 (describing several myths about Folsom and its legacy as a turning point in US copyright law from being a statutory monopoly to a proprietary right that significantly diminished the public domain). *But see* Sag, *supra* note 32 (describing the important history of fair abridgement before Folsom as the "pre-history" of fair use as we know it today and *Folsom* as part of a continuum rather than as inaugurating a new trajectory in copyright law).

In *Folsom*, Justice Story explained that defendant's use is not "fair" because "so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another."[51] Justice Story's explanation is based on "a theory of unjust enrichment"[52] and focuses on quantity taken and market harm, but is further qualified by other considerations, such as "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[53] Justice Story explains that "none are entitled to save themselves trouble and expense, by availing themselves, for their own profit, of another man's works, still entitled to the protection of copyright."[54] The Supreme Court would eventually overrule this latter statement about "sweat of the brow," but not until 1991 and after a century of disputes about whether in the absence of originality the author's labor alone justifies copyright protection.[55] In the meantime, the *de minimis* doctrine and copyright fair use take root only six years apart as two related but distinct considerations in an equitable assessment of infringement defenses.

Six years later, *Webb* did not engage in a fair use analysis presumably because 156 words were just too few for a market substitutional effect. The 1831 Copyright Act gave the copyright holder "the sole right and liberty of printing, reprinting, and vending" the copyrighted work.[56] There was no statutory basis for a finding of infringement "that includes the copying of a portion (even a small portion) of a copyrighted work either in form or substance."[57] But since *Folsom* opened the door to infringement determinations based on the quantity and quality of the copied material "and the degree in which the use may … supersede the objects[]

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[51] *Folsom*, 9 F. Cas. at 348.

[52] Patterson, *supra* note 33, at 440.

[53] *Id*.

[54] *Folsom*, 9 F. Cas. at 349.

[55] Jessica Silbey, *A Matter of Facts: Copyright's Fact-Exclusion and its Implications for Disinformation and Democracy*, 70 J. Copyright Soc'y 365 (2024) (describing this debate and its culmination in *Feist*). *See also* Robert Brauneis, *The Transformation of Originality in the Progressive-Era Debate over Copyright in News*, 27 Cardozo Arts & Ent. L.J. 321, 364 (2009); Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 Colum. L. Rev. 338 (1992).

[56] Copyright Act, ch. 16, § 1, 4. Stat. 436–39 (1831).

[57] Patterson, *supra* note 33, at 441. *See also* Sag, *supra* note 32, at 1380–93 (describing scope of copyright protection as wholesale reproduction of books and "colorably shortened" abridgements).

of the original work,"[58] courts could now consider harm to plaintiffs from *partial* copying as weighed against the benefits of such minimal copying to readers and other writers.

Webb was not about piracy; it was a case about whether copying helpful material from one book to include in another without laboring to produce those portions oneself is the kind of copying copyright law should care about. *Webb* adapted *Folsom v. Marsh* for those situations in which no copies were made, but some small amount of copying occurred. When the court in *Webb* decided the case as a matter of equity in defendant's favor, it correctly dismissed the case, characterizing it about "trifles with which the law should not concern itself."[59] *Webb* sprouted a new copyright doctrine from *Folsom*'s fair use language and held that some small amount of copying was "hardly sufficient to justify an injunction" and was defensible not because it was a fair use but because it was trivial and too "insignificant in character for the law to notice."[60] *Webb v. Powers* is cited well into the mid-20th century for this holding that defendant's copying of 156 words from Plaintiff's botany textbook was an "insubstantial invasion" of Plaintiff's copyright for the court to take notice.[61]

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[58] *Folsom*, 9 F. Cas. at 348.

[59] *See supra* note 1.

[60] Webb v. Powers, 29 F. Cas. 511, 520 (C.C.D. Mass. 1847) (citing Master's report); Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong., Fair Use of Copyrighted Works 1 (Comm. Print 1960) (report by Alan Latman) (submitted as part of the 1976 Copyright Act revisions) (acknowledging the indebtedness of *de minimis* doctrine to fair use and that they are importantly separate doctrines).

> In certain situations, the copyright owner suffers no substantial harm from the use of his work. This may be due to the small amount of material used. Here, again is the partial marriage between the doctrine of fair use and the legal maxim *de minimis* non curat lex. Of course, the view has frequently been expressed to the effect that 'if the taking is not sufficient to be substantial the question of fair use does not arise.' Yet Judge Carter has stated that although a fair use can never be 'substantial,' it may be 'extensive.' These apparent contradictions suggest that there is a borderland between (1) the insignificant amount of appropriation which could never, regardless of purpose, effect, acknowledgment or intent, amount to infringement and (2) the amount of appropriation which, in every case constitutes infringement. Within this borderland, the amount used may, in conjunction with other factors, be insufficient to exceed the bounds of fair use.

[61] Brief for Respondents at 35, Columbia Broadcasting System, Inc. v. Loew's Inc., 356 U.S. 43 (1958) (No. 90), 1957 WL 87601.

The *de minimis* defense originates with the Court of Chancery as a "maxim of equity" and thus was correctly applied in *Webb*.[62] With roots centuries old, the function of general common law doctrine is "to place outside the scope of legal relief the sorts of intangible injuries, normally small and invariably difficult to measure, that must be accepted as the price of living in society."[63] As Minnesota's highest court explained in 1908, the maxim addresses "mere trifles and technicalities" that "must yield to practical common sense and substantial justice."[64] Over centuries, the *de minimis* doctrine was applied across many legal areas in which it declared diverse notions of "value" trivial (including "absolute values and relative values, monetary values and human values, public values and private values").[65] Beginning with *Webb v. Powers*, copyright law was part of this history.

Between 1847 and 1909 (the enactment date of a new Copyright Act, which introduced statutory damages[66]), there is one reported case that arguably considers the *de minimis* defense to defeat an infringement claim.[67] The one exception is *List Publishing Co. v. Keller* (1887). It concerns rival "social" directories, and the court determined that defendant infringed plaintiff's directory based on the copying of 39 fake entries.[68] Its statement that "the compiler of a general directory is not at liberty to copy any part, however small, of a previous directory, to save himself the

[62] Jeff Nemerofsky, *What Is a "Trifle" Anyway?*, 37 Gonz. L. Rev. 315, 323 (2001).

[63] *Id*. (citing 27 A Am. Jur. 2d *Equity* § 118, at 599 (1996)).

[64] Goulding v. Ferrell, 117 N. W. 1046, 1046 (Minn. 1908) (a suit to collect damages for injury to a sidewalk, for which verdict of $2 in damages and $43 in costs was returned).

[65] Veech & Moon, *supra* note 2, at 557–78 (describing values and deriving factors to consider when applying the doctrine, including practicality, intent, and mutuality). *See id.* at 542 ("This early development of the maxim indicates that it is a rule of reason, a substantive rule that may be applied in all courts and to all types of issues."). *See also* Frederick McKean, *De Minimis Non Curat Lex*, 75 U. Pa L. Rev. 429 (1927) (describing when the doctrine best applies and is otherwise inapplicable); Jeff Nemerofsky, *What is a Trifle Anyway?* 37 Gonz. L. Rev. 315 (2001) (same, describing a range of fields in which the doctrine is inapplicable, including land, constitutional rights, class actions, criminal law and fiduciary responsibility).

[66] *See* Pamela Samuelson and Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 448 (2009).

[67] *See* Bracha, *Not De Minimis*, *supra* note 3 (citing sporadic uses of the term *de minimis* in copyright cases that has little bearing on the infringement test). See *infra* Part III for description of how we identify *de minimis* cases. Among the copyright treatises at this time, Eaton Drone, A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States (1879) and George Curtis, A Treatise on the Law of Copyright (1847), we found no mention of the *de minimis* defense.

[68] List Publishers Co. v. Keller, 30 F. 772 (C.C.S.D.N.Y. 1887).

trouble of collecting the materials from original sources," expresses the contestable notion that there is no such thing as *de minimis* copying.[69] It also paraphrases the "sweat of the brow" doctrine from *Folsom* quoted above, which the Supreme Court eventually overruled.[70] *List Publishing* is plausibly about how much copying is too much (just 39 fake entries) but also about how to prove unauthorized copying of a factual work (by seeding fake entries into a factual database). *List Publishing* is cited in only two mid-century cases discussing the *de minimis* defense.[71] And its statement that a subsequent author cannot save themselves time by copying from another is no longer good law.[72]

These are the early origins of copyright's *de minimis* defense. The nineteenth century *de minimis* doctrine evaluated the nature and value of the parts copied compared to the whole work in the context of copyright law's goals: promoting the progress of science through incentivizing the production of authored works by preventing market substitution.[73] From here, the *de minimis* defense blossomed into an independent defense for most of the twentieth century.[74] More recently, however, and since the beginning of the twenty-first century, our data shows that the significance of the *de minimis* defense has been dwarfed by fair use and the *de minimis* analysis partially colonized by the substantial similarity test.[75] To be sure, the *de minimis* defense began as an element of fair use, sharing with it the effect of exempting from infringement copying that was not a market substitute.[76] But fair use today does not only concern works that merely contain small parts of another copyrighted work. It covers much more, as the statutory preamble explains.[77] The

[69] *Id.* at 773.

[70] Feist Publications, Inc. v. Rural Telephone Service, Co., 499 U.S. 340 (1991).

[71] G.R. Leonard & Co. v. Stack, 386 F.2d 38, 41 (7th Cir. 1967) (technical use as *de minimis*); Nat'l Rsch. Bureau, Inc. v. Kucker, 481 F. Supp. 612, 615 (S.D.N.Y. 1979) (*de minimis* in terms of damages).

[72] *Feist Publ'ns, Inc.*, 499 U.S. at 359–60.

[73] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

[74] See *infra* Part III for charts depicting independence of substantial similarity from *de minimis* assessments, especially before 1976.

[75] *See infra* Part III at 73 and accompanying notes.

[76] *See* Webb v. Powers, 29 F. Cas. 511, 519 (C.C.D. Mass. 1847) (noting the importance that the defendant's product was not "a substitute of the same class" for the plaintiff's product).

[77] 17 U.S.C. § 107 (2018) ("[T]he fair use of a copyrighted work, including such use by reproduction in copies of phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."). For analysis of the varieties of fair use defenses, see Michael Madison, *A Pattern-Oriented Approach to Fair Use*, 45 Wm. & Mary L. Rev. 1525, 1540 (2004); Barton Beebe, *An*

de minimis defense became useful and relevant, as *Webb v. Powers* demonstrates, in its distinction from fair use and misappropriation (one standard for which became "substantial similarity").[78] Yet, as both fair use and misappropriation standards evolve to become more complex and fact-driven, so does the *de minimis* defense when it was supposed to be a quick end to a frivolous lawsuit. We track that evolution below.

II
The Eras Tour (With Apologies to Taylor Swift)

Our comprehensive dataset of *de minimis* cases between 1847 and 2022 includes only 178 court opinions. (We discuss the collection and coding of these cases in Part III.) At first, we were surprised by this small number. But in the context of assessing the contested evaluation of a "trifle," finding 178 examples is significant.

As already mentioned, the earliest *de minimis* case is *Webb v. Powers* from the District of Massachusetts in 1847.[79] After that, the *de minimis* defense does not occur with any regularity until the new century.[80] In 1903, copyright's originality doctrine expands to assure that more works are covered by copyright protection.[81] And then the new 1909 Copyright Act further broadens copyrightable subject matter, scope, and remedies by adding a new statutory damage regime.[82] Both events make exceptions and limitations to infringement even more important, which we believe roused the *de minimis* defense from its mid-19th century roots. As we describe below, this first Era contained twenty-one *de minimis* cases.

Empirical Study of U.S. Copyright Fair Use Opinions, 1978 – 2005, 156 U. Pa. L. Rev. 549, 616 (2008); Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537, 2549 (2009).

[78] *Webb*, 29 F. Cas. at 517 (holding that the key factor in determining whether infringement was present was whether the defendant's book was "substantially a copy" of the plaintiff's).

[79] *Webb*, 29 F. Cas. at 520. *See* discussion *supra* Part I.

[80] Beginning, we believe, with *West Publ'g Co. v. Edward Thompson Co.*, 169 F. 833, 884 (E.D.N.Y. 1909).

[81] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 239 (1903) (noting that pictorial illustrations, including advertising posters, are entitled to copyright protection).

[82] Copyright Act of 1909, Pub. L. No. 60–349, 35 Stat. 1075, 1075–1077 (1909) (broadening categories of works protected and extending the term of protection). *See* Samuelson & Wheatland, *supra* note 66, at 448 (describing "a new generalized regime of statutory damages, available 'in lieu' of actual damages and profits, which could overcome the severe difficulties of proof of damages and profits about which participants in the legislative history had so vigorously complained").

After the 1976 Act, defendants raise the *de minimis* defense with more frequency. Notably, fair use was codified in the 1976 Act, but the *de minimis* defense was not. Nonetheless, the variety and quantity of cases alleging *de minimis* copying as a defense to infringement rose substantially after 1978 to 157 cases, affirming its common law roots and its significance to court cases.[83] Several features of a changing society fuel this upward trend of *de minimis* cases. First, unauthorized copying becomes ubiquitous with copying technology commercialized and accessible (think photocopy machines, home recording technology, and the rise of personal computers).[84] Second, the entertainment industry's licensing and distribution systems become sophisticated and complex, and freelance and independent authors are asserting copyright claims.[85] Third, mid-20th century infringement standards evolve, including the doctrines of fragmented literal similarity and substantial similarity, allowing for reproduction infringement based on much smaller parts of the whole work.[86] These technological and industry changes, combined with infringement doctrines evolving to become notoriously complex and quixotic,[87] create the need for a more robust *de minimis* defense, which is asserted with more frequency in the Third Era.

In this part, we divide the cases into Eras related to these trends and legal milestones. Within each Era, we discuss patterns in the parties' identities, works, and the legal standards. A noticeable trend is that in the Early Era cases are between competitors and the works at issue arguably compete in the same market (*e.g.*, book

[83] *See infra* Part III. and Figures 1–3 for upward trend in cases.

[84] *See, e.g.*, Dana A. Scherer, Cong. Rsch. Serv., R43984, Money for Something: Music Licensing in the 21st Century (2018) ("As technological changes made it possible to reproduce sound recordings on tape cassettes in the late 1960s and in the form of digital computer files in the 1990s, Congress extended exclusive reproduction and performance rights to sound recordings as well.").

[85] *See infra* Part II.B (describing industry trends).

[86] Arnstein v. Porter, 154 F.2d 464, 469 (2d Cir. 1946); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54–56 (2d Cir. 1936). For doctrinal and historical analyses of the substantial similarity tests, see Pamela Samuelson, *A Fresh Look at Tests for Non-Literal Copyright Infringement*, 107 N.W. L. Rev. 1821 (2013), Shyamkrishna Balganesh, *The Questionable Origins of the Infringement Test*, 68 Stan. L. Rev. 791, 796–97 (2016) (describing how the jury-centric approach to copyright infringement developed in *Arnstein* continues to influence copyright law and is responsible for its subjective and unpredictable nature but should be reconsidered given its roots in repudiated judicial philosophy); Boyden, *supra* note 25, at 1093 (describing how "total concept and feel" standard for infringement appeared at a critical juncture for the federal judiciary mid-century to retain decision-making power in infringement cases, but in fact eventually yielded more jury determinations, with anarchic results).

[87] *See* Boyden, *supra* note 25, at 1093 (describing infringement determinations as "anarchic").

publisher suing another book publisher). By Era Three, however, the disputes are less often between parties offering arguable market substitutes, and instead they are between putative licensees and licensors (*e.g.*, a visual artist suing a television company for hanging art in the background of a television show set). This later breed of lawsuit includes plaintiff complaining of defendant's failure to license plaintiff's work (or a part of it) as an input into defendant's work, even when the requirement to pay remains debatable under copyright law. This new claim for copyright harm–not clearly market substitution, but instead the rise of a kind of in-licensing or rights/clearance practice–puts pressure on the *de minimis* defense, which immunizes fragmentary, partial, or fleeting copying of authored works. As we explain *infra*, the rise of this new kind of in-licensing claim harms the *de minimis* defense and too easily shifts the court's attention to the more fact-intensive and costly fair use analysis. We urge a correction of this trend at the end of the Article with clearer *de minimis* guidelines and recommendations to litigants and courts.

A. The Early Era (until 1977)

The Early Era, covering the 19th century and the first half of the 20th century, contains only 21 cases. Of those, only 5 ended in a successful *de minimis* defense (including *Webb v. Powers*).[88] The cases in the Early Era are largely between competitors in the same or closely related industries. They mostly concern directories, advertising catalogues, manuals and textbooks, high-information literary works of the technical or non-fiction kind. In all but four of the cases, copying is fragmentary or partial, and the court's *de minimis* analysis while very brief features quantitative considerations.[89] It makes sense that few *de minimis* cases arose in the first half of the 20th century, because copyright law still largely was thought to prohibit only copying of the whole work akin to market substitution.

[88] In addition to *Webb v. Powers*, 29 F. Cas. 511 (C.C.D. Mass. 1847), the *de minimis* defense cases in which defendants prevail are: *West Publ'g Co.*, 169 F.833; *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943); *G.R. Leonard & Co.*, 386 F. 2d 38; and *Toulmin v. Rike-Kumler Co.*, 316 F.2d 232 (6th Cir. 1963).

[89] The four cases of whole copying in which *de minimis* defense was alleged occurred in the last decade of this era, and in none does the defense succeed. They are: *Mills Music v. Ariz.*, 187 U.S.P.Q. (BNA) 22 (D. Ariz. 1975); *Neal v. Thomas Organ Co.*, 325 F.2d 978 (9th Cir. 1964); *Blumcraft of Pittsburgh v. Newman Bros.*, 159 U.S.P.Q. (BNA) (S.D. Ohio 1968); *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975).

When addressing defendant's *de minimis* defense, the Early Era court often invokes a cursory standard with a single metric (usually quantitative) or no standard at all, and it simply says the use is or is not *de minimis*. Because most of these cases are fragmentary or partial copying cases, when the court finds infringement there is usually a determination that the copying has replaced the value of the original work in the marketplace. The substantial similarity standard for infringement was still developing into the one we recognize today, and it is rare in the Early Era for courts to use the phrase. Instead, courts say, for example, that "it is necessary that a substantial part of the copyrighted work be taken"[90] or the copying was "not substantial" or "important."[91]

One such case, *Mathews Conveyor Co. v. Palmer-Bee Co.* (1943), is a dispute between competing manufacturing companies in which Plaintiff alleged a range of contract and unfair competition claims.[92] The copyright claim concerns their respective catalogues and occupies only a small part of a much larger opinion devoted to discussing the agency and contract relationship between the parties.[93] Defendant allegedly reproduced as sketches several photographs from Plaintiff's catalogue.[94] The court described the defendant's catalogue sketches of machine parts and materials as not being exact copies and being from different angles than the plaintiff's catalogue photographs.[95] Also, the status of plaintiff's copyright was disputed because the catalogue appeared to be distributed without notice of copyright.[96]

Notwithstanding these weaknesses in plaintiff's case, the Court of Appeals went on to decide

> "the issue on this phase of the case . . . from a consideration whether there has been such a substantial infringement of plaintiff's right . . . [and] that in order to sustain an action for infringement of copyright, a substantial copy of the whole, or a material part, must be reproduced."[97]

[90] *Mathews Conveyer Co.*, 135 F.2d at 85 (citing Hoffman v. Le Traunik, 209 F. 375, 379 (N.D.N.Y 1913)).
[91] Advertisers Exch. v. Hinkley, 101 F. Supp. 801, 805 (W.D. Mo. 1951)
[92] *Mathews Conveyer Co.*, 135 F.2d at 76–77.
[93] *Id.* at 84–85.
[94] *Id.* at 84.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 84.

As to the *de minimis* defense, the court said "on the principle of *de minimis non curat lex*, it is necessary that a substantial part of the copyrighted work be taken."[98] It cites *Folsom v. Marsh* for the proposition that "whether so much has been taken as would sensibly diminish the value of the original" is also a factor.[99] The court then affirms the denial of Plaintiff's copyright infringement claim, citing several reasons, including "that any injury to the plaintiff from defendant's action in regard to these two sketches … is obviously infinitesimal; and that the alleged appropriation of the idea or form or perspective of plaintiff's two cuts from among the hundreds in its catalogue, is insubstantial as an infringement of plaintiff's copyrighted book."[100]

We see in *Mathews* the characteristic feature of competitors fighting over market share and harnessing dubious copyright claims to do so. In this case, the court conceives of copyright infringement as a cause of action that prevents injury to the value of the work as a whole and does not consider the individual parts of the work (here photographs made into sketches) as separate from the catalogue.[101] It further assesses the reproduction of two of the photographs into sketches as "insubstantial" and any injury suffered as "infinitesimal."[102] The *de minimis* analysis, infringement assessment, and fair use question reinforce each other, and also reinforce the conclusion of no copyright liability, but they are nonetheless described as distinct.

Another case from this era, *Advertisers Exchange v. Hinckley* (1951), involved a contract dispute between industry players in advertising.[103] Plaintiff provided copyrighted advertisements to defendant-advertiser for redistribution in local papers in a select geographic area for a fixed annual fee.[104] Defendant purportedly cancelled the contract with Plaintiff but continued to use the copyrighted materials (twenty-nine advertisements) for more than eighteen months thereafter in a local newspaper with a circulation of 3,261 copies.[105] The court spends almost no part

[98] *Id.* at 85.
[99] *Id.* at 85.
[100] *Id.* at 85.
[101] *Id.* at 85.
[102] *Id.* at 85.
[103] Advertisers Exch. v. Hinkley, 101 F. Supp. 801 (W.D. Mo. 1951).
[104] *Id.* at 802–03.
[105] *Id.* at 803.

of the opinion deciding the issue of *de minimis* raised by the defendant. The extent of its ruling on that matter is this: "Compared to the amount which had been sent to the defendant from which he might choose such as he desired to use, it is true the amount was small, but it was important, and I think a substantial part of the material was used by defendant over this period of approximately 20 months."[106]

Most of the opinion discusses whether the contract was in fact terminated and if so, what the damages should be. As to the latter issue, the court questions whether copyright or contract damages makes sense. A calculation of copyright damages "runs into a ridiculous amount," the court says, and "it never was intended that the statute should apply in a case of this kind."[107] Because the contract was for services—the provision of advertising copy for a fixed annual sum no matter how much advertising copy the defendant used—the court rejected the idea of per-copy damages.[108] "The only actual damages the plaintiff could possibly have suffered would be the loss of the sale of service to some other merchant in the community, which amounted to $156 a year, under the terms of the contract."[109]

We see in *Hinckley*, as in *Mathews*, industry siblings with arm's-length agreements in place. When the relationship breaks down, the plaintiff tries to use copyright law (which is arguably a marginal aspect of the business relationship) to recover damages from what is an obvious breach by the defendant of contractual terms. As in *Mathews*, the *Hinckley* court focuses on quantitative metrics to assess whether the copying is *de minimis* because, while each of the advertisements were copied as a whole, the amount of time the advertisements circulated was considered central to Plaintiff's injury. The works are copyrightable literary works with pictorial components, and yet the court assesses the harm from copying in terms of lost contract revenue, substantially mitigating the damages under copyright law that would have been substantially higher given the statutory damages regime. This mitigation perhaps reflects the "small" number of unauthorized copies relative to the amount to which Defendant had access under the contract, counterbalanced by the "importance" of the unauthorized copies relative to the parties' relationship and the duration Defendant continued to use the advertisements after terminating the

[106] *Id.* at 805.
[107] *Id.* at 805–06.
[108] *Id.* at 806.
[109] *Id.* at 806.

contract. Unlike *Mathews*, *Hinckley* contains discussion of neither the infringement standard nor fair use. When the Defendant raises the *de minimis* defense in response to the Plaintiff's copyright claim, the court simply says that the Defendant's actions are not *de minimis*.[110] Instead of assessing copyright damages, the court rewards the plaintiff under the contract, indicating *sub silentio* that the plaintiff's injury only tangentially relates to unauthorized copying.[111]

In these cases, courts accept the fact of unauthorized copying of copyrightable material and assess whether that copying crossed a threshold of harm that copyright law aims to prevent. That harm appears to be the expected investment in the material and/or the value of the material copied measured by the context of the overall business transaction. The pithy *de minimis* discussion in light of the lengthier descriptions of the business transactions reflects the courts' appreciation of the relevance of the parties' business relationship to assessing harm from copying of the business materials. We think it fair to characterize these as competition cases in which *de minimis* relates to the extent of unfairness of the copying (but not the copying itself) and whether the copying interfered with the plaintiff's business expectations. Whether we call these examples of copying "technical violations"—copying without cognizable harms—or copying that does not meet the quantitative threshold for infringement is reasonably debatable. But neither of these cases (and most cases in this era) do not evaluate infringement in a manner that resembles the substantial similarity analysis we have come to know.[112] Nonetheless, the cases from this Early Era anchor the common law *de minimis* defense in copying that is unrelated to, or has so insubstantial an effect on, the plaintiff's business interests.

B. The Transition Era (1978-1997)

The second era covers the first two decades of the 1976 Act. It contains thirty cases, of which eleven ended in successful *de minimis* defenses (only three of which also involved fair use, a feature of this Era we discuss *infra* in Part III). All but one

[110] *Id.* at 805.

[111] *Id.* at 806.

[112] The application of the "substantial similarity" test today varies across circuits but shares key components. *See* Clark D. Asay, *An Empirical Study of Copyright's Substantial Similarity Test*, 13 U.C. Irvine L. Rev. 35 (2022). *See also* Boyden, *supra* note 25, at 1095 n.2 ("there is a remarkable inconsistency in every circuit surrounding the test for infringement; alternative formulations are common, sometimes within the same opinion.").

of those prevailing defendant cases concerned copying of literary works.[113] The number of *de minimis* cases in this era rises slightly as a percentage of all copyright case decisions (from 2% to 4%), but defendant win rates remains relatively the same.[114] Distinct from the Early Era, the Transition Era included literary works encompassing both fictional and non-fictional works, as well as software cases for the first time. Like the Early Era, most litigation pairs in the Transition Era are parties in the same or similar fields, and cases brought to prevent industry competition.[115]

A difference in the Transition Era and the Early Era concerns the nature of the industries and the amount of the copying. As to the industries, in this second era, we see cases disputing the copying of software.[116] And there are more entertainment companies, including television, music, and film as both plaintiff and defendant.[117] As to the amount of copying, this era introduces defendants copying plaintiffs' works in *whole* for inclusion in different works, not just parts of plaintiff's works, such as a plaintiff's sculpture in a film[118] and plaintiffs' photographs as part of an internet distribution service.[119] Thus, the Transition Era appears to inaugurate the

[113] The outlier is *Knickerbocker Toy Co. v. Azrak-Hamway Int'l Inc.*, 668 F.2d 699 (2d Cir. 1982), in which a copyright infringement claim was dismissed where a competitor copied plaintiff's toy (sculptural work) as a two-dimensional pictorial work as a sample for use to position their artwork but never distributed the image.

[114] *Compare infra* Figures 3 and 4 (rate of cases) *with infra* Figures 13 and 14 (win rates). Figure 3 compares the total number of copyright cases and *de minimis* cases. Although the count of *de minimis* cases appears to rise a small amount during this period, *de minimis* cases as a share of all copyright cases doubles from 2% to 4% (as seen in Figure 4). Figures 13 and 14 show that *de minimis* wins as a share of all *de minimis* cases remain relatively stable over this period.

[115] *See infra* Figure 5 (litigation pairs).

[116] *See, e.g.*, Computer Assoc. Int'l v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992); Vault Corp. v. Quaid Software, 847 F.2d 255 (5th Cir. 1988); Mitek Holdings Inc. v. Arce Eng'g Co., 89 F.3d 1548 (11th Cir. 1996); Micro Consulting Inc. v. Pedro Zubeldia & Medical Elec. Data Exch., 813 F. Supp. 1514 (W.D. Okla. 1990).

