WHY THE BRIDGEPORT RULE FOR INFRINGEMENT OF SOUND RECORDINGS IS NO LONGER 'VOGUE'♦

INTRODUCTION

"It doesn't sound anything like 'Under Pressure.'"—Vanilla Ice, on his one hit wonder "Ice Ice Baby"[1]

Every day, music lovers across the Internet identify hundreds of samples from songs and add them to the database on WhoSampled.com.[2] According to WhoSampled.com, the most sampled song in history has been used throughout music over 2841 times.[3] The song is called "Amen Brother" and was released by The Winstons in 1969.[4] Its use in music sampling spans across artists and decades. The track was sampled by one of the most popular rap groups of the 1980s, N.W.A, prominent 2000s rock group, Slipknot, and, more recently, electronic/dance DJ, Skrillex.[5] Despite its widespread use, The Winstons were a relatively unknown group that split up in 1970, soon after the song was released.[6] Notwithstanding their minimal success, The Winstons take the top spot in sampling credits and leave open the question as to how they became the authors of the most sampled song in history. Nate Harrison, a Brooklyn-based artist and academic, suggests that, "one of the first things that sampling allowed for was the re-use of older recorded material."[7] Additionally, this piece is popular to sample because the drumbeat of the song is particularly conducive to chopping and rearranging, which tends to be the backbone of a lot of music today.[8]

While music sampling[9] has been around and generally available to

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[1] Daniel Bothma, *Vanilla Ice MTV Interview*, YOUTUBE (June 17, 2012), https://www.youtube.com/watch?v=bid0AbLTcco (1989 MTV News broadcast). Vanilla Ice was sued by David Bowie and Queen for his infringement of their 1981 hit song "Under Pressure." Vanilla Ice was forced to pay Queen and Bowie and also give Queen frontman Freddie Mercury and Bowie writing credits on a song with which they never intended to be associated. *See* Emily Shire, *'Blurred Lines' and 5 other popular songs sued for copyright infringement*, WEEK (Oct. 31, 2013), http://theweek.com/articles/457529/blurred-lines-5-other-popular-songs-sued-copyright-infringement.

[2] David Goldenberg, *It Only Takes Six Seconds To Hear The World's Most Sampled Song*, FIVETHIRTYEIGHT (Sept. 22, 2016, 4:05 PM), http://fivethirtyeight.com/features/the-most-sampled-song-of-all-time/.

[3] *Most Sampled Tracks*, WHO SAMPLED, http://www.whosampled.com/most-sampled-tracks/1 (last visited Apr. 2, 2018). (At the author's last look before publication, this song had been sampled 2841 times, up from 2253 times during the first draft in November of 2016.)

[4] *Id.*

[5] *Id.*

[6] Ellen Otzen, *Six Seconds that shaped 1,500 songs*, BBC (Mar. 29, 2015), http://www.bbc.com/news/magazine-32087287.

[7] *Id.*

[8] *Id.*

[9] The Ninth Circuit in *Newton v. Diamond* explained sampling as the following: "Sampling entails the incorporation of short segments of prior sound recordings into new recordings. The practice originated in Jamaica in the 1960s, when disc jockeys (DJs) used portable sound systems to mix segments of prior recordings into new mixes, which they would overlay with chanted or

the public since the 1960s, the use of "Amen Brother" in sampling did not become widespread until the mid-1980s, when commercial digital samplers became available at an affordable cost.[10] Since becoming mainstream, sampling has been cited as both a pro and a con in music progress. Some of the benefits of sampling in music are that it promotes collaboration, innovation, and exploration of other artists.[11] It can bridge the past and the present and repurpose older voices and songs that may spark the creative efforts of future musicians.[12] However, there may also be negative consequences. While some artists see it as a form of flattery, others have equated sampling as "'a longer term for theft.'"[13]

As new genres of music like hip-hop began to infiltrate mainstream music, the use of digital sampling experienced a period of growth from the early 1980s through the Golden Age of hip-hop "roughly between 1987 and 1992."[14] Widely known communications scholar Kembrew McLeod asserts that, "[f]or this short period of time, hip hop producers were getting away with the intellectual property equivalent of murder, though many would soon find themselves in court for sampling."[15] This "Golden Age" lasted until the first sound recording infringement case *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.* went to court in 1991.[16] Since *Grand Upright*, there has

'scatted' vocals. *See* Robert M. Szymanski, *Audio Pasitiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 U.C.L.A. ENT. L. REV. 271, 277 (Spring 1996). Sampling migrated to the United States and developed throughout the 1970s, using the analog technologies of the time. *Id.* The digital sampling involved here developed in the early 1980s with the advent of digital synthesizers having MIDI (Musical Instrument Digital Interface) keyboard controls. These digital instruments allowed artists digitally to manipulate and combine sampled sounds, expanding the range of possibilities for the use of prerecorded music. Whereas analog devices limited artists to "scratching" vinyl records and "cutting" back and forth between different sound recordings, digital technology allowed artists to slow down, speed up, combine, and otherwise alter the samples. *See also id.*; Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2003).

[10] *See* Josh Jones, *The "Amen Break": The Most Famous 6-Second Drum Loop & How It Spawned a Sampling Revolution*, OPEN CULTURE (Mar. 12, 2013), http://www.openculture.com/2013/03/the_amen_break_the_most_famous_6-second_drum_loop_how_it_spawned_a_sampling_revolution.html.

[11] *See, e.g.*, Nick Boyd, *Sampling or theft?*, MICHIGAN DAILY (Mar. 23, 2014), https://www.michigandaily.com/arts/04sampling-or-theft07.

[12] *Id.*

[13] KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 82 (2005) (citation omitted).

[14] KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 19 (2011) (McLeod and DiCola generally define this golden age as one where there was freedom of sampling. The music made during this time was largely done so without restrictions, and there were a range of artistic possibilities available to musicians in their development of creativity and expression that largely were not censored by legal and economic interests.).

[15] MCLEOD, *supra* note 13, at 78.

[16] *See generally* Grand Upright Music, Ltd. v. Warner Bros. Records Inc., 780 F. Supp. 182 (S.D.N.Y. 1991) (In 1991, Warner Brothers was sued for infringing a sample of Gilbert O'Sullivan's "Alone Again, Naturally" in rapper Biz Markee's song "Alone Again." On December 16, 1991, the District Court for the Southern District of New York ruled that sampling without permission is an infringement in copyright, and artists who wished to sample other artists

been an increase in music sampling cases.[17] It is no surprise that a quarter of a century of nonstop sampling has led to a large number of unlicensed samples[18] embedded across hundreds of albums and dozens of record labels.[19] The probability of these lawsuits rose yet again after the Sixth Circuit Court of Appeals decided the case *Bridgeport Music Inc. v. Dimension Films* and infamously declared to musicians and artists around the country that they should "get a license or . . . not sample."[20]

Since the *Bridgeport Music v. Dimension Films* decision in 2005, courts around the country have launched an attack on the Sixth Circuit's extremely controversial decision.[21] The most recent and prominent of these was the Ninth Circuit's June 2016 decision in *VMG Salsoul, LLC v. Ciccone*.[22] In June 2016, the Ninth Circuit affirmed a district court ruling that the de minimis defense in copyright may be applied in cases involving the copying of a sound recording and therefore does not constitute copyright infringement.[23] This case is of particular importance—it creates a circuit split on the subject, which has not been

music needed to secure permission to do so.); see also MCLEOD & DICOLA, supra note 14, at 19–20.

17 Joe Fassler, *How Copyright Law Hurts Music, From Chuck D to Girl Talk*, ATLANTIC (Apr. 12, 2011), https://www.theatlantic.com/entertainment/archive/2011/04/how-copyright-law-hurts-music-from-chuck-d-to-girl-talk/236975 (In this interview with Kembrew McLeod, McLeod asserts that there is an increase in "litigious sampling culture" today, due to the early sampling cases of the 1990s.); *see also* Bridgeport Music, Inc. v. Dimension Films 410 F.3d 792, 798–99 (2005) (In coming to their conclusions, the Bridgeport court stated that advances in technology coupled with the advent of the popularity of hip-hop or rap music have made instances if digital sampling extremely common and have spawned a plethora of copyright disputes and litigation.); MCLEOD & DICOLA, *supra* note 14, at 30 ("[T]he disputes have only intensified in recent years. And it is probable that they will continue, because every major label likely owns and distributes numerous ticking time bombs waiting to be ignited by a copyright infringement lawsuit. A quarter century of nonstop sampling undoubtedly has produced a very large number of uncleared samples that are embedded in hundreds of albums released by major labels. Even though some have been discovered, many believe that a huge number have gone undetected.").

18 Nappy, *A Guide to Sample Clearance for Today's Producer*, COMPLEX (June 27, 2013), http://www.complex.com/music/2013/06/guide-to-sample-clearance-for-producers (Generally, it is the responsibility of the party who is using a work made by another author to get permission from both the owner of the sound recording of the song and the composition in order to use the sample in the artists new work. Copyright owners will often want to hear how the sample is being used within the new song before they grant permission. Once the artists obtain the permission needed from the copyright holders, they will have "cleared the sample" and can use it in their subsequent work. An "unlicensed sample" therefore, is a sample that makes its way to the final version of a record without first acquiring the requisite permission from the original artist to the that piece of the original work.).

