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A Music Industry Circuit Split: The De Minimis Exception in Digital Sampling

Michaela S. Morrissey
University of Richmond School of Law

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A MUSIC INDUSTRY CIRCUIT SPLIT: THE DE MINIMIS EXCEPTION IN DIGITAL SAMPLING

INTRODUCTION

When hip-hop icon Biz Markie released his album "All Samples Cleared!"[1] he joked of the end of what was known as the "Golden Age"[2] of digital sampling in the hip-hop and rap music industry. The Golden Age began in the late 1980s, and because there was no regulation of the practice, it was a period of musical enlightenment in which musicians could freely utilize digital sampling without legal repercussion.[3]

However, in 2005, the United States Court of Appeals for the Sixth Circuit handed down an opinion that sent shock waves across the music industry. In *Bridgeport Music Inc. v. Dimension Films*,[4] the Sixth Circuit cracked down on digital sampling when it ruled that any use of a copyrighted sound recording amounted to copyright infringement, no matter the size of the sample taken.[5] Although the opinion was staunchly criticized,[6] it remained the only digital sampling case decided by the federal court of appeals for

1. BIZ MARKIE, ALL SAMPLES CLEARED! (Cold Chillin' Records 1993).

2. *See* Ethan Hein, *Biz Markie Gets the Copyright Smackdown*, THE ETHAN HEIN BLOG (July 19, 2009), https://www.ethanhein.com/wp/2009/biz-markie-gets-the-copyright-smackdown [https://perma.cc/5KA2-S3QV].

3. *See* Wayne M. Cox, Note, *Rhymin' and Stealin'? The History of Sampling in the Hip-Hop and Dance Music Worlds and How U.S. Copyright Law & Judicial Precedent Serves to Shackle Art*, 14 VA. SPORTS & ENT. L.J. 219, 227 (2015).

4. 410 F.3d 792 (6th Cir. 2005).

5. *Id.* at 798.

6. *See* Claire Mispagel, Note, *Resolving a Copyright Law Circuit Split: The Importance of a* De Minimis *Exception for Sampled Sound Recordings*, 62 ST. LOUIS U. SCH. L.J. 461, 474, 481–82 (2018); *see also* Adam Baldwin, Comment, *Music Sampling and the De Minimis Defense: A Copyright Law Standard*, 19 UIC REV. INTELL. PROP. 310, 318–20 (2020).

over ten years.[7] Yet, in 2016, the United States Court of Appeals for the Ninth Circuit formalized the divide when it held that the de minimis defense—the rule that a small amount of copying is permitted—does, in fact, apply to sound recordings.[8] This opinion stands in direct opposition to the *Bridgeport* holding,[9] thereby creating a circuit split on the issue of de minimis use of digital sampling. If this rift remains unresolved, it will continue to send a wave of unpredictability across the music industry that will both chill artistic creativity and stifle the judicial economy.[10]

This Comment examines the current circuit split between the Sixth and Ninth Circuits over music sampling and sound recording copyright, specifically the application of the de minimis defense. Part I of this Comment will define digital sampling and provide its history and the techniques used in the process. Part II will review copyright law principles that apply to digital sampling, including copyright infringement and the de minimis defense. Part III will analyze the circuit split between the Sixth and Ninth Circuits. Finally, Parts IV and V will discuss the impact of the split on the music industry, as well as proposed congressional and judicial solutions to the issue.

I. BACKGROUND

Sampling is not a new practice, as artists have long borrowed from predecessors as a part of the creative process. When Pablo Picasso said, "Bad artists copy. Great artists steal,"[11] he was referring to his invention of the "collage," which combined previously existing images found in magazines and wallpaper into new works of art.[12] When Igor Stravinsky said, "A good composer does not imitate, he steals,"[13] he was referring to his practice of sampling

7. *See* MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.03 (2021).

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

9. *Id.* at 886 (recognizing that the court was "tak[ing] the unusual step of creating a circuit split by disagreeing with the Sixth Circuit's contrary holding in *Bridgeport*").

10. *See* discussion *infra* Part IV.

11. Lucille M. Ponte, *Preserving Creativity from Endless Digital Exploitation: Has the Time Come for the New Concept of Copyright Dilution?*, 15 B.U. J. SCI. & TECH. L. 34, 56 n.111 (2009).

12. Melissa Eckhause, *Digital Sampling v. Appropriation Art: Why Is One Stealing and the Other Fair Use? A Proposal for a Code of Best Practices in Fair Use for Digital Music Sampling*, 84 MO. L. REV. 371, 374–75 (2019).

13. Kembrew McLeod & Rudolf Kuenzli, *I Collage, Therefore I Am: An Introduction to*

melodies from Russian folk music for his own compositions, a common practice for classical composers.[14] No matter the medium, whether visual art or music, all art has traditionally built upon past works.[15]

A. *What Is Digital Sampling?*

To that end, music that is truly original is exceedingly rare.[16] This is an inevitable consequence given that there are a finite number of musical notes and instruments, and therefore a finite number of combinations.[17] Still, sampling is one method which provides musicians an avenue to produce new and unique compositions.[18] Sampling has been defined as "the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo."[19] Musicians must digitally record a sound from an existing recording—typically an old or popular song that the artist wants to recreate—to produce a sample that typically lasts no more than a few seconds.[20] Supporters of digital sampling claim that sampling allows an artist to commemorate admired musicians of the past.[21] Opponents counter that samplers merely "unfairly appropriate and exploit the creative efforts" of musical innovators.[22]

The safest way to digitally sample is to obtain a license from the copyright holder.[23] However, obtaining a license can be time consuming and costly because there are two different copyrightable

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Cutting Across Media, *in* CUTTING ACROSS MEDIA: APPROPRIATION ART, INTERVENTIONIST COLLAGE, AND COPYRIGHT LAW 1 (Kembrew McLeod & Rudolf Kuenzli eds., 2011).