[117] *See, e.g.*, Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986); New Boston Television Inc. v. Ent. Sports Programming Network, 1981 WL 1374 (D. Mass. 1981); Georgia Television Co. v. TV News Clips of Atlanta, 1991 WL 204425 (N.D. Ga. 1991); Elsmere Music Inc v. Nat'l Broad. Co., 482 F. Supp. 741 (S.D.N.Y. 1980); Warner Bros. Inc. & DC Comics v. ABC, 720 F.2d 231 (2d Cir. 1981); Sony Corp. v. Universal Studios, 464 U.S. 417 (1984); Acuff-Rose Music v. Campbell, 972 F.2d 1429 (6th Cir. 1992).

[118] Amsinck v. Columbia Pictures Indus., 862 F. Supp. 1044 (S.D.N.Y. 1994).

[119] Playboy Enter. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

potential for in-licensing whole works as parts of other works.[120] Newer copyright-rich businesses are more prevalent in this era.[121]

This Transition Era also inaugurates more case variation as between plaintiffs and defendants, size of the copying, and the legal standards courts employ to evaluate the *de minimis* defense. Quantitative metrics still predominate as they did in the Early Era, but in this second era courts more frequently employ a standard that approximates fragmented literal similarity to assess whether the defendant's copying of the plaintiff's work is either *de minimis* or constitutes a cognizable copyright harm.[122] As in the first era, there are many cases in which the standard is conclusory, and the court simply accepts or rejects a finding of "*de minimis* non curat lex." But in contrast to the first era, this second era contains cases in which courts evoke "recognizability" and "substantial similarity" as relevant to the *de minimis* assessment. These more fact-intensive and plaintiff-friendly analyses become common touchpoints for the infringement standard in the third (and contemporary) era and, we argue, unnecessarily complicate the *de minimis* defense, rendering it less able to achieve its purpose of judicial economy.

This is a Transition Era because we surmise that when media companies diversify, contributors to those media companies vie for market share in the value of the distributed content, and newer media companies and networks compete with older and more established ones.[123] As copyright industries diversify, and more copyright authors claim a share of the revenue, courts struggle to determine when the defendant's copying is trivial in relation to the parties' business as a going concern and when, in contrast, copyright law should protect the plaintiff's investment in their work by forcing defendant to pay or refrain from its use. Two illustrative cases follow in which the court correctly held the defendant's use was defensible but not necessarily because it was *de minimis*. Both cases contain seeds of the doctrine's unfortunate complexification, which sprout in the Third Era.

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[120] *See infra* Figure 5 (Litigation Pairs); Figures 6.1 and 6.2 (Plaintiff and Defendant Works by Era); 7.1 and 7.2 (Forms of *de minimis*).

[121] *See id.*

[122] 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03[A][2] (defining fragmented literal similarity).

[123] For example, this era contains *Rural Tel. Serv. Co. v. Feist Publ'n*, 663 F. Supp. 214 (D. Kan. 1987), in which the new entrant Feist initially defended its copying of Rural's telephone directory with, among other things, a *de minimis* claim on the basis that the only entries that were protectible and copied were four fictional entries.

Computer Associates International v. Altai Inc. is well-known for its implementation of the "abstract-filtration-comparison" test for copyright infringement of computer software.[124] The case "deals with the challenging question of whether and to what extent the 'non-literal' aspects of a computer program … are protected by copyright."[125] The court mentions the *de minimis* defense exactly once: in the context of approving the district court's infringement analysis (using a fragmented literal similarity test) when comparing the competing programs' parameter lists and macros as part of a fragmented literal similarity test. The court writes:

> [F]unctional elements and elements taken from the public domain do not qualify for copyright protection. With respect to the few remaining parameter lists and macros, the district court could reasonably conclude that they did not warrant a finding of infringement given their relative contribution to the overall program. *See Warner Bros., Inc. v. American Broadcasting Cos., Inc.,720 F. 2d. 231, 242 (2d Cir. 1983)* (discussing *de minimis* exception which allows for literal copying of a small and usually insignificant portion of the plaintiff's work); 3 Nimmer § 13.03[F][5], at 13–74.[126]

In support of the non-infringement determination, the court cites a case and a treatise, both confusingly relating the *de minimis* defense with the infringement standard.[127] The court relies on Nimmer for his discussion of the fragmented literal similarity test, occurring when copying is exact but not comprehensive.[128] Exact copying of small portions of a copyrighted work should be *de minimis*, but not when the copying is extensive. Nimmer's discussion of fragmented literal similarity, and the cases adopting it, is a major step toward what Oren Bracha has called the doctrinal "slippery slope," whereby *de minimis* (as measured in small bits) becomes part of the substantial similarity test for infringement (as measured both quantitatively and qualitatively).[129] The court also cites *Warner*

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[124] *Computer Assoc. Int'l*, 982 F.2d 693.
[125] *Id.* at 715.
[126] *Id.* at 714–15.
[127] *Id.*
[128] *Id.* at 715.
[129] *See* Bracha, *Not De Minimis*, *supra* note 3 at 164–65 (locating the pivotal step in the slippery slope in 1986, a case from this era, in a footnote, citing Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986) ("a

Brothers v. ABC, a case from this same time period when plaintiff film company unsuccessfully alleged infringement by defendant television company of Superman (the character) in the new television show "The Greatest American Hero."[130] The defendant evoked the *de minimis* defense as part of a fragmented literal similarity test to support its argument that only a small part of a large work was copied (a character) and arguably only an idea (of a superhero).[131] The appellate court in *Computer Associates*, applying this precedent, approved the district court's finding of no infringement, saying "the district court reasonably found that [plaintiff] failed to meet its burden of proof on whether the macros and parameter lists at issue were substantially similar."[132] Here, we see the use of fragmented literal similarity test evolving to bridge the *de minimis* defense with the infringement standard, melding quantitative and qualitative evaluations into a broader substantial similarity analysis.[133] This move arguably guides courts to decide *de minimis* cases when quantitative metrics are objectively discernible and the use of the small bits are insubstantial parts of the plaintiff's work. This is a laudable and clear baseline standard for a *de minimis* defense on a motion to dismiss, and one we take up at the end of this Article. It nevertheless gets marginalized as the *de minimis* doctrine evolves to appear entangled with more complicated infringement standards (as it does in this case) and more frequent fair use defenses.

Computer Associates retains some features of the Early Era. It maintains a quantitative focus on the nature of the copying and describes a competitive situation between parties whose literary works – computer software – are thinly protected by copyright but are nonetheless valuable products for sale. The *de minimis* analysis in *Computer Associates* bridges the earlier cases, in which discrete amounts of copying were measurable as against copying of the whole work, with the newer cases in which valuable but small parts of the work are being copied (literary

taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation")).

[130] Warner Bros., Inc. v. American Broad. Co., 720 F.2d 231 (2d Cir. 1983).

[131] *Warner* says that *de minimis* "allow[s] the literal copying of a small and usually insignificant portion of the plaintiff's work." *Id.* at 242. *Warner*, in turn, cited to a Seventh Circuit decision from the Early Era, *G.R. Leonard & Co. v. Stack*, in which five listings of 90,000 were copied and the court held that was *de minimis*. G.R. Leonard & Co. v. Stack, 386 F.2d 38 (7th Cir. 1967).

[132] *Computer Assoc. Int'l*, 982 F.2d at 715.

[133] As Part III describes in more detail, the rise of the substantial similarity test with an emphasis on qualitative measures in the second era correlates with less successful *de minimis* defenses.

characters or software macros). *Computer Associates* mentions the *de minimis* defense, fragmented literal similarity analysis, and the substantial similarity test all in one paragraph,[134] evidencing the court's struggle to determine when fractional but material copying is cognizable as an infringement or when it is otherwise defensible. The defendant-friendly holding makes good sense to us, and it is followed in future decades as significant precedent.[135] But the *de minimis* aspect of the case is underappreciated and, we think, played an important role in the defendant's success.

Carola Amsinck v. Columbia Pictures Industries Inc. presents another kind of transition case.[136] It is not a case between competitors, but one in which a self-employed graphic artist, Carola Amsinck, sues a film company for its use of her whole copyright work (pastel-colored teddy bears) in several movie scenes.[137] This case is thus a precursor to the claims in which parties dispute whether distinct copyrighted works (*e.g.*, graphic art) incorporated as an input into larger and more complex copyrighted works (*e.g.*, a film) is copyright infringement.[138] Amsinck's teddy bears were made, with her permission, into a baby mobile by a toy company.[139] The company making the mobile credited Amsinck with the original design and paid her.[140] But Defendant Columbia Pictures neither gave Amsinck credit nor licensed the work (as a toy or graphic art) for use in the film.[141] The mobile appears in several scenes in the film for between two to twenty-one seconds, "with a total exposure of approximately one minute and thirty-six seconds."[142] The court describes the mobile as at times "barely visible" and at other times "in a close-up shot."[143]

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[134] 982 F.2d at 714–15.

[135] The case is cited nearly 5,000 times in the "allfeds" database on Westlaw (as of June 30, 2025).

[136] Amsinck v. Columbia Pictures Indus., 862 F. Supp. 1044 (S.D.N.Y. 1994).

[137] *Id.* A case like *Amsinck* from the same era but that comes out the other way is *Lebbeus Woods v Universal City Studios Inc.*, 920 F. Supp. 62 (S.D.N.Y. 1996) (unauthorized use of detailed drawing in the back of a film scene for approximately five minutes held infringing).

[138] *See, e.g.*, Ringgold v. Black Ent. Television, 126 F.3d 70 (2d Cir. 1997).

[139] *Amsinck*, 862 F. Supp. at 1045.

[140] *Id.*

[141] *Id.* at 1046.

[142] *Id.*

[143] *Id.*

Defendant Columbia Pictures prevails in a combination ruling that the film was not a "copy" of the mobile in the way copyright cares about, and, in the alternative, because the film's use of the copy was fair.[144] As to the first point, the court concludes that Columbia Pictures did not commit substitutional copying, which is the kind copyright law aims to prevent.[145] The court states that

> [T]o establish 'copying,' the plaintiff must prove that the defendant 'mechanically copied the plaintiff's work'; there must be some degree of permanence or the maxim '*de minimis*' applies, requiring a finding of no liability. In determining whether a use constitutes a copy, the courts look to a functional test to see whether the use has 'the intent or the effect of fulfilling the demand for the original.[146]

This invocation of *de minimis* resembles the cases from the Early Era in which courts found the defendant's copying of *parts* of the plaintiff's work to be trivial in the context of market substitution. The difference here is that the defendant is copying the *whole* of the plaintiff's work and the court's assessment of triviality relates to the minimal time the work appeared in the film and the lack of market for its filmed appearance. The court concludes that

> [T]he defendants' display of the Mobile bearing Amsinck's work is different in nature from her copyrighted design. In this matter, the defendants' use was not meant to supplant demand for Amsinck's work; nor does the film have the effect of diminishing interest in Amsinck's work. Defendant's use was not a mechanical copy. Defendants' use, which appears for only seconds at a time and can be seen only by viewing a film, is fleeting and impermanent. This Court therefore concludes that the defendants' use is not a copy for the purposes of a copyright infringement action.[147]

This resembles the technical use defense that Judge Leval evokes in *Davis v. Gap, Inc.* when he describes the singing of Happy Birthday by restaurant

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[144] *Id.* at 1047–48.

[145] *Id.* at 1047.

[146] *Id.* (quoting 3 M. Nimmer, Nimmer on Copyright, § 13.05[B], 13–192, which quotes Berlin v. E.C. Publications. Inc., 329 F.2d 541, 545 (2d Cir. 1964) (not a *de minimis* case; holding that parodic use of copyrighted lyrics is not market substitution advances)).

[147] *Id.* at 1048.

patrons, quoted earlier.[148] Whereas defendant (Columbia Pictures) used and enjoyed plaintiff's work, defendant's use and enjoyment are insignificant in light of the defendant's work as a whole and as compared to how plaintiff (Amsinck) ordinarily earns a living from her copyrighted work (*e.g.,* selling copies of the teddy bears or licensing copies of them to make mobiles). This court determines triviality, or the existence of a "trifle," in terms of the non-existence or miniscule market harm to the plaintiff. It does not consider the use of the plaintiff's derivative work in the film as a market on which the plaintiff reasonably relies, and even if it existed, the use was so fleeting or trivial to be inconsequential.

The court's determination that the defendant did not engage in copyright infringement could have ended the case. But the court nonetheless also conducted a fair use analysis, possibly, to insulate its first ruling with a second in case of appeal.[149] The fair use analysis starts with factor four and, essentially, repeats the conclusion from the first part of the opinion: "In situations where the copyright owner suffers no demonstrable harm from the use of the work, fair use overlaps with the legal doctrine of *de minimis*, requiring a finding of no liability for infringement."[150] The court explains that

> The film does not pose a threat to the market for Amsinck's work in either licensing artwork or in future sales to motion pictures. Indeed, the Court believes that, notwithstanding the lack of identification of the Mobile, its use in the film might actually increase the demand for mobiles in general, thereby benefitting plaintiff indirectly.[151]

From this statement, we learn the court does not consider the parties to be competitors in related markets; it considers the defendant's use of the plaintiff's

[148] *See supra* note 30 and accompanying text. In *Davis v. Gap, Inc.*, the court found Gap, Inc. liable for its display of the sunglasses in its advertisement and lacking both a *de minimis* and fair use defense, despite the use resembling a technical use that is often found to be *de minimis*. This is perhaps because by 2001, *Ringgold v. Black Entertainment Television*'s effect on the *de minimis* standard was to shrink its breadth and elevate the relevance of "recognizability," which the court in *Davis* emphasized given the unusual nature of the eyeglasses at issue.

[149] Amsinck v. Columbia Pictures Indus., 862 F. Supp. 1044, 1048 (S.D.N.Y. 1994).

[150] *Id.*

[151] *Id.* at 1049.

work as beyond the reasonable or customary use that would require payment.[152] The court's analysis of the third fair use factor (amount and substantiality) similarly repeats its earlier *de minimis* analysis.[153] While conceding that the defendant displays the design "in its entirety" and "used every element of the work," the court explains, "the Mobile is seen for only a few seconds at a time, and the artwork itself is visible for less than 96 seconds."[154] The court concludes that "[a]lthough generally a use does not constitute fair use if it reproduces the entire work, the Court declines to find that the defendants' short-term display of the Mobile in a film precludes a finding of fair use."[155]

The court's quantitative analysis (the amount of time the works was visible in the film) combined with an assessment of market harm as a measure of whether the use was *de minimis* resembles earlier cases about partial copying and market substitution. It also resembles later cases discussed *infra* in the Contemporary Era insofar as: the copying is whole (however brief); the parties are not competitors; and the plaintiff's work is an input to the defendant's work, albeit not in a central way (*e.g.*, not in the manner of sequels or translations).[156] Notably, however, the *Amsinck* court does not ask whether the defendant's work is "substantially similar" to the plaintiff's. Doing so would not make sense in this context. But the court does consider how visible the plaintiff's work is to viewers and how much the defendant's work focuses on the plaintiff's work, resembling a "recognizability" evaluation that eventually (and unfortunately) becomes an alternative for "substantial similarity" in similar cases in the Contemporary Era.[157] This case thus bridges the earlier

[152] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

[153] 17 U.S.C. § 107(3) ("[T]he amount and substantiality of the portion used in relation to the copyrighted work as a whole.").

[154] *Amsinck*, 862 F. Supp. at 1050.

[155] *Id.*

[156] *See infra* Part II.C and Part III (contemporary cases discussing use of whole photos used in *de minimis* manner).

[157] *See* Bracha, *Not De Minimis*, *supra* note 3 ("To add to the confusion [to the application of de minimis], the court associated such extremely trivial copying with unrecognizability by the audience."); *See* Part II.C. (Contemporary Era) and Part III (discussing evolving metrics in more detail). This case resembles a later case, *Woods v. Universal City Studios*, 920 F. Supp. 62 (S.D.N.Y. 1996) in which the plaintiff-artist similarly complained about the use of his artwork as the model for the set design of a film's opening scene. Plaintiff won and the court issued an injunction against the distribution of the film (after which the parties settled the case). Defendant Universal Studios argued its copying was *de minimis* because the infringing footage

era with the subsequent one, combining a quantitative and qualitative assessment, perhaps because of the rising frequency of whole copying.[158] Fair use is also more helpful now that it has been expressly codified in the 1976 statute requiring analysis of market harm, purpose and character of the use, amount copied, and nature of the work.[159]

Despite the prolonged fair use analysis in the *Amsinck* case, it is a laudable decision that – although not decided on a motion to dismiss – reaches the right result for the right reasons. Quantitatively miniscule and qualitatively insignificant, the use of plaintiff's derivative work in the background of a film is not copyright infringement. Notable is that this case is about the whole of a plaintiff's work, not parts of it, and still the court determines that the copying is trivial. To be sure, judicial and lawyering resources were wasted deciding a case about such a triviality. Hopefully, the patterns and standards described in this Article can streamline cases like *Amsinck* and guide courts and defendants in the future.

As we describe more fully in Part III, after the 1976 Act and in the Transition and Contemporary Eras, *de minimis* cases include many more defendants arguing that *whole* copies are nonetheless *de minimis*.[160] This may seem counterintuitive, but it's an important evolution of the case law that should save more judicial and lawyering resources if followed. Only four such cases existed between 1960-1977, comprising 19% of the cases before 1978. Starting in 1978, and in this Transition Era, cases alleging whole copying in which the defendant raises a *de minimis* defense compromises 30% of the cases. This increase might be a result of earlier courts treating the "work" as a more fixed and less flexible category.[161]

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amounted to less than five minutes of the 130 minute long film. The court disagreed saying "whether an infringement is *de minimis* is determined by the amount taken, … and not by the characteristics of the infringing work. … [Defendant] copie[d] substantial portions of Woods' drawing." *Id.* at 65. In *Woods*, contrary to *Amsinck*, the court found defendant's whole copying determinative. *Woods* is the same court (although different judge) and just two years later. It is hard not to find relevant in *Woods* the unique qualities of plaintiff's artwork, the fact that it was made into set design (something artists often get paid for), and that it was in the opening scene of the film which was five minutes.

[158] *See infra* Figures 7.1 and 7.2 (forms of *de minimis*).

[159] In this second era, fair use (first codified in the 1976 Act) is evoked with more frequency than in the first era. *See* Part III.B.4 and Figure 12 (fair use by era).

[160] *See infra* Figures 7.1 and 7.2.

[161] Margot E. Kaminski & Guy A. Rub, *Copyright's Framing Problem*, 64 UCLA L. Rev. 1102 (2017); Paul Goldstein, *What Is a Copyrighted Work? Why Does It Matter?*, 58 UCLA L. Rev. 1175, 1178 (2011); Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 Fordham L. Rev. 575, 621 (2005). *See also*

As explained *supra*, in the first half of the 20th century and in the Early Era, parts of works copied and disputed as *de minimis* may have concerned photographs or sketches in catalogues or manuals, where the work was the catalogue and the part was the photograph or sketch contained within it.[162] But in the second and third eras, a plaintiff might bring such a case for unauthorized copying of a photograph or a work of visual art (as in *Amsinck*) because that work is separately authored and owned.

The growing number of "whole" work *de minimis* cases after 1978 might also be a result of increased access to copying technology, the growing acceptance of copying whole works for personal use, ephemeral use, or as raw material for the rapidly evolving entertainment and high-technology industries.[163] Whatever the reason for the rise of whole copying cases, they put pressure on the *de minimis* standard, which was primarily (although not always) concerned with small parts of works, not the inconsequential use of whole works. This pressure should be alleviated in light of the revealed patterns in these cases adjudicating whole copying as *de minimis* when uses are quantitatively small and qualitatively insignificant.

We consider both *Computer Associates* and *Amsinck* examples of early versions of what emerges in the Contemporary Era as a fragile basis for the *de minimis* defense, delineated by milestone case *Ringgold v. Black Entertainment Television*.[164] As the next section explains, *Ringgold* describes and affirms both a "technical violation" (a whole copy without consequence) and "quantitative threshold" standard for the *de minimis* defense. The first is "a technical violation of a right so trivial that the law will not impose legal consequences";[165] and the second is copying that "has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity."[166] *Ringgold* also includes a qualitative analysis of the use to which the copy is put as part of its description of the

Zahr Said, *Jury-Related Errors in Copyright*, 98 Ind. L.J. 749, 790–91 (2023) (describing the shifting nature of "work" in jury instructions and evidentiary determinations); Thomas Hemnes, *The Copyright Work of Authorship*, Santa Clara High Tech L.J. 35 (2024) ("According to the [Copyright Act of 1976], [a work of authorship] can be perceived in tangible fixations, but is distinct from the fixations.").

[162] *See* Part II.A. (discussing cases).

[163] For example, this was the era when VCRs, photocopy machines, and home recording generally became ubiquitous. *See* Sony v. Universal Pictures, 464 U.S. 417 (1984).

[164] Ringgold v. Black Entertainment Television, 126 F.3d 70 (2d Cir. 1997).

[165] *Id.* at 74.

[166] *Id.*

de minimis defense, which closely resembles a substantial similarity analysis.[167] Before and during the Transition Era, the substantial similarity test was evolving and expanding. We believe this shift was partly because of the changing nature of the claims being brought by parties who demand licenses for a broad range of uses of their copyrighted works (*e.g.*, Carole Amsinck). When plaintiffs bring infringement claims with more frequency of whole copying as background input into complex audiovisual works, the quantitative metric of the *de minimis* standard adjusts and the qualitative metric rises in significance. We discuss this trend, combining quantitative and qualitative metrics complexifying the *de minimis* defense in Parts II.C and III below.

C. The Contemporary Era (1998-2022)

The Contemporary Era differs in significant ways from both the Early and the Transition Eras. As Part III describes in more detail, there are many more cases in the Contemporary Era. Also, the rate of defendant successes declines (*e.g.*, the *de minimis* defense is less successful overall). The third era is also characterized by more diversity: the identities of the litigants are more varied, plaintiff-authors appear more frequently to file opportunistic lawsuits for licensing revenue with questionable claims of market harm, and courts' legal evaluations of *de minimis* are more varied and complex.

There are 127 cases in this era, which as a percent of all copyright decisions is more than double the previous eras.[168] It might make sense, then, that legal standards would be more diverse as courts struggle to assess *de minimis* defenses across a wide range of claims and industries.[169] Although the *de minimis* defense is more common in the Contemporary Era, it prevails less frequently as compared to the Transition Era.[170]

As in previous eras, this one includes competitors in industries not reasonably relying on copyright, who nonetheless harness copyright to contest certain business practices. These include financial services and manufacturing companies competing on sales of goods and services but who sue for, among other things,

[167] *Id.* at 77.

[168] *See infra* Figure 3.

[169] See *infra* Figures 5, 6.1, and 6.2 showing industry diversity; see also *infra* Figures 9, 10 and 11 for legal standards and evaluative metrics by era.

[170] Defendants prevail in only 33 of the cases; *see infra* Figures 13 and 14.

copying parts of catalogues or business materials.[171] Copyright is largely a side-show in these cases in which trade secret misappropriation, tortious interference with contractual relations, and breach of fiduciary duty play more central roles.

Different from earlier eras, however, in the Contemporary Era, there are more music cases and many more software cases.[172] This tracks the growth of both industries in the internet age and to us is unsurprising, especially when copying small parts of either music or software is easier with digital technology and bits of music or software are reasonably considered lawful input into new music or software. These cases become notorious and contested disputes, as the "value" of the bit copied (e.g., a musical riff or software code module) arguably has independent market significance. These features confound the *de minimis* doctrine, as we see in the discussion of *VMG Salsoul v. Ciccone* below.

The bulk of the cases in this era involve entertainment or media companies and distributors, and they are between individuals and companies or individuals and other individuals (e.g., *not* between competitors).[173] The kind of copying now is fairly split between whole and partial (or fragmentary), with whole copying outpacing both in the latter part of this era between 2008-2022.[174] Plaintiffs' claims of whole copying of their pictorial/image-based works predominate in the Contemporary Era, and the landmark cases discussed below illustrate this trend. This is when the *de minimis* doctrine should be most useful, in the vein of *Amsinck* and *Computer Associates*, and yet its contours blur in tandem with the more complex infringement standards and fair use assessments that are also evolving.

Over half of the courts in cases of this third era employ either no evaluative standard or only a quantitative standard to determine whether the copying was *de minimis*.[175] This is not surprising, because that is how *de minimis* started

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[171] A few examples include: *R&B, Inc. v. Needa Parts Mfg., Inc.*, No. 1-CV-1234, 2001 WL 1251211 (E.D. Pa. Aug. 10, 2001); *Walker Mfg., Inc. v. Hoffmann, Inc.*, 261 F. Supp. 2d 1054 (2003); *EBC Brakes USA, Inc. v. Teagan*, No. 11-CV-12907, 2013 WL 12181866 (E.D. Mich. Nov. 4, 2013*); SplitFish AG v. Bannco Corp.*, 727 F. Supp. 2d 461 (E.D. Va. 2010); *Alifax Holding Spa v. Alcor Sci. Inc.*, No. 14-440, 2019 WL 13091790 (D.R.I. Mar. 26, 2019); *John M. Floyd & Assocs. v. Jack Henry & Assocs.*, No. H-05-1105, 2006 WL 1007264 (S.D. Tex. Apr. 13, 2006); *Biosafe-One, Inc. v. Hawks*, 639 F. Supp. 2d 358 (S.D.N.Y. 2009).

[172] *See infra* Figures 6.1 and 6.2.

[173] *See infra* Figure 5a.

[174] *See infra* Figures 7.1 and 7.2.

[175] *See infra* Figures 17–19 (standards across the Eras along various metrics).

and it reflects the earlier eras. However, in the Contemporary Era, qualitative evaluations of *de minimis* become more common, with as many as 42 of the cases (a third) referring to "substantial similarity."[176] "Substantial similarity" often includes "recognizability" as part of the standard, which we think makes Plaintiff's case easier to prove and contributes to the unfortunate weakening of the *de minimis* defense.

The Contemporary Era cases span a range of approaches reflecting this era's diversity. Cases such as *Ringgold v. Black Entertainment Television* (1997),[177] in which a visual artist plaintiff wins against a television company, and *Gottlieb v. Paramount Pictures Corporation*,[178] in which a visual artist plaintiff loses against a film company, are different sides of the same coin. We discuss them below.[179] These have come to be known as landmark cases in for the doctrine.[180] But whatever their milestone status, their doctrinal approach to *de minimis*, including qualitative evaluations that resemble aesthetic assessments, remains a *minority* approach. A contrasting case, the music sampling dispute *VMG Salsoul v. Ciccone*, reflects approaches from earlier eras assessing fragmentary copying in quantitative

[176] This evidence disputes Nimmer's description of the doctrine in his treatise. He rejects the diversity of standards for *de minimis* defense as a doctrinal matter. He writes that "the overwhelming thrust of authority upholds liability even under circumstances in which the use of the copyrighted work is of minimal consequence" and that "among the several potential meanings of the term *de minimis,* that defense should be limited largely to its role in determining either substantial similarity or fair use," eschewing the "technical use" or "classic de minimis" doctrine in contemporary copyright law, despite its relative ubiquity. Melville B. Nimmer & David Nimmer, 2 Nimmer on Copyright § 8.01[G] (2024). In support for this narrow interpretation of the doctrine, he cites *Bell v. Wilmott*, 12 F.4th 1065 (9th Cir. 2021) (which cites his own treatise for this proposition) and discounts cases such as *Knickerbocker Toy Co. v. Azrak-Hamway*, 668 F.2d 699 (2d Cir. 1982) and *Ringgold v. Black Entertainment Television*, 126 F.3d 70 (2d Cir. 1997). He also disagrees with Judge Leval's Nimmer Lecture discussing the various *de minimis* standards, 44 UCLA L. Rev. 1449, 1457 (1997). Nimmer does not describe the origins of the *de minimis* defense and whether they justify preserving its roots as distinct from substantial similarity or fair use.