19 MCLEOD & DICOLA, *supra* note 14, at 30.

20 *Bridgeport*, 410 F.3d at 801; *see also*, MCLEOD & DICOLA, *supra* note 14, at 31.

21 *See infra* Part II.A.

22 *See* VMG Salsoul, LLC v. Madonna Louise Ciccone, 824 F.3d 871 (9th Cir. 2016).

23 Tamany Vinson Bentz & Matthew J. Busch, *VMG Salsoul, LLC v. Madonna Louise Ciccone, et al.: Why a Bright Line Infringement Rule for Sound Recordings is no Longer in Vogue*, VENABLE LLP: NEWS & INSIGHTS (June 28, 2016), https://www.venable.com/vmg-salsoul-llc-v-madonna-louise-ciccone-et-al-why-a-bright-line-infringement-rule-for-sound-recordings-is-no-longer-in-vogue-06-28-2016/.

challenged since *Bridgeport* in 2005.[24]

This Note will analyze the newly created circuit split between the Sixth and Ninth Circuit Courts, in the respective cases of *Bridgeport Music v. Dimension Films* and *VMG Salsoul v. Ciccone*. The 2016 *VMG Salsoul v. Ciccone* ruling is the red flare coming from a sinking ship, signaling to both Congress and the Supreme Court of the United States that sampling is a serious concern facing copyright law that is not going to disappear. Part I provides an overview of the relevant portions of the Copyright Act, including the substantial similarity argument and the de minimis defense in copyright infringement cases. Part II provides an analysis of the *Bridgeport Music* decision and the reasoning behind the Sixth Circuit's departure from traditional music copyright law with the implementation of its bright line ruling. Part III explores what happened in the music industry and within the court system as a result of the *Bridgeport* decision. Part IV analyzes the *VMG Salsoul* case, with a focus on the Ninth Circuit's opinion and its role in taking a stand against the *Bridgeport Music* decision. Finally, Part V discusses the implications of the circuit split that the Ninth Circuit created, and why this court became the first of the circuit courts to finally outright reject *Bridgeport*, when no other court had done so in the past. This Part also proposes a solution to the circuit split created between the Sixth and Ninth Circuits, arguing for a new bright line rule that embraces the benefits of the promotion of music sampling.

I. BACKGROUND LAW

A. *History and the Copyright Act*

Copyright is a concept long rooted in American history. Article I, section 8 of the Constitution grants Congress "the power to promote the progress of science and useful arts, by securing for limited times to authors and investors the exclusive right to their respective writings and discoveries."[25] President George Washington opened the second session of Congress by stating "there is nothing that can better deserve your patronage than the promotion of science and literature."[26] Congress responded affirmatively to President Washington's assertion and passed the first Copyright Act of 1790 during the second Congress.[27] While the overall response towards the protection of works was positive, as copyright law developed over the following decades, music would be left behind. It was not until February 4, 1831 that music became a

[24] *Id.*

[25] U.S. CONST. art. I, § 8.

[26] KEVIN PARKS, MUSIC AND COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX 3 (2012) (citations omitted).

[27] *Id.*

beneficiary of a new copyright law that recognized music specifically and granted the author of a "musical composition" the sole right and liberty of printing, reprinting, publishing, and vending such work for twenty-eight years.[28]

Modern music copyrights come in two variations: musical compositions and sound recordings.[29] These two kinds of copyrights can coexist simultaneously in one piece of music. While music composition has been protected in copyright law since 1831, it was not until Congress revised the Copyright Act to give sound recordings,[30] fixed on or after February 15, 1972, the same protection as musical compositions.[31] The purpose behind splitting copyright between both sound recordings and musical composition was to accommodate changes within the industry.[32] This was a response by Congress to curb technological innovations in music piracy and the availability of unauthorized sound recordings on audiocassette tapes.[33] It also became much more frequent that those who wrote the songs and artists who recorded the songs were different people, and therefore, the sound recording and underlying musical composition are considered separate works with their own distinct copyrights.[34]

In general, copyright protection is available for original works of authorship, including sound recordings that are fixed in any tangible medium of expression.[35] The Copyright Act, through sections 106 and 114, provides the author of a copyrightable work with rights in the work.[36] Section 106, "Exclusive Rights in Copyrighted Works," provides six explicit rights that the owner of a copyright under title 17

[28] *Id.* at 9 (citations omitted); *see also* U.S. COPYRIGHT OFFICE, MUSICAL COMPOSITIONS http://www.copyright.gov/prereg/music.html (last visited Jan. 23, 2017) (The U.S. Copyright Office provides the following definition of a musical composition: Musical compositions are "original music, including any accompanying lyrics; also, original arrangements or other derivative versions of earlier musical compositions to which new copyrightable authorship has been added. Music is generally defined as a succession of pitches or rhythms, or both, usually in some definite pattern. Musical works are registrable without regard to aesthetic standards.").

[29] MCLEOD & DICOLA, *supra* note 14, at 76.

[30] *See* U.S. COPYRIGHT OFFICE, CIRCULAR 56A: COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1, http://www.copyright.gov/circs/circ56a.pdf (last visited Jan. 23, 2017) (Sound recordings are works that result "from the fixation of a series of musical, spoken or other sounds," but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied.).

[31] *Id.*

[32] MCLEOD & DICOLA, *supra* note 14, at 77.

[33] Tatsuya Adachi, *Did Vimeo Kill the Radio Star? DMCA Safe Harbors, Pre-1972 Sound Recordings & The Future of Digital Music*, 34 CARDOZO ARTS & ENT. L.J. 443, 448 (2016).

[34] MCLEOD & DICOLA, *supra* note 14, at 77.

[35] *See* 17 U.S.C. § 102(a)(7) (2012) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device.").

[36] *See* 17 U.S.C. § 106 (2012).

of the U.S. Code has in regard to their copyright.[37] The purpose of these rights is to give a copyright holder the power to use and distribute the copyrighted work as they please.[38] If someone performs an action that violates one of these exclusive rights without permission, that person may be sued in federal court for copyright infringement. Section 114 provides for the scope of the exclusive rights described in section 106.[39]

Should someone wish to use a copyrighted work in a particular way, they normally must seek permission from the copyright holder to do so. In the music industry, this permission is called licensing.[40] A license allows a third party to do something with the copyrighted work that usually belongs to the copyright holder.[41] Licenses can either be voluntary and negotiated between the copyright holder and the third party or statutory and provided for by the Copyright Act.[42] Section 115

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[37] *See* 17 U.S.C. §106 (2012). § 106 provides:

> Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
> (1) To reproduce the copyrighted work in copies or phonorecords;
> (2) To prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> (5) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copy- righted work publicly; and
> (6) In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

[38] *Rights Granted Under Copyright*, DIGITAL MEDIA L. PROJECT, http://www.dmlp.org/legal-guide/rights-granted-under-copyright (last visited Jan. 23, 2017).

[39] *See* 17 U.S.C. §114 (2012):

> (a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).
> (b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs.

[40] Brian T. Yeh, Cong. Research Serv., RL33631, Copyright Licensing in Music Distribution, Reproduction and Public Performance (2015).

[41] *Id.*

[42] U.S. COPYRIGHT OFFICE, CIRCULAR 73: COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS 1, https://www.copyright.gov/circs/circ73.pdf (last visited Jan. 23, 2017).

of the Copyright Act provides a compulsory license for musical compositions and allows others to make and distribute phonorecords once a phonorecord of the work has been distributed to the public in the United States with the authority of the copyright holder.[43] This license can be obtained if the primary purpose in making the phonorecords is to distribute them for private use.[44] Upon obtaining either a compulsory or voluntary license, the person seeking to use the copyrighted material will pay the copyright holder a royalty fee.[45]

B. *Substantial Similarity*

If a copyright holder feels that their rights have been infringed upon, they may bring an action against the alleged infringer. It should come as no surprise that to bring a claim for copyright infringement, a court would need to find that there was actual proof of copying. Often, proving this is difficult, so plaintiffs frequently attempt to show copying through a substantial similarity between the two works. A court will first decide whether the alleged infringer had access to the contested work. If the court finds there was access, they then move to a substantial similarity test.[46] The traditional test for substantial similarity requires a subjective analysis sometimes called the "audience test" or the "ordinary observer test."[47] This test essentially asks whether the defendant wrongly copied enough of the plaintiff's protected expression to cause a reasonable lay observer to immediately detect the similarities between the plaintiff's expression and the defendant's work, without any aid or suggestion from others.[48] This analysis reasons that if the defendant had access to the plaintiff's work, and the two works are sufficiently similar to the point where the only explanation for the similarity was copying and not through coincidence, independent creation, or a prior common source, then the works are sufficiently similar and infringement exists.[49] Should a court find that there was substantial similarity, the plaintiff could seek relief for the infringement.[50]

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[43] *Id.* at 2.

[44] *Id.*

[45] A royalty fee is payment that a musician receives for his or her work. *Royalty*, MUSIC BUS. DICTIONARY, http://www.musiciansbusinessdictionary.com/mbd/index.php?title= Royalty (last visited Jan. 23, 2017).

[46] Mark A. Lemley, *Our Bizzare System for Proving Copyright Infringement* (Stanford Pub. Law Working Paper No. 1661434, 2010), http://ssrn.com/abstract=1661434.