14. Eckhause, *supra* note 12, at 377.

15. *Id.* at 374.

16. *See* Spencer K. Gray, *Circuit Split: An Efficient Rule to Govern the Sampling of Sound Recordings*, 106 KY. L.J. ONLINE (2018), https://www.kentuckylawjournal.org/online-originals/index.php/2018/01/26/circuit-split-an-efficient-rule-to-govern-the-sampling-of-sound-recordings [https://perma.cc/5PK4-AAGA].

17. *Id.*

18. *Id.*

19. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 875 (9th Cir. 2016) (citing Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004)).

20. Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use,* 3 UCLA ENT. L. REV. 271, 276 (1996).

21. Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 516–17 (2006).

22. *Id.* at 517.

23. Danica Mathes, *Music-Licensing Reform May Be On the Way*, LAW360 (Sept. 9, 2014, 10:45 AM), https://www.law360.com/articles/573481/music-licensing-reform-may-be-on-the-way [https://perma.cc/NH3H-TNNY].

aspects of music: the musical composition and the sound recording.[24] The issue is that the copyright holders for both are often different, therefore, artists who wish to obtain a license to use small samples from a copyrighted song will have to obtain multiple licenses from multiple sources.[25]

B. *History of Digital Sampling*

The root of digital sampling primarily comes from Jamaica in the 1960s when disc jockeys ("DJs") used portable sound systems to take records and weave in their own vocals, chants, growls, and shouts.[26] The sound system concept was brought to the United States by Kool Herc, a Jamaican-born DJ whose famous Herculoids sound system shook South Bronx clubs in the early 1970s.[27] As this Bronx-style DJing grew in popularity, DJs began using members of their crew to provide vocals, or "rap" along with the beat.[28] DJs used analog record turntables and a stereo mixer to loop, cut, and extend various break beats.[29] Though, because DJs had to rely on analog technology, sampling in the early days was often extremely time-consuming, involving hours of layering sampled loops and sounds.[30]

These techniques advanced in the 1980s with the invention of the digital sampler.[31] Digital samplers now had musical instrumental digital interface keyboard controls, which made sampling easier and cheaper.[32] The digital sampler quickly became an editing short-cut, used to save music producers time and money.[33] For instance, "sometimes a horn section, a bass drum, or background vocals would be lifted from a recording easily and quickly, limiting the expense and effort to locate and compensate studio

24. *Id.*; *see* discussion *infra* section II.A.

25. Mathes, *supra* note 23.

26. David Katz, *Scratch the Super Ape: An Embodiment of Dub's Mashup Culture*, *in* MASHUP: THE BIRTH OF MODERN CULTURE 155–57 (Daina Augaitis, Bruce Grenville & Stephanie Rebick eds., 2016).

27. *Id.* at 155–57.

28. Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 182 (2002). The "MCs", or Masters of Ceremony, eventually developed their own style, which became known as "rapping." *Id.*

29. *Id.*

30. KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 21 (2011).

31. *See id* at 33.

32. *See id.*

33. Wilson, *supra* note 28, at 182.

musicians."[34] By the mid 1980s, the price of samplers had dropped dramatically.[35] "As samplers became more affordable, their use spread from recording studios to homes, and [DJs] began to produce their beats and . . . record marketable versions of their performances . . . ."[36] A digital sampler was now just like any other instrument used to make music.[37] Though sampling was initially confined to hip-hop and rap,[38] it is now widely accepted in all areas of music.[39] What was once considered a fringe movement, sampling is now a mainstream practice.[40]

The expansion of digital sampling planted the seeds for future copyright problems as rappers began to take notice of artists like the Beastie Boys and Public Enemy who were rising to the top of hip-hop charts producing sample-heavy albums.[41] Soon, every imitator hoping to make it in the industry was incorporating digital sampling into their music.[42] By 1996, "digital sampling ha[d] become so pervasive that many musicians and engineers . . . regard[ed] it as being 'indispensable in the music industry.'"[43] However, this period of freedom in the industry suddenly stopped when questions of copyright law started emerging around the practice.[44] As digital sampling grew in popularity, piles of sampling lawsuits grew as well.[45] Initially, these lawsuits were settled because it was unclear on which side of the issue courts would land.[46] But in December of 1991, the District Court for the Southern District of New

34. TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 73 (1994).

35. *See* Wilson, *supra* note 28, at 182. In 1979, an Australian company introduced the first digital sampler to the audio production market at a price of $29,000. By the mid-1980s, digital samplers were being sold at prices as low as $1,000. *Id.* at 182 n.28.

36. John Schietinger, Note, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 212 (2005).

37. *See* Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 LOY. L. REV. 879, 882 (1992).