[177] Ringgold v. Black Ent. Television, 126 F.3d 70 (1997).

[178] Gottlieb Dev. LLC v. Paramount Pictures Corp., 590 F. Supp. 2d 625 (S.D.N.Y. 2008). *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (1998) is a case with facts similar to *Gottlieb*.

[179] *See infra* Part II.C. (discussing *Davis v. Gap, Inc.* as another such case). In that case, the plaintiff designs and manufacturers eye-glasses, and thus the copyright in that sculptural work reproduced in a clothing advertisement for Gap, Inc. is not a competitive harm for the sale of eyeglasses, but it does interfere (or so the plaintiff says) in the market for licensing images of the sculptural work, albeit not alone or as the focus of the image, but just in the background (like Ringgold and Gottlieb). *See also* Bracha, *Not De Minimis*, *supra* note 3 (describing the dissolution of an independent de minimis defense).

[180] *Bracha*, *supra* note 3; *Inesi*, *supra* note 3.

terms and elevates the *de minimis* standard in a way that would effectuate judicial economy and copyright policy if decided on a motion to dismiss.[181] As discussed below, the defendant's win in *VMG* aligns with the trends in the earlier eras and continues in this contemporary era to maintain the vitality of the *de minimis* defense.

Finally, the case of *Bell v. Wilmott Storage Services* (2021), rejecting a *de minimis* defense for whole copying of a photograph on an obscure website, is an outlier and, we argue, incorrect. But it is nonetheless significant.[182] Plaintiff prevails in *Wilmott* for what in earlier eras would be a technical violation of copyright (a whole copy without harmful effect). Defendant's display of plaintiff's photo on a hard-to-access website inflicted no market harm.[183] Courts in earlier eras would likely have dismissed as *de minimis* the single use of a photograph in an undistributed (or not widely distributed) publication to avoid wasting judicial resources.[184] That the plaintiff-photographer prevails in *Bell v. Wilmott* is unfortunate and a mistake. The court's reasoning in *Wilmott* relies in part on the absence of *de minimis* in the statute's text, and thus is a head-in-the-sand formalistic reading of copyright's scope defying the century's long history of the common law *de minimis* defense.[185] *Wilmot* is also inconsistent with many of the cases in this era of whole copying which result in a relatively high number of defense wins. As we explain more fully in Parts III and IV, this contemporary era's increasing tolerance for whole copying of pictorial works, contra *Wilmot*, inaugurates an updated and laudable version of the quantitatively minimal copying standard from prior eras. In this Contemporary Era, the quantitative analysis applies consistently to whole works when used for a short time and with insufficient visibility.[186] If courts in the future fail to follow this trend and instead rely on *Bell v. Wilmot*, something we do

[181] VMG Salsoul v Ciccone, 824 F.3d 871 (9th Cir. 2016) (disagreeing with Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005)).

[182] Bell v. Wilmott Storage Serv. LLC, 12 F.4th 1065 (9th Cir. 2021).

[183] *Id.*

[184] *See, e.g.*, Mathews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943) (Early Era); Knickerbocker Toy Co. v. Azrak-Hamway Int'l Inc., 668 F.2d. 669 (2d Cir. 1982) (Transition Era).

[185] *See infra* Part II.C.2 (discussion of *Wilmott*). By this reasoning, patent exhaustion – which is not in the text of the Patent Act – would also be unavailable to users and owners of patented inventions (such as cell phones, cars, or tools) who seek to use, sell, or otherwise transfer their lawfully made and owned personal property.

[186] *See* Figure 11.

not advocate, the *de minimis* doctrine is likely to become less helpful to defendants and courts, frustrating the principle of judicial economy that it serves.

1. Ringgold *and the Second Circuit Cases*

Ringgold is a dispute about the unauthorized display of a "story quilt" (in poster form) as background set decoration for a television show.[187] (See Image 1.) The poster of the quilt was displayed intermittently during the half-hour sitcom for a total of 27 seconds.[188] The court nonetheless held that that use of the poster was not *de minimis* and violated Faith Ringgold's copyright in the quilt. The court also rejected fair use as a defense.[189]

[Image 1]

The *Ringgold* court recognized that a "copyrighted work might be copied as a factual matter, yet a serious dispute might remain as to whether the copying that occurred was actionable."[190] Notably, *Ringgold* described three possible invocations of *de minimis* as a defense to copyright infringement: (1) "a technical violation of a right so trivial that the law will not impose legal consequences"; (2)

[187] Ringgold v. Black Ent. Television, 126 F.3d 70, 73 (1997).
[188] *Id.* at 77.
[189] *Id.* at 78.
[190] *Id.* at 75.

copying that "has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying"; and (3) as part of the fair use analysis to assess its third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[191]

This tripartite division of the copyright *de minimis* defense is a fair reading of its history across the eras. The *Ringgold* court explains that the first category of "technical violations" is "rarely litigated" because of their very nature.[192] In support, it references Judge Pierre Leval's 1997 Nimmer Lecture (reproduced in his opinion in *Davis v. Gap, Inc.* and quoted *supra*) in which he explains that singing "Happy Birthday" in a restaurant or making a photocopy of a cartoon to hang on the refrigerator are examples of "*de minimis* non curat lex."[193] The *Ringgold* court also cites its *Knickerbocker Toy Co. v. Azrak-Hamway Int'l Inc.* decision.[194] In that case, the court dismissed the plaintiff's copyright infringement claim on the basis of a technical but trivial violation in which an office copy of the plaintiff's work was made but never widely distributed, concluding the harm from the unauthorized copying was so small that legal enforcement was not justified.[195]

Ringgold's main contribution to copyright law is its application of the second category of the copyright *de minimis* defense, which it uses to analyze the sitcom's use of the story quilt. In considering whether the second kind of *de minimis* use prevails as a defense, *Ringgold* applies a standard that copying of protected material must "fall below the quantitative threshold of substantial similarity."[196] The court says this necessitates looking "to the amount of the copyrighted work that was copied, as well as (in cases involving visual works), the observability of the copyrighted works in the allegedly infringing work."[197] Observability demands consideration of factors such as "length of time the copied

[191] *Id.* at 74–75.

[192] *Id.* Oren Bracha calls this kind of de minimis defense "de minimis proper." Bracha, *Not De Minimis*, *supra* note 3, at 162.

[193] Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. Rev. 1449, 1457 (1997). Leval repeats this example and cites to his lecture in *Davis v. Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001).

[194] Knickerbocker Toy Co. v. Azrak-Hamway Int'l Inc., 668 F.2d 669 (2d Cir. 1982).

[195] *Ringgold*, 126 F.3d at 74 (citing *Knickerbocker Toy Co.*, 668 F.2d at 703).

[196] *Id.*

[197] *Id.* at 75.

work is observable … and such factors as focus, lighting, camera angles, and prominence."[198]

Applying this standard, the court engages in an aesthetic interpretation of the sitcom to reject a *de minimis* defense. The court assesses the television show's use of the story quilt – how the show displayed the story quilt (prominently and in focus) and the role the quilt played in the sitcom's story (affirming themes and deepening character delineation). It describes a 4-5 second segment in which its "own inspection of a tape of the program reveals that some aspects of observability are not fairly in dispute."[199] In this description, the court discusses camera angle, position of actors in relation to the quilt, scene framing, and camera focus. It concludes, saying

> An observer can see that what is hung is some form of artwork, depicting a group of African-American adults and children with a pond in the background. The brevity of the segment and the lack of perfect focus preclude identification of the details of the work, but the two-dimensional aspect of the figures and the bold colors are seen in sufficient clarity to suggest a work somewhat in the style of Grandma Moses. … All the other segments are of lesser duration and/or contain smaller and less distinct portions of the poster. However, their repetitive effect somewhat reenforces the visual effect of the observable four-to-five second segment just described.[200]

Based on this quantitative and qualitative analysis of the sitcom's use of the quilt, the court determines that the quilt is "recognizable, … and with sufficient observable detail for the 'average lay observer' to discern African-Americans in Ringgold's colorful, virtually two-dimensional style. The *de minimis* threshold for actionable copying of protected expression has been crossed."[201] Finding no *de minimis* use and substantial similarity, the court then also rejects the defense of fair use, concluding the balance of the factors favors the plaintiff despite the defendant prevailing on factor three.[202] *Ringgold*'s effect is that later cases also conduct this

[198] *Id.*
[199] *Id.* at 76.
[200] *Id.* at 76–77.
[201] *Id.* at 77.
[202] *Id.* at 80–81.

layered aesthetic analysis by folding the *de minimis* defense into the infringement assessment as a component of the substantial similarity test, grounding copyright misappropriation in recognizability by the "average lay observer."[203]

The *Ringgold* test, while plaintiff-friendly, does not inevitably result in a defense loss. A year after *Ringgold*, the Court of Appeals for the Second Circuit decides *Sandoval v. New Line Cinema Corp*, a case raising a similar circumstance as *Ringgold*.[204] In *Sandoval*, plaintiff photographer Jorge Antonio Sandoval disputes the use of ten of his photographs by New Line Cinema in the background of the film "Seven."[205] The photographs were used in the full-length film and "visible, in whole or in part, for a total of approximately 35.6 seconds."[206] The court cites *Ringgold* for the applicable *de minimis* standard: whether "the copying of the protected material is so trivial as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying."[207] As in *Ringgold*, the court closely analyzes the use of the photographs, describing their observability and contextualization in the film. In the court's description,

> [T]he photographs never appear in focus, and except for two of the shots, are seen in the distant background, often obstructed from view by one of the actors, … figures in the photographs are barely discernable, with one shot lasting for four seconds and the other for two seconds. Moreover, in one of the shots, after one and a half seconds, the photograph is completely obstructed by a prop in the scene.[208]

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[203] Oren Bracha traces the melding of substantial similarity with the *de minimis* doctrine to the rise of the substantial similarity test in the mid-1800s, when "infringement analysis slowly shifted from having a strong focus on verbatim copying to encompassing increasingly remote levels of similarity." Bracha, *Not De Minimis*, *supra* note 3, at 171. The data in this article traces the conflation of substantial similarity and *de minimis* to this second era, not the previous century. The mid-1800s were also when copyright fair use doctrine took shape, as explained *supra* Part II.A., see Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841), and thus *de minimis'* origins could be both in fair use and the evolution of substantial similarity's breadth. Whether the *de minimis* doctrine became entangled with assessments of misappropriation in the 1800s or later, *Ringgold* is today a milestone case for the *de minimis* doctrine, and it enacts that entanglement while also explaining the other forms a *de minimis* analysis could take.

[204] Sandoval v. New Line Cinema Corp., 147 F.3d 215, 216 (1998).

[205] *Id.*

[206] *Id.*

[207] *Id.* at 217 (citing *Ringgold v. Black Entertainment Television*, 126 F.3d 70, 74 (2d Cir. 1997).

[208] *Id.* at 216.

As in *Ringgold*, the *Sandoval* court reviews video evidence, becoming a kind of film critic.[209] But unlike in *Ringgold* where plaintiff prevails, in *Sandoval* the plaintiff loses. The Court of Appeals affirms the district court's grant of summary judgment for the defendant, finding "that the defendant's copying of Sandoval's photographs falls below the quantitative threshold of substantial similarity. … [b]ecause Sandoval's photographs appear fleetingly and are obscured, severely out of focus, and virtually unidentifiable, we find the use of those photographs to be *de minimis*."[210]

Notice how in both *Ringgold* and *Sandoval*, defendants copied all of the plaintiff's work – the whole quilt and each photograph. Defendants' copying was neither fragmentary nor partial. These cases are thus unlike those from previous eras that contest the harmful uses of fragments or parts (sentences or sketches) that compromise pieces of a larger whole. Nonetheless, these courts evaluate the whole copying of pictorial works under a *de minimis* standard as either "a technical violation of a right so trivial that the law will not impose legal consequences" or as quantitatively trivial and qualitatively insignificant.[211] In both *Ringgold* and *Sandoval* – as in *Carola Amsinck* – the defendant's use of the plaintiff's work is arguably not within an existing or foreseeable reproduction or licensing market. Plaintiffs and defendants are in distinct industries with separate markets for their authored works (fabric arts and television (*Ringgold*); still photography and Hollywood (*Sandoval*)). And the harm to plaintiffs in both cases is not a competitive substitutionary harm; defendant's use is not a market replacement for plaintiff's work or a labor-saving device.

A decade later, the *Ringgold de minimis* analysis is so well established that it even enables dismissal for defendants at an early stage. *Gottlieb Development v. Paramount Pictures Corp.* presents a factual and legal analysis similar to *Ringgold* and *Sandoval*, except the court decided the *de minimis* defense on a motion to dismiss.[212] In *Gottlieb*, artwork on the side of a pinball machine was visible in the background of a movie scene.[213] (See Image 2.) As with *Ringgold* and *Sandoval*,

[209] *Cf.* Jessica Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 497 (2004).

[210] Sandoval v. New Line Cinema Corp., 147 F.3d 215, 218 (1998).

[211] Ringgold v. Black Ent. Television, 126 F.3d at 70, 74–75 (1997).

[212] Gottlieb Dev't LLC v. Paramount Pictures Corp., 590 F. Supp. 2d 625 (S.D.N.Y. 2008).

[213] *Id.* at 629.

the court engages in an aesthetic assessment of the recognizability and context of the defendant's use of the plaintiff's art in the film. The court says plaintiff's work was used "sporadically … always in the background … play[ed] no role in the plot, … [was] almost always partially obscured, and [was] fully visible for only a few seconds during the entire scene."[214] The court concludes that the "'average lay observer' would not be able to discern any distinctive elements of Gottlieb's designs" and thus any copying fell "below the quantitative threshold of substantial similarity."[215] *Gottlieb* cites both *Sandoval* and *Ringgold* for authority to dismiss the plaintiff's copyright claim as "*de minimis* and therefore not actionable"[216] on the basis of the assessment of observability "factors such as focus, lighting, camera angles, and prominence."[217] *Gottlieb* is a culmination of *de minimis* doctrine in the Contemporary Era achieving its goal of judicial efficiency.

[Image 2]

[214] *Id.* at 632.
[215] *Id.* at 633.
[216] *Id.* at 632.
[217] *Id.*

These cases explain that whole copying can be *de minimis*. Additionally, however, they engage in more complex and nuanced aesthetic analyses to assess whether copying is both quantitatively and qualitatively below the infringement threshold, sometimes undermining a swift dismissal. These detailed aesthetic analyses featured in the Contemporary Era highlight the inevitable and oppugnant presence of aesthetic judgment in copyright cases, even in cases alleging only a very small or insignificant amount of copying.[218]

The case of *Davis* v. *Gap, Inc.* further develops the third era's doctrinal trend.[219] In *Davis*, the court rejects a *de minimis* defense in the context of an advertisement that features models donning the plaintiff's "sculptured metallic ornamental wearable art" (ornamental eyeglasses) without his permission.[220] (Image 3.) Judge Leval, writing for the court, determines that the "*de minimis* doctrine is not applicable" because "the infringing item is highly noticeable … in part because [they] are strikingly bizarre."[221] It may be "a trivial matter for persons to be shown wearing their eyeglasses or wristwatches" in advertising, but not in the circumstances under review.[222] This is a remarkable statement in the context of the court's other examples of *de minimis* copying (singing "Happy Birthday" or copying a cartoon to hang on a refrigerator).[223] The defendant's for-profit status cannot be the distinguishing factor, as defendants in *Sandoval* and *Gottlieb* were also for-profit (although they were feature films and not print advertisements for a clothing company). Perhaps the fact that the defendant's print advertisement is static (not fleeting) and "widely displayed throughout the United States" makes a difference?[224] It is otherwise hard to distinguish the situation in *Davis* from those in *Sandoval* and *Gottlieb*, except to take the court at its word and accept its aesthetic evaluation: the eyeglasses are distinctive and noticeable.

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[218] *Contra* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (aesthetic nondiscrimination principle). Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 301 (1998) ("[T]he existence of copyright makes subjective judicial pronouncements of aesthetic taste necessary."); Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standards*, 109 Nw. U. L. REV. 344 (2015).

[219] Davis v. Gap, Inc., 246 F.3d 152 (2d Cir. 2001).

[220] *Id.* at 156.

[221] *Id.* at 173.

[222] *Id.*

[223] *Id.*

[224] *Id.* at 156.

[Image 3]

Each of these cases demonstrates how the *de minimis* standard evolves to include qualitative factors and begins to more closely resemble the substantial similarity test by including "recognizability" and "observability" as factors.[225] Although courts still focus on the quantitative element (how much and for how long), the courts in the Contemporary Era also delve into a qualitative analysis with an aesthetic interpretation of the defendant's use and its reasonable perception in the context of the whole work. The mixing of *de minimis* defense factors with the infringement standard is not an inevitable state or evolution of either doctrine, as earlier eras demonstrate. Commentators criticize this doctrinal shift as broadening the misappropriation standard and affecting the scope of substantive law.[226] We

[225] The substantial similarity test for infringement is often described in terms of whether to the "ordinary observer" the works have the same "total concept and feel," Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970). It is also sometimes described as "whether the work is recognizable by an ordinary observer as having been taken from the copyrighted source," Bradbury v. Columbia Broad Sys., Inc., 287 F.2d 478, 485 (9th Cir. 1961), or "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work," Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021 (2d Cir. 1966). For a thorough analysis of the genealogy, see Boyden, *supra* note 25. Oren Bracha describes this evolution as the substantial similarity test replacing *de minimis* defense with a "feeble exception" to copyright infringement rather than making plaintiffs prove the misappropriation. Bracha, *Not De Minimis*, *supra* note 3, at 141. "Buried in the technicalities of the quantitative/qualitative test was a fundamental move: reducing the domain of no substantial similarity to cases of exceptional trivial taking." *Id.* at 167.

[226] Bracha, *Not De Minimis*, *supra* note 3, at 143; Inesi, *supra* note 3.

agree. But as this Eras Tour shows, the *de minimis* defense was not always and is not consistently part of the "substantial similarity" inquiry. As Part III shows in more detail, it is often independent from the exclusive rights of reproduction and display, for example, and it is also frequently independent from the fair use defense.[227] To align with its purpose and copyright policy, we urge the reclaiming of the *de minimis* doctrine's independence with a focus on quantitative triviality (even in the case of whole copying) and qualitative insignificance.

2. VMG Salsoul *and the Ninth Circuit*

The Ninth Circuit's 2016 decision *VMG Salsoul v. Ciccone*[228] resembles the cases discussed above, except for two important features. First, it is a case between two music authors, rather than between parties in different copyright industries. And it is a *de minimis* case about fragmentary copying, not whole copying. Despite resembling cases from previous eras, it is an important case in this third era because its analysis of the *de minimis* defense includes both quantitative and qualitative factors, and it expands the application of the *de minimis* defense to sound recordings.

VMG Salsoul v. Ciccone involves Madonna Ciccone's use in her song "Vogue" of a one-second sample from VMG's sound recording. The sample was a single horn hit (a note or a chord) used four times.[229] *VMG Salsoul* decision was a milestone *de minimis* case because it was the first court to split with the 2005 case of *Bridgeport v. Dimension Films*, which held sound recording infringement was immune to the *de minimis* defense.[230] For a decade after *Bridgeport*, debates raged over whether Section 114 of the Copyright Act, directed to sound recordings specifically, precluded a *de minimis* defense.[231] The Ninth Circuit concluded that it did not.

> Other than *Bridgeport*, … we are aware of no case that has held that the *de minimis* doctrine does not apply in a copyright infringement

[227] Part III disentangles these doctrines to demonstrate their independence. Part III also describes how the *de minimis* defense is surprisingly successful in the Contemporary Era at excusing the defendant's whole copying of pictorial works in specific contexts.

[228] VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 881–82 (9th Cir. 2016)

[229] *Id.* at 875.

[230] Bridgeport v. Dimension Films, 410 F.3d 792 (6th Cir. 2005)

[231] *Id.*

> case. Instead, courts consistently have applied the rule in all cases alleging copyright infringement. Indeed, we stated in dictum … "that the rule applies throughout the law of copyright, including cases of music sampling." … [N]othing in the neutrally worded statutory definition of "sound recordings" suggests that Congress intended to eliminate the de minimis exception.[232]

The court explains that Section 114 articulates the principle that "infringement takes place whenever all or *any substantial portion* of the actual sounds … are reproduced."[233] Therefore, copying that is less than "substantial" is not infringement.

The court held that the *de minimis* defense prevails because a single horn hit, repeated at most four times in a song, was not "substantial." The court reaches this determination in several ways. First, it explains that the horn hit was unrecognizable to an average audience and thus was not actionable misappropriation.[234] Second, the court cites its own *de minimis* precedent, *Fisher v. Dees*,[235] and an early substantial similarity case from 1926, *Dymow v. Bolton*, to argue that *de minimis* copying combines quantitative triviality with unrecognizability.[236] "As a rule, a taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation."[237] Cases about fragmentary and partial copying continue to cite the "substantive" standard as elaborated in *VMG*, but whether "recognizable" means anything more than "too small to notice" remains unclear. *Sandoval* and *Gottlieb*, discussed above, demonstrate that there are cases in which copying a *whole* work may not be recognizable to ordinary observers; however, such copying would fail to meet the "meager and fragmentary" requirement embedded in the *VMG de minimis* standard.

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[232] *Salsoul*, 824 F.3d at 881–82 (quoting Newton v. Diamond, 388 F3d 1189, 1195 (9th Cir. 2004) and 17 U.S.C. § 102).

[233] *Id.* at 884 (quoting 17 U.S.C. § 114(b)) (emphasis added). Oren Bracha describes *VMG Salsoul* as "reject[ing] sound recording exceptionalism." Bracha, *supra* note 3, at 156.

[234] *Id.* at 878.

[235] *Id.* (citing Fisher v. Dees, 794 F.2d 432, 435 n.2 (9th Cir. 1986)).

[236] *Id.* (citing Dymow v. Bolton, 11 F.2d 690, 692 (2d Cir. 1926) ("copying which is infringement must be something which ordinary observations would cause to be recognized as having been taking from the work of another.")).

[237] *Fisher*, 794 F.2d at 435 n.2.

VMG evaluates *de minimis* largely as a quantitative test, while also attaching the more modern "recognizability" factor to measure substitutional value.[238] The court's quantitative emphasis reappears when it describes the copyright misappropriation doctrine as the right to prevent a "substantial copy of the whole or of a material part."[239] Audience observability or recognizability is relevant, the court explains, because without it "the copier has not benefitted from the original artist's expressive content. Accordingly, there is no infringement."[240] The court thus implies that misappropriation requires copying that is "substantial," and observability or recognizability is evidence in support of meeting that standard. But it is not true that recognizability alone is sufficient to find infringement, given the many *de minimis* cases in which copies are made and identified but are still deemed trivial.[241] In other words, not all recognizable or observable copying is misappropriation, even under *VMG*.

Rather than using the whole of plaintiff's work in an insubstantial way,[242] the defendant in *VMG* used an insubstantial portion of the work – a fragment – in her song in a manner it could not be detected by an ordinary listener.[243] The horn hit was a fragment of the plaintiff's work, and that fragment as used in defendant's sound recording was both unrecognizable and *de minimis*. The Ninth Circuit's aesthetic analysis in *VMG* nonetheless followed that of the Second Circuit cases by asking how an average audience would perceive both the quantitative and qualitative aspects of the copying:

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[238] Oren Bracha critiques this case as defining *de minimis* as the inverse of substantial similarity. Bracha, *Not De Minimis*, *supra* note 3, at 156. We are not sure that is the whole story given that the court's evaluation is largely driven by quantitative (not qualitative) metrics.

[239] *Salsoul*, 824 F.3d at 881 (citing Perris v. Hexamer, 99 U.S. 674 (1878)).

[240] *Id.*

[241] In fact, no case could be brought without a plaintiff identifying (or recognizing) the use of their work. Insofar as "recognizability" means "identifiable," "recognizability" might launch an investigation into unlawful copying but is not proof of it.

[242] In both *Sandoval* and *Gottlieb*, plaintiff's copyrighted works were visible and wholly copied in defendants' films, but they were not the camera's focus and played insignificant roles in the film's story. *See supra* Part II.C.1; Gottlieb Dev. LLC v. Paramount Pictures Corp., 590 F. Supp. 2d. 625 (S.D.N.Y. 2008); Sandoval v. New Line Cinema Corp., 147 F.3d 215 (1998). The same could be said of the eyeglasses in *Davis v. Gap, Inc.* as well. But presumably the court thought otherwise because of their unusual and recognizable shape.

[243] The same was true in *Bridgeport v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

> After listening to the audio recordings, . . . we conclude that a reasonable juror could not conclude that an average audience would recognize the appropriation of the horn hit. . . . The horn hit is very short – less than a second, . . . occurs only a few times in *Vogue*. . . . [and is] easy to miss. Moreover, the horn hits in *Vogue* do not sound identical to the horn hits in *Love Break*. . . . [Furthermore,] a highly qualified and trained musician listened to the recordings with the express aim of discerning which parts of the song had been copied, and he could not do so accurately. An average audience would not do a better job.[244]

This assessment resembles a substantial similarity analysis but is distinct due to its sole consideration of the use of a fragment of a sound recording and the fundamental dissimilarity of the songs. "Vogue" is not a copy of "Love Break." *VMG Salsoul* thus resembles cases in the Early Era in which the defendant copied fragments of the plaintiff's work (a photograph in a manual or words from a book) but in which the defendant's and plaintiff's respective works were not copies of each other and thus not market substitutes.[245] Unlike the Early Era, the infringement standard now condemns partial (even fragmentary) copying as actionable infringement when the copy is "recognizable" as a measure of input-value—perhaps especially in musical work and sound recording cases. In *VMG Salsoul*, the fragment was undetectable and that was the end of the case.

A more recent Ninth Circuit decision, *Bell v. Wilmott Storage Services*, develops *VMG*'s analysis in a way that conflicts with the Second Circuit cases discussed above.[246] Specifically, it rejects the possibility of a "technical use" of another's work as *de minimis* – a copy without harmful consequence. (This was the first iteration of the *de minimis* defense from *Ringgold*.[247]) In so doing, *Bell* leaves only fragmentary copying as plausibly insubstantial and thus non-infringing. This holding conflicts with case trends across the eras and ignores the long history of the *de minimis* doctrine.

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[244] *Salsoul*, 824 F.3d at 880.

[245] *See* Part II.A. (discussing cases).

[246] Bell v. Wilmott Storage Serv. LLC, 12 F.4th 1065 (9th Cir. 2021) (explaining it was clarifying "the role that *de minimis* copying plays in statutory copyright.").

[247] *Id.* at 1078, 1080.

Bell v. Wilmott Storage Services concerns the reproduction of a photograph of the Indianapolis skyline on a website. The defendant was unaware of the photograph, since it had recently acquired the website (along with thousands of others) in a database purchase; moreover, the site was inaccessible to most internet users.[248] The site mostly consisted of text and had few photos; it comprised a part of a server database associated with a website called VisitUSA.com.[249] According to the court, the photograph "was only accessible to those users who conducted a reverse image search—as Bell had—or those who knew the precise address of the image database archiving the photograph."[250]

Given this context, there was little that a qualitative or aesthetic analysis of the kind in *Ringgold* and *VMG* could accomplish. Instead, the court relies on the fact that "the 'degree of copying' was total—the infringing work was an identical copy of the copyrighted Indianapolis photo. There is thus no place for an inquiry as to whether there was *de minimis* copying."[251] The court distinguishes earlier cases, including *Fisher v. Dees* and *VMG Salsoul* as partial-copying cases.[252] Both are inapposite, the court explains, because in *Bell* the whole photograph was copied and was fully and clearly displayed on the website, however inaccessible it was to most ordinary internet users.[253]

The defendant contends that, although the whole photograph was copied and displayed, no cognizable harm occurred and litigation was therefore unwarranted. [254] This *de minimis* defense relies on several facts. First, the website was inaccessible and the photograph hard to find.[255] Second, the copying was unintentional and without value to the defendant.[256] The court rejected the relevance of these facts, stating that the *de minimis* defense does not relate to

[248] *Id.* at 1069. The concurring decision explains that the plaintiff appears to be a copyright "troll" reported to have filed over 100 copyright infringement lawsuits concerning the Indianapolis photo, which it may not actually own. *Id.* at 1082.