[47] Jason E. Sloan, *An Overview of the Elements of a Copyright Infringement Cause of Action—Part II: Improper Appropriation*, AM. BAR ASS'N YOUNG LAWYERS DIV.: 101 PRACTICE SERIES, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/part_2_elements_of_a_copyright.html (last visited Jan. 23, 2017).

[48] *Id.*

[49] Lemley, *supra* note 46, at 2; *see also* Midway Mfg. Co. v. Dirkschneider, 543 F. Supp. 466, 482 n.10 (D. Neb. 1981).

[50] Eric Osterberg, *Copyright Litigation: Analyzing Substantial Similarity*, OSTERBERG LLC

Copying that constitutes substantial similarity can range from verbatim copying to copying of the total concept and feel of a work.[51] The more apparent form of copying is verbatim, which occurs when the copying is both obvious and significant, and it is not hard for an average audience to determine.[52] Copying of the total concept and feel of a work, however, can be much more difficult for the average audience to ascertain. This occurs when an infringer copies, for example, things that are common to songs of a particular time period. In the now famous "Blurred Lines" case from the Ninth Circuit,[53] the songs at bar, "Blurred Lines" and Marvin Gaye's "Got to Give It Up," share an "R&B funk flavor, with upbeat percussion, sparse instrumentation and similar vocal lines."[54] The Gaye estate, in their lawsuit against Robin Thicke and other artists featured on the song, specifically claimed that the similarities included signature phrasing of the main vocal melodies, hooks with similar notes, hooks with similar backup vocals, similar core themes, similar back up hooks, bass melodies with similar rhythmic elements, keyboard similarities, and similar unusual percussions sounds, including the cowbell.[55] Their argument is that all of these elements together create a substantial similarity between "Blurred Lines" and "Got to Give It Up" in their total concept and feel.

In determining whether there was substantial similarity between the total concept and feel of "Blurred Lines" and "Got to Give It Up," the Ninth Circuit used its own two part version of the audience test for substantial similarity, called the extrinsic/intrinsic test.[56] Jury members were informed that in order to show by a preponderance of the evidence that there is substantial similarity between "Got to Give It Up" and "Blurred Lines," the Gaye party must show that there is both extrinsic and intrinsic similarity.[57] To show extrinsic similarity, the two works

(Sept. 25, 2013), http://www.osterbergllc.com/wp-content/uploads/2013/09/Practical-Law-Article.pdf.

[51] *Id.*

[52] *Id.*

[53] After the release of Robin Thicke and Pharrell Williams smash hit "Blurred Lines" in 2013, the family of the late Marvin Gaye began making claims that the hit was infringing on Gaye's 1977 song "Got to Give it Up." Thicke and Williams preemptively filed a lawsuit against the Gaye estate claiming that the two songs were strikingly different. The Gaye estate then filed a countersuit, claiming that that there were too many similarities between the two songs. *See* Kory Grow, *Robin Thicke, Pharrell Lose Multi-Million Dollar 'Blurred Lines' Lawsuit*, ROLLING STONE (Mar. 10, 2015), http://www.rollingstone.com/music/news/robin-thicke-and-pharrell-lose-blurred-lines-lawsuit-20150310.

[54] Eberhard Ortland, *Blurred Lines: A Case Study on the Ethics and Aesthetics of Copying, in* THE AESTHETICS AND ETHICS OF COPYING 225, 231 (Darren Hudson Hick & Reinold Schmücker eds., 2016).

[55] Josh H. Escovedo, *The Blurred Lines of an Infringement Action*, IP LAW BLOG (Mar. 6, 2015), http://www.theiplawblog.com/2015/03/articles/copyright-law/the-blurred-lines-of-an-infringement-action.

[56] *See* Ortland, *supra* note 54, at 235.

[57] *Id.*

must share a similarity of ideas and expressions, as explained by expert testimony.[58] If the court or fact finder concludes that there are extrinsic differences, they then look to whether intrinsic differences exist. The intrinsic test is an examination of an ordinary person's subjective impression of the similarities between the two works.[59] To establish infringement, both tests must be satisfied.[60]

C. *De Minimis*

The de minimis rule in copyright is a defense to a claim of substantial similarity and attempts to answer the question "how much copying is too much?" This doctrine strikes a balance between the interests of authors in the control and exploitation of their works and society's competing interest in the free flow of ideas, information and commerce.[61] Before a court makes a determination of whether the use of a copyrighted work is free from liability, it must first consider the issues of whether the copying was substantial enough to infringe.[62] If the court finds that the copying was de minimis, or insubstantial, then liability is not triggered, and the use of the work is not considered to be an infringement on the rights of the copyright holder.[63] Courts have found that when a portion of plaintiff's work is copied yet not be plainly observable, the copying is likely within the protection of de minimis use and therefore not actionable.[64] The de minimis exception to copyright was expressed over 100 years ago by Judge Learned Hand in *West Publ'g Co. v. Edward Thompson Co.*, where he famously stated: "Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent."[65] A de minimis defense will be strengthened in any case where the elements of the allegedly copied portion of the work are considered generic, unoriginal, or widely used.[66] One of the key policy reasons behind this rule is to avoid the administrative time and costs of lawsuits when the takings are minimal and difficult to ascertain.[67]

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[58] Escovedo, *supra* note 55.
[59] *Id.*
[60] *Id.*
[61] Lee S. Brenner & Allison S. Rohrer, *The De Minimis Doctrine: How Much Copying Is Too Much?*, COMM. LAW. 9, 9 (Spring 2006) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)).
[62] *Id.*
[63] *Id.* at 10.
[64] *Id.*
[65] *See* W. Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (E.D.N.Y. 1909).
[66] Ryan Lloyd, *Unauthorized Digital Sampling in the Changing Music Landscape*, 22 UNIV. OF GA. J. INTELL. PROP. L. 143, 152 (2014).
[67] MCLEOD & DICOLA, *supra* note 14, at 141.

D. *How Substantial Similarity and De Minimis Work Together*

The Ninth Circuit applied a substantial similarity test in an alleged copyright infringement of a musical composition in the 2003 case of *Newton v. Diamond*.[68] The parties to this case were James W. Newton Jr., a musician who held the composition rights to his flute and jazz piece, "Choir," and Michael Diamond, a founding member of the rap group, Beastie Boys.[69] In 1981, Newton composed the song "Choir," performed and recorded it, and subsequently assigned the rights to the sound recording to ECM Records.[70] In 1992, Beastie Boys obtained a license for the sound recording of "Choir" to use in their song "Pass the Mic" in exchange for a one-time fee of $1000.[71] The portion of composition at issue consisted of three notes, C, D-flat, and C, which are sung over the background of C played on the flute.[72] Pursuant to their license from ECM Records, Beastie Boys digitally sampled the opening six seconds of Newton's sound recording of "Choir" and repeated and looped the sample as a background element throughout "Pass the Mic," so that it appears over forty times in the song.[73] Newton's action was filed alleging violations of copyright in the underlying composition.[74] The district court ultimately held that the three note segment of the "Choir" composition could not be copyrighted because it lacked requisite originality.[75] It also stated that even if it was copyrightable, Beastie Boys' use of the work was de minimis and therefore not actionable.[76]

The dispute between Newton and Beastie Boys centers on the copyright implications of the practice of sampling.[77] The court held that for an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement.[78] That means that even where the fact of copying is conceded, there will not be legal consequences unless the copying is substantial.[79] This principle reflects the legal maxim, *de minimis non curat lex* ("the law does not concern itself with trifles").[80] On the facts of the record, the court concluded that no reasonable juror could find the sampled portion of the composition to

68 Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2003).
69 *Id.* at 1191.
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.* at 1192.
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.* at 1192–93.
79 *Id.* at 1193.
80 *Id.*

be significant in relation to the composition as a whole.[81] Additionally, Newton conceded that "Choir" and "Pass the Mic" are substantially dissimilar in concept, feel, and most importantly, their overall thrust and meaning.[82] The court found that there were both qualitative and quantitative factors that led to the decision.[83] Qualitatively, the notes were insignificant because the sequence of the three notes at issue only appeared one time in the composition of "Pass the Mic" and amounted to about two percent of the four-minute song.[84] Quantitatively, the court concluded that the notes did not represent the "heart or hook" of "Choir."[85] Since no person in an average audience would be able to discern Newton's hand as a composer, from Beastie Boys' use of the sample, the copying was not enough to constitute infringement and was therefore de minimis.[86]

II. BRIDGEPORT MUSIC V. DIMENSION FILMS

A. *The Sixth Circuit's Ruling and Reasoning*

Two years after the Ninth Circuit concluded that the de minimis doctrine could be applied to musical composition cases in *Newton v. Diamond*, the Sixth Circuit Court of Appeals issued a decision in stark contrast to *Newton*.[87] In 2005, the Sixth Circuit decided *Bridgeport Music v. Dimension Films*, a case that initially came from 500 counts of alleged copyright infringement against some 800 defendants.[88] The plaintiffs in this case were Bridgeport Music, Inc. and Westbound Records, Inc., each of which engaged in the business of music publishing, exploiting both musical composition and sound recording copyrights.[89] The defendants were No Limit Films, a production company that released the 1998 movie *I Got the Hook Up* ("*Hook Up*"), which featured the N.W.A song "100 Miles and Runnin" ("100 Miles") that contained alleged samples of George Clinton Jr.'s "Get Off Your Ass and Jam" ("Get Off").[90]