38. *See, e.g.*, Newton v. Diamond, 388 F.3d 1189, 1191 (9th Cir. 2003).

39. *See* W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling's Effect on the Market for Copyrighted Works*, 67 OKLA. L. REV. 443, 446 (2015).

40. *See* WHO SAMPLED, https://www.whosampled.com [https://perma.cc/JA4P-42NM] (documenting over 833,000 samples as of March 5, 2022).

41. Cox, *supra* note 3, at 227.

42. *Id.*

43. Szymanski, *supra* note 20, at 278 (quoting Howard Reich, *Send in the Clones: The Brave New Art of Stealing Musical Sounds*, CHI. TRIB., Feb. 15, 1987, at 8).

44. Cox, *supra* note 3, at 227; *see* Stephen Carlisle, *Sounds Great! But It Does Sound Very Familiar . . . Where to Draw the Line on Digital Sampling of Sound Recordings?*, LANDSLIDE, May–June 2017, at 14, 15.

45. Carlisle, *supra* note 44, at 15.

46. *Id.*

York "dropped the hammer"[47] on rapper Biz Markie when it ruled that all sampling was a violation of copyright law, full stop.[48] Though, before diving more into the case law, an introduction of the legal overview of copyright law and digital sampling is necessary.

II. INTRODUCING COPYRIGHT LAW

Article I, Section 8 of the United States Constitution provides for the regulation of copyrights by granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[49] Specifically, Section 8 gives Congress the power to make copyright laws.[50] The Copyright Act of 1909[51] set the stage for incorporating music into the Copyright Clause.[52]

A. *Copyright Law for Sound Recordings*

As technology improved, Congress amended the Copyright Act in 1971 through the Sound Recording Amendment,[53] which included separate copyright protection for sound recordings.[54] After this amendment, "most 'records, tapes, and CDs'[55] have involved two separate copyrights:" the musical composition copyright[56] and the sound recording copyright.[57] The musical composition copyright protects the lyrics and music of a song.[58] The sound recording

47. *Id.*

48. Grand Upright Music Ltd. v. Warner Bros. Recs., Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

49. U.S. CONST. art. 1, § 8, cl. 8.

50. *Id.*

51. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

52. *See id.*; *see also* Spenser Clark, Note, *Hold Up: Digital Sampling, Copyright Infringement, and Artist Credit Through the Lens of Beyonce's* Lemonade, 26 INTELL. PROP. L. 131, 140 (2019).

53. Sound Recording Amendment of 1971, Pub. L. No. 92-140, 85 Stat. 391.

54. Elyssa E. Abuhoff, Note, *Circuit Rift Sends Sound Waves: An Interpretation of the Copyright Act's Scope of Protection for Digital Sampling of Sound Recordings*, 83 BROOK. L. REV. 405, 409 (2017).

55. *Id.*

56. *Id.*; 17 U.S.C. § 102(a)(2).

57. Abuhoff, *supra* note 54, at 409; § 102(a)(7).

58. § 102(a)(2); Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1669 (1999); *see* Abuhoff, *supra* note 54, at 409.

copyright, in contrast, "protects one particular recording of a musical work."[59] Though a sound recording copyright may be held by the artist, it is typically held by the record company,[60] while a songwriter or publishing company usually holds the music composition copyright.[61]

The most recent revision of the Act, the Copyright Act of 1976,[62] "expands the scope of protection for music[al compositions and] limits the scope of copyright [protection] for sound recordings."[63] The Act provides the copyright owner with the following exclusive rights: the right to reproduce the work, the right to prepare derivative works, the right to publicly perform the work, the right to display the work in a public place, and—for sound recordings only—the right to publicly perform the work by means of a digital audio transmission.[64] Congress enacted these exclusive rights with the intent to encourage artists to create original works by providing them with economic protection.[65]

B. *Copyright Infringement of Sound Recordings*

A copyright owner who believes one of their rights has been violated may bring a copyright infringement suit. There are three elements required for a successful copyright infringement claim: (1) ownership of a valid copyright, (2) proof of copying, and (3) unlawful appropriation of original elements.[66] In cases with unauthorized sampling, providing proof of copying may be especially difficult.[67] This is especially true when producers alter the musical samples by changing the pitch or tempo of the sound.[68] However, in sampling cases in which the sampled piece is less distorted, the alleged infringer typically admits to direct copying, since it is clear he sampled the sound directly from the sound recording.[69]

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59. Abramson, *supra* note 58, at 1669.
60. *Id.* at 1669–70.
61. *Id.* at 1669.
62. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.
63. Abuhoff, *supra* note 54, at 409–10.
64. 17 U.S.C. § 106(1)–(6).
65. *See, e.g.*, Schietinger, *supra* note 36, at 215.
66. NIMMER & NIMMER, *supra* note 7, § 13.01.
67. Wilson, *supra* note 28, at 183–84.
68. *Id.*
69. *See* Schietinger, *supra* note 36, at 218; *see also* Grand Upright Music Ltd. v. Warner Bros. Recs., 780 F. Supp. 182, 183 (S.D.N.Y. 1991); Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 838 (M.D. Tenn. 2002).