[249] *Id.* at 1069–70.

[250] *Id.* at 1070. "Bell frequently uses reverse image searches to identify potential infringers, and he has filed over 100 copyright infringement lawsuits concerning the Indianapolis photo, a number that exceeds 200 when combined with suits concerning a different photo that he took of the Indianapolis skyline." *Id.* at 1069.

[251] *Id.* at 1074.

[252] *Id.* at 1075.

[253] *Id.* at 1074–75.

[254] *Id.* at 10776.

[255] *Id.* at 1073.

[256] *Id.* at 1074.

insignificant or minimal use (as in only one time on an obscure server database).[257] It instead relates to the "quality =and quantity of the protected work that was 'used' by the defendant to make the allegedly infringing copy."[258] This conclusion is incorrect, ignores relevant context, and is inconsistent with most other *de minimis* cases, including those in the Contemporary Era.

Wilmott's restatement of the *de minimis* doctrine purposefully and directly disregards earlier cases concerning "technical use" as *de minimis* (cases that *Ringgold* said comprised category (1)).[259] These past cases expressly considered whether the extent of the use is "trifling" in terms of the market harm or substitutionary effect and not worth the costs of litigation.[260] Why did the *Wilmott* court cast aside this early history of the *de minimis* defense? Perhaps because more recent cases, including *VMG*, appear to anchor infringement and the "substantiality" determination in terms of "recognizability." As the *Wilmott* court says "we have consistently applied the *de minimis* principle to determine whether a work is infringing by analyzing the quantity and quality of the copying to determine if the allegedly infringing work is a recognizable copy of the original work, in other words, whether the works are substantially similar."[261]

This is an inaccurate statement of the *de minimis* doctrine and is a contestable statement of the substantial similarity test. [262] One problem with this formulation is that it prioritizes *de minimis* copying that is partial, meager or fragmentary over whole copying that occurs only once, infrequently, or is otherwise immaterial. As the Eras Tour shows and Part III further elaborates, the *de minimis* defense applies to both whole and partial copying. Indeed, the *de minimis* defense arises frequently when the plaintiff claims unauthorized copying of their whole work – in as much

[257] *Id.*
[258] *Id.* at 1076.
[259] *Id.* at 1078 & n.9.
[260] *Id.*
[261] *Id.* at 1076.
[262] Bracha, *supra* note 3 at 160. *See also* Boyden, *supra* note 25, at 1095. Recognizability alone just cannot be the test for copyright infringement. Consider phrases such as "Use the force, Luke" or "Winter is Coming." We know of no cases alleging that using such phrases would be infringement even though they are "recognizably" from Star Wars or Game of Thrones. To be sure, those audiovisual works are copyrightable as a whole, but copying a famous line from those works is not infringement of the work as a whole (e.g., it is not a substantially similar copy of the film or television show). Copyright does not give authors the right to prevent quotation or evocation, which is what such copying would entail. Such use is clearly *de minimis*, unless the argument is that these famous lines are independently copyrightable, which we doubt.

as 40% of all the cases and with more frequency since the late 1990s. There is no doctrinal reason why whole copying should be any less defensible than partial copying. It is the nature of the harm that matters, not whether copying occurred. [263] Another problem is that *Bell v. Wilmott* fails to account for harm to the Plaintiff in the specific context of Defendant's use. It is therefore out of line with the overall trend in *de minimis* cases, which consider substitutional harm and materiality of copying to measure whether the plaintiff's case is worth the court's time in the first instance. The *Wilmott* court's rigid reading of the Copyright Act as precluding "technical copying" is wrong as a matter of both doctrine and fact. Indeed, as we explain *infra*, defendants prevail at approximately the same rates when raising a *de minimis* defense to the unauthorized copy of a whole work as with a fragment of plaintiff's work.[264] Nonetheless, the *Wilmott* court rejected both *Ringgold* and *Davis* that embraced "technical violations" as *de minimis*.[265]

> We reject [defendant's] 'technical violation' theory of a *de minimis* defense ... Copyright is a creature of statute, and the only rights that exist under copyright law are those granted by statute. Where an unauthorized material use of the copyrighted work does fall within one of those exclusive rights, infringement occurs, unless the use is excused by one of the privileges, exemptions, or compulsory licenses found in sections 107 through 122. ... A 'technical violation' defense ... is plainly in tension with this right because it suggests that making a single copy is somehow not enough to show a violation absent some further material use or action. But crucially, the Act is agnostic as to the use of the copy once it is made; the unlicensed copying itself *is* the violation.[266]

Bell v. Wilmott recharacterizes whole copying as never *de minimis*, despite prior cases that say the opposite.[267] It attempts to narrows the doctrine to situations involving only fragments of a copyrighted work and rejects the common-law

[263] *See* Figures 7.1 and 7.2.

[264] *See* Figure 7.1.

[265] Bell v. Wilmott Storage Serv. LLC, 12 F.4th 1065, 1078 & n.9 (9th Cir. 2021).

[266] *Id.* at 1079–80.

[267] Bell also inserts the word "material" several times in its analysis, e.g., "an unauthorized material use" and "absent some further material use." I am unfamiliar with a "materiality" element for copyright infringement, unless what the court is means is an immaterial use would be *de minimis*. But that seems in tension with the last sentence in the above-quoted excerpt, "unlicensed copying itself *is* the violation." *Id.*

understanding of *de minimis* as a trifling use unworthy of judicial attention, solely because the Copyright Act contains no explicit defense. [268] [269] *Bell* marks a doctrinal break from copyright history and policy, disregarding the long tradition of excusing even complete copies when the resulting harm was trivial. This history is especially relevant in the internet age when whole but fleeting copies are made with ubiquity as part of digital communications.

Part III analyzes the dataset in detail to show that while the use of the *de minimis* defense has grown, its success rate has not. And yet the idea of trivial copying is more vital than ever and remains a total defense to copyright infringement. Plaintiff's contemporary complaints involving (what in earlier eras might have been) trivial copying and dismissed early in the case, now occurs simultaneous with court's more complicated analyses of the *de minimis* defense, infringement, and occasionally fair use for drawn-out litigation. The result is that what qualifies as trivial copying appears to be neither judiciously resolved nor as straightforward in the Contemporary Era.[270] But as we also show in Part III, *Wilmott* remains an outlier. It is true that the *de minimis* doctrine has come to resemble the infringement analysis with more frequency, with smaller parts of works more relevant to misappropriation claims and whole copies sometimes more easily deemed infringing. But the *de minimis defense* is not defunct. To the contrary,

[268] It is possible we are overreading *Wilmott*, which could be understood to concern whole, persistent copying as opposed to whole, intermittent copying. But we don't think so. First, *Wilmott* says that it reads *Ringgold* (a whole, intermittent copying case) as concerning "whether the works were substantially similar so as to constitute actionable copying." *Id.* at 1078 & n.9. The court thus displaces *de minimis* assessment with the substantial similarity test. Second, the facts of *Wilmott* are like other *de minimis* cases in which a whole copy is made but largely inaccessible, and yet the court expressly disavows those cases or reinterprets them.

[269] This interpretation comports with the Supreme Court's current overdetermined textualism jurisprudence: if it's not in the statute, it's not law. Yet by that reasoning, patent exhaustion – which is not in the text of the Patent Act – would also be unavailable to users and owners of patented inventions. But the Supreme Court has whole-heartedly accepted patent exhaustion, *see* Impression Products, Inc. v. Lexmark Int'l, Inc., 581 U.S. 360 (2017). And it has extended copyright exhaustion beyond its statutory incarnation, *see* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013) (extending copyright first sale beyond 17 U.S.C. § 109 based on preexisting common law doctrine because Congress is presumed to retain the substance of the common law" when it does not explicitly abrogate this it in the statute; the old rule remains in place).

[270] Inesi, *supra* note 3 at 946 ("copyright invites trivial violations"). One might think that as copyright scope expands and infringement cases are more numerous, the *de minimis* defense would (like the fair use defense) also expand in scope and relevance. While that may have happened with fair use (*see* Jessica Litman, *Billowing White Goo*, 31 Colum. J.L. & Arts 587 (2008)), it has not happened with the *de minimis* defense.

it is even more relevant for defendants in a certain category of cases – whole copying of pictorial works, especially non-photos – that resemble the technical violations *Wilmott* rejects. It is to these features of the data set we now turn.

III
The Data

This Part describes the *de minimis* case data set, the manner of its collection, and its coding. It then disaggregates the different kinds of *de minimis* copying across the three eras and relates them to evolving legal standards, party identities, nature of the works, and fair use claims. Finally, this Part identifies the circumstances under which a *de minimis* defense is more likely to prevail in the Contemporary Era. Drawing on this trend, it then proposes a clarified *de minimis* standard to revitalize its judicial economy purpose and conform with copyright policy.

A. Collecting Cases [Figures 1-4]

Litigated cases described here are a very small slice of litigated copyright disputes and transactions in which the *de minimis* defense is relevant. The nature of the defense is such that most *de minimis* uses are not ever litigated. As such, we do not capture in our dataset the many circumstances in which cases are settled before or shortly after a case is filed. We assume, given the nature of the *de minimis* doctrine, those circumstances far outnumber the cases in our dataset.[271] This study does not cover all litigated cases in which the defense is raised, only those reported in Westlaw in which the defense was mentioned in a written court opinion. Furthermore, Westlaw is not comprehensive, especially in earlier decades.[272] As such, this Article's data cannot be used to draw conclusions about cases where a *de minimis* challenge was raised but never discussed by a court. Nonetheless, litigated cases – and especially on-line available court opinions – influence legal

[271] Many *de minimis* challenges may be settled or dropped before a court issues a ruling. These cases are not observable in our dataset. The direction of this settlement bias is unclear. It is possible that *de minimis* challenges are more likely to be dropped when the plaintiff has a stronger case, making a *de minimis* challenge weaker. Cases could also settle when defendants have particularly clear support that the alleged copying is truly a trifle. The cases we observe may be those where the outcomes are more uncertain making a ruling necessary.

[272] Jason Rantanen, *Empirical Analyses of Judicial Opinions: Methodology, Metrics, and Federal Circuit*, 49 Conn. L. Rev. 227 (2016).

doctrine's application and development.[273] Lawyers rely on litigated cases, such as those described *supra* in the Contemporary Era to advise clients. A significant aspect of legal practice concerns understanding what those cases say and how what they say has changed over time.

The data set includes 178 court opinions.[274] Our initial search resulted in 710 cases in which the terms "*de minimis*" and "copyright" co-occurred in one paragraph in the ALLCASES database. (We used other search terms for "*de minimis*," such as "deminimis," "de minimus," and "deminimus" due to spelling variations.) We extracted from this large set cases in which *de minimis* applied to subject matter analysis (whether a *de minimis* amount of creativity existed in the purportedly authored work) and to damages analysis (after a plaintiff-friendly infringement analysis). We were only interested in copyright cases in which the *de minimis* defense arose to undermine an infringement claim in the context of the indisputable copying of a copyrighted work.

To check for completeness, we ran several other searches. We ran a search for "trifl! /p copyright! % "de minimis,"" which returned only 36 cases, of which one was relevant. We added that case to the database.[275] We also ran a search for "insubstantial! /p copyright! % "*de minimis*"" that returned 346 cases. A randomized analysis of those cases returned no relevant cases.[276] And we ran a search for "infring! /p substant! /p copy /p whole /p material! /p part," derived from an early standard for *de minimis*, which returned 56 cases, none of which

[273] "The fact remains that litigated cases are important and they are constantly subject to ad hoc empirical assessments. Disputes that culminate in written decisions are the primary source of information for lawyers and judges attempting to discover the content of the law." Matthew Sag & Pamela Samuelson, *Discovering Ebay's Impact on Copyright Injunctions Through Empirical Evidence*, 64 Wm. & Mary L. Rev. 1447, 1465 (2023) (acknowledging problem of selection effects in case counting empirical study).

[274] We analyze written opinions not distinct cases because we are interested in courts' analyses, outcomes, and stages of litigation at which the *de minimis* defense is raised. Of the 178 opinions, there are 171 distinct cases. Counting opinions from the same case does not influence our main results.

[275] MacDonald v. Du Maurier, 144 F. 2d 696 (2d Cir. 1944). While reading through the cases, we learned that what we call "de minimis" today was sometimes called "insubstantial" and "trifling" in the 1800s and early 1900s. Based on that knowledge, we traced citations in the *de minimis* cases to earlier cases citing "trifling" in the *de minimis* context without mentioning the term, which turned up *List Publishing Co. v. Keller* (1887) cited *supra* Part I. We included it in our data set as it was frequently cited in 20th century *de minimis* cases.

[276] In descending date order, we reviewed every 18th case for a total of 20 cases. All reviewed cases in this set concerned fair use, used "insubstantial! /p copyright!" in terms of subject matter, or related to something irrelevant to copyright de minimis defense.

were relevant.[277] We also found an additional three cases by following citations to *West Publishing Co. v. Edward Thompson Co.* (E.D.N.Y. 1909), which appears to inaugurate an early version of the *de minimis* defense without using that phrase.[278] We added those three cases and *West Publishing* to our database as well.

For the purposes of this Article, we call this final set of 178 the "*de minimis* cases."[279] The cases range in time from 1847-2022.

Below are four graphic representations of the total number of *de minimis* cases in our data set. The take-away is that the *de minimis* defense to copyright infringement has been on the rise since the first decade of the twenty-first century. But that trend began with the 1976 Copyright Act and the Transition Era. Specifically, *de minimis* decisions hovered between 2-4% of all copyright decisions for 70 years and then doubled to 8% for the years 2011-2020. We cannot know the cause of this rise, but we hypothesize it is due to several factors making the *de minimis* defense all the more important, including: the broadening of the copyright cause of action as previously described, the availability of statutory damages making litigation more attractive even for weak claims to promote settlement, and the rise of the internet facilitating all sorts of copying both trivial and nontrivial.

Figure 1 is the number of *de minimis* case decisions over time. There were only 21 cases in the Early Era, which ends in 1978.[280] There were 157 cases after

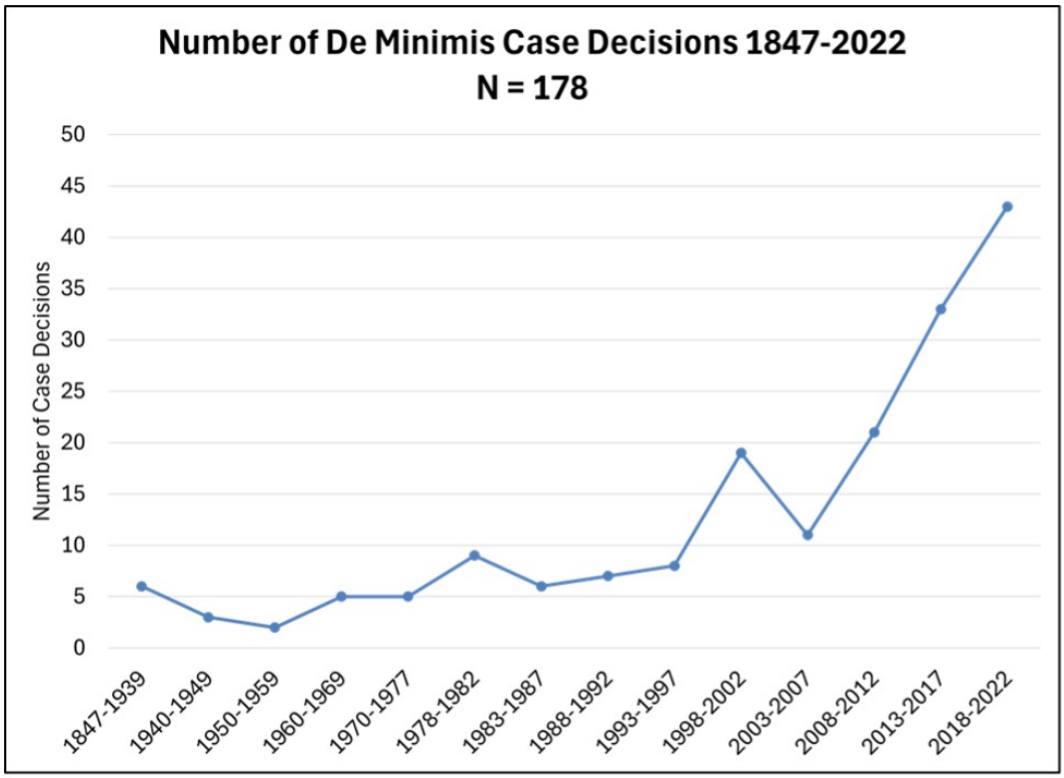
[277] This search string originates from the case of *Perris v. Hexamer* 99 U.S. 674, 675 (1878) ("It follows that to infringe this right a substantial copy of the whole or of a material part must be produced.").

[278] *West Publ'g Co. v. Edward Thompson Co.*, 169 F. 833 (E.D.N.Y. 1909). ("To constitute an invasion of copyright it is not necessary that the whole of a work should be copied, nor even a large portion of it in form or substance, but that, if so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient to constitute an infringement."). Cases citing *West Publ'g* for this principle in the context of a *de minimis* analysis include: *Harold Lloyd Ent., Inc. v. Moment Factory One, Inc.*, No. LA CV15-01556, 2015 WL 12765142 (C.D. Cal. Oct. 29, 2015); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947); *Malkin v. Dubinsky*, 146 F. Supp 111 (S.D.N.Y. 1956).

[279] Although this may seem like a small number, Westlaw reports that 3,341 copyright decisions were issued between 1981 and 2020. Applying recent statistics from an analysis of copyright substantial similarity cases between 1978 and 2020, only 63% of those decisions perform a substantial similarity analysis, and 7% of those consider the *de minimis* defense. *See* Clark Asay, *An Empirical Study of Copyright's Substantial Similarity Test*, 13 U.C. Irvine L. Rev. 35, 92 (2022). Using the Westlaw number as the baseline, that translates to 151 cases raising the *de minimis* defense in the context of misappropriation and is close enough to our 143 cases in the same date range (which includes more than just substantial similarity claims) to give us confidence that we have identified the relevant universe of copyright cases raising the *de minimis* defense.

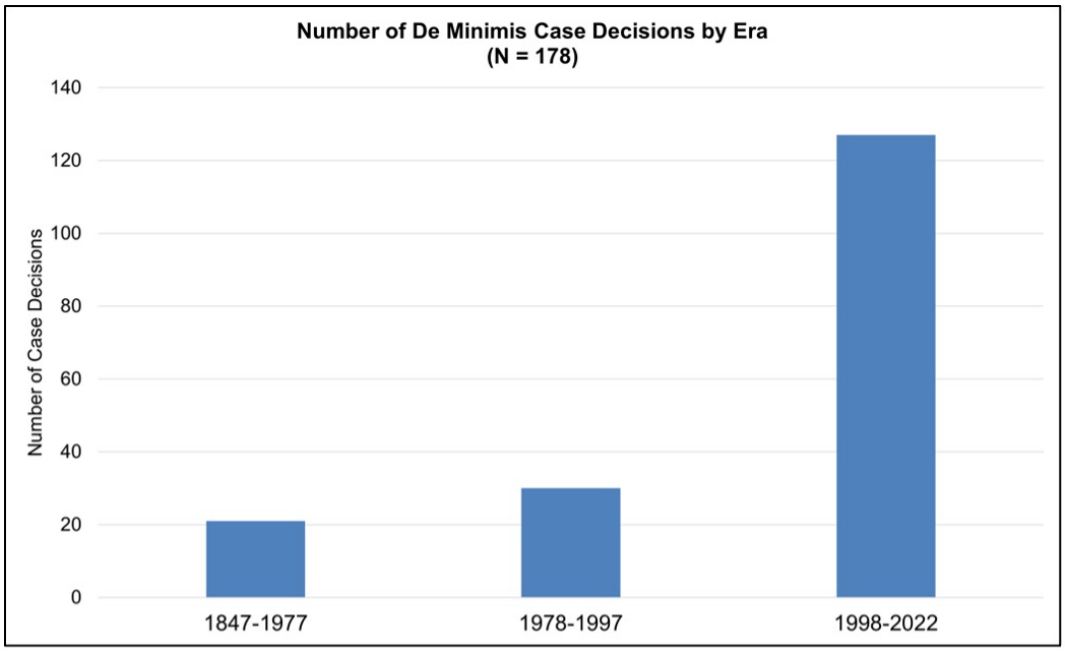
[280] The Early Era ends in 1978, the effective date of the 1976 Copyright Act.

that date. Due to the small number of observations, the data is bucketed in decades and later five years to highlight the growth over time. The buckets have a break between 1977-1978 to indicate the number of case decisions before and after the Copyright Act of 1976.



[Figure 1: Number of *De Minimis* Case Decisions Over Time]

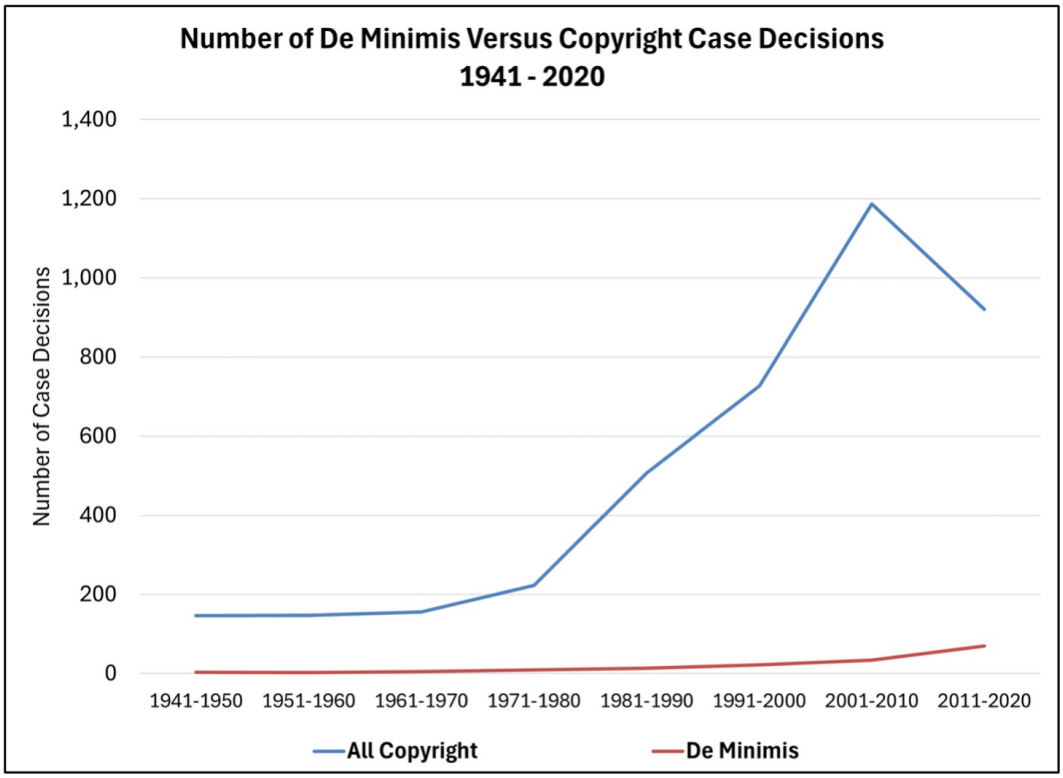
Figure 2 shows the same data as Figure 1 but by Era. The Contemporary Era dominates the *de minimis* dataset. This comports with our hypothesis that the internet age has driven the explosion of *de minimis* cases, highlighting the question whether prolific but trivial copying as part of our everyday communications and transactions requires adjustments to copyright law, including the scope of defenses.



[Figure 2: Number of *De Minimis* Case Decisions by Era]

We also measured the rate of *de minimis* decisions in relation to copyright decisions generally. Figure 3 shows the raw number of *de minimis* decisions in relation to copyright decisions from 1941 to 2020. Notably, in the first decade of the twenty-first century, *de minimis* decisions begin to increase as copyright decisions decrease.[281] The number of copyright (blue) and *de minimis* (red) decisions over time highlight and compare the trends over time. This confirms the rise in relevance of the *de minimis* defense to copyright defendants in the Contemporary Era. As unauthorized copying becomes an inevitable part of everyday life, fewer copyright lawsuits are filed but more of them contain a *de minimis* defense, justifying the copying as trivial.

[281] We collected U.S. District Court cases with an issued opinion from Westlaw, owned by Thompson Reuters, available at https://legal.thomsonreuters.com/en/products/westlaw-advantage. *De minimis* cases were collected as described *supra* Part III.A. All copyright cases were collected by searching for Federal District Court cases containing the word "copyright" and filtering for the Key Number 99: Copyrights and Intellectual Property.

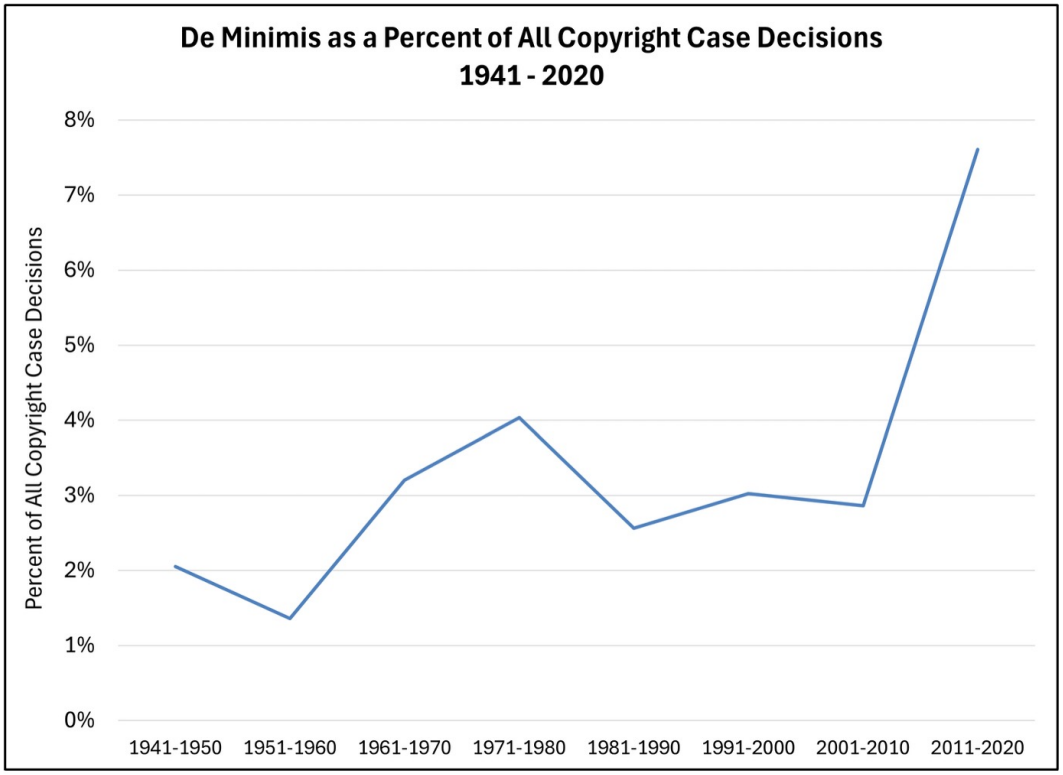


[Figure 3: *De Minimis* v. Copyright Case Decisions]

We visualize this upward trend of *de minimis* decisions in Figure 4, which shows the *de minimis* case decisions as a *percent* of all copyright case decisions from 1941 to 2020. *De minimis* decisions hovered between 2-4% of all copyright decisions for 70 years and then doubled to 8% for 2011-2020. This shows that the *de minimis* case decisions made up a larger share of copyright decisions in court.[282] When combined with Figures 2 and 3, this data shows not only the rise of legal relevance of the *de minimis* defense to copyright defendants in the internet age, but also the relevance of the defense to courts deciding copyright cases. As judges write more opinions on *de minimis* challenges over time, varying the standards and their application in particular cases, there is need for clearer standards and doctrinal predictability to serve the doctrine's purposes of judicial economy. Judicial economy is not the same over time; as cases become more complex with different kinds of parties asserting different kinds of works, as is true in the Contemporary Era, concerns of judicial economy should increase and

[282] Figure 4 is *de minimis* cases divided by total copyright cases from the data in Figure 3.

de minimis claims become more salient.