In the district court proceeding, No Limit Films moved for summary judgment, arguing that (i) the sample is not protected by copyright law because it was not "original;" and (ii) the sample was legally insubstantial or de minimis and therefore does not amount to

[81] *Id.* at 1195.
[82] *Id.* at 1196.
[83] *Id.* at 1195.
[84] *Id.* at 1196.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 795 (2005).
[89] *Id.*
[90] *See id.* To listen to each of these songs and compare them, visit and search for the songs on http://www.whosampled.com.

actionable copying under copyright law.[91] The district court agreed, finding that the portion of song at issue was original and creative, but ultimately de minimis.[92] They determined that "no reasonable juror, even one familiar with the works of George Clinton would recognize the source of the sampling without having been told of its source."[93]

However, when the case was appealed to the Sixth Circuit, the court reversed the district court's decision, ruled in favor of Bridgeport, and imposed a per se infringement rule to be applied to sound recording copyright infringement cases. The main premise of the Sixth Circuit's decision is based on the idea that there is a distinction between infringement cases involving musical compositions and infringement cases involving sound recordings.[94] The court found that sound recordings and musical compositions differ because when sounds are sampled, they are taken directly from a fixed medium, which is more akin to a physical taking as opposed to an intellectual one.[95] While no court had ever established this precedent, the Sixth Circuit cited both to statutory language and policy reasons for their conclusions.

The foundation of the court's statutory analysis lies within section 114 of the Copyright Act.[96] Until 1971, copyrights for sound recordings were not given protection under the Copyright Act.[97] The protection under section 114 puts express limitations on the rights of copyright holders and gives them the exclusive right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.[98] The Sixth Circuit interpreted this to mean that artists looking to sample or borrow from another work are free to imitate or simulate creative work, so long as an actual copy of the sound recording itself is not made.[99] This conclusion led the court to believe that if an artist is unable to pirate the entire sound recording, they should also not be able to sample anything less than the whole.[100] Thus, the court implemented a restrictive per se rule that still stands as law today: "get a license, or do not sample."[101]

The Sixth Circuit addressed several policy reasons for favoring a

91 *Bridgeport*, 410 F.3d at 797.
92 *Id.* at 796–97 (The portion of the song at issue was an arpeggiated chord. It consisted of three notes that if struck together compromise a chord, but instead are played one at a time in very quick succession.)
93 *Id.* at 797.
94 McLeod & DiCola, *supra* note 14, at 140.
95 *Bridgeport*, 410 F.3d at 802.
96 *See* Rights Granted Under Copyright, supra note 38.
97 *Bridgeport*, 410 F.3d at 800.
98 17 U.S.C. §114(b) (2012).
99 *Bridgeport*, 410 F.3d at 800.
100 *Id.*
101 *Id.* at 801.

per se rule.[102] The court's main reason for imposing this standard is that the rule is easy to follow and enforce. Also, the Sixth Circuit believed that requiring an artist to obtain a license to sample would not stifle creativity.[103] It pointed out that an artist is still free to duplicate the sound in the studio even if they cannot sample it directly from someone else's work.[104] Additionally, the court felt that the market would control the price of licensing samples in order to keep the price within reasonable means for artists.[105] The court also noted that sampling is "never accidental."[106] When an artist samples a sound recording, they are well aware that they are taking another's work product, and therefore should not be able to do so without some cost to them or attribution of credit to the original artist.[107] Even though a small part of a sound recording is taken, that part is something of value.[108] The court found that a sample does contain some value by addressing the reasons that people generally choose to sample in the first place.[109] These reasons are: to save costs, add something to the new recording, or both.[110] The rule implemented by this court has now been in effect for more than ten years.

III. WHAT HAPPENED AFTER BRIDGEPORT?

A. *Effect on the Music Industry*

After the Sixth Circuit's decision in *Bridgeport*, the music industry experienced a change in the way both artists and music professionals alike thought about the way to approach sampling.[111] The *Bridgeport* decision shifted copyright law to the benefit of copyright owners, eliminating the de minimis defense for samples of sound recordings.[112] Music attorney, Dina LaPolt, says that *Bridgeport* changed the way that she advises clients.[113] Before *Bridgeport*, she would have no reason to think that use of a small snippet of a song was not de minimis. Now, attorneys take a very conservative approach to

102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.* at 801–02.
109 *Id.* at 802.
110 *Id.*
111 McLeod & DiCola, *supra* note 14, at 139.
112 *Id.*
113 *Id.* at 141.

clearing samples to the point where even if they cannot hear a sample of the recording, they would advise their client to clear it anyway.[114]

In its attempt for a clearer, bright line rule, *Bridgeport* also gave music rightsholders an unprecedented level of exclusion that tipped the balance very heavily in their favor.[115] For someone like an amateur, unsigned artist, this rule has the potential to be fatal to their career.[116] To avoid an infringement lawsuit, an artist's only option is to effectively examine the potentially infringing work for unauthorized samples and obtain any licenses that would be necessary to use the sample.[117] While this would seem like a relatively fair system, it does not exist without challenges. The artist may have a problem finding both the original source of the sample to try and obtain a license as well as the person or record label or parent company that holds the copyright to both the musical composition and sound recording.[118] It is not uncommon that a parent company or label holds the copyright to the musical composition, while a different label or company holds the rights to a sound recording.[119] Once the artist finds the copyright owner, they still may run into problems while negotiating for the use of the sample.[120] Because there are no specific provisions for samples under section 115 for the Copyright Act, holders of copyrights have no legal obligation to license the rights for their song to another artist who wishes to use the sample.[121] Therefore, the artist must go through a negotiation process with the rightsholder. During this process, the rightsholder can dictate the price, subsequent royalty payments, and even limit how the artist wishing to use the sample can use the sample.[122] A negotiation could be for a one-time use of the sample, or a portion of each future sale as a royalty payment, depending on what the rightsholder thinks will be more profitable.[123] One-time fees can range anywhere from $250 to $10,000, with most fees falling between $1000 and $2000 per sample.[124] Under this scheme, an artist has the potential to lose profits if they feel like they have no choice but to enter into an agreement with a copyright holder. If left without a way to clear the sample that is economically viable, an unsigned, independent artist might still choose not to because they believe that they are relatively

114 *Id.* at 141–42
115 Lloyd, *supra* note 66, at 166.
116 *Id.*
117 *Id.*
118 *Id.* at 167.
119 *Id.*
120 *Id.*
121 *Id.* at 154.
122 *Id.* at 155.
123 *See id.*
124 Michael McCready, *The law regarding music sampling*, COPYRIGHT L., TREATIES & ADVICE, http://www.copynot.org/Pages/Music%20sampling.htm (last visited Jan. 25, 2017).

anonymous in the music world. On the other hand, the expansion of the Internet and online music culture makes not doing so extremely risky.[125] Without licensing the sample, artists leave themselves open to the possibility that they will be liable for copyright infringement, where damages can run from $500 to $20,000 for a single act of infringement.[126]

B. *Sampling Trolls*

Bridgeport Music, the central plaintiff in *Bridgeport v. Dimension Films*, has emerged within the music industry to become what is sometimes referred to as a "sample troll." Similar to its cousin, the "patent troll," Bridgeport and similar companies hold the portfolios of a vast amount of copyrights and bring lawsuits against successful music artists for routine sampling, even if small and relatively unnoticeable.[127] Bridgeport is what is known as a catalog company. It has no employees and holds no assets other than the copyrights it owns.[128] Bridgeport holds all of the copyrights to funk legend George Clinton's works. Another "sample troll" company, TufAmerica, holds the copyrights to all of Tina Turner's works.[129] TufAmerica has targeted artists like LL Cool J, Beastie Boys, and Christina Aguilera with litigation for their use of unauthorized samples.[130] "Sample trolls" are bad for both artists and mainstream record labels. Ideally, music would be made at a minimal cost to both the artist and record label.[131] However, if forced to clear samples through companies operating as sampling trolls, production becomes much more expensive and makes new and innovative music much riskier to make.[132]

C. *A Look At The Cases After Bridgeport and Before VMG Salsoul*

The *Bridgeport* decision was the first of its kind. Following the decision in 2005 until June 2016, courts not bound by the decision have declined to follow the holding—without expressly denouncing it in their opinions.