C. *The De Minimis Defense*

Finally, unlawful appropriation is required for a finding of copyright infringement.[70] The rights granted to copyright owners are not absolute. Over a century ago, Judge Thomas Chatfield explained: "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."[71] Unlawful appropriation is established by showing that alleged infringing work bears a substantial similarity to the original work.[72] *De minimis non curat lex* ("de minimis") refers to "copying that is so trivial that it falls below the required element of substantial similarity."[73]

In digital sampling cases, the two main tests courts have used to determine whether the alleged infringer's copying is de minimis are the "ordinary observer" test[74] and the "fragmented literal similarity" test.[75] Under the ordinary observer test, substantial similarity exists when a trier of fact determines that an average listener could recognize the appropriation.[76] This test proposes that a court should not impose liability on an unauthorized appropriator if the average audience, looking at each song as a whole, would not find that the alleged infringing work is similar to the original work.[77]

Conversely, under the fragmented similarity test, courts look only at the similar portions of each song—like the sampled segment—rather than the entire song.[78] Substantial similarity is found where either (1) the sample constitutes a substantial portion of the original work (not a substantial portion of the *infringing* work) or (2) although the similarity is small, the sampled portion

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70. *See* NIMMER & NIMMER, *supra* note 7, § 13.01 n.26.3.

71. *See* W. Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (E.D.N.Y. 1909).

72. NIMMER & NIMMER, *supra* note 7, § 13.03.

73. Wilson, *supra* note 28, at 185; Ringgold v. Black Ent. Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997). The phrase "*de minimis non curat lex*" translates to "the law does not concern itself with trifles." *Id.*

74. *See* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

75. Wilson, *supra* note 28, at 185 (citing NIMMER & NIMMER, *supra* note 7, § 13.03).

76. *See id.*

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

78. Brief of Plaintiffs-Appellants at 43 n.7, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005) (No. 02-6521) (citing Tree Publ'g Co. v. Howard, 785 F. Supp. 1272, 1275 (M.D. Tenn. 1991)).

is significant because it is "the heart of the work."[79] In sampling cases, courts have applied either of these tests, and sometimes a combination of the two, to determine whether the infringing work is substantially similar to a copyrighted work.[80]

In cases of digital sampling, courts are tasked with determining what constitutes the substantiality of the portion used in relation to the copyrighted work as a whole. Contrary to popular belief, there is no bright-line rule, and "this uncertainty [has] caus[ed] confusion in the music industry as to what is acceptable practice."[81] There are no legal standards for musicians to follow on what percent or amount of copying courts will consider substantially similar as opposed to de minimis.[82] Unless an unlawful appropriation is found to be substantially similar, a court applying the de minimis rule will find that no copyright infringement has occurred.[83]

III. THE CIRCUIT SPLIT

The first music sampling case to make it to federal court was *Grand Upright Music Ltd. v. Warner Bros. Records*.[84] In this case, the District Court for the Southern District of New York made it clear that sampling was out and out copyright infringement.[85] The opinion, which began with "[t]hou shalt not steal,"[86] effectively ended unauthorized digital sampling in the music industry. The court rejected the reasoning from defendant Biz Markie that digital sampling was commonplace in the music industry and thus should not constitute infringement.[87] This case transformed the music industry so rampant with unauthorized sampling, holding,

79. Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 841 n.12 (M.D. Tenn. 2002).

80. Schietinger*, supra* note 36, at 219–20; *see, e.g.*, Newton v. Diamond, 388 F.3d 1189, 1195–96 (9th Cir. 2003); Williams v. Broadus, No. 99 Civ. 10957, 2001 U.S. Dist. LEXIS 12894, at *3–4 (S.D.N.Y. Aug. 24, 2001).

81. Clark, *supra* note 52, at 141.

82. *See* Gray, *supra* note 16.

83. *See, e.g.*, Leigh v. Warner Bros., Inc., 212 F.3d 1210 (11th Cir. 2000); Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821 (11th Cir. 1982); Jarvis v. A & M Recs., 827 F. Supp. 282 (D.N.J. 1993); *Williams*, 2001 U.S. Dist. LEXIS 12894; Tuff 'N' Rumble Mgmt., Inc. v. Profile Recs., Inc., No. 95 Civ. 0246, 1997 U.S. Dist. LEXIS 4186 (S.D.N.Y. Apr. 2, 1997).

84. 780 F. Supp. 182 (S.D.N.Y. 1991); *see* Wilson, *supra* note 28, at 187–88.

85. *Grand Upright Music*, 780 F. Supp. at 183.

86. *Id.* This phrase comes from the Eighth Commandment of the Ten Commandments of the Jewish Torah. *Exodus* 20:15.

87. *Grand Upright Music*, 780 F. Supp. at 183.

for the first time, that all recording artists were required to clear any samples they used in a song with the original artist or artists.[88]

After *Grand Upright*, all major labels in the industry were on notice of the sudden shift in the world of digital sampling. For those artists still wishing to sample, the choice was simple: "either pay up or hope not to get caught."[89] Sometimes the latter approach worked, but, almost ironically, only when the song was unsuccessful.[90] The more successful a song, the higher the likelihood someone will notice the similarities from the copied song.[91] For example, Vanilla Ice's rap song "Ice Ice Baby" opened with a "highly recognizable sample" of the bassline of Queen and David Bowie's song, "Under Pressure."[92] Vanilla Ice did not obtain a license to sample from "Under Pressure," so when the song hit the jackpot and became the first song by a rapper to reach number one on the Billboard charts,[93] there was little hope of not getting caught. Still, Vanilla Ice tried to hide it, arguing in an interview that he added an extra note to the bassline, which changed the rhythm completely.[94] He later admitted that he was joking, and the case was subsequently settled out of court with both Queen and Bowie receiving writing credit and four million dollars.[95]