[Figure 4: *De minimis* cases as a percentage of copyright cases]

B. Coding Cases

A team of four research assistants and one author (Silbey) coded the case facts and their doctrinal details. At first, we coded the same cases and met once a week during the coding to check intercoder reliability and discuss questions raised. After several weeks, cases were divided among four research assistants and each coded only their cases. One of us (Silbey) reviewed all coded cases independently. At the conclusion of the coding, each research assistant wrote a memo about their cases' themes and outliers.

We coded for a variety of facts and doctrinal details.[283] We coded for: the kind of work (both plaintiff's and defendant's);[284] the stage of litigation at which *de*

[283] See Appendix for Tables and Definitions of coded features.
[284] *See* Table 1.

minimis was discussed; form of *de minimis* (*e.g.*, fragments, special parts, or whole, and sub-categories therein);[285] the nature of the court's *de minimis* analysis (legal standards, quantitative or qualitative thresholds);[286] the identity of the plaintiff and defendant;[287] presence or interaction with fair use; and success or failure of the *de minimis* defense.[288]

1. Types of Works and Case Pairs [Fig. 5-6.2]

Many of these categories required careful delineation for coding purposes. For example, because we hypothesized that the kind of works at issue might affect the *de minimis* analysis, we expected to see patterns arise concerning works that are more easily fragmented (and thus *de minimis* more available as a defense). Since copyright law does not define a "work," and some regularly appearing works are also left undefined in the Copyright Act, we had decisions to make about genres, forms, and boundaries.[289]

Parties frequently debate the boundaries of the work, often to their strategic advantage, especially when the work contains parts that could be separately copyrightable (such as screen shots, characters, or chapters).[290] We sought to identify those strategies when they occurred, and so divided works along these lines even if not part of the Copyright Act (*e.g.*, "article" separate from "book" whereas the Copyright Act speaks only of "literary work"). We categorized each work in terms of its most reasonably appreciated whole and in terms of the work that the author originally conceived, even if the part that was copied could be

[285] *See* Tables 2 and 3.

[286] *See* Tables 4–6.

[287] *See* Table 7.

[288] All descriptive codes were independent of case outcome, with the exception of the code tracking final disposition.

[289] For example, manufacturing manuals and sales catalogues are not separately enumerated as "literary works" in the Copyright Act, but we identified them independently for this analysis because they appeared with such frequency. For a discussion of the difficulty in defining a "work" in copyright law, *see* Margot E. Kaminski & Guy A. Rub, *Copyright's Framing Problem*, 64 UCLA L. Rev. 1102 (2017); Paul Goldstein, *What Is a Copyrighted Work? Why Does It Matter?*, 58 UCLA L. Rev. 1175, 1178 (2011); Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 Fordham L. Rev. 575, 621 (2005).

[290] For discussion of the strategic gaming problem in copyright and related IP areas, *see* Jeanne Fromer and Mark McKenna, *Claiming Design*, 167 U. Pa. L. Rev. 123 (2018); Mark Lemley & Mark McKenna, *Scope*, 57 Wm. & Mary L. Rev. 2197 (2016).

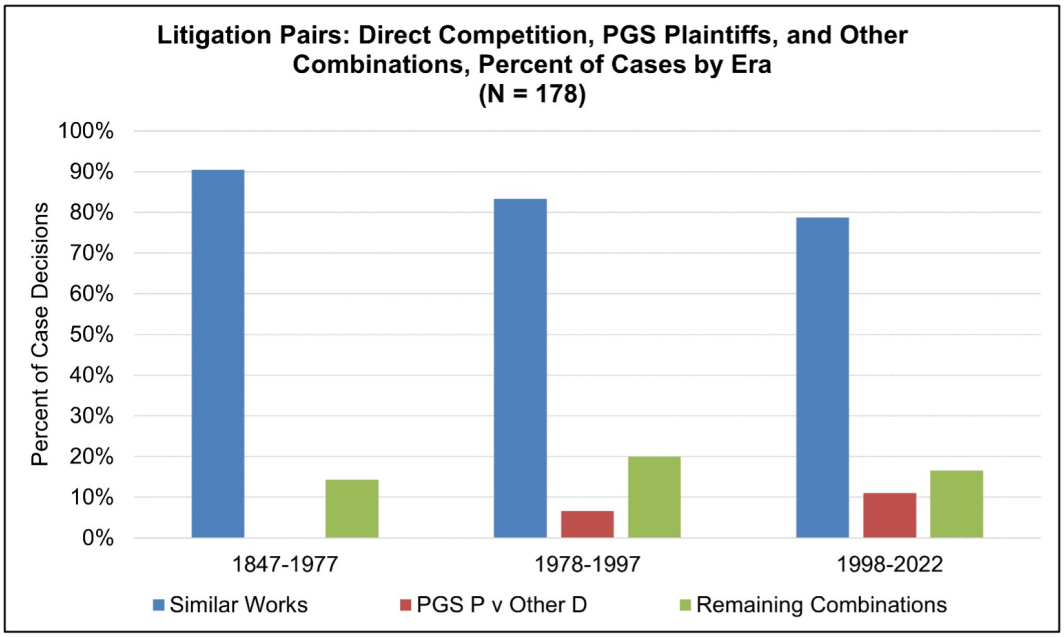
independently copyrightable.[291] For example, when defendant copied the pictorial or graphic works within plaintiff's manufacturing manual, we coded that as a manual (for plaintiff); if defendant was using the images in its manual, that was coded as a manual as well. This accurately captures the kind of lawsuit it is (between similar companies preparing similar products). In later eras, and especially in the Contemporary Era, the same dispute is more likely to be characterized as between a Plaintiff's pictorial work (if Plaintiff was the individual author and owner of the image) and a Defendant's manual.

The evolution in the Contemporary Era of disputes between putative licensees and licensors, as opposed to between industry competitors, is captured by this shift in the nature of works the parties claim. In the Contemporary Era, it is more common for photographers or visual artists to sue as independent authors for use of their works as input into books or audiovisual works. These cases were coded in relation to the authorial claim of each (*e.g.*, visual artist versus movie producer), and we understand these cases to represent a different kind of lawsuit than in prior eras – not between competitors but between potential licensees. After the *Ringgold* decision in 1998, we see a rise in these different lawsuits in which the works are disaggregated, especially with regard to pictorial works, whole works (not fragments), and when the lawsuit is between potential licensees as opposed to industry competitors. These kinds of lawsuits may lend themselves more often to *de minimis* defenses as defendants contend that small-value inputs into a larger work (e.g., a background poster for a television sitcom set) is not copyright infringement, because that was true in earlier eras. Of course, whether it is a *de minimis* copy or copyright infringement is precisely the question these new lawsuits in a new era raise. And the varying approaches in the Contemporary Era fail to clarify the question.

Figure 5 describes litigation pairs by era showing this pattern of rising lawsuits between putative licensees-licensors. If a plaintiff claims a defendant's book included a copy of an excerpt from plaintiff's book, that was coded as Book_Book. The vast number of cases still involve plaintiff and defendant authors of the same kind of work. We believe this approximates direct competition in the marketplace, with *de minimis* claims focusing on whether substitutional

[291] Other coding categories investigate whether what was taken was a "specific part" that might stand alone or has independent commercial value, see Table 3.

harms exist, a bedrock copyright complaint. The post-*Ringgold* period (and the Contemporary Era) includes many more cases involving plaintiffs and defendants authoring *different* kinds of work. We believe these cases are less obviously about direct competition and instead reflect a new plaintiff strategy to seek licensing revenue for uses that were either previously considered *de minimis*, fair use, or not substitutional copies at all (e.g., not substantially similar copies). The vast majority of these new cases are brought by individual plaintiff authors of pictorial, graphic, and sculptural works ("PGS" works[292]) against defendant authors of movies, television shows, and videos. These kinds of cases grew from nothing in the Early Era to 11% of the cases in the Contemporary Era (the middle bar in Figure 5).



[Figure 5: Plaintiff and Defendant Work Type Pairs by Era]

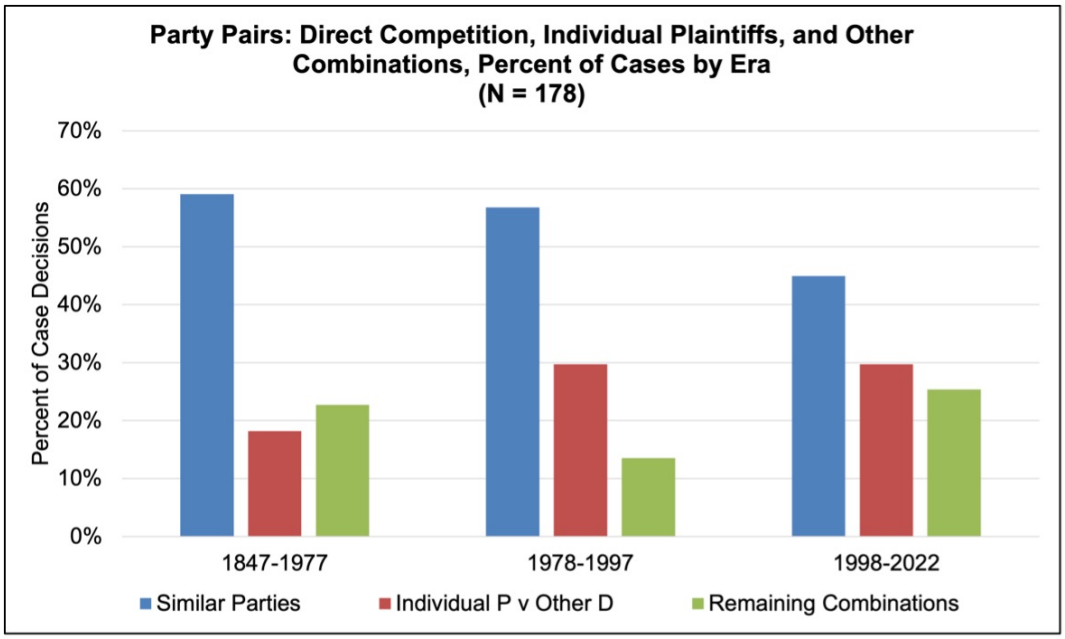
In general, we found that the distribution of the kinds of works over time was related to the prevalence and growth of copyright industries at the beginning of the internet age. For example, we see more music cases after 1993 (although they existed in earlier eras). And computer code cases begin in the late 1980s

[292] 17 U.S.C. § 102(5) (2025) (enumerating PGS works as copyrightable subject matter); 17 U.S.C. § 101 (2025) (defining PGS work).

and rise in the mid-2000s, when personal computers became available and the industry rapidly grew.[293] Claims by pictorial work authors begin to rise in the mid-1990s and spike in the mid-2000s, with photography cases in particular growing in number. Not only are pictorial works easier to copy and distribute in the internet age, but the image industries (photography and visual arts) are booming currently and are populated by independent and freelance authors who claim copyright in their work and who license them to media outlets for publication.[294] As Figure 5a shows, the percent of cases involving similar parties have decreased over the Eras with less than half the cases (45%) in the Contemporary Era involving similar parties. These cases are getting replaced more often by those brought by individual plaintiffs. Further, individuals suing other individuals are 21 of those "Similar Parties," confirming our hypothesis that independent and individual authorship of different kinds of works, which become parts of and input into other works, may fuel these disputes in which *de minimis* defense is salient.

[293] In contrast to computer code, which only showed up in the late 1980s, works like Books, Lists, Manuals, and Articles have been claimed over the entire time period we describe in this Article. And video didn't start appearing until 2008-2012. *See* Table 1 (Works).

[294] Jessica Silbey, Eva Subotnik & Peter DiCola, *Existential Copyright*, 95 Notre Dame L. Rev. 263 (2019) (describing the evolution of the photography industry as regards copyright authorship and infringement claims and the heyday of the 1970s-1990s). Of course, many image-based authors were also employees who might not own their works. The *de minimis* cases concerning image-based works are largely individuals suing media companies. *See, e.g.*, Straus v. DVC Worldwide, Inc., 484 F. Supp. 2d 620 (S.D. Tex. 2007) (agency's use of the photographer's work in a television commercial for two to three seconds was *de minimis*); Sandoval v. New Line Cinema Corp., 147 F.3d 215 (1998) (use of plaintiff's photographs in the movie Seven was *de minimis*); Davis v. Gap, Inc., 246 F.3d 152 (2d Cir. 2001) (*de minimis* doctrine inapplicable where eyeglass jewelry design was highly noticeable in the advertisement).

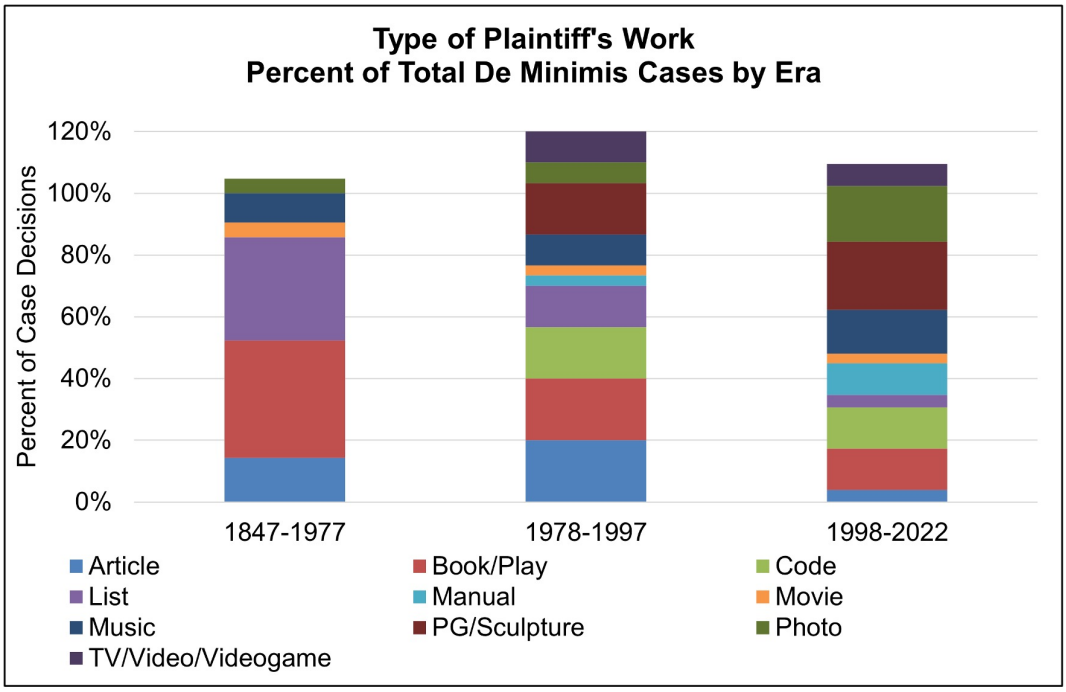


[Figure 5a: Plaintiff and Defendant Industry Type Pairs by Era]

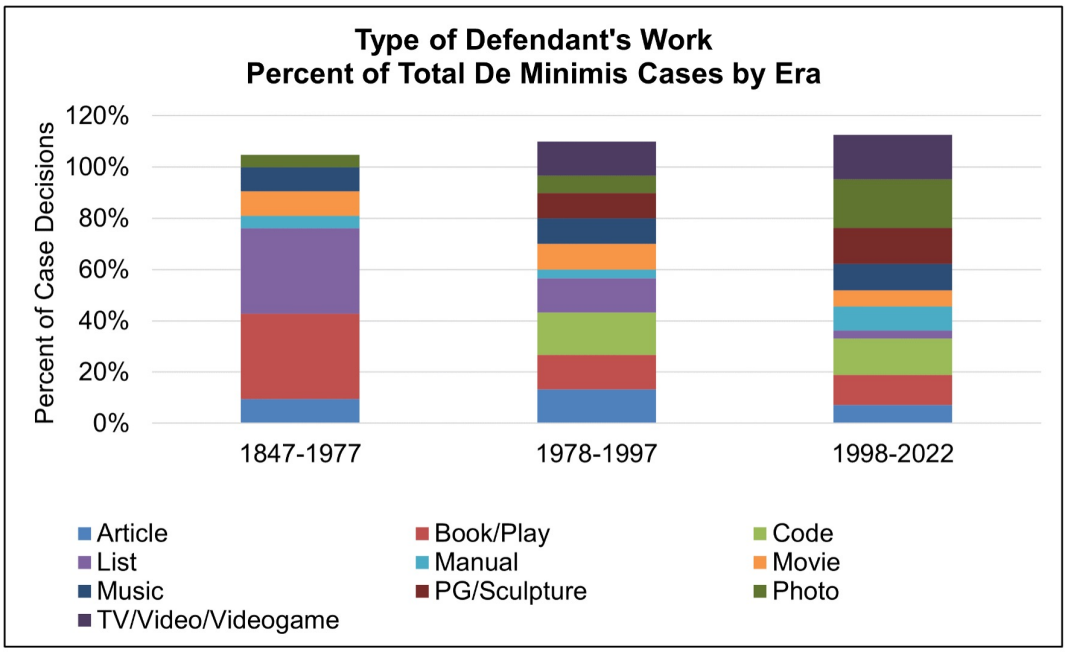
Figures 6.1 and 6.2 shows the percent of plaintiff and defendant *works* over the total number of cases over time, bucketed by eras.[295] The main observation with these two Figures demonstrating the growth of new industries is that the types of works involved in these cases become more varied over time for both plaintiffs and defendants. The Early Era is dominated by books, lists, articles, and music. The Transition Era sees a rise of computer code, PGS works, and television. The Contemporary Era includes the whole range of works, but most prevalent are computer code, video, and PGS works. Over time, articles, books, and lists appear less often in *de minimis* cases. We interpret this trend as confirming the utility of the *de minimis* defense to efficiently resolve disputes between legacy copyright industries common in the Early Era. The prevalence of newer industries in the later eras in which *de minimis* is more frequently debated suggests that norms of permitted copying and required licensing in new industries may still be developing and judges struggle to arrive at a clear standard, increasing opportunism among litigants. Increased variety and nascent, ambiguous copying/licensing norms negatively implicates the *de minimis* doctrine's judicial economy rational. As the next section demonstrates, norms from the Early Era about whole copying

[295] The percentages by era total more than 100% because multiple works can be mentioned per case. See Table 1 for definitions.

in a quantitatively trivial manner begin to take root in the Contemporary Era especially with regard to PGS works, which is a laudable development. But the doctrine's growing complexity still challenges its underlying rationale and requires further clarification.



[Figure 6.1: Plaintiff's Work by Era]



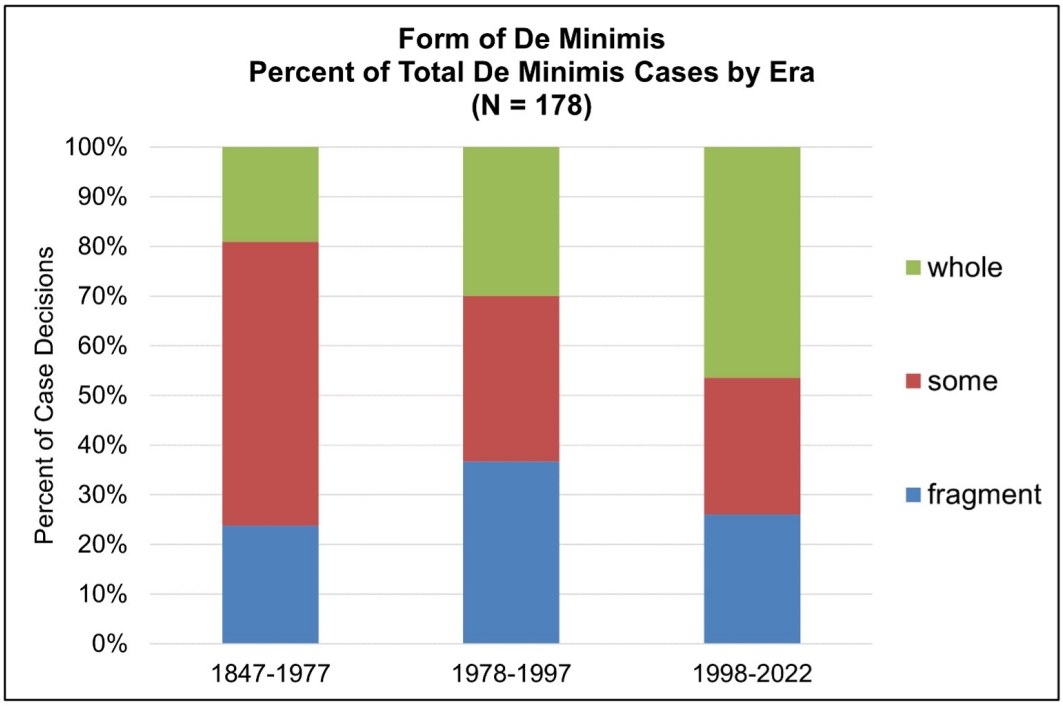
[Figure 6.2: Defendant's Work by Era]

2. *Forms of* De Minimis *[Fig. 7.1, 7.2, 8]*

Because we hypothesized that the form of *de minimis* might matter to the court's analysis, we coded for three forms measured quantitatively: "fragment" "some", and "whole" (described further below and in Appendix Table 2). And then we further coded for specific forms identified qualitatively, such as photographs, videos, textual sentences, etc. (also described further below and in Appendix Table 3).

As explained, whole copying of a work dramatically increased over time, first appearing with any regularity in the Transition Era and outpacing other kinds of partial copying (fragmented or some) in the Contemporary Era. Figure 7.1 shows this distribution bucketed by eras. It shows how the categories of "some" and "whole" completely change relative prevalence between the Early Era and the Transition Era. In the Early Era, "some" copying was 57% of all cases and "whole" was 19%. By the Contemporary Era, "some" was only 28% and "whole" was 46%. There is reversion back to the mean in the Contemporary Era for "fragments" at 26% of all cases in the eras. The two take-aways from this distribution are (1) copying the whole work and asserting a *de minimis* defense has become much more common over time; and (2) when combined with defendant win rates, fragments and whole copying are defendant-friendly factors in an infringement suit when alleging *de minimis* defense.[296] That whole copying can be (and frequently is) adjudicated to be *de minimis* is an important commendable, and surprising feature of copyright law in the internet age. Courts and litigants should take note.

[296] *See* Figure 15 (Prevailing *De Minimis* by Plaintiff Work and Form).

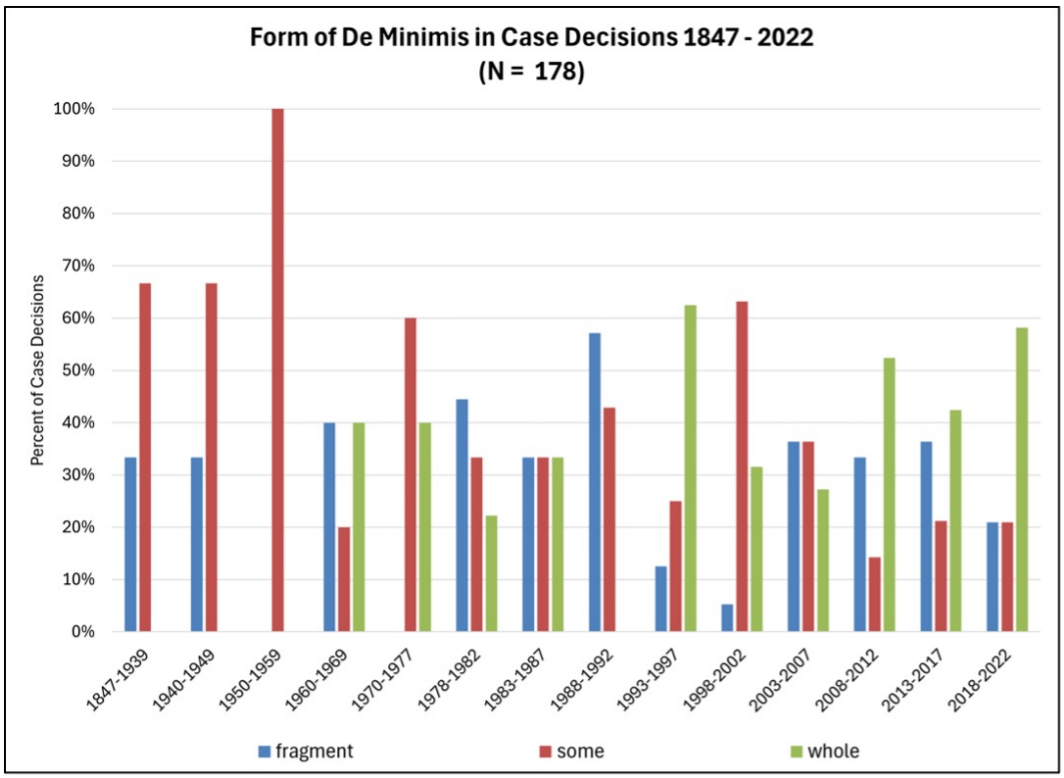


[Figure 7.1: Form of *De Minimis*]

Figure 7.2 shows this same distribution of *de minimis* forms roughly by decades. As with Figure 7.1, in Figure 7.2 the percent of *de minimis* case decisions controls for the growing trend of *de minimis* claims over time. Whole works did not appear until the 1960s, presumably because by then copying technology was popularized and accessible. Whole works have remained a consistent and growing percentage of *de minimis* cases. As we explain *infra* regarding prevailing defendants, although fragmentary copying remains the predominant way for a defendant to win when asserting a *de minimis* defense, courts also appear solicitous of defendants who make whole copies of pictorial works in certain contexts, separate and apart from a fair use defense.[297] Notably, the rise of whole copying cases in which *de minimis* is raised as a defense and succeeds undermines the account that *Ringgold* and the doctrinal developments in the Contemporary Era have made it harder for defendants to prevail. We consider this a significant corrective to the narrative that *Ringgold*'s complex and time-consuming approach governs *de minimis* analyses, opening up more opportunities to build upon a trend

[297] *Id.*

that is economical and comports with copyright law and policy.



[Figure 7.2: Whole vs. Partial Copying Claims Over Time]

We hypothesized that specific kinds of fragments, parts, or works, might make a difference in the prevalence and success of defendant's *de minimis* defense. [298] As Figure 8 shows, sentences (including lede sentences and single pages) dominated the Early Era with 62% of the cases, but have become much less prevalent, reducing to 21% of cases in the Contemporary Era.[299] These early cases were about titles, headings, lines of code, and short sentences (including definitions, such as in informational works).[300] Taking the place of these kinds of cases in the Transition and Contemporary Eras are cases involving the whole copying of pictorial works and phrases (including musical phrases and visual phrases as ideas and stock

[298] See Table 3 for the specific forms of *de minimis* copying.

[299] The percentages by era total more than 100% because multiple forms can be mentioned per case.