In *TufAmerica, Inc. v. WB Music Corp.*, Eddie Bo and The Soul Finders asserted that Jay-Z, in his 2014 song "Run This Town," sampled the word "oh" from their song "Hook & Sling Part I" and used

125 Lloyd, *supra* note 66, at 155.
126 McCready, *supra* note 124.
127 Tim Wu, *Jay-Z Versus the Sampling Troll*, SLATE (Nov. 16, 2006, 1:50 PM), http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html.
128 *Id.*
129 *Rise of the Sample Trolls: 99 Problems and a Sample is 1*, UPTOWN, (Nov. 12, 2013), http://www.uptownmagazine.com/2013/11/rise-of-the-sample-trolls-99-problems-sample-is-1/.
130 *Id.*
131 Wu, *supra* note 127.
132 *Id.*

it more than forty times within "Run This Town."[133] The plaintiffs claimed that this infringed on both their sound recording and musical composition copyrights.[134] The district court, sitting within the Second Circuit, held that the "oh" in question was qualitatively insignificant because the word "oh" is quite common and not at all in the heart of either of the two songs.[135] The court also found that the use of "oh" in "Run This Town" is barely perceptible to the average listener.[136] The court ultimately held that the alleged sampling of "oh" in "Run This Town" is "sufficiently *de minimis* to render moot whatever otherwise might have been made of the alleged copying with respect to the qualitative significance of that which was copied."[137] The court held Plaintiff's argument assumes that any part of another artist's protected work is infringement but improperly mixes factual copying and actual copying.[138]

In 2014, the District Court for the Eastern District of Louisiana, sitting in the Fifth Circuit, considered a copyright infringement claim in *Batiste v. Najm*. Paul Batiste, the founding member and owner of the Batiste Brothers Band, brought a claim against Faheem Rasheed Najm, professionally known as T-Pain.[139] The claim alleged that T-Pain infringed on various beats, lyrics, chords melodies, chants, hooks, horns, and "gliss" within Batiste's musical compositions.[140] After engaging in a substantial similarity analysis, the court warned Batiste that he should think twice before adding any sampling claims by amending the complaint.[141] While the court understood that the Sixth Circuit applied a different standard for the matter of sampling, they believed it was better not to diverge from a substantial similarity analysis when determining whether a sample has been unlawfully used.[142]

Saregama India Ltd. v. Mosley is yet another case in which a

133 TufAmerica Inc. v. WB Music Corp., 67 F. Supp. 3d 590, 591–92 (S.D.N.Y. 2014).
134 *Id.* at 592.
135 *Id.* at 596–97.
136 *Id.* at 598.
137 *Id.*
138 *Id.* at 598–99.
139 Batiste v. Najm, 28 F. Supp. 3d 595, 597–98 (E.D. La. 2014).
140 *Id.* at 598.
141 *Id.* at 625. Gliss is the shorthand term for glissando, which is a musical gliding effect performed "by sliding one or more fingers rapidly over the keys of a piano or strings of a harp." *Glissando*, DICTIONARY.COM, http://www.dictionary.com/browse/glissando (last visited Dec. 17, 2017).
142 *Batiste*, 28 F. Supp. 3d at 625. ("However, the Court strongly cautions the plaintiff that he should consider very carefully any decision to add sampling claims. First, while the Sixth Circuit has applied a different standard to digital sampling (i.e., where sounds from the plaintiff's sound recording are not imitated, but rather are literally lifted from the recording and incorporated into the defendant's recording), other circuits have continued to apply the substantial similarity test to claims based on sampling. Thus, it is far from clear that such claims would be exempt from the analysis already applied herein.")

court, this time the Eleventh Circuit, declined to follow *Bridgeport*.[143] Saregama contended that the sound recording at issue needs to be treated differently than any other kind of musical recording, relying on the holding in *Bridgeport*.[144] However, the court maintained that "the Sixth Circuit's decision to carve out an exception for sound recordings has not been followed in this circuit," and "the Eleventh Circuit [instead] imposes a 'substantial similarity' requirement as a constituent element of *all* infringement claims."[145] The court found it unclear why the *Bridgeport* court's analysis of section 114(b) of the Copyright Act diverges so drastically from its text. The *Bridgeport* holding changes the scope of derivative works to include all works containing any sound from the original sound recording, whether those works bear substantial similarities to the original work or not.[146] "Section 114(b) does not seem to support the distinction between sound recordings and all other forms of copyrightable work that the *Bridgeport* court imposes."[147] The court held the analysis in this case should instead focus on the songs "taken as a whole" in determining whether there are similarities between these two songs and whether those similarities are merely de minimis.[148] The court found that the only part of the two recordings presented by the plaintiff that was similar was "an approximately one second snippet of a female vocal performance."[149] Taken as a whole, both songs had different lyrics, tempo arrangements, and rhythms.[150] The court reasoned "it is highly unlikely" that the average observer would be able to discern this one-second snippet from both of the songs without any "prior warning."[151]

IV. A WIN FOR SAMPLING? VMG SALSOUL LLC V. MADONNA LOUISE CICCIONE

A. *District Court Decision*

Since arriving on the Billboard Hot 100[152] Chart in October 1983

143 Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325 (S.D. Fla. 2009); *see also*, Bentz & Busch, *supra* note 23.
144 *Saregama*, 687 F. Supp. 2d at 1338.
145 *Id.* at 1338–39.
146 *Id.* at 1340.
147 *Id.* at 1341.
148 *Id.* at 1338.
149 *Id.*
150 *Id.*
151 *Id.* at 1139.
152 Justin Charity, *Is the Billboard Top 100 Broken?*, THE RINGER, (July 26, 2016, 11:39 AM), https://www.theringer.com/2016/7/26/16047050/billboard-hot-100-singles-chart-broken-3 13cbe9094b9 (explaining that "the Billboard Hot 100 Charts have been published since 1958. The Charts purport to measure the 'overall popularity' of all songs commercially distributed within the U.S. The chart has since its inception, been the main authority on any given song's popularity within the U.S."). For more information, see *Charts*, BILLBOARD, http://www.billboard.com/

with her song "Holiday," Madonna has had a total of fifty-seven chart hits, including a record number thirty-eight top ten hits.[153] According to *Billboard* magazine, Madonna's hit single, "Vogue," rose to the Billboard Hot 100 number one spot in 1990 and stayed there for three weeks.[154] "Vogue" was a hit for Madonna, popularizing a dance fad in the early 1990s.[155] Yet in July 2011 and February 2012, VMG Salsoul, a record company, sent Madonna, record producer Shep Pettibone, and WB Music Corp. a notice of copyright infringement, claiming that new technology gave VMG the ability to detect that the 1990 hit sampled the Salsoul Orchestra's 1977 disco song "Love Break."[156] In July 2012, VMG commenced their suit in the Central District of California, claiming that Madonna and her co-author on the song, Pettibone, copied portions of "Love Break" in "Vogue" and its various remixes.[157] On September 6, 2012, Pettibone filed an answer on behalf of all of the defendants. The district court granted summary judgment to the defendants, first on the ground that neither the composition nor the sound recording of the horn hit was "'original' for purposes of copyright law" and, second, even if the horn hits were original, any sampling of the horn hit was "de minimis or trivial."[158] The Ninth Circuit took the plaintiff's appeal.

B. *The Ninth Circuit Decision*

The horn hit in dispute appears in "Love Break" in two forms.[159] There is a single horn hit "that consists of a quarter note chord[160] compromised of four notes—E-flat, A, D and F—in the key of B-Flat."[161] "The single horn hit lasts for 0.23 seconds."[162] The double horn hit in "Love Break" consists of an eighth-note chord of those same

charts.

153 Keith Caulfield, *Madonna's 40 Biggest Billboard Hits*, BILLBOARD (Aug. 16, 2015), http://www.billboard.com/articles/list/499398/madonnas-40-biggest-billboard-hits.

154 *Id.*

155 *Id.*

156 David McAfee, *Madonna, Producer Escape 'Vogue' Copyright Suit*, LAW360 (Nov. 18, 2013), https://www.law360.com/articles/489618/madonna-producer-escape-vogue-copyright-suit.

157 *Id.*

158 VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 876 (9th Cir. 2016).

159 *Id.* at 875.

160 A chord in music is a set of three or more notes that are played simultaneously. Chords are intended to add texture and depth to a piece of music. Different combinations of different notes are meant to inflict certain feelings upon the listener. For example, a major chord often contains notes that when placed at different intervals on a scale, have a brighter, cheerier sound when played together, while minor chords contain notes that give the chord a more dark and sad sound; *See* Andrew Pouska, *The Difference between Major and Minor*, STUDYBASS, https://www.studybass.com/lessons/bass-scales/the-difference-between-major-and-minor (last visited Jan. 25, 2017); *Chord Definition*, MUSIC THEORY, http://www.simplifyingtheory.com/definition-of-chord (last visited Jan. 25, 2017).

161 *VMG*, 824 F.3d at 875.