The *Grand Upright* decision sparked other sample-related cases, and litigation in the area began to pile up.[96] Most notably of these was *Newton v. Diamond*,[97] a case involving a six-second, three-note segment of a musical composition by jazz flutist James Newton that the Beastie Boys sampled and placed into their song, "Pass the Mic."[98] The Ninth Circuit held that the sample, which comprised of "two percent of the four-and-a-half-minute . . . sound

88. Clark, *supra* note 52, at 138 (noting that, for the first time, "one of the biggest names in hip-hip . . . was being held liable for his us[e] of unauthorized digital sampling").

89. Carlisle, *supra* note 44, at 15.

90. *Id.*

91. *Id.*

92. *Id.*; *Ice Ice Baby by Vanilla Ice*, SONGFACTS, https://www.songfacts.com/facts/vanilla-ice/ice-ice-baby [https://perma.cc/7QL3-Q6KP].

93. *Ice Ice Baby by Vanilla Ice, supra* note 92.

94. Carlisle, *supra* note 44, at 15; *see also* Kasper Hartwich, *Vanilla Ice Denies Ripping Off Queen and David Bowie's Under Pressure*, YOUTUBE (Mar. 12, 2013), https://www.youtube.com/watch?v=a-19-z9rbY&abchannel=KasperHartwich [https://perma.cc/MAC5-E3NL].

95. Kevin Stillman, *'Word to Your Mother'*, IOWA STATE DAILY (Feb. 27, 2006), https://www.iowastatedaily.com/news/article_766d27d2-dc56-5ff3-9040-47e44d46094f.html [https://perma.cc/H8VC-JNQX].

96. *See* Mispagel, *supra* note 6, at 465.

97. 388 F.3d 1189, 1190 (9th Cir. 2003).

98. *Id.* at 1190–91.

recording,"[99] was too small compared to the length of the song to be actionable, and that "an average audience would not discern Newton's hand as a composer . . . from Beastie Boys' use of the sample."[100] Therefore, the court concluded that the Beastie Boys' use was de minimis, and thus did not constitute copyright infringement.[101] However, because the Beastie Boys had obtained a license to sample the sound recording, *Newton* left open the issue of whether the de minimis defense similarly applied to sound recordings.[102]

A. *The Sixth Circuit*

Two years after *Newton*, the issue returned to federal court when the Sixth Circuit attempted to resolve de minimis use in unauthorized sampling of sound recordings.[103] This was the first time that a court of appeals had ruled on a sound recording sampling.[104] In *Bridgeport Music, Inc. v. Dimension Films*, the dispute arose out of the use of a sample from the George Clinton, Jr., and Funkadelic's song, "Get Off Your Ass and Jam," in the N.W.A. song, "100 Miles."[105] The case centered around a two-second, three-note guitar riff that was "copied, the pitch was lowered, and the copied piece was 'looped' and extended to 16 beats."[106] The sample appeared five places in the song, with each looped segment lasting around seven seconds.[107] The district court granted summary judgment to the defendants, finding that the sample did not constitute unlawful appropriation under the de minimis test.[108]

On appeal, the defendants argued that it was irrelevant whether or not the appropriation was de minimis, because the de minimis test should not be used at all in cases concerning digital sampling of a sound recording.[109] The Sixth Circuit agreed and reversed the district court's granting of summary judgment, ruling that sound recordings are subject to a different analysis than musical

99. *Id.* at 1195–96.
100. *Id.*
101. *Id.* at 1196.
102. *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 877–78 (9th Cir. 2016).
103. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).
104. Carlisle, *supra* note 44, at 16.
105. *Bridgeport*, 410 F.3d at 795.
106. *Id.* at 796.
107. *Id.* The segment appears at 0:49, 1:52, 2:29, 3:20, and 3:46. *Id.*
108. *Id.* at 798.
109. *Id.*

compositions.[110] The court relied on a statutory interpretation of 17 U.S.C. § 114(b) to reach its conclusion.[111] After noting that it is clearly unlawful to copy an entire sound recording, the court proceeded to determine whether sampling something less than the entire sound recording is equally unlawful.[112]

In addressing this issue, the court turned to § 114(b), which states that the exclusive rights granted to copyright holders in § 106(1)–(6) "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."[113] In other words, § 114(b) allows anyone to listen to the sound recording and imitate or simulate the notes played, insofar as the person does so using her own instruments or recording equipment.[114] The court focused on the word "entirely,"[115] using it to interpret § 114(b) as providing a sound recording owner with "the exclusive right to 'sample' his own recording," meaning that an imitating musician may not literally copy any portion of it.[116] Thus, the Sixth Circuit adopted the rule which declared unauthorized sampling as copyright infringement, regardless of how trivial.