[300] *See* Webb v. Powers, 29 F. Cas. 511 (C.C.D. Mass. 1847) (exemplifying these kinds of cases in the Early Era about fragments).

images).[301] Cases concerning pictorial works went from 10% of cases to 34% over the eras. And cases concerning phrases comprised 5% of the Early Era cases as compared to 22% of the Contemporary Era cases. These are cases such as *Ringgold* and *Gottlieb* (pictorial works) and the many musical copyright cases (musical phrases), such as *VMG Salsoul*. The works subject to "entire" copying in this Figure 8 does not include two-dimensional visual art (such as images) but does include sculpture, audiovisual works (television and film), and literary works such as computer programs and manuals.[302] The majority of whole and entire work cases in the Early Era occur in the last decade, as Figure 7.2 indicates.

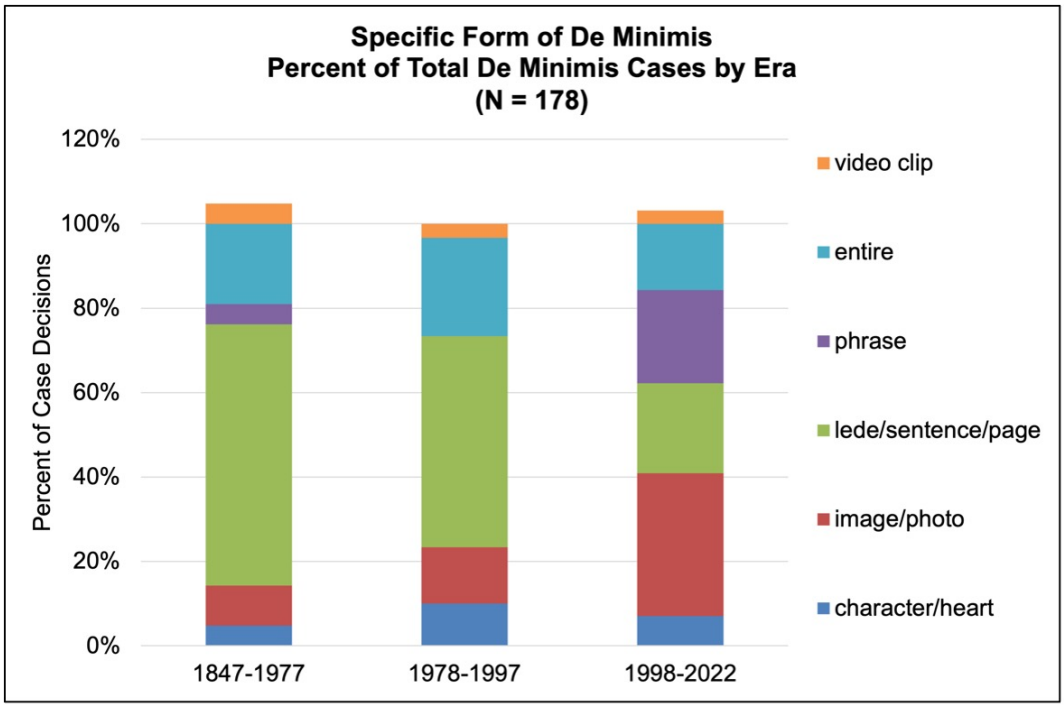
To us, Figure 8 confirms several themes arising in the dataset: (1) the growing diversity of plaintiff works involved in *de minimis* cases in the Contemporary Era; (2) the rise of *de minimis* cases concerning pictorial works in the internet age and Contemporary Era (usually asserted against defendants who are putative licensees, not industry competitors); and (3) the shrinking of *de minimis* cases in which defendants are accused of copying textual fragments of the plaintiff's work, which is how the *de minimis* doctrine began. One way to think of this evolution is that a new kind of *de minimis* case is arising in the Contemporary Era: whole copies of image-based works used in audiovisual or literary works. And these new cases are a version of the old *de minimis* case in which textual quotation or referral is common and acceptable. This is a critical new feature of the *de minimis* doctrine because today we communicate as much by images as by words.[303] Allowing speakers to copy and paste images in order to communicate, without being subject to copyright infringement, is speech-enhancing and effectively harmonizes copyright law and the First Amendment. We understand this trend to be an admirable adaptation of Early Era *de minimis* decisions that is consistent with copyright law and policy: immunizing from frivolous lawsuits defendant's quantitatively trivial and qualitatively insignificant copying while also promoting

[301] See Part II.B and C for cases.

[302] See Table 3 for definitions of these codes. As Table 3 indicates, we code "Entire" separately from other kinds of more frequently occurring forms, also copied in their entirety, such as "Photograph" and "Image," to dig deeper into the quantitative assessment data.

[303] Ryan M. Milner, The World Made Meme: Public Conversations and Participatory Media (The MIT Press, 2016) (exploring and explaining emerging patterns of onslaught of visual communication in public conversations in the twenty-first century).

knowledge through distribution of expressive works.



[Figure 8: Specific Forms of *De Minimis* Works by Era]

3. Legal Standards & Evaluative Factors [Fig. 9-11]

How do courts assess *de minimis* and what factors do they consider in a *de minimis* determination? Because so many cases contain only a conclusory assessment of the *de minimis* defense, there was often nothing to code. We nonetheless sought to understand how many of the cases in the data were perfunctory judicial hand-waves (as either *de minimis* or not). And we wanted to understand the details of courts' *de minimis* analyses when they were more complex. So, when courts engaged in more specific analysis, even if only a sentence or small paragraph, we looked closely at the factual and legal considerations.

We identified six general approaches to the *de minimis* defense and tracked them in terms of their substance and predominance. They included: (1) no standard at all; (2) a simple statement of "*de minimis* non curat lex"; (3) a quantitative assessment; (4) an assessment of aesthetic significance, which we considered a qualitative measure; (5) consideration of financial investment or

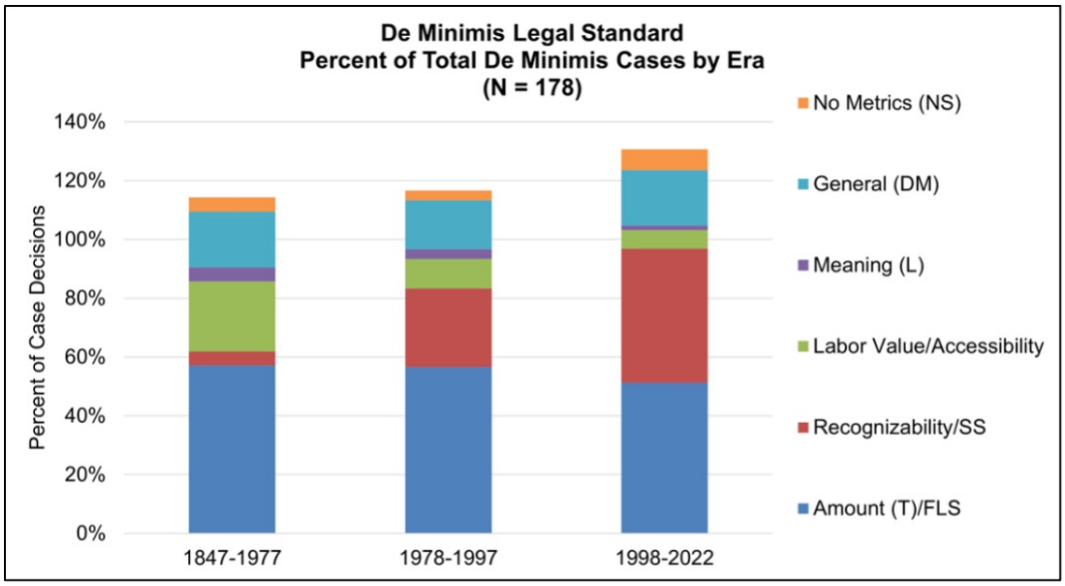
harm; and (6) analysis resembling "substantial similarity," which often included "recognizability" or "observability" as a key factor.[304]

Figure 9 visualizes the range and distribution of standards over the eras.[305] This data analysis confirms three themes from the previous discussion. (1) Courts in the Contemporary Era engage more diverse legal standards per case than in the past, which is why the Contemporary Era's bar goes past 120%, confirming that the *de minimis* analysis has become more complex over time. (2) The largest change to the *de minimis* analysis is the incorporation of a standard that resembles a "substantial similarity" infringement analysis, growing from 5% in the Early Era to 46% in the Contemporary Era ("Recognizability/SS"). And, (3) the perfunctory quantitative origins of *de minimis* ("Amount/FLS") remain constant over the three eras and continue to account for a majority of the cases. Additionally, financial investment rationales for assessing *de minimis* decrease from 24% to 6% between the Early and Contemporary Era (this is the "Labor Value/Accessibility" factor). We attribute this in part to the milestone case of *Feist Publication Inc. v. Rural Telephone Services*, 499 U.S. 340 (1991) – itself a *de minimis* case – which ended copyright's sweat-of-the-brow doctrine and explained that the "primary objective of copyright is not to reward the labor of authors, but to promote the progress of science and the useful arts."[306] The upshot is that *de minimis* is becoming more a complicated doctrine (and thus less efficient), undermining a key purpose of the defense. But also, importantly, some categories of cases are ripe for quick *de minimis* dismissals and identifying them is key to maintaining the defense's vitality in the digital age.

[304] *See* Table 4 (describing these standards in more detail).

[305] The percentages by era total more than 100% because multiple standards can co-occur in a single case. For detailed descriptions of the factors, see Table 4 (*De Minimis* Legal Standard).

[306] Feist Publ'n v. Rural Tel. Co., 499 U.S. 340, 349 (1991).



[Figure 9: Legal Standards by Era]

Before evaluating the trends in prevailing *de minimis* defense cases – *i.e.*, which of these standards appears more frequently when defendant wins – we dig further into the quantitative and qualitative metrics that courts consider as part of a *de minimis* defense. The discussions in these cases resemble aesthetic analyses of defendant's use of plaintiff's works. Despite courts' admonitions that judges should avoid art criticism,[307] copyright law is shot through with aesthetic questions.[308] The *de minimis* decisions evaluating quantitative and qualitative metrics *are* aesthetic analyses, and they highlight how much aesthetic considerations may matter even in cases alleging only trivial copying.

We were not surprised by the rise of more complex *de minimis* analyses, given that we hypothesized that *Ringgold* and *Gottlieb* were landmark cases for the evolving doctrine. However, we were surprised by the distribution of quantitative metrics over time.[309] As Figure 10 shows, the fraction of cases considering whole copying is similar in the Early and Contemporary Eras at around 20% (and is less

[307] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903); *see also* Andy Warhol Found. for The Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 533–35 (2023).

[308] *See* Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 301 (1998) ("[T]he existence of copyright makes subjective judicial pronouncements of aesthetic taste necessary."); *see also* Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 Nw. U. L. REV. 343, 344 (2015).

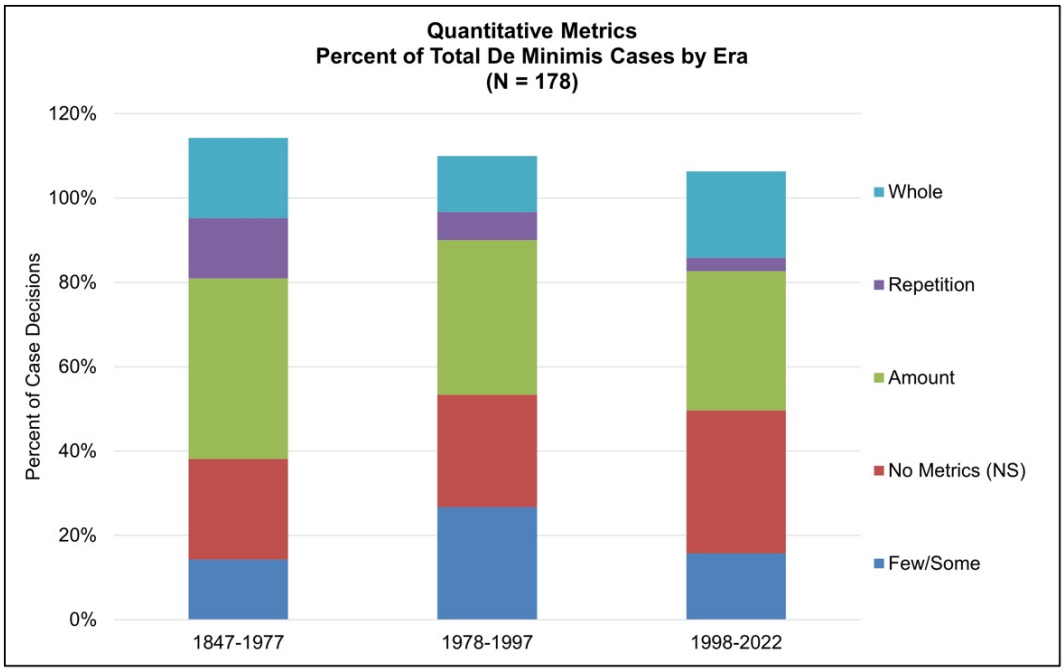
[309] See Table 5 for descriptions.

in the Transition Era at 13%). The number of cases considering partial copying is also similar between the Early and Contemporary Eras at around 15%, and higher in the Transition Era (at 27%). The second era therefore stands out as a transition era for these quantitative metrics, and so appropriately named. Factors that decline over time include repetitious use of small amounts ("Repetition"), dwindling from 14% in the Early Era to 3% in the Contemporary Era. Courts appear to discuss the *de minimis* defense less frequently when defendants make small but repetitious use of copyrighted material. And courts are less likely to consider *specific* fractional amounts of copying ("Amount") as relevant to the *de minimis* determination over time, declining from 43% in the Early Era to 33% in the Contemporary Era. Fractional amounts nonetheless remain a significant factor in the cases (about a third of *de minimis* analysis contain them).[310] The element that increases over time, is the *absence* of a quantitative metric ("No Metrics"), which may be one way to explain the relative waning success of the *de minimis* defense in the Contemporary Era.[311] A third of cases are more likely to have *no* quantitative metric at all in the Contemporary Era at 34% as compared to 24% in the Early Era, and this bodes badly for defendants. As we explain *infra*, the presence of a quantitative metric helps defendants in borderline cases, especially in the case of copying a PGS work.[312] Given that the *de minimis* doctrine began with quantitative assessments of triviality and its goal is to be an efficient equitable defense, it makes sense for both courts and litigants to anchor the analysis in quantitative metrics.

[310] This includes when the court computes the percentage of the plaintiff's work copied and the percentage of defendant's work that consists of plaintiff's work.

[311] *See infra* Figures 13 and 14.

[312] When courts evoke a quantitative metric or a perfunctory *de minimis* standard, defendants nearly always prevail (91% of the time, or 45/49 prevailing defendant cases). *See infra* Figures 16 and 19 and accompanying notes.

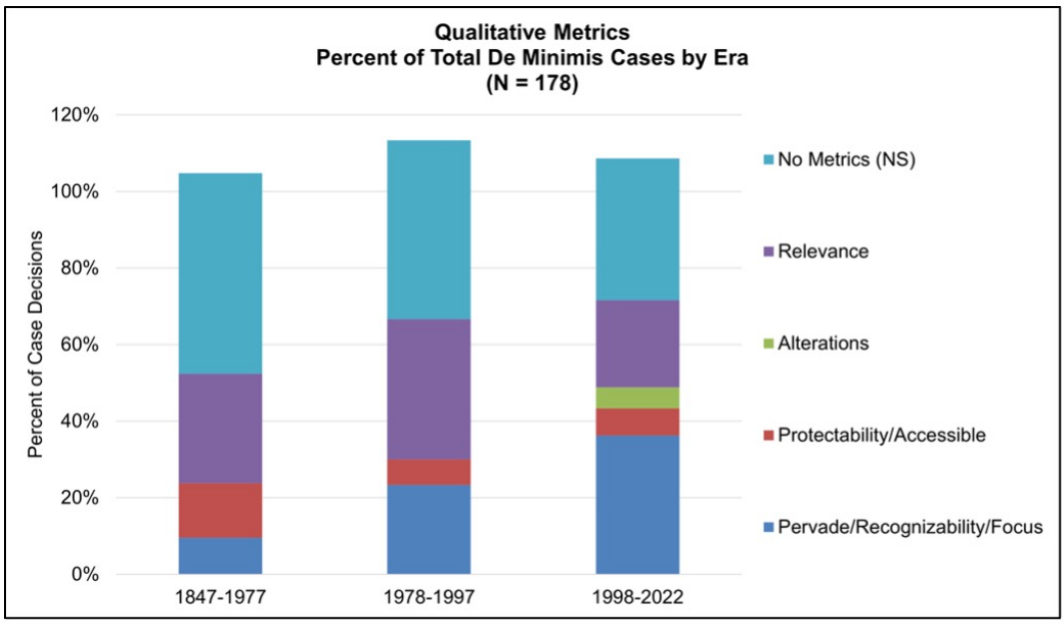


[Figure 10: Quantitative Metrics by Era]

Qualitative metrics follow a similar pattern, with some exceptions.[313] As Figure 11 shows, 37% of cases in the Contemporary Era use no metric at all to evaluate the *de minimis* defense ("No Metrics"). This is a decrease from the Early Era in which more than half (52%) of cases contained no qualitative metric. This is not surprising given the *de minimis* defense began as an assessment of quantitative triviality in terms of fragments and small parts of larger works; courts infrequently considered relevant the aesthetic qualities of works. When courts do consider meaning or message of the work copied, the next common factor is "relevance" – when courts consider the nature of the work copied salient to the meaning or value of the defendant's work. The "relevance" factor ranges from 23% to 37% over the eras and approximates courts' substantive assessment of "triviality." We believe this reflects court's concern with market substitution for Plaintiffs expressive form. Qualitative assessments concerning alterations to the plaintiff's or defendant's work only appear in the Contemporary Era (Alterations). This makes sense given how much harder it would have been in other eras to copy and alter another author's work and insert it into one's own. Perhaps more surprising – but consistent with the doctrinal evolution described *supra* in Part II

[313] See Table 6 for further descriptions of these factors.

– is the rise in qualitative metrics of "recognizability" and "observability" from 10% in the Early Era to 36% in the Contemporary Era. This follows the trend of co-mingling the *de minimis* with the substantial similarity analysis. And it raises the important question whether in some large number of "trivial" copying cases, the *de minimis* standard and the substantial similarity standard are insufficiently doctrinally distinct. Their co-mingling is an obstacle to achieving the *de minimis* doctrine's goal of judicial efficiency.



[Figure 11: Qualitative Metrics by Era]

Despite the trend of co-mingling *de minimis* with infringement analyses, as much as between a majority and a third of the cases *do not* discuss qualitative factors at all. *Ringgold*'s in-depth analysis that resembles the substantial similarity test is thus still a doctrinal minority across all cases. And, overall, courts more frequently frame the *de minimis* analysis in terms of no metric and/or quantitative metrics.[314] A more rigorous qualitative analysis resembling the substantial similarity test only arises with relative frequency in the second half of the Transition Era. By the Contemporary Era, a qualitative evaluation is one of several analytic options. This shows that *Ringgold* and its progeny may have

[314] *See supra* Figure 9.

shifted the way *de minimis* defense operates, *but only in a subset of cases*. The more qualitative and aesthetically complex analysis is neither the default standard nor the only one. Furthermore, as we discuss below, the other *de minimis* standards are more defendant-friendly.[315] For the *de minimis* defense to remain independent and effective, therefore, courts and lawyers must appreciate the range of *de minimis* standards and the optimum contexts for their use.

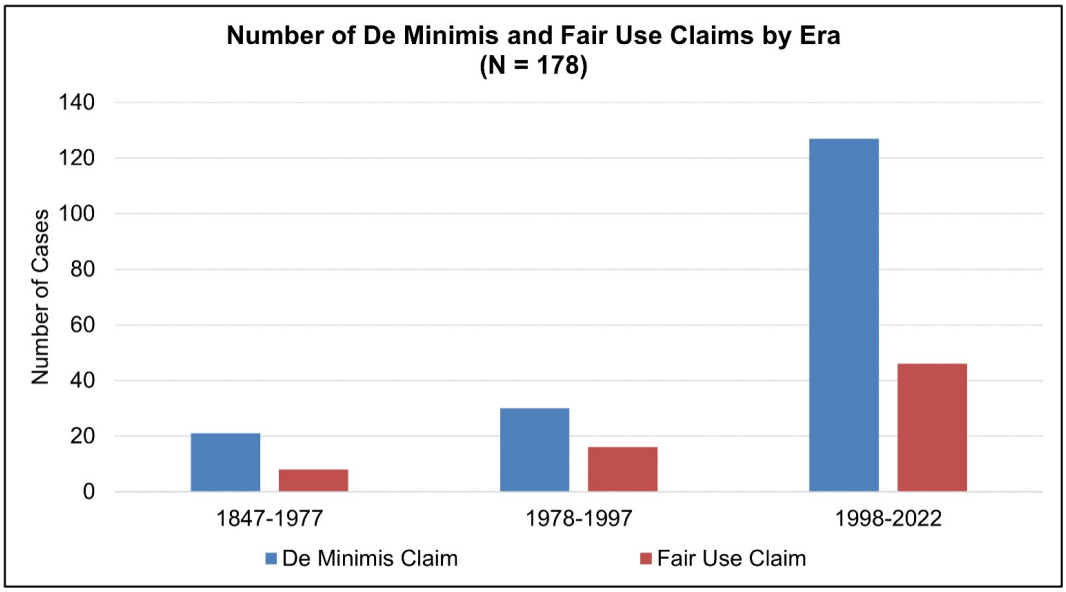
4. Case Outcomes & Fair Use Interaction [Fig. 12-21]

A goal of this research was to learn under what circumstances the *de minimis* defense succeeds and if it succeeds at the earliest possible stages of litigation, as the defense optimally demands. To this end, we coded for the success or failure of the *de minimis* defense, its interrelation with the existence of a fair use defense, and the stage of litigation at which the *de minimis* analysis is dispositive.

As seen in Figure 12 below, only a portion of cases raising a *de minimis* defense also raise a fair use defense, and in the Contemporary Era the overlap in defenses is the smallest of all eras. This supports a determination of the independent relevance of the *de minimis* defense from fair use. Although the *de minimis* defense developed from fair use in the 1840s, as described in Part I *supra*, in a majority of cases since then it has been alleged independently.

This bodes well for the early intervention of *de minimis* in an appropriate case. The relative lack of overlap in the dataset between *de minimis* and fair use may also send the wrong signal that raising both defenses is inconsistent or risky for defendants. Given the *de minimis* data set clearly demonstrates the *de minimis* defense's independent structure and role, lawyers should not avoid raising both defenses and courts should not default to the more complicated fair use analysis in the presence of a simultaneous *de minimis* defense. For *de minimis* to effectuate judicial economy, it must be available early in the litigation and, if inappropriate for dismissal, its early assertion should not preclude other defenses later in litigation.

[315] *See supra* note 283; *infra* Figures 16 and 10 and accompanying notes. We explain this subset of cases further *infra*.



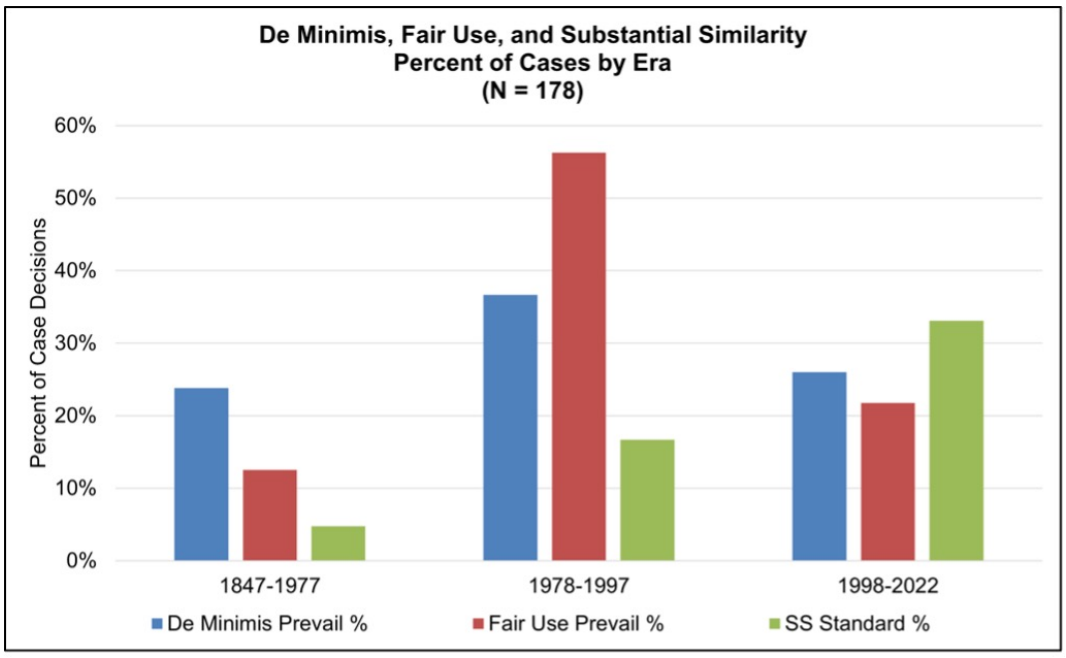
[Figure 12: When *De Minimis* and Fair Use Defenses Co-exist]

In terms of win-rates,[316] as seen in Figure 13 below, *de minimis* claims prevailed at similar rates in the Early and Contemporary Eras (about 25%); and *de minimis* also prevailed over fair use raised in the same case in both eras (although in the Contemporary Era the rates of success are close).[317] The Transition Era follows a different pattern. Both *de minimis* and fair use (when claimed in a *de minimis* case) success rates are higher, 37% and 56% respectively. The rise in fair use successes over and above the *de minimis* defense in the Transition Era may be explained by fair use's recent statutory codification in 1976. It is possible that courts were relying on new and express statutory fair use factors (which includes a factor for "amount and substantiality") instead of an implied, albeit deeply rooted, common law *de minimis* defense to dispose of cases. Also notable in Figure 13 is that when (what eventually becomes) the *Ringgold* standard for evaluating the *de minimis* defense (SS Standard) rises in prevalence from the Early to the Contemporary Era, the rate of successful *de minimis* defenses reverts to its Early Era level. No matter, each are independently viable defenses to be raised optimally

[316] Prevailing *de minimis* outcomes are those with clear wins. Failed *de minimis* outcomes are those with clear rejections of the challenge. The 15 cases where there was no outcome, or it was split are not included in the figures.

[317] This is a comparison of fair use claims in cases in which de minimis is also raised, not in all fair use cases.