162 *Id.*

notes, followed immediately by a quarter-note chord of the same notes.[163] The single horn hit occurs twenty-seven times, and the double hit occurs twenty-three times at intervals of approximately two to four seconds in two different segments of the song.[164] "The horn hit in 'Vogue' appears in the same two forms as in 'Love Break.'"[165] The single horn hit occurs one time, the double horn hit occurs three times, and a "breakdown" version of the horn hit occurs once.[166] As the horn hits play, many other instruments are also playing.[167]

The claim in this case is for two distinct alleged infringements. The first is infringement of the copyright to the *musical composition* of "Love Break," and the second is infringement of the copyright to the *sound recording* of "Love Break."[168] The Ninth Circuit previously held in *Newton v. Diamond* that the de minimis exception applies to claims of infringement of a copyrighted musical composition, but it remains an open question as to whether the exception applied to claims of infringement of a copyrighted sound recording.[169]

In determining whether the defendants infringed upon the copyright to the composition of "Love Break," the court concludes that the defendants did copy two distinct passages from the horn part of the score of "Love Break."[170] However, after listening to the recordings, the court concluded that a reasonable jury could not conclude that an average audience member would recognize the appropriation of the composition.[171] The copied elements from the "Love Break" composition are much shorter than the six-second sample at issue in *Newton*.[172] The single horn hit lasts for less than a quarter of a second, and the double horn hit lasts for less than a second.[173] Additionally, the horn hits appear only five to six times in "Vogue," as opposed in to *Newton*, where the sampled material appeared dozens of times.[174]

Turning then to the question of whether there is infringement of the copyrighted sound recording, the court asserts that what matters is not how the musicians played the note but how their rendition distinguished the recording from a "generic rendition" of the same

163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.* at 876 n.4. The court notes that the record does not appear to disclose what the meaning of a "breakdown" version of the horn hit is, and neither party attributes any significance to this form of the horn hit.
167 *Id.* at 875.
168 *Id.* at 878–79.
169 *Id.* at 877. For a discussion of Newton v. Diamond, *see supra* Part I.D.
170 *VMG*, 824 F.3d at 878.
171 *Id.* at 879.
172 *Id.*
173 *Id.*
174 *Id.*

composition.[175] They find that the horn hit was not copied exactly because transposing[176] the chord upward and overlaying it with other sounds and effects changed the way that the chord sounded and felt.[177] Moreover, the horn hit is not isolated; there are many other instruments playing at the same time in both "Love Break" and "Vogue."[178] Despite this, when viewing the evidence in the light most favorable to the plaintiff, the court was able to determine that Pettibone did copy one-quarter note in both the single and double horn hit and overlaid the resulting horn hits with sounds from other instruments to create the sounds in "Vogue."[179] However, in listening to the recordings that were submitted by both parties, the court concluded that a reasonable juror would not be able to recognize the appropriation of the horn hit.[180] Their reasoning for finding this way comes from the procedural history of the district court.[181] The primary expert for the plaintiff initially misidentified the allegedly sampled double horn hit.[182] Initially, he concluded that the creators of "Vogue" had sampled both the single and double horn hit but became confused once he was able to listen to the tracks without the overlay of other instruments.[183] The expert then changed his opinion to conclude that only the single horn hit was sampled, and it was this single horn hit that was used to create the double horn hit in "Vogue," not an independent creation of an additional double horn hit.[184] The court reasoned that because a highly qualified and trained musician listened to the recording with the express aim of trying to discern which parts of the song were copied or original and could not do so, there is no way that an average audience would be able to identify the difference between the two horn hits.[185]

The main thrust of the court's decision then turned to whether the

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175 *Id.* at 878(quoting Newton v. Diamond, 388 F.3d 1189, 1193)(describing the protected elements of a copyrighted sound recording as the elements unique to the musician's performance).

176 *See Music Theory Lesson: Learn How To Transpose Music*, MUSICNOTES BLOG (Aug. 8, 2014), http://www.musicnotes.com/blog/2014/08/08/how-to-transpose-music (Transposition is the process of changing the key in a piece of music. Music is often transposed so that it can be played on different instruments. Because instruments vary in their range and sound, it can be easier to transpose a piece of music to make it simpler for the musician to play cohesively with other instruments in large ensembles. Transposition consists of identifying the key that the sheet music is in, and then determining how far up or down in tone to move the notes for the new instrument to sound the same as the original composition. Each individual note must be moved in the group of notes by the same musical interval.).

177 *VMG*, 824 F.3d at 879.

178 *Id.*

179 *Id.* at 880.

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

de minimis doctrine applies to sound recordings in addition to musical compositions. VMG Salsoul's argument was that even if the copying is trivial, it becomes irrelevant because the de minimis doctrine does not apply to infringements of copyrighted sound recordings.[186] VMG Salsoul stressed that the court should follow the Sixth Circuit's decision in *Bridgeport Music v. Dimension Films* and apply the bright line rule that was articulated for copyrighted sound recordings and the use of any unauthorized copying: no matter how trivial the use of a sample an artist uses, that use will constitute infringement.[187] The court firmly disagreed with this argument, and in turn, decided to expressly divert from the *Bridgeport* decision.

The analysis brought by the court begins with the statutory text of 17 U.S.C. § 102 "Subject matter of copyright: In general." Subsection (a)(7) of this statute states:

> Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include . . . [s]ound recordings.[188]

Nothing in the text of this statute suggests that sound recordings should be treated any differently than something like a literary work or dramatic work, and therefore, they should be treated identically to all other kinds of protected works.[189]

The court then moves to VMG Salsoul's argument, which rests within the third sentence of 17 U.S.C. §114(b). Section 114(b) states:

> The exclusive rights of the owner of a copyright in a sound recording under clauses (1) and (2) of Section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.[190]

This sentence imposes an express limitation on the rights of a copyright holder.[191] It means that a new recording that mimics the copyrighted recording, however well mimicked, is not an infringement so long as there was no actual copying.[192] A House Report, printed in 1976, states that "subsection (b) of Section 114 makes clear that

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186 *Id.*

187 *Id.* For a more in-depth discussion of the Sixth Circuit's holding in Bridgeport Music v. Dimension Films, see supra Part 2.A.

188 17 U.S.C. § 102(a)(7) (2012); VMG, 824 F.3d at 881; *see also* U.S. COPYRIGHT OFFICE, *supra* note 30.

189 *VMG*, 824 F.3d at 882.

190 *Id.* at 882; 17 U.S.C. § 114(b) (2012).

191 *VMG*, 824 F.3d at 882.

192 *Id.* at 883.

statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated."[193] Therefore, if a band played and recorded a version of "Love Break," in a way that was extremely similar to the recording that is protected by the copyright, "there would be no infringement so long as there was no actual copying of the recorded 'Love Break'".[194] However, since the horn hits here were identical, VMG Salsoul argues that the court should find infringement. Nevertheless, both the House Report and section 114(b) show that there was no indication that "Congress intended . . . to expand the rights of a copyright holder to a sound recording" through this section of the Copyright Act.[195]

However, the Ninth Circuit chose to emphasize the more important principle articulated in section 114(b): infringement only takes place where "all or any substantial portion of the actual sounds are reproduced."[196] Reading the statute in this way illustrates that Congress clearly understood and meant for the de minimis doctrine to apply to sound recordings, just as it applies to all other copyrighted works. The Ninth Circuit disagreed with the Sixth Circuit's holding that "the rights of sound recording copyright holders under clauses (1) and (2) of Section 106 'do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation or other sounds.'"[197] Under this interpretation of the statute, only a sound recording owner would have the exclusive right to "sample" his own recording.[198]

The Ninth Circuit outright rejected the Sixth Circuit's interpretation of section 114(b) and, subsequently, the Sixth Circuit's application of the de minimis rule to sound recordings. The reasoning in *Bridgeport* failed because the Sixth Circuit did not acknowledge the express limitations on the copyright holder afforded in section 114(b).[199] *Bridgeport* also declined to consider legislative history on the ground that "digital sampling was not being done in 1971."[200] Additionally, the

193 *Id.* (citing H.R. Rep. No. 94-1476, at 61(1976), as reprinted in 1976 U.S.C.C.A.N. 5559, 5674)("Infringement takes place whenever all or any or substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audio portion of a modern picture or other audio visual work. Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.").

194 *VMG*, 824 F.3d at 883.

195 *Id.*

196 *Id.* at 884.

197 *Id.*

198 *Id.*; Bridgeport Music, Inc. v. Dimension Films 410 F.3d 792, 800–01.

199 *VMG*, 824 F.3d at 884.

200 *Id.*

Ninth Circuit found that *Bridgeport* inferred from the language of the statute that "exclusive rights . . . *do not extend* to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds."[201] The Ninth Circuit held that the Sixth Circuit incorrectly came to the conclusion that exclusive rights would then extend to the making of another sound recording that *does not consist* entirely of an independent fixation of other sounds.[202] In the Ninth Circuit's view, a statement that rights do not extend to a particular circumstance does not then automatically mean that the rights extend to all other circumstances.[203] To further undermine the statutory analysis advanced by the *Bridgeport* court, the Ninth Circuit provided the following analogy: "if it has rained, then the grass is not dry," does not necessarily mean that "'if it has not rained, then the grass is dry.'"[204] The Ninth Circuit furthered this analogy, stating: "Someone could have watered the lawn, for instance."[205]

Additionally, the court departed from *Bridgeport* in analyzing the nature of sound recordings themselves. While the Sixth Circuit in *Bridgeport* reasoned that sampling represents an actual taking, the Ninth Circuit found that the potential for a "physical taking" exists with respect to other kinds of artistic works including photographs and literary works, to which the de minimis rule applies.[206] Even if the premise is accepted that sound recordings are different from other copyrighted works and could warrant a different infringement rule, this does not mean that Congress actually adopted a different rule.[207] Finally, the distinction between a "physical taking" and an "intellectual one" based on saving costs has no bearing on the issues in this case because the Supreme Court held that the Copyright Act protects only the expressive aspects of a copyrighted work and not the fruit of the author's labor.[208]

In addition to disagreeing with the *Bridgeport* court in their statutory interpretation of the Copyright Act, the Ninth Circuit found it beneficial to address what David Nimmer,[209] one of the leading scholars