The Sixth Circuit recognized that it was drawing a bright-line rule that de minimis defenses do not apply to music sampling and attempted to justify its holding.[117] Most notable was the court's "ease of enforcement" reasoning.[118] This rule made enforcement simple: "Get a license or do not sample."[119] Second, the court reasoned that "the market will control the license price" and keep them reasonable.[120] Third, the court pointed out that all music sampling is intentional and deliberate.[121] Whereas musical compositions frequently involve subconscious copying—for example, when a composer has "a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work

110. *Id.* at 800 & n.8.
111. *Id.*
112. *See id.*
113. *Id.* (emphasis added) (quoting 17 U.S.C. § 114(b)).
114. *See id.*
115. § 114(b).
116. *Bridgeport*, 410 F.3d at 800–01.
117. *See* Carlisle, *supra* note 44, at 16; *see also Bridgeport*, 410 F.3d at 800–01.
118. *Bridgeport*, 410 F.3d at 801.
119. *Id.*
120. *Id.*
121. *Id.*

of another which he had heard before"[122]—sound recordings do not involve subconscious copying, because "you know you are taking another's work product."[123] Finally, the court concluded that sampling was "a physical taking rather than an intellectual one,"[124] and that alone proves that, no matter how small, "the part taken is something of value."[125]

The *Bridgeport* decision garnered prompt attention and criticism with its adoption of a bright-line rule for music sampling.[126] Nevertheless, Congress did not take any steps to clarify the law in the years following the holding.[127] While it has never been accepted as controlling or persuasive authority for district courts outside of the Sixth Circuit, no other circuit court has decided to take up the issue,[128] and it was not until *VMG Salsoul, LLC v. Ciccone* that the issue of de minimis's applicability to sound recording was discussed again by a circuit court.[129] In 2016, the Ninth Circuit muddied the waters when it ruled in direct conflict with the ruling of the Sixth Circuit on precisely the same point.[130] By declining to follow the bright-line rule in *Bridgeport*, the Ninth Circuit created a circuit split on the legality of digital sampling of sound recordings.

B. *The Ninth Circuit*

In *VMG Salsoul*, the sample at issue was a horn hit from Shep Pettibone's "Ooh I Love It" used in Madonna's song, "Vogue."[131] The horn hit sample appeared in two different forms: (1) a "'single' horn hit . . . [that] last[ed] for 0.23 seconds" and "consist[ed] of a quarter-note chord comprised of four notes"; and (2) "a 'double' horn hit . . . [which] consist[ed] of an eighth-note chord of th[e] same notes [from the single horn hit], followed immediately by a quarter-note chord of the same notes."[132] Madonna modified the horn hits by

122. *Id.*
123. *Id.*
124. *Id.* at 802.
125. *Id.* at 801–02.
126. *See* Mispagel, *supra* note 6, at 470; *see also* Baldwin, *supra* note 6, at 316.
127. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016).
128. *Bridgeport*, 410 F.3d at 804–05; Mispagel, *supra* note 6, at 470.
129. 824 F.3d at 874.
130. *Id.* at 886.
131. *Id.* at 875.
132. *Id.*

raising the pitch a half-step and then inserted it five different times throughout "Vogue."[133]

Presented with the challenge of whether the sampling at issue constituted copyright infringement, the Ninth Circuit first determined whether the de minimis exception applies to sound recordings.[134] The court recognized that "the response of the ordinary lay hearer" is an essential part of the copyright infringement test.[135] Moreover, a copyright owner's legally protected interest in their copyright is the potential for compensation.[136] However, because any potential compensation rests on consumer recognition of the work, if consumers are unable to detect the appropriation, then "the copier has not benefited from the original artist's expressive content,"[137] and, accordingly, no infringement has occurred. Next, the Ninth Circuit conducted a statutory interpretation of Congress's intent in creating federal copyright protection in 17 U.S.C. § 106.[138] The court determined that nothing in § 106—which provides exclusive rights in copyrighted works—"suggests differential treatment of de minimis copying of sound recordings."[139]

The court then turned its attention to § 114(b), which was the provision at the heart of the *Bridgeport* holding.[140] It noted that in § 114(b), "[t]he exclusive rights of the owner of a copyright in a sound recording . . . *do not extend* to the making or duplication of another sound recording . . . ."[141] This sentence "imposes an express *limitation* on the rights of a copyright holder,"[142] and a straightforward reading of § 114(b) indicates that Congress did not intend for an imitation of the copyrighted recording to constitute an infringement.[143] The court determined that the statutory text was clear: "infringement takes place whenever all *or any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced."[144] Therefore, the Ninth Circuit

133. *Id.* at 875–76.

134. *Id.* at 877–78.

135. *Id.* at 881 (quoting Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977)).

136. *Id.*

137. *Id.*

138. *Id.* at 881–82.

139. *Id.* at 882.

140. *Id.* at 884.

141. *Id.* at 883 (emphasis in original) (citing 17 U.S.C. § 114(b)).

142. *Id.* (emphasis in original).