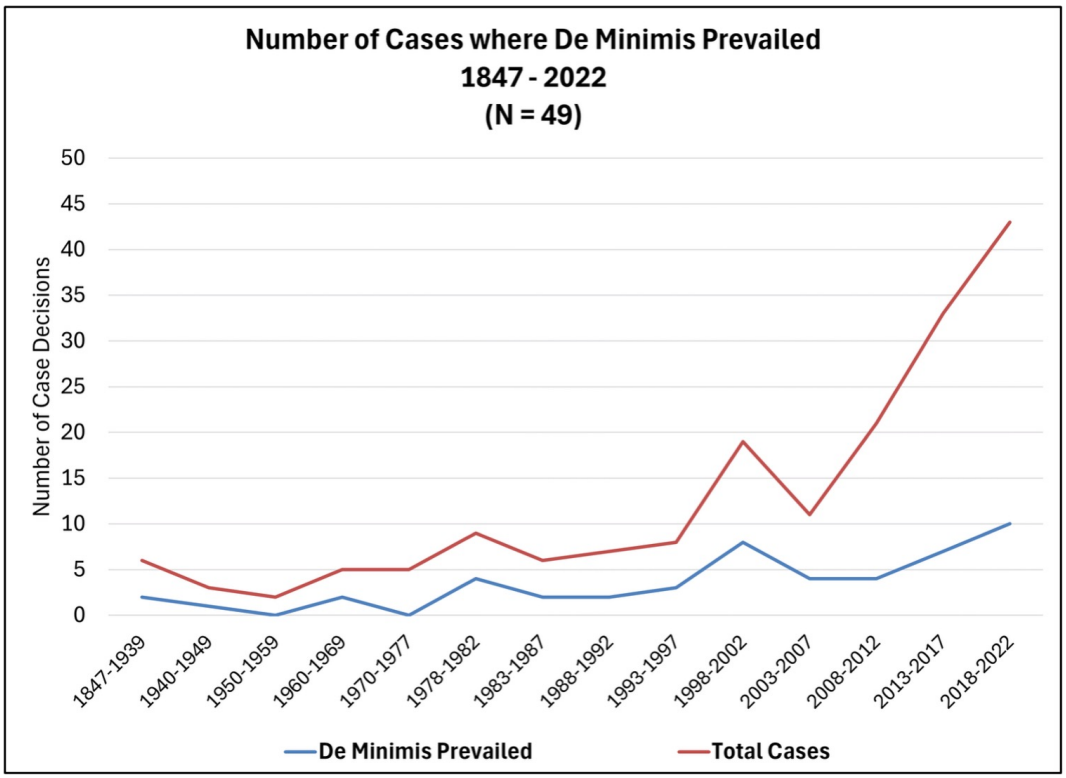
at different stages of litigation, which is an important observation given the *de minimis* defense appeared to come from fair use.



[Figure 13: Prevailing Defenses in Relation to Substantial Similarity Analyses]

The *de minimis* defense is not often successful in court. In only 49 of the 178 cases did the *de minimis* defense prevail.[318] Figure 14 below compares the total number of *de minimis* cases with the fraction of those in which the defense prevailed. As shown in the figure, the rate of success is fairly constant over the century but then slows in the Contemporary Era around 2003 (when the two lines drastically diverge), which corresponds to the early days of the internet's popularity.

[318] This is similar to fair use win rates at the preliminary injunction stage as reported in a study concerning copyright cases from 1978-2005. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. Pa. L. Rev. 549, 575–76 (2008) (preliminary injunction win rates between 24.1% and 30.4%). It is significantly lower than summary judgment fair use win rates described in the same study as ranging from 75.7% to 86.5%.

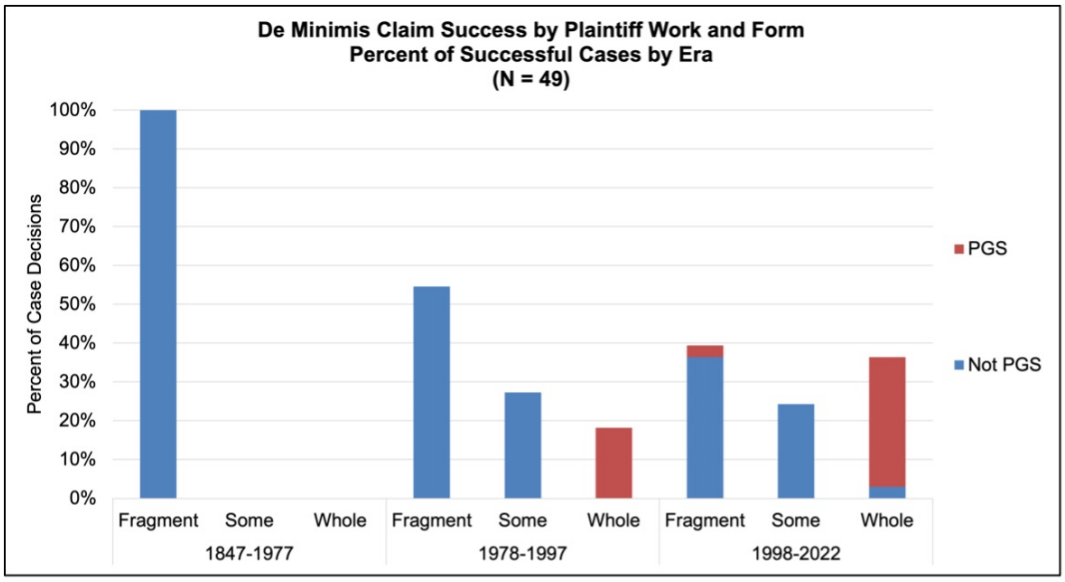


[Figure 14: Raw Counts of *De Minimis* Successes v. All *De Minimis* Cases]

We tried to understand this data regarding win/loss rates from different perspectives. We did so first with regard to the nature of the *de minimis* copying (whole, fragment, or some). We predicted that fragmentary or partial copying was more likely to be *de minimis*; and that whole copying (especially of pictorial works, such as photographs or other visual art), which was more common in the internet age, was less likely to be *de minimis*. Indeed, fragmentary and partial copying is more likely to be *de minimis*, but surprisingly whole copying is also determined to be *de minimis* with relative frequency, albeit under a different legal standard. We rely on this trend to structure our proposal in Part IV for a clarified *de minimis* defense.

In Figure 15 below, we see in the Early Era all the cases in which *de minimis* prevails concern fragmentary copying (and none are PGS works). In the Transition Era, prevailing *de minimis* cases are spread between fragments, partial, and whole copies, with fragments being the form that most frequently prevails. Notably, across eras all but one prevailing *de minimis* case concerning a whole work

involved PGS works.[319] In the Contemporary Era, successful *de minimis* cases are also spread between all three forms, but fragmentary and whole copying rival each other for prevalence and "whole" copying prevails more often than in the past. Again, PGS works predominate the "whole" copying category. PGS arrive later in the *de minimis* data set and PGS plaintiffs lose at higher frequency.



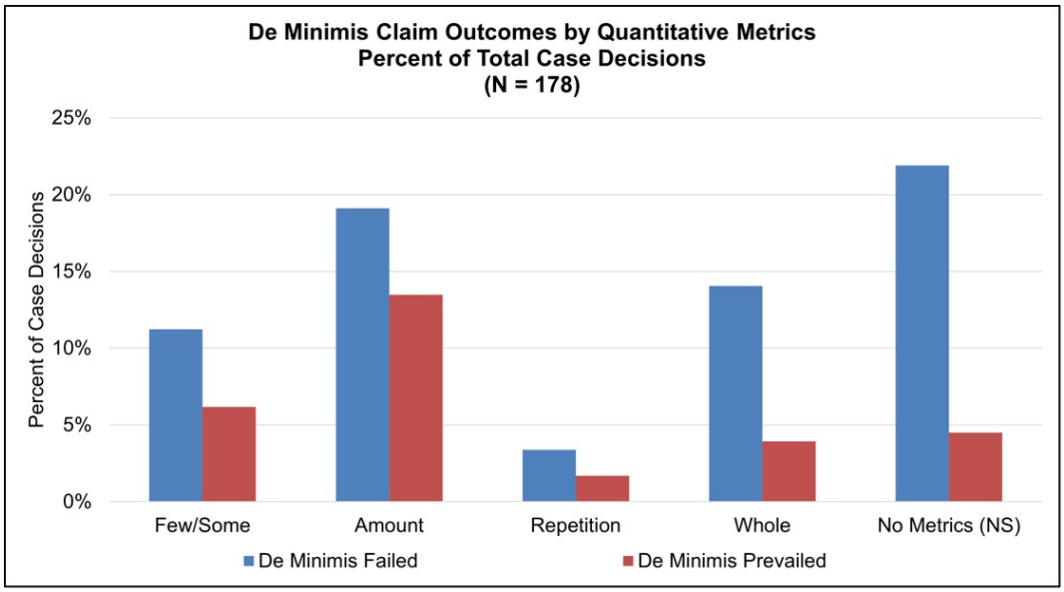
[Figure 15: Prevailing Cases by Plaintiff Work and Form of *De Minimis*]

What other factors correlate with a successful *de minimis* defense? In general, when courts assess a defendant's copying in a quantitative manner (the "Few/Some" and "Amount" bars below in Figure 16), the defendant is more likely to win a *de minimis* defense.[320] In particular, courts' identification of specific amounts (fractions, percentages, or quantifiable parts) correlates with successful

[319] One prevailing "whole" (but not PGS work) *de minimis* case from these eras was *Eng v. Reichardt*, No. 14-cv-1502, 2014 WL 2600321, at *11–13 (E.D.N.Y, June 9, 2014), in which plaintiff's copyright infringement allegations based on unauthorized distribution of his play among NYU professors and administrators as part of disciplinary proceeding was held to be *de minimis*. There is another case with a split win we do not include in the Figures. This other case of "whole" copying in which the *de minimis* defense prevails during the Contemporary Era, and which is not a PGS work, is *Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190 (2012). In that case, which was overturned on appeal as regards the fair use analysis, several e-reserve copies of articles were found to be *de minimis* copying because they were not accessed, not accessible, or rarely accessed. *Id.* at 1247–99.

[320] *See* Table 5 (describing quantitative metrics).

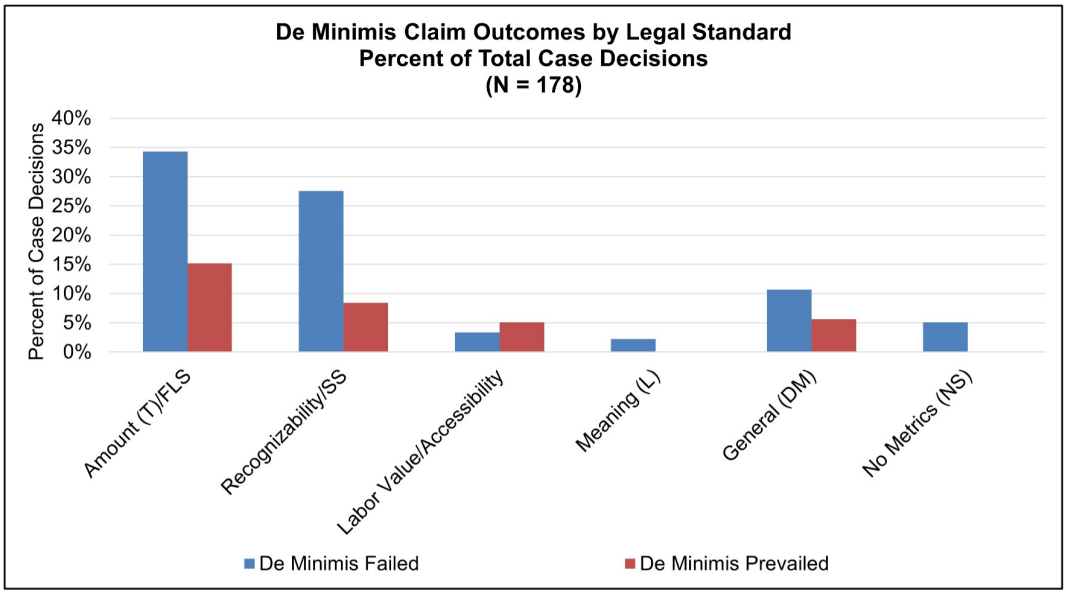
de minimis defenses. If there is no quantitative metric ("NS" below), the *de minimis* claim is more likely to fail than with any other metric. In other words, a *de minimis* defense has better odds of winning if there is an amount mentioned. From this data, we understand that quantifiability is crucial to a successful *de minimis* defense, which makes sense both historically and normatively. And we urge defendants and courts to draw on quantitative metrics to justify a dismissal on the basis of *de minimis* copying, which is consistent with case law and the roots of the common law doctrine.



[Figure 16: *De Minimis* Claim Outcomes by Quantitative Metrics]

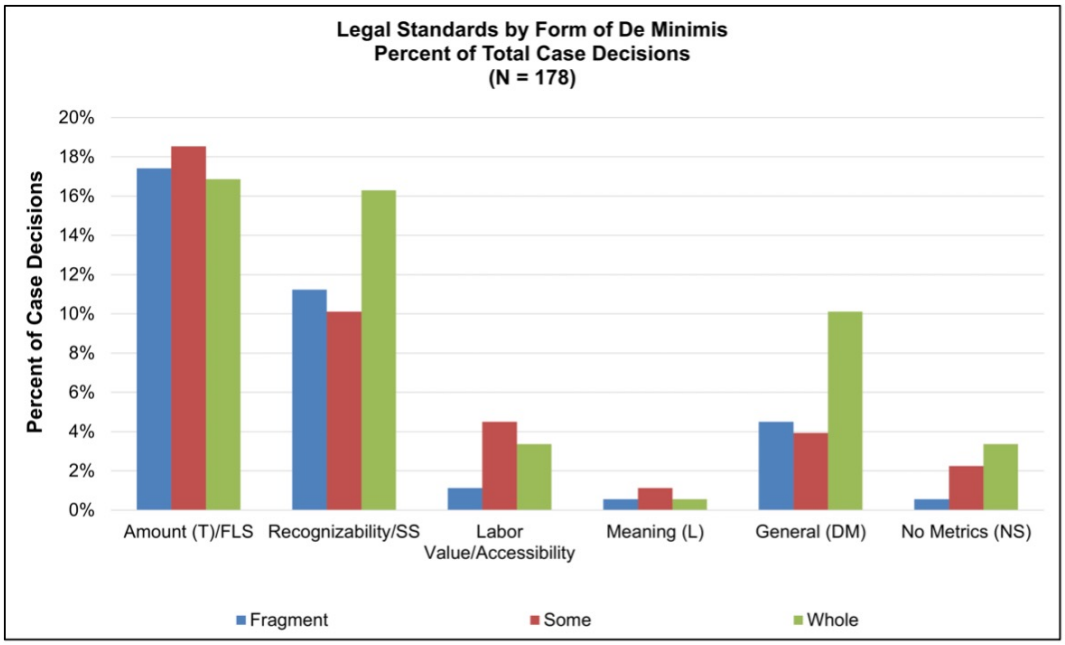
Although *de minimis* claims lose more often than they prevail, we see this same pattern of preferences for quantitative metrics when we evaluate legal standards in general. As Figure 17 shows, the *de minimis* defense standard that has a better chance of success is quantitatively oriented (15% of all cases). Recognizability/Substantial Similarity (8%) and the general "de minimis non curat lex" (DM, 6%) are the next most successful. The *de minimis* standard of "Labor Value/Accessibility" also has a high chance of success relative to the cases in which it is raised. Three of these evaluative standards (but not "Recognizability") originate in the Early Era and persist in the Contemporary Era. We think they reflect a historically accurate conception of *de minimis* as a judicially efficacious defense that ideally short-cuts Plaintiff's claims early in litigation when defendant's unauthorized copying is not a market substitute for Plaintiff's work and thus causes

no copyright harm.



[Figure 17: *De Minimis* Claim Outcomes by Legal Standard]

The combination of the data from the above three Figures might seem to lead to the conclusion that whole copying is disfavored overall, even if more common in the Contemporary Era. But the picture is more complicated. Whole works show up in conjunction with all six possible standards, see Figure 18 below, but courts analyze whole copying under the "de minimis non curat lex" standard 2.5 times more often than they do for partial copying. (This general standard originates from the doctrine's earliest days and is described in *Ringgold* as a "technical violation.") Otherwise, the courts view the forms similarly across the other legal standards. As shown above in Figure 17, this general standard (DM) frequently drives successful *de minimis* defenses. We learn from this that certain forms of *de minimis* (whole copying) may be more likely to prevail under certain legal standards even without close or complex multi-factor analysis. This fact is worth emphasizing given the importance of early and efficient dismissals of non-meritorious copyright cases.

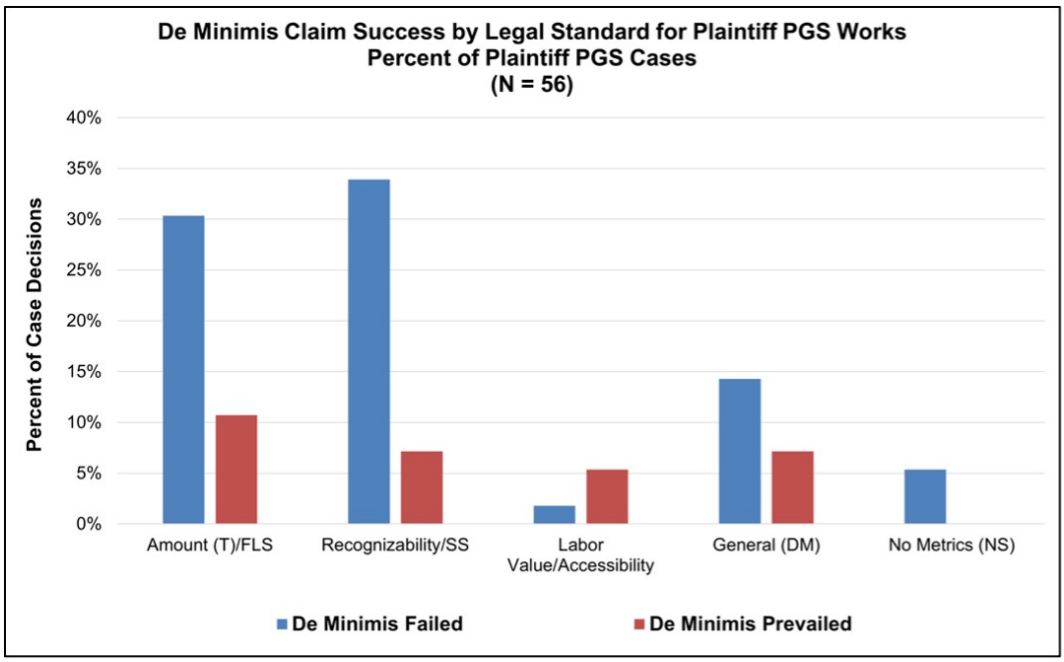


[Figure 18: Legal Standards by Form of *De Minimis*]

When we dug deeper into the cases concerning whole copying, we learned that successful *de minimis* cases involving whole PGS works most commonly involve a general standard (DM). This was surprising given the cases of *Bell v. Wilmott*, *Davis v. Gap, Inc.*, and *Ringgold*, which feature whole copies of plaintiff's PGS works in which the defendant lost. Despite these well-known cases, although the majority of prevailing defendants copy only fragments or parts of the plaintiff's work, when the defendant copies a whole PGS work they are also more likely to succeed than in other situations. Litigants and courts should pay attention to this trend and avoid over-emphasizing these renowned cases. They may be notorious cases precisely because they are lengthy and complex analyses of a doctrine that is meant to be a quick off-ramp for defendants and thus the cases are anomalies, not the norm.

Below in Figure 19, we see the *de minimis* cases involving PGS works (56 in total), those that succeed, and under which standard. Although these PGS cases only prevail 25% of the time (14 of the 56 cases, 13 of which are "Whole" copies), the most common standards mentioned are quantitative, general, or "Labor Value/Access." This suggests that courts are still assessing *de minimis* under a "technical violation" standard and are doing so more frequently in the context of PGS works. This reflects an importation of the origins of *de minimis* into the internet age in which PGS copying is more frequent but resembles the

assessment of harmless but recognizable copying from the Early Era.



[Figure 19: *De Minimis* Claim Success by Legal Standard for PGS Works]

Finally, below are two logit regressions[321] that feature the factors associated with a prevailing *de minimis* claim. As Figure 20 demonstrates, one of the most important factors for a prevailing *de minimis* defense is whether the plaintiff's work is a PGS work (but not a photograph), after controlling for other factors of the case. This is surprising because it contradicts the theory that cases like *Ringgold* determine *de minimis* case outcomes. It turns out that *Ringgold* is more of an outlier than prevailing wisdom presumes. Further, articulating a quantitative metric and invoking the legal standard of "Labor Value/Access" also may increase the odds of prevailing, all else being equal.

[321] A logit table is a summary that explains the result of a regression model, which help interpret the relationships between an array of variables and a binary (or categorical) outcome. These tables help understand the statistical significance and practical impact of different factors on the likelihood of an event occurring. We choose to use logit models for our analysis because the outcome of interest, whether the *de minimis* claim prevailed, is measured as a binary response (i.e., the statement is true or false). Logits account for the fact that there are only two possible responses and not a continuous set.

Logistic regression — Number of obs = 178
Wald chi2(12) = 40.03
Prob > chi2 = 0.0001
Log pseudolikelihood = -75.227691 — Pseudo R2 = 0.2818
DV = De Min Claim Prevailed = YES

	Coefficient	Robust std. err.	z	P>z	[95% Conf.	Interval]
P Work - PG	2.520	0.659	3.820	0.000	1.228	3.812
P Work Photo	0.345	0.696	0.490	0.621	-1.020	1.710
Whole	-0.486	0.509	-0.950	0.340	-1.484	0.512
Quant - Amount	2.136	0.535	3.990	0.000	1.087	3.185
Quant - Few	1.995	0.677	2.950	0.003	0.668	3.321
Legal Std. - DM	0.730	0.587	1.240	0.214	-0.421	1.880
Legal Std. - SS	-0.412	0.528	-0.780	0.435	-1.448	0.623
Legal Std. - Access	2.391	1.213	1.970	0.049	0.013	4.769
Legal Std. - Labor Value	1.727	0.643	2.690	0.007	0.466	2.988
Fair Use Claim	-2.613	0.625	-4.180	0.000	-3.838	-1.388
Era 2	1.369	0.841	1.630	0.104	-0.280	3.017
Era 3	0.404	0.744	0.540	0.587	-1.053	1.862
constant	-2.424	0.763	-3.180	0.001	-3.919	-0.928

[Figure 20: Logit Regression Showing Factors Important to Prevailing on a *De Minimis* Challenge]

Unfortunately, raising a fair use claim alongside a *de minimis* defense *lowers* the chance of a *de minimis* defense success. This is also surprising. If there is a chance at a *de minimis* defense, one might think a fair use claim is also strong (given fair uses' "amount and substantiality factor"). It is not, and we think this is a problem for copyright law and policy. One defense should not preclude the other. We hypothesize that when defendants raise a fair use defense together with a *de minimis* defense, because fair use is well-established and case law is plentiful (*contra* the *de minimis* doctrine), courts frequently default to fair use. This is unfortunate because fair use is more fact-intensive and often occurs at summary judgment, after time-consuming and expensive discovery, whereas *de minimis* defenses can and should be raised earlier in litigation ideally at the motion to dismiss stage to achieve the doctrine's goal of judicial economy. We learn from this data that courts and litigants need to be better educated that these defenses can and should be raised in the same case albeit at different times in litigation. Also, as alternative defenses, the existence of fair use should not defeat serious evaluation of the *de minimis* defense.

In the context of PGS works, however, this logit regression together with Figure 21 below indicates that courts act as if *whole* copying is more defensible as *de minimis*, after controlling for other factors. This is also surprising, and a feature of the data set from which courts and litigants can also learn. It is relevant

both substantively and procedurally. Substantively, courts appear appropriately solicitous of copying PGS works as forms of "quotation" or reference, which is how we communicate in the internet age. Like fragmentary copying of literary works is quintessentially *de minimis*, and has been since the origins of the doctrine, copying PGS works for a similar purpose or in a similar manner (as a fragment of a larger whole, or as informational or referential use) should also be *de minimis*.[322] Indeed, the logit regression in Figure 21 demonstrates that exactly.

Logistic regression — Number of obs = 178
Wald chi2(12) = 39.57
Prob > chi2 = 0.0002
Log pseudolikelihood = -74.191799 — Pseudo R2 = 0.2917

DV = De Min Claim Prevailed = YES

	Coefficient	Robust std. err.	z	P>z	[95% Conf.	Interval]
P Work - Photo	0.764	0.722	1.060	0.290	-0.650	2.178
P Work - PG	0.892	0.950	0.940	0.348	-0.971	2.755
Whole	-1.049	0.667	-1.570	0.116	-2.355	0.258
PG*Whole	2.331	1.222	1.910	0.057	-0.065	4.726
Quant - Amount	2.045	0.544	3.760	0.000	0.978	3.111
Quant - Few	1.913	0.679	2.820	0.005	0.582	3.244
Legal Std. - DM	0.762	0.602	1.270	0.205	-0.418	1.942
Legal Std. - SS	-0.297	0.544	-0.550	0.586	-1.363	0.770
Legal Std. - Access	2.496	1.161	2.150	0.032	0.219	4.772
Legal Std. - Labor Value	1.841	0.654	2.820	0.005	0.559	3.122
Fair Use Claim	-2.575	0.634	-4.060	0.000	-3.817	-1.333
Era 2	1.398	0.850	1.650	0.100	-0.267	3.064
Era 3	0.461	0.747	0.620	0.537	-1.004	1.925
constant	-2.405	0.768	-3.130	0.002	-3.910	-0.900

[Figure 21: Logit Regression Showing Factors Important to Prevailing on a *De Minimis* Challenge, Focusing on a Work Being PGS AND Whole]

The regression represented here is similar to Figure 20, with one major change. Here we look at the additional effect of being *both* a PGS work and a "whole" copy on the likelihood of having a prevailing *de minimis* defense (the

[322] These may not be all the factors relevant to a prevailing *de minimis* challenge. Unobservable and difficult to measure factors may be unaddressed confounders. For example, one factor that could influence a *de minimis* win might be "star power" or the number of eyes that may have seen the accused violation. As copying becomes more ubiquitous and it's easier to see a potential violation, the courts may see that as "non-trivial." This is a difficult factor to measure consistently over almost 200 years for very different types of works. However, this factor is likely uncorrelated with the work being a PGS work, so our main results would likely hold even with this factor included.

line highlighted in yellow).[323] When we look at the interaction of these factors, the majority of the effect (resulting in a successful defense) comes from that combination. These results suggest being both a PGS work and a whole copy is more likely to prevail than use of pictorial works in any other form.

These two Figures (20 and 21), when combined with Figures 15-19, demonstrate a surprising pattern in the dataset: although a *de minimis* defense rarely prevails, when it does prevail in the Contemporary Era and a whole PGS work is concerned, the original and still prevalent standard of "de minimis non curat lex" explains a defendant's win, but not fair use which negatively correlates with a prevailing *de minimis* defense. Access/Labor Value is the standard with the largest influence. This pattern may reflect current communication trends and everyday on-line transactions dominated by visual images (e.g., emojis, memes, gifs) in which the pictorial images stand in for pithy messages and are more informational than expressive.[324] The court's acceptance of these trends suggests copyright law's adaptability to new modes of communication, as is appropriate with a statute that was meant to evolve with technological innovation.[325] The negative finding here is that the existence of a fair use defense appears to hurt the chance of a prevailing *de minimis* defense in the context of whole PGS works, and this puts defendants who copy such works in a difficult position, as they face choosing between an early dismissal on the basis of *de minimis* and potentially waiving (by failing to raise) the admittedly more fact-intensive but doctrinally more evolved fair use defense. We argue below in Part IV that courts and litigants should reverse this trend and accept alternative defensive pleading without negative consequences to defendant's chances of success. Photographs alone are treated differently. Although they too are almost always whole works, defendants copying photographs have only won 4 times out of 26 cases (15%). All of these cases were in the Contemporary Era. Possibly courts are reluctant to treat unauthorized copying of photographs as *de minimis*, although the growing number of *de minimis* wins for whole PGS works in general suggests a doctrine in flux, and thus ripe for optimizing and clarification.

[323] We controlled for photographs in both logit regressions on the assumption they might have a significant effect on their own separate from PG works, but they do not.

[324] Amy Adler & Jeanne Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. Rev. 453 (2022).

[325] Jessica Silbey & Jeanne Fromer, *Retelling Copyright: The Contributions of the Restatement of Copyright Law*, 44 Colum. J.L. & Arts 341 (2021).

Finally, let us say something about when in litigation the *de minimis* defense prevails, which should be early to align with the doctrine's purpose before significant time and resources are expended. When the *de minimis* defense prevails, 22% of the time (11/49 cases) it is at the motion to dismiss stage. Sixteen percent of the time (8/49 cases) it is at the preliminary injunction stage. That means that 39% of the prevailing *de minimis* defenses occur at what we consider the appropriate procedural stage of litigation, leaving 61% of the prevailing *de minimis* cases at the summary judgment or other later stage. This is not optimal and courts and litigants can do better. Ideally all *de minimis* wins should be at the motion to dismiss or preliminary injunction stages.