[201] 17 U.S.C. § 114(b) (2012).
[202] *VMG*, 824 F.3d at 884.
[203] *Id.* at 885.
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.* (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991))(Feist held that the names, towns, and telephone numbers copied by Feist were not original to Rural and, therefore, not protectable by the copyright in Rural's combined white and yellow pages directory).
[209] David Nimmer is of counsel to Irell & Manella LLP in Los Angeles, California and a professor at the UCLA School of Law. Since 1985, Professor Nimmer has authored and updated Nimmer on Copyright, the standard reference treatise in the field, first published in 1963 by his late father Professor Melville B. Nimmer. The U.S. Supreme Court has cited Nimmer on

in the field of copyright, has written on the *Bridgeport* decision.[210] One of the main reasons the Ninth Circuit found that such a deep split already existed throughout the country regarding copyright law is because Nimmer has taken a strong stance on the ruling in *Bridgeport*. Nimmer has pointed out that *Bridgeport's* reasoning fails on its own terms because contemporary technology plainly allows the copying of small portions of a protected sound recording.[211] In fact, the court explained that Nimmer, in *Nimmer on Copyright*, devotes many pages to explaining why the Sixth Circuit's opinion is, in no uncertain terms, wrong. [212]

The court then addresses their creation of a circuit split. In doing so, the court acknowledges the need to diverge from the Sixth Circuit because without acts like this, courts would have no choice but to blindly follow the rules announced by whichever circuit court decided an issue first, even when they are convinced that their sister circuit erred.[213] The court also concedes that in this particular case, the consequences of a circuit split were diminished because a deep split among the federal courts already existed.[214] In formally creating this split, the court provided a much-needed first step in defining the permissible bounds for unauthorized sampling.[215] Given the uneven application of the de minimus doctrine, the court hoped this decision could pave the way for reform of the licensing regime for digital samples that took root after *Bridgeport*.[216]

Copyright on numerous occasions, as has every federal appellate court, countless district and state courts, and courts across the globe. *See David Nimmer*, UCLA LAW, https://law.ucla.edu/faculty/faculty-profiles/david-nimmer/ (last visited Jan. 26, 2017).

[210] *See VMG*, 824 F.3d at 880 (Court cites Nimmer on Copyright.).

[211] 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.03(A)(2)(b) (2017).

[212] *See id.*

[213] *VMG*, 824 F.3d at 884–85.

[214] *See, e.g.*, Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1340–41 (S.D. Fla. 2009) (rejecting Bridgeport's rule after analysis); *see generally* Steward v. West, No. 13-02449, 2013 WL 12120232 (C.D. Cal. 2014) (unpublished civil minutes); Batiste v. Najm, 28 F. Supp. 3d 595, 625 (E.D. La. 2014) (noting that because some courts have declined to apply Bridgeport's rule, it is unclear that Bridgeport's rule should apply); Pryor v. Warner/Chappell Music, Inc., No. CV13-04344, 2014 WL 2812309, at 7 (C.D. Cal. June 20, 2014) (declining to apply Bridgeport's rule and citing to the alternative rule adopted by the Ninth Circuit); EMI Records Ltd v. Premise Media Corp., No. 601209, 2008 WL 5027245 (N.Y. Sup. Ct. Aug. 8, 2008) (expressly rejecting Bridgeport's analysis).

[215] *See* Bentz & Busch, *supra* note 23.

[216] *Id.*

V. THE PROBLEM OF BRIDGEPORT AND THE NEED FOR A BRIGHTLINE RULE TO TAKE US OUT OF THE DARK

A. *Music Sampling is Beneficial*

With the development and progression in the digital era of music, it comes as no surprise that sampling creates some issues. Overall, the benefits of music sampling are such that it allows artists to be creative and brings to society new, "remixed" ideas.

One of the ways in which sampling is beneficial is that it allows for crossover in music and, therefore, can be a good source of publicity for artists.[217] Sampling can bring back a song that was once popular years or even decades after it was originally released and recreate it. This allows for the original single to be brought back into the mainstream, while the new song that sampled the older song can mean important exposure for the new artist.[218] Pop superstars Taylor Swift and Rihanna have recently released hits, "Look What You Made Me Do" and "Wild Thoughts," respectively, which brings this crossover to the forefront of today's popular music. Swift's "Look What You Made Me Do" takes on the 1991 work of Fred Fairbrass, Richard Fairbrass, and Rob Manzoli, better known as the one hit wonder group Right Said Fred, "I'm Too Sexy."[219] In a statement posted on its website, the group wrote:

> We're very pleased to hear Taylor Swift's interpolation of our 1991 hit 'I'm Too Sexy.' Taylor and her team reached out to us about the track, we like what she does and we were very honoured to have her interpolation feature on her new single 'Look What You Made Me Do.' We're very happy that our debut single will potentially be reaching new fans 26 years after its release.[220]

While interpolation does not directly equate to sampling, Swift's use and Right Said Fred's reaction reflect the notion that the use of a prior work benefits both the old and new artist. DJ Khaled, Rihanna, and Bryson Tiller arguably created the song of summer 2017 with the release of "Wild Thoughts" from Khaled's new album, *Grateful*, which features a prominent sample of rocker Carlos Santana's 1999 hit "Maria

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[217] *See* nearly witches, *Music Sampling: Daylight Robbery or Art Form?*, MIBBA CREATIVE WRITING, http://www.mibba.com/Articles/Entertainment/6762/Music-Sampling-Daylight-Robbery-or-Art-Form (last visited Jan. 26, 2017).

[218] Hayley Edwards, *Is sampling music good or bad for the business?*, BBC (August 12, 2010), http://news.bbc.co.uk/local/coventry/hi/people_and_places/music/newsid_8909000/8909151.stm.

[219] Gil Kaufman, *Right Said Fred Thanks Taylor Swift's 'Look What You Made Me Do' for 'Marvellous Reinvention' of 'I'm Too Sexy'*, BILLBOARD (Aug. 25, 2017), http://www.billboard.com/articles/columns/pop/7941949/taylor-swift-right-said-fred-thank-look-what-you-made-me-do.

[220] *Id.*

Maria." When Santana was asked how he felt about the use of the sample, he responded:

> There is a reason that the infectious groove/theme that Wyclef [Jean, fellow contributor] and I created on 'Maria Maria' still resonates today. It speaks to the heart. DJ Khaled, Rihanna and Bryson take that vibe and bring it to a new dimension with 'Wild Thoughts,' but the groove and essence of the song is still intact. . . . 'Maria Maria' was and will always be that feel-good summer song that speaks to women, and 'Wild Thoughts' is an extension of that summer song vibe that is timeless. . . . I am honored that DJ Khaled, Rihanna and Bryson felt the intense intentionality of 'Maria Maria' and have shared this summer vibe with the world.[221]

Additionally, sampling has become one of the key pieces that have allowed entire genres of music to develop and thrive. While hip-hop music existed long before sampling became a main component, the very act of borrowing bits and pieces of existing work was part of the hip-hop aesthetic that originated out of the Bronx, New York.[222] Hip-hop artist Chuck D of rap group Public Enemy[223] explained that sampling came from a tradition of rap artists recording over live bands.[224] Once synthesizers and samplers were introduced, this allowed rap artists to incorporate all kinds of popular sounds so that artists could still "do their thing over it."[225] Sampling was not used to pass off another artist's creativity as one's own work but instead was another way to take the music that already existed and arrange and perform those sounds in a new and creative way.[226] With the ever growing amount of samples that benefit rap and hip-hop, it has been suggested that artists should not treat sampling as a leech on the music industry that does away with creative ingenuity, but rather, as a tool of art that composers can use to improve original songs already made.[227]

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[221] David Renshaw, *Carlos Santana says That DJ Khaled's "Wild Thoughts" Is "Timeless,"* FADER (June 21, 2017), http://www.thefader.com/2017/06/21/carlos-santana-co-signed-wild-thoughts.

[222] Tonya M. Evans, *Sampling, Looping and Mashing . . . Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 859 (2011).

[223] Public Enemy is an American hip-hop group, consisting of several well-known hip-hop artists, including Chuck D and Flava Flav. Public Enemy is considered to be one of the most influential and controversial rap groups of the late 80's and early 90's. They are well known for rhyming about social problems, particularly those that have an adverse affect on the black community. Public Enemy is well known for their dense soundscapes and relied on cut and paste techniques, sampling, and chaotic beats. For more information, see Stephen Thomas Erlewine, *Public Enemy*, ALL MUSIC, http://www.allmusic.com/artist/public-enemy-mn0000856785/biography (last visited Jan. 26, 2017).

[224] Evans, *supra* note 222, at 860.

[225] *Id.* at 860 n.94.