143. *Id.*

144. *Id.* at 883–84; H.R. REP. No. 94-1476, at 106 (1976), *as reprinted in* 1976

concluded that Congress intended for the de minimis exception to apply to sound recordings in the same manner in which it applies to all other types of copyrighted works.[145]

Once the Ninth Circuit determined that the de minimis exception applies to sound recordings, the court addressed whether the sample at issue was de minimis.[146] It reasoned that if the expert witness, a "highly qualified and trained musician,"[147] could not identify what portions had been sampled, "an average audience would not do a better job."[148] Thus, the sampling was de minimis and did not constitute copyright infringement.[149]

In support of its holding, the *VMG Salsoul* court explained that the Sixth Circuit's bright-line rule fails because it relies on a logical fallacy.[150] The *Bridgeport* court concluded that since the "'exclusive rights . . . *do not extend* to the making or duplication of another sound recording that *consists* entirely of an independent fixation of other sounds,' . . . that exclusive rights *do extend* to the making of another sound recording that *does not consist* entirely of an independent fixation of other sounds."[151] However, a "statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances. In logical terms, it is a fallacy to infer the inverse of a conditional from the conditional."[152]

IV. POLICY CONCERNS: JUDICIAL ECONOMY VS. CREATIVITY

In support of its holding, the Sixth Circuit argued that the application of a bright-line rule for digital sampling would lead to judicial efficiency.[153] The court stated that a bright-line rule is necessary to help diminish the backlog of digital sampling cases before the courts.[154] By creating such a rule, courts will be able to apply the law more easily, and therefore, reduce litigation overall.[155]

U.S.C.C.A.N. 5659, 5721 (emphasis added).

145. *VMG Salsoul*, 824 F.3d. at 883–84.
146. *Id.* at 880.
147. *Id.*
148. *Id.*
149. *Id.* at 880–81.
150. *Id.* at 884.
151. *Id.* (quoting 17 U.S.C. § 114(b)).
152. *Id.* (citing JOSEPH G. BRENNAN, A HANDBOOK OF LOGIC 79–80 (2d ed. 1961)).
153. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 802 (6th Cir. 2005).
154. *Id.*
155. Clark, *supra* note 52, at 151.

Further, it is possible that artists will know they cannot sample copyrighted music, and thus will not waste time trying.[156] However, as one author argued, "the backlog of cases should not be a reason to ignore the core of copyright law that has been utilized for decades."[157]

Moreover, the argument for judicial efficiency comes at a cost of stifling creativity. And, with the exception of licensors, a bright-line rule does not advance the interest of the music industry.[158] Artists who want to use insignificant portions of a song will be forced to jump through expensive hoops to obtain a license.[159] These hoops will have the biggest impact on small and upcoming artists, who may in turn choose to refrain from sampling all together, while having little effect on the large production and recording studios with vast resources.[160] In turn, a "no unlicensed sampling" rule will have a chilling effect on "creativity and artistry, which is exactly what copyright law is intended to prevent."[161] Use of samples have influenced musicians across the spectrum and have led to the creation of many hit-songs that have out-charted the original songs they sampled.[162] Songs that out-chart the songs they sample indicate that sampling revives songs of the past and gives them new life. The potential "ease on the dockets of courts . . . should not outweigh the creativity the founders sought to protect" in Article 1, Section 8 of the Constitution.[163]

Though some scholars argue that the de minimis rule will result in lesser judicial efficiency, as it slows down the litigation process and results in uncertainty for the parties,[164] others have suggested the inverse: a de minimis rule may actually promote judicial efficiency, because plaintiffs will be less inclined to risk litigation if they are afraid the court will use the de minimis defense to absolve

156. *Bridgeport*, 410 F.3d at 802.

157. Clark, *supra* note 52, at 151.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *See* Gary Trust, *Ask Billboard: What Hits Have Out-Charted the Songs They Sample?*, BILLBOARD (Apr. 4, 2014), https://www.billboard.com/articles/columns/chartbeat/6039674/ask-billboard-what-hits-have-out-charted-the-songs-they-sample [https://perma.cc/Z9QE-UCSK].

163. Clark, *supra* note 52, at 152.

164. Ryan C. Grelecki, Comment, *Can Law and Economics Bring the Funk . . . or Efficiency?: A Law and Economics Analysis of Digital Sampling*, 33 FLA. ST. U. L. REV. 297, 317 (2005).

the alleged infringer of liability.[165] Following this argument, the de minimis rule would actually result in more settlements.[166] Also, it is more efficient for artists because they would not be required to contact and negotiate with every artist to use a small piece of a copyrighted song.[167]

Still, it is important to note that applying the de minimis rule could stifle creativity as well.[168] New artists may be discouraged from creating new copyrightable material if any artist is allowed to take a small portion of their song with no legal repercussions and no prospect of compensation.[169] However, when compared to the impact on creativity under the bright-line rule, the de minimis rule seems to be the lesser of two evils.[170] It seems unlikely that an artist would choose not to produce a new song, thereby giving up all potential compensation, simply because of the potential loss of compensation from unlicensed sampling.

V. SO, THERE IS A CIRCUIT SPLIT—NOW WHAT?

The Sixth Circuit's bright-line rule of "[g]et a license or do not sample"[171] had been on the books for over ten years. Musicians who could not afford a license either did not sample, or did not license and risked litigation.[172] The Ninth Circuit resolved this dilemma when it held, for the first time, that the de minimis rule did, in fact, apply to digital sampling.[173] The opinion stands in direct opposition to the Sixth Circuit's ruling, and no other circuit has subsequently addressed the issue.[174] Though *VMG Salsoul* altered the landscape for copyright law in the music industry, many musicians are still stuck in a clearance culture that requires all samples to be licensed. Now, there are two rules, and the answer to the question "Can I sample this?" will depend largely in part on where you live

165. *See* Gray, *supra* note 16.
166. Grelecki, *supra* note 164, at 323.
167. *Id.*
168. *Id.*
169. *Id.*
170. *See id.* at 328.
171. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005).
172. Bill Donahue, *9th Circ. Throws Down the Gauntlet On Music Sampling*, LAW360 (June 4, 2016, 5:11 PM), https://www.law360.com/articles/803236/9th-circ-throws-down-the-gauntlet-on-music-sampling [https://perma.cc/MZS7-VDWP].
173. *Id.*; VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir. 2016).
174. *See Bridgeport*, 410 F.3d at 805.