Of the 19 cases in which the *de minimis* defense prevailed early, 15 include a quantitative evaluative measure and 4 contain a conclusory statement of the rule ("de minimis non curat lex") or no standard at all. They include a wide range of works (literary, PGS, and audiovisual) and no *de minimis* form predominates (fragment, some or whole). The amount of successful de minimis dismissals is relatively even between the Early Era and the Contemporary Era (20% and 27%, respectively). To us, this affirms the existence of a fertile ground on which to plant the seed for an updated, useful and generally applicable *de minimis* defense standard for the internet age. Such a standard will expand the number of cases properly dismissed at early stages of litigation, honor the common law evolution of the equitable doctrine and its purposes of judicial economy, and conform to copyright law and policy. We turn to that formulation in our Conclusion.

Conclusion: A Revised *De Minimis* Standard and Its Exemplary Application

We learn from this empirical evaluation of the *de minimis* defense over the three eras of copyright litigation that it has become more relevant but lacks its defining efficaciousness. The *de minimis* doctrine is meant to quickly dispose of meddlesome lawsuits in which only trifling harm is alleged. But over the eras, the *de minimis* doctrine has become more complex and has lost some of its decisive efficiency. A return to the origins of the *de minimis* defense in copyright would reverse the outcomes of some milestone cases, as we explain below, and doing so would require only minor doctrinal adjustments producing significant benefits for litigants and courts.

In the Early Era, few cases were brought and those that were (and prevailed as *de minimis*) concerned fragmentary copying. They were between competitors, and the predominant legal analysis concerned lack of either market substitution or defendant's enrichment. Copying occurred but copyright harm was absent. In the Transition Era, more cases arose involving new industries and authors of, for example, PGS works, audiovisual works, and software. Many of these cases were between competitors resembling the Early Era. But also new kinds of claims arose between authors of complementary (not competitive) works in which whole copying occurred, which was nonetheless defended as trivial. In large part, the analysis during the Transition Era remained about substitutional copying that the courts described in terms of a functional test: whether the defendant's use has "the intent or effect of fulfilling the demand for the original."[326]

In the Contemporary Era, many more cases arise between potential licensees as opposed to industry competitors. Many of the cases consist of individuals suing corporate authors (such as movie or television companies), reflecting a new strategy seeking licensing fees for uses that were previously considered either fair or not substitutional. To be sure, in many of these new kinds of cases, courts dispose of the copyright claims as *de minimis* with perfunctory analysis, resembling the Early Era. The difference now is that in addition to the cases of fragmentary copying, in many cases defendant copies *all* of plaintiff's work (not just a small bit). In other cases from this era, however, courts commence engaging in more complex evaluations resembling fact-laden substantial similarity analyses, requiring more time and resources. New standards arise in these cases distinguishing trivial from harmful copying. In addition to quantitative measures for assessing triviality, in these new licensee-licensor cases concerning whole copying, courts determine substantiality as an approximation of replacement value (the misappropriation standard) through observability and recognizability of the authored expression. This means that while whole copying may technically occur, defendant's use may be harmless if it is fleeting, elusive, indistinct, or otherwise so insubstantial that the law should not bother.[327]

[326] Amsinck v. Columbia Pictures Indus., 862 F. Supp. 1044, 1047 (S.D.N.Y. 1994).

[327] "The law should not concern itself with trifles" is how courts translate "*de minimis* non curat lex." *De Minimis Con Curat Lex*, Black's Law Dictionary (11th ed. 2019).

De minimis copying should be resolved at the earliest possible stage and at minimal cost to achieve the doctrine's goal. If copying is quantitatively small, such as a fragment or insignificant part, courts readily dispose of cases with the standard "de minimis non curat lex." This is the trend throughout the eras and should continue.[328] If defendant's copying is whole, but its expressive value to the defendant at first appears debatable absent more searching aesthetic inquiry, the efficiency of the *de minimis* doctrine shrinks as the complexity of the court's analysis grows with briefing and discovery demands on both parties. This lamentable trend can be reversed if courts *sua sponte* raise the *de minimis* defense at the motion to dismiss stage or litigants raise the defense early while being undeterred from preserving fair use for a later time. In this posture, courts should assess *de minimis* copying as it was originally intended: in terms of substitutional value for plaintiff's whole authorial expression in the context of the defendant's expression.[329]

The revised standard would focus on *quantitative triviality* – how much of or for how long is the plaintiff's work appreciable to ordinary observers? – and *qualitative insignificance* – what function does the plaintiff's work play in the defendant's work as a whole? *Defendant's whole copy of plaintiff's work should not undermine the de minimis defense*. To the contrary, when the whole copy is akin to quotation, informational reference, or is otherwise substantively insignificant, transitory, or minimized in the context of the defendant's work as a whole, the defendant's *de minimis* defense should prevail. Assessment would occur before discovery and as soon after an answer/dispositive motion to dismiss is filed.[330]

[328] *But see* Bridgeport Music Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).

[329] This conclusion resonates with Shyamkrishna Balganesh's argument that an author's claim of copyright infringement should be limited to those uses that are reasonably foreseeable at the time the original work was created. *See* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569 (2009).

[330] Given the common law history of the U.S. copyright *de minimis* defense, proposing quantitatively precise thresholds for presumptively *de minimis* uses seems ahistorical and contrary to precedent. Germany, in 2021, passed a law that does provide this kind of clarity, which also comes with the inevitable rigidity of numerical cut-offs. It is described by one commentator as (so far) a "sweet spot" and is largely applicable to on-line platforms and user-generated participation in those platforms. *See* Guy Forte, *Just a Little Bit: Comparing the De Minimis Doctrine in U.S. and German Copyright Regimes*, 39 Ariz. J. Int'l & Compar. L. 415, 429 (2022) (describing thresholds as "up to 15 seconds of an audio track or cinematic work, 160 characters of a text, or 125 kilobytes of a photographic work").

The application of this standard is straightforward in many of our exemplary cases discussed in Part II, such as: *Webb v. Powers*, *Matthews Conveyor Co. v. Palmer-Bee Co.*, *Amsinck v. Columbia Pictures*, *VMG Salsoul v. Ciccone*, and *Gottlieb v. Paramount Pictures.*[331] However, only in *Gottlieb* was the case dismissed early in litigation, leaving the other cases to proceed through expensive and time-consuming discovery. This diversion from the *de minimis* doctrine's purpose and proper structure we think is because of the confounding negative effects of *Ringgold*, the changing business practices among certain industries for in-licensing when copyright law may not require it, and the evolution of the substantial similarity doctrine and fair use after 1978. In light of this empirical study, however, it is our hope that these confounding effects can be mitigated or reversed, and courts and litigants can properly assess and apply the *de minimis* doctrine early, capably, and with alacrity.

What would this look like as applied to cases we contend are outliers and were wrongly decided? Both *Bell v. Wilmot*[332] and *Ringgold v. BET*[333] would come out the other way and in favor of defendant's *de minimis* defense. In *Bell*, defendant's whole copying of plaintiff's photograph would be *de minimis* because the copy was elusive and largely inaccessible to the public and because it has no expressive value to the defendant (who was buying only website addresses and not commercializing or making them publicly available). Although a whole copy of Plaintiff's photograph was made, its near invisibility to ordinary observers is akin to a quantitative triviality. It was the equivalent of a copy stored in a file

For reasons already explained, we don't think such a rule makes sense or is necessary in the United States. Specific thresholds often quickly are outdated with new technology and creative practices. And when Congress has reformed copyright law to explicate limitations and exceptions, it speaks in terms of standards not rules. *See* 17 U.S.C. § 107 (fair use four factors); 17 U.S.C. § 512 (c)(a) (safe harbor for platform liability in terms of common law terms such as "knowledge" and "awareness"); *but see* 17 U.S.C. § 110(5) (describing now outdated precise equipment capacities and size for exemptions to transmissions or retransmissions of public performance of nondramatic musical works intended to be received by general public and originating by a radio or television). We thank Christopher Yoo for bringing this German law and Guy Forte's article to our attention.

[331] *See generally* Webb v. Powers, 29 F. Cas. 511 (C.C.D. Mass. 1847); Mathews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943); *Amsinck*, 862 F. Supp. at 1044; Gottlieb Dev. LLC v. Paramount Pictures Corp. 590 F. Supp. 2d. 625 (S.D.N.Y. 2008); Sandoval v. New Line Cinema Corp., 147 F.3d 215 (1998); VMG Salsoul LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016).

[332] *See* Bell v. Wilmott Storage Serv., LLC, 12 F.4th 1065 (9th Cir. 2021).

[333] *See generally* Ringgold v. Black Ent. Television, Inc., 126 F.3d. 70 (2d Cir. 1997).

cabinet un-disseminated, relatively prevalent across the eras, or a fleeting display or performance, such as "Happy Birthday" sung by patrons and waitstaff in a restaurant.[334] In *Bell*, the copy is valueless to the defendant – a near accident of failed due diligence upon the purchase of thousands of such websites – and thus is qualitatively insignificant to the defendant's work as a whole. The result in *Bell* is wrong because copying alone is not a harm in copyright law. Actionable copying must cause harm related to the unauthorized use of the expression, such as foregone fees associated with the appreciation or apprehension of the copyrighted work. The plaintiff in *Bell* suffered no harm derived from defendant's copying of his photograph except that it resided on an obscure website without his permission. Judicial resources should be minimized in such a case with a swift motion to dismiss and sanctions on appeal if affirmed. This should have especially been the case in *Wilmott* given the Plaintiff's reputation as a copyright troll.[335]

Likewise, in *Ringgold v. BET*, the defendant's use of plaintiff's quilt poster as background art for 27 non-consecutive seconds during a half-hour sitcom should have been *de minimis*.[336] Its use despite being a whole copy and recognizable was quantitatively trivial as fleeting and elusive for only 27 of 1,800 seconds of the show. Defendant used the quilt poster in the background of a television set to tell a convincing but fictional story about a community that would have had such a quilt poster hanging on their walls. It was an evanescent but culturally

[334] *See* Davis v. Gap, Inc., 246 F.3d 152 (2d Cir. 2001) (citing "Happy Birthday" singing as an example); *see also* Knickerbocker Toy Co. v. Azrak-Hamway Int'l Inc., 668 F.2d 669 (2d Cir. 1982) (office copy of plaintiff's work made but never widely distributed).

[335] Wilmott's case was dismissed on summary judgment at the district court and then reversed on appeal by a three-judge panel of the Ninth Circuit in a 38-page opinion that includes two concurrences. *See Bell*, 12 F.4th 1065 (9th Cir. 2021). One of the concurrences strongly discourages plaintiff from filing further claims, with this admonition:

> I write separately to discourage further pursuit of those claims. Plaintiff is reported to have filed over 100 copyright infringement lawsuits concerning the Indianapolis photo. … That number exceeds 200 when combined with similar suits Plaintiff has brought for another photograph of the Indianapolis skyline. With each successive suit, Plaintiff, a retired attorney, is solidifying his identification as a "copyright troll"—one "more focused on the business of litigation than on selling a product or service or licensing their [copyrights] to third parties to sell a product or service." *Id.* at 1083 (Clifton, R. concurring).

There was further evidence in the case that questioned whether plaintiff was in fact the owner of the photograph. *Id.*

[336] *See* Ringgold v. Black Ent. Television, Inc., 126 F.3d. 70 (2d Cir. 1997).

resonant use, an informational referent for a community of observers who would understand its background use as rendering more convincing the fictional story portrayed on television – like seeing the Statue of Liberty in a panoramic shot of New York City, the Charging Bull in an establishing shot for Wall Street, or Cloud Gate ("the Bean") in the background of a scene set in Chicago's Millenium Park.[337] The television show did not compete with or serve as a substitute for the quilt or its graphic derivative in poster form. Its use was qualitatively insignificant for the television show's expressive message as a whole except as informational and referential, and it did not frustrate plaintiff's marketable expectation for her work. Indeed, the result in *Ringgold* contrives a market substitute for an attenuated new use through its novel analysis of the *de minimis* defense, which more closely resembled a substantial similarity evaluation that assumes market substitution as the harm to be avoided.

Reversing the results in both cases in the manner described strengthens the surprising but welcome trend in the Contemporary Era cases adapting the *de minimis* defense for the internet age in the context of whole copying. Whole copies of PGS works that are referential background or used in fleeting, elusive, or qualitatively insignificant ways are and should continue to be *de minimis*.[338] These uses are the equivalent to quotations or informational referents, and courts should dismiss them early in litigation as trivial copying consistent with the fragmentary uses from the Early Era. Detailed or aesthetically complex analysis is unwarranted in such cases, confuses *de minimis* with substantial similarity and undermines sound copyright policy aimed at promoting knowledge and further expression through more authored works. By identifying copyright harm as competitive copying akin to market substitution for the copy, courts can efficiently dismiss trivial or *de minimis* copying as incommensurate with infringement.

Trivial copying arose in the mid-19th century as a total defense to infringement. It should remain that way. Not all copying – be it partial or whole – creates copyright liability. Copyright is a misappropriation tort embedded with normative standards of "substantiality" that is a court-created heuristic for

[337] Marcel Katz, *The 4 Most Influential U.S. Cities for Public Art: A Spotlight on Creativity in Urban Spaces*, Art Plug (September 15, 2024), https://artplug.com/public-art-in-us-cities/ [https://perma.cc/MN3T-QQGJ].

[338] *See, e.g.*, Gottlieb Dev. LLC v. Paramount Pictures Corp., 590 F. Supp. 2d. 625 (S.D.N.Y. 2008); Sandoval v. New Line Cinema Corp., 147 F.3d 215 (1998).

materiality and harm.[339] For important reasons of court efficiency and copyright policy, the *de minimis* doctrine became an independent defense in the mid-19th century. Our data shows it has laudably remained independent from fair use and the substantial similarity test – both complicated and fact-specific doctrines that spend rather than conserve judicial resources. The trend from the Early Era to the Contemporary Era grows the *de minimis* doctrine's relevance but not its uniform success and efficiency, threatening to eviscerate the doctrine's purpose. Courts and lawyers should remain vigilant and protect the *de minimis* doctrine as a vital defense to indispensable but trivial copying by dismissing cases early. *De minimis* copying is a determination that the copier's use – be it fragmentary, partial, or whole – is immaterial to the author's reasonable expectation for the exploitation of their authorial expression. This can be straightforwardly evaluated very early in litigation with objective metrics and does not require sophisticated aesthetic analyses, as illustrated above. As this Article shows, the pattern across the eras reflects these features of the historic and critical defense and are worth preserving to revitalize the *de minimis* defense for the digital age.

[339] In *Unbundling the "Tort" of Copyright Infringement*, 102 Va. L. Rev. 1833 (2016), Patrick Goold describes five different copyright torts, including those related to privacy invasions, creative control, and artistic reputation. This is a broader view of copyright law than we consider good policy, whether it be an accurate account of how in fact copyright law is used. *See, e.g.*, Eric Goldman & Jessica Silbey, *Copyright's Memory Hole*, 2019 B.Y.U. L. Rev. 929 (arguing that copyright law should not be used to protect privacy interests).

Our *de minimis* data set does not distinguish between the many reasons a plaintiff may assert copyright, only that courts dismiss as *de minimis* defendant's copying that is an insubstantial market substitute in ways explained *infra* and thus recognize both consumer and competitor diversionary copying (in Goold's taxonomy) as harmful. *Unbundling the "Tort" of Copyright Infringement*, at 1860.

Appendix

A. Table 1: Works

Article	Literary work, published or unpublished, includes website and poetry (does not include Book, List, Code, Manual)	Book	Books, published or unpublished, includes correspondence (but not Manual)
Code	Computer code	List	Itemized textual work, such as catalogues and databases; includes test materials
Manual	Instructional manuals	Movie	Feature films
Music	Musical works and sound recordings	PG	Images, such as drawings, illustrations, graphic works, architectural drawings (but not Photo)
Photo	Photograph (but not screen shots, which are part of Video, Videogame, or Movie)	Play	Theatrical plays, but not screen plays or television scrips, which are part of movies and TV
Sculpture	3-D copyrighted work, includes useful articles	TV	Television shows
Video	Video (but not Movies)	Videogame	Videogames

Some of the categories of copyrighted works follow the Copyright Act's own definitions, but many of our codes distinguish within categories of copyrighted works.[340] We include pictorial and graphic works as one category (PG), but separate photographs (PHOTO) because we hypothesize their different treatment due to their abundance in the dataset. Sculptural works have their own category, in part to separately capture useful articles and be able to discern any appreciable differences in their treatment given the Copyright Act's special rules for their reproduction and display.[341] Among literary works, we separately code for books (BOOK) which includes correspondence but not manuals (such as technical manuals or teaching manuals). Manuals (MANUAL) are coded separately because of their frequency in the first half of the twentieth century among copyright litigants. Theatrical and film screen plays (PLAY) and computer programs (CODE) each have their own category. And we code as articles (ARTICLE) shorter writing that is not a book and includes websites and poetry. Movies (MOVIE), television

[340] 17 U.S.C. § 102(a), 101.
[341] 17 U.S.C. § 113(b)–(c).

shows (TV), videos (VIDEO) are also separately categorized. Videos include videos made for distribution on the internet and also potentially on television, usually for journalism purposes. We have a separate category for literary works that are list-like (LIST), which includes directories, test materials, and catalogues. Music (MUSIC) is its own category and includes both musical works and sound recordings. Videogames (VIDEOGAME) is also a separate category. None of these codes are exclusive of the other and can co-occur if the court discusses them.

B. Table 2: Form of De Minimis

Fragment	Small part of larger work that could count as individual work under other circumstances, e.g., screen shot of a video	Some	Not Fragment or Whole
		Whole	Exact or near-exact copies of the whole work

We noted when the whole work was copied (even for a brief moment) as WHOLE. When defendant was alleged to copy a very small portion of plaintiff's work, we coded that as a fragment (FRAGMENT). This included a screen shot of a video, a sentence of a book, a few lines of code in a large computer program. When the copied material was neither a fragment nor the whole work, we coded that as SOME. These are obviously coding choices subject to some interpretation, but that is how all coding works. Other coding categories (see Table 6) dig deeper into the proportion of the fragment to the whole.

C. Table 3: Specific Forms

Character/ Heart	Literal or visual (even if part of a larger work), which also includes when court talks about being "heart" of work		
Image/ Photo	All pictorial works, including screen shots	Sentence/ Lede	More than a phrase, full ideas, including lines of code; also includes lede sentences
Page	Page or pages	Entire	Entire or substantially the entire work (but not Photo or Character, which may be considered an entire work or part of a larger work)
Phrase	Musical phrase, aphorism or single line, includes scènes a faire or stock images, categories in lists	Videos	All videos, television and film clips.

When defendant was alleged to copy a specific part of plaintiff's work, such as a famous first line of a book or song, we noted separately using different codes for specific forms. We break these down in the SPECIFIC FORM category. (See Table 3.) We hypothesized courts might find specific or special forms more or less relevant for the *de minimis* analysis. And some special parts were already deemed as such by leading cases. They include literary or visual characters (CHARACTER), which includes when something is considered the "heart" of the original work, a term that is used by courts with sufficient frequency to garner its own category.[342] Other specific forms worthy of separate analysis include pictorial and graphic forms, including screen shots and photographs (IMAGE/PHOTO). We also coded for copying of video, tv, and film (VIDEO), pages (PAGE), sentences (SENTENCE), and phrases (PHRASE). VIDEO is for moving images of all kinds. PAGE is for the select but whole copying of pages. PHRASE can be musical phrases, list headings, aphorisms, and visual "phrases" that resemble ideas, stock images, or themes, but not usually a full sentence or image. SENTENCE includes full sentences and usually more than one (and lines of code), and includes lede sentences. Finally, we include the specific form of ENTIRE when defendant copied

[342] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 544 (1985) (discussing the Nation's copying of the "heart" of the "soon-to-be-published" book based on district court's finding of that fact).

the entire work, which should be partially coincident with WHOLE in Table 2, except here images and characters are considered separately. The goal with this subcategory of specific forms is to dig deeper into the kinds of fragments and special parts and forms that make up the quantitative assessments. None of these codes are exclusive of the other and can co-occur if the court discusses them.

D. Table 4: De Mininis *Legal Standard*

Amount (T) /FLS	Quantitative (amount), this includes Fragmented literal similarity test	L	Qualitative (meaning)
Labor Value/ Accountability	Market or money value, which includes discussion of whether the work copied was accessible (e.g. out of print) or defendant's unauthorized copy was inaccessible	SS/ Recognizability	Average lay observer test and has to mention "substantial similarity;" this category includes when courts discuss "observability" or "recognizability" as part of the standard
DM	General, without any quantitative or qualitative metrics, or any other metric except a recitation of the principle that "de minimis non curat lex"	NS	No standard mentioned at all

We coded all fragmented literal similarity analyses as quantitative (T) in the context of a *de minimis* case. By contrast, we considered an invocation of the "ordinary observer" test in the context of what appeared to be a *de minimis* analysis as a qualitative analysis and coded that as SS. Discerning these tests was important, we thought, as we were interested to learn if the rise of the fragmented literal similarity test (or the ambiguities inherent in the substantial similarity test) correlated with other patterns in *de minimis* cases.[343] When the court's assessment was primarily qualitative without an articulated standard or quantitative measure, we coded the case as L. When the *de minimis* standard was more general without

[343] For discussion of the origins of the fragmented literal similarity test, see *supra* notes 81 and 103–111 and accompanying text.

any quantitative or qualitative metrics, or any other metric except a recitation of the principle that "de minimis non curat lex," we coded that as DM. Courts also sometimes apply a standard that resembles the market harm analysis from fair use when discussing the *de minimis* defense.[344] This occurred in early cases, but sometime also arose in later cases referring to early ones. We coded that as LABOR VALUE, because it was frequently discussed in terms of the investment in hard work and the return on that investment as an original goal of copyright law. Relatedly, courts sometimes consider inaccessibility of the defendant's unauthorized copy as part of its *de minimis* defense, which we understood to be a determination that plaintiff was not being harmed by the unauthorized copy. We also included this in the LABOR VALUE category. Both of these standards – DM and LABOR VALUE – are separate from a court's qualitative analysis, which more resembles the "substantial similarity" test varieties (of L and SS). Since at least *Ringgold*, "observability" or "recognizability" has become a factor in the legal standard of infringement, in some cases negating a *de minimis* defense. We included those cases in SS. This includes when courts describe the taking as "meager and fragmentary" such that an audience would not "recognize" the plaintiff's work. This code often co-occurred with one of the other categories, but its mention in the cases deserved independent analysis because of the doctrinal shift in the *de minimis* doctrine as described in Part II, which we are attempting to study with some empirical precision. When no standard was announced, not even recitation of the statement "de minimis non curat lex," we coded that as NS. None of these codes are exclusive of the other and can co-occur if the court discusses them.

E. Table 5: Quantitative Metrics

Amount	When numbers are indicated	Few/ Some	When not fractionized but otherwise small, insignificant, minimal or trivial
Whole	Whole	NS	No amount discussed
Repetition	When use is repeated		

We further disaggregated the quantitative and qualitative categories into the following subcodes. When the court specifically considers quantitative measures

[344] We believe this standard originated with the 1909 case of *West Publishing v. Edward Thompson Co.*, F. 833, 854 (E.D.N.Y. 1909). *See supra* note 280.

(such as 27 seconds in a television show, or 3 pages of a book) or otherwise described the amount copied in percentage terms, we coded that in terms of the percentage and as AMOUNT. When the court described the taking as "trivial," "small," "minimal" or "insignificant," but did not otherwise use numbers in its assessment, we coded that quantitative metric as FEW/SOME. This category overlaps often with the "form of *de minimis*" code "FRAGMENT" but not always, because some fragments repeat, become quantitatively and qualitatively significant, and did not merit (in the court's view) the adjective "trivial" or "insignificant." We thus also coded for REPETITION, which would co-occur with these other codes, to indicate the court considered the repetition of fractional taking in its analysis, such as when a musical phrase is repeated in a new work. Whole copies were coded as WHOLE. WHOLE co-occurred with a fractional taking (AMOUNT) when the whole work was copied but was displayed or performed for a short time, such as in the background of a film, and the court discussed the time increments. If no amount was discussed, it was coded NS. None of these codes are exclusive of the other and can co-occur if the court discusses them.

F. Table 6: Qualitative Metrics

Protectability/ Accessible	Discussion of whether what was taken is copyrightable, combined with whether the work copied was accessible (e.g. out of print) or defendant's unauthorized copy was inaccessible	Alterations	Were changes made and did that matter?
Pervade/ Recognizability/ Focus	Concerning audience response and attention, where "observable" is a matter of form, recognizable is a matter of meaning, includes discussion of focus, form, highlight, heart, and whether the amount taken pervades	Relevance	Insignificant or material, relevant or irrelevant to meaning and to value (includes bad faith, of which there was one)
NS	No metric discussed		

The qualitative metrics include some of the previously designated codes, including PROTECTABILITY (which includes discussion of accessibility) and RECOGNIZABILITY. We also coded for analyses of the relevance of the part

taken (RELEVANCE) when the court considered the expressive significance of the part copied.[345] When the court assessed defendant's alterations to the work copied, we coded that as ALTERATIONS. We coded assessment of the plaintiff's work pervading the defendant's copy within RECOGNIZABILITY. This includes discussion of the copying of aesthetic and semantic themes, and it is the qualitative analogue to the quantitative REPETITION. When the court discusses whether a defendant's work focuses on the part taken from the plaintiff in terms of aesthetic form (e.g., discussing how the camera centers an image in the background, or when the image is blurry), we included that within RECOGNIZABILITY as well. NS is used when no qualitative metric is discussed. None of these codes are exclusive of the other and can co-occur if the court discusses them.

[345] There was one case that considered the defendant's bad faith. That case was also coded as RELEVANCE within the qualitative metrics.

G. Table 7: Industries

Individual	Any single person or person D/B/A (includes musical artists, literary authors)	Software	Company selling or licensing computer programs and software products
Manufacturer	Company selling durable goods, including devices embedded with software (such as medical devices, but not computers or networks)	Hardware	Computer hardware companies and network service providers
Media	Traditional media companies (film, book publishers, video, news, website publishers, advertising company) but doesn't include music publishers	Music Publisher	Music publishers and distributors, including of sound recordings (basically the entire music business)
Education/ Consulting	Educational organizations and consulting companies, including the provision of copyrighted material they provide to their clients	Financial	Financial services company, including provision of financial information services
Architecture	Architectural firms, and builders/contractors	Data Services	Companies that sell or provide data, such as phone books or directories (including legal directories)
Government	Government party (state, federal, or local)	Other	All others.

SOFTWARE indicates a company that sells computer programs and software products. MANUFACTURER indicates a seller of durable goods, including devices embedded with software such as medical devices. MEDIA indicates all traditional media (news, film, video, print publishers, website publishers) and includes advertising. This category aims for readership and audiences that consumer their content. It does not include music publishers, however, which is its own category (MUSIC PUBLISHER). Musical artists when suing in their individual capacity are coded as INDIVIDUAL, as are all other parties suing in their own capacity. HARDWARE indicates a seller of computer hardware and network systems. EDUCATION/CONSULTING includes educational institutions and those that consult for educational institutions (including authored materials for that purpose). DATA SERVICES indicates companies that sell or provide data, such as phone book or directory companies. But catalogues that are

peripheral to a company's main revenue – such as a manufacturing catalogue – is included as MANUFACTURER. FINANCIAL indicates a company that provides financial services, including financial information services. ARCHITECTURE indicates architectural firms and contractors. These categories can co-occur, such as SOFTWARE and HARDWARE, and multiple party plaintiffs will also have multiple listings of identities.