[226] *Id.*

[227] Chino Mendiola, *Music Sampling: A Good Thing or Bad Thing?*, REINVENT (Jan.22, 2015),

In the twenty-first century, more and more artists have embraced technology in music, some even taking on a challenge to create entire albums based on samples. Danger Mouse created the *Grey Album*, which consisted entirely of samples from The Beatles' eponymous album, popularly referred to as *The White Album*, and Jay-Z's *Black Album*.[228] When Jay-Z was asked how he felt about the fact that Danger Mouse created this mash-up album without any copyright permission, he responded that he thought it was a "really strong album."[229] He further stated, "I champion any form of creativity and that was a genius idea to do it."[230] When asked if he felt that he got ripped off, he instead said that he felt honored to be on the same song with The Beatles.[231] Mark Ronson, a popular DJ and producer on Amy Winehouse's *Back to Black* album, is a proponent of sampling and all of its benefits for the music world. In a TED Talk, Ronson refers to how our society is now in the "post-sampling" era.[232] Artists now take the things that they love and build on them. In doing so, they have the chance to become part of the music evolution that they love, thereby making something old, new again.[233]

B. *The Bridgeport Decision Invites Venue Shopping*

One of the inadvertent effects of the *Bridgeport* decision is that now, artists who feel that their work is unfairly being sampled by another artist are more incentivized to bring their case to the Sixth Circuit to obtain a more favorable ruling. This "forum shopping" invites potential plaintiffs to manipulate the rules of civil procedure and choose a forum where they believe that a court that has held a certain way in the past, will rule in their favor. In the United States, forum shopping is relatively simple. Derived from *International Shoe Co. v. Washington*, a defendant need only have certain minimal contacts with the forum state in order for a defendant to be subject to a decision within that jurisdiction.[234]

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http://www.reinventmag.com/music/music-sampling-a-good-thing-or-bad-thing. For a more in depth look at the moral psychology behind copyright infringement, see Christopher J. Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINNESOTA L. REV. 2433-2507 (2016).

228 WILLIAM PATRY, HOW TO FIX COPYRIGHT 101 (2011).

229 *Id.* at 102 (citation omitted).

230 *Id.* (citation omitted).

231 *Id.*

232 Mark Ronson, *How Sampling Transformed Music*, TED, https://www.ted.com/talks/mark_ronson_how_sampling_transformed_music/transcript?language=en (last visited Sept. 20, 2017).

233 *Id.*

234 *See Forum Shopping*, CORNELL UNIV. L. SCH.: LEGAL INFO. INST.,

In May 2016, indie singer, White Hinterland, filed a lawsuit against Justin Bieber and Skrillex in the District Court for the Middle District of Tennessee.[235] The complaint states that the opening vocal riff, consisting of five notes at the opening of "Sorry" is the strikingly similar to the four note opening vocal riff in Hinterland's song, "Ring the Bell," and Bieber's "'wrongful conduct has deprived [Hinterland] of the benefit of her exclusive right to . . . her copyrighted works.'"[236] Hinterland has asked the Tennessee court to order Bieber to pay damages and enact an injunction barring them from using that piece of music.[237] This then leads to the question as to why the suit was brought in the Middle District of Tennessee, as opposed to a more "traditional" venue for entertainment disputes like Los Angeles or New York.[238] Hinterland's venue choice in this matter is no coincidence because this court lies within the Sixth Circuit, the same court that decided that de minimis does not apply to music sound recordings.[239]

C. *How to Resolve the Bridgeport and VMG Salsoul Decisions*

In order for musicians and artists to keep creating new music while benefitting from the ability to sample small portions of other music, Congress must enact legislation to expressly give sound recordings the same protections as musical compositions under the Copyright Act. By implementing a steadfast rule that allows the de minimis doctrine to apply to sound recordings, legislation will maximize the cultural and artistic benefits of music sampling while ensuring that the artists that create the works being sampled do not lose out on profits from artists using a more substantial portion of their work.

Congress enacting the Digital Millennium Copyright Act in 1998 was the last time there was any significant change to the Copyright Act pertaining to digital works.[240] As technology becomes more accessible on a day-to-day basis, the desire to borrow and share is not going to go

https://www.law.cornell.edu/wex/forum_shopping (last visited Jan. 25, 2017) ("[M]ultiple courts can have concurrent jurisdiction over a plaintiff's claims, however, the plaintiff may forum shop, or choose the court that will treat his or her claims most favorably); *see also* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 492 (2011).

235 Jeff John Roberts, *Bieber Is Right Not to Be 'Sorry' About This Copyright Lawsuit*, FORTUNE (June 1, 2016), http://fortune.com/2016/06/01/bieber-copyright.

236 *Id.* (citation omitted).

237 *Id.*

238 J. Michael Keyes, *Sorry Beliebers, But Justin Bieber Has Been Sued for Copyright Infringement*, JD SUPRA (May 31, 2016), http://www.jdsupra.com/legalnews/sorry-beliebers-but-justin-bieber-has-50054.

239 Roberts, *supra* note 235.

240 *See generally* Digital Millennium Copyright Act, 17 U.S.C. § 101 (2012).

away.[241] While music has not decreased in popularity, long gone are the days of tracks that featured dozens of samples because, now, the modern system is unable to handle tracks featuring more than just a few samples.[242] Sampling software tools now extend sampling across the Internet and allow people to share their new creations and remixes on a variety of Internet and social media platforms with ease.[243] Congress needs to acknowledge these technological realities and amend the Copyright Act in a way that makes more sense for the majority of amateur and professional creators.[244]

Congress can enact legislation that sets out guidelines to create a limit on how much a sample will cost a musician to use it. This would allow for a fixed rate for the sample that the artist wishes to use. In determining how much a sample is "worth," Congress could provide guiding principles, such as the importance of the sample to the original work, how recognizable the original work is, the amount of money the original work has generated for the original artist, and how prominent that work is in the music industry.[245] By setting guidelines for a set price based on these factors, an artist could essentially figure out if it is worthwhile for them to sample a song before they attempted to use it. This is not to say that negotiation of a licensing fee would disappear, as an original artist might like the idea of the use of the sample so much that they would encourage its use by another artist without payment. Rather, this kind of system would allow musicians to incorporate samples without having to go through the current process of clearing samples, which would cost less time and money and ultimately be better for the artist's creative decision-making process.[246]

Congress could also clarify the language of section 114(b) of the Copyright Act, which was the section in dispute in both *Bridgeport* and *VMG Salsoul*. Professor Daniel J. Gervais of Vanderbilt University Law School states that section 114 is problematic, and most people who practice copyright agree that it is one of the nation's most poorly drafted statutory provisions.[247] Should Congress redraft this section, it would have the chance to finally distinguish between musical composition and sound recording copyrights and provide clear black letter law outlining

241 McLeod & DiCola, *supra* note 14, at 266.
242 *Id.*
243 *Id.*
244 *Id.*
245 Robert Willey, *Document 84: A Call For Change In Copyright Law: The Seven Second Free Zone*, U.S. COPYRIGHT OFFICE: MUSIC LICENSING STUDY, at 30 (May 15, 2014), https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Robert_Willey_MLS_2014.pdf.
246 McLeod & Dicola, *supra* note 14, at 266–67.
247 Steven Seidenberg, *US Perspectives: US Courts Split on Legality of Music Sampling*, INTELL. PROP. WATCH (June 28, 2016), http://www.ip-watch.org/2016/06/28/us-courts-split-on-legality-of-music-sampling.

the protections to be afforded to sound recordings.[248]

One novel proposal brought forth is to impose a seven-second limit for sampling. This length of time can accommodate two bars of a sample in 4/4 time at sixty-eight beats per minute.[249] By imposing a bright line rule akin to this kind of scheme, it would be much easier for artists to use more than just drumbeats or a single horn hit like what is at issue in the *VMG Salsoul* case. Artists might be afraid of a system like this because of the notion that sampling is disrespectful to the effort that went into creation of the original song.[250] However, sampling may increase the sale of the original, reminding the listener that the older song exists, and would not take away from the music listeners seeking out the original.[251] This is the kind of bright line standard sound recording sampling needs. By having a concrete standard that artists can adhere to, it will make it much more simple and straightforward to use samples. It would also allow for the return of more of the creative albums that used a multitude of samples common to hip-hop in the 1990s.

The creation of a multi-national database that would hold information about both the sound recording and composition copyright holders, as well as information on any person or group who has performed the work is an additional solution.[252] While there are databases, such as the one maintained by the U.S. Copyright Office, they are not comprehensive and can be inaccurate.[253] The benefits of having a global database would be substantial. Artists from all over the world would be able to input the copyrights they own and make sure that they are being fairly compensated. Additionally, it would make the royalty process much less difficult if an artist had a way to centrally locate information that could easily identify licensors and reduce search costs. This would particularly benefit lesser-known songs, artists, or copyright holders that would have otherwise been difficult or impossible to find.[254]

Lastly, the Ninth Circuit created a circuit split with its decision in *VMG Salsoul*. While the Sixth Circuit's position gained little traction in any court outside of the Sixth Circuit, no other circuit court had come forward to take the contrary position. This is an opportune time for the U.S. Supreme Court to grant VMG Salsoul certiorari. While the Supreme Court usually only grants certiorari when multiple circuits

248 *Id.*
249 Willey, *supra* note 245, at 4.
250 *Id.*
251 *Id.*
252 Klementina Milosic, *GRD's Failure*, MUSIC BUS. J. BERKLEE C. MUSIC (2015), http://www.thembj.org/2015/08/grds-failure/.
253 *Id.*
254 *Id.*

have issued contradictory rulings, there may be enough interest due to the number of district court cases that have declined to follow *Bridgeport*.

CONCLUSION

The market is not going to change itself. In 2005, the *Bridgeport* court in its reasoning made the claim that the market would self regulate, and reasonable licensing fees for samples would be worked out between artists. Since *Bridgeport*, the music industry has not seen any kind of balancing in the prices for these samples. Additionally, law on this matter has only managed to become more confusing, with varying case law and no change to the Copyright Act. If we do not bring sampling in music into twenty-first century law and put in protections for those who choose to express themselves in this way, artists who choose to sample will continue to hide from conflicting laws that continue to criminalize these beneficial activities.

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