(or where you are sued) and how likely the court of appeals in your jurisdiction will come down on the issue.

A. *Impact of the Split*

Musicians across the country are now faced with varying levels of protection, and without a resolution of the split, the future of music sampling remains unclear. Different levels of protection are problematic, because contrasting law can result in the practice of litigants choosing the court thought to provide the most favorable outcome, known as forum shopping.[175] The Sixth Circuit includes Tennessee courts, while the Ninth Circuit includes California courts,[176] meaning the split affects the major music recording hubs of the country: Los Angeles, Nashville, and Memphis.[177] With the prevalence of sampling in today's music industry, as long as the split remains unresolved, forum shopping is bound to continue.[178]

B. *Resolution of the Split*

There are two main ways in which the issue of whether the Copyright Act allows for the de minimis exception for the unauthorized use of copyrighted sound recordings can be resolved: a congressional solution or a Supreme Court of the United States decision.[179] The Sixth Circuit believed Congress was better suited to solve the issue when it said that if its interpretation of the Act was not what Congress had intended, then the music industry should look to Congress for "clarification or [a] change in the law."[180] Congress could clarify the language in § 114 by "specifying what is meant by 'entirely,' or explicitly stating that de minimis defenses" apply to sound recordings.[181] However, this solution is unlikely.[182] Congress

175. Abuhoff, *supra* note 54, at 425.

176. *See About U.S. Federal Courts*, FED. BAR ASS'N, https://www.fedbar.org/for-the-public/about-u-s-federal-courts [https://perma.cc/DPS2-3H4Y].

177. Many people in the industry have "ties to both Tennessee and California . . . and can therefore forum shop between the two states in the hopes of achieving their desired outcome." Abuhoff, *supra* note 54, at 426.

178. *Id.*

179. *Id.* at 428.

180. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 805 (6th Cir. 2005).

181. Baldwin, *supra* note 6, at 325. Section 114 states that the exclusive rights granted to copyright holders does 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." 17 U.S.C. § 114(b) (emphasis added).

182. Baldwin, *supra* note 6, at 325.

recently updated the Copyright Act for the first time in decades when it implemented the Music Modernization Act of 2018 ("MMA").[183] At the time it was passed, the circuit split caused by *Bridgeport* and *VMG Salsoul* was well-known,[184] yet, the MMA made no attempt to address the de minimis issue for sound recordings.[185] Further, the Act even modified § 114, but did not modify the phrase "entirely."[186] Congress had a textbook opportunity to address the problems caused by the circuit split, but chose not to.

Additionally, one author suggested that Congress should enact compulsory licensing for all sound recordings.[187] Under a compulsory licensing system, anyone can sample a previously released song by paying the original artist set licensing fees or royalties regulated by the federal government.[188] However, there has been little support for the creation of a compulsory licensing system.[189] Among other things, Congress voiced "concerns about the risk of promoting record piracy and the difficultly in establishing [fair royalty rates]."[190] It recognized that compulsory licenses would allow music pirates to selectively pick popular songs, thereby profiting off of the time and resources of the licensor.[191] Further, determining manageable royalty rates would be unfeasible due to a number of factors, such as the quantity and quality of the portion sampled, as well as the popularity of both the sampled song and its musician.[192]

A Supreme Court ruling on the issue is the most effective way to resolve the current circuit split. By responding to the split, the Supreme Court could "offer clear, nationwide guidance on how copyright law should cover sampling."[193] Although the Justices "may not have expertise in copyright [law] specifically, the Court [does have] expertise in statutory interpretation."[194] Thus, in order for

183. Orrin G. Hatch-Bob Goodlattee Music Modernization Act of 2018, Pub. L. No. 115-264, 132 Stat. 3676.
184. Baldwin, *supra* note 6, at 325.
185. *Id.*; Orrin G. Hatch-Bob Goodlattee Music Modernization Act.
186. Orrin G. Hatch-Bob Goodlattee Music Modernization Act § 103.
187. Gray, *supra* note 16.
188. *Id.*
189. *See id.*; *see also* Ponte, *supra* note 21, at 549.
190. Ponte, *supra* note 21, at 549.
191. *Id.* at 549–50.
192. *Id.* at 550.
193. Donahue, *supra* note 172.
194. Abuhoff, *supra* note 54, at 431.

musicians to be granted equal copyright protection nationwide, the Supreme Court must provide some clarity on the issue.[195]

CONCLUSION

In light of the impact of the circuit split that the Ninth and Sixth Circuits created on the music industry, the Supreme Court should interpret the Copyright Act to allow for an exception to unauthorized digital sampling, so long as the sampling is de minimis. "Digital sampling is engrained in the fabric of the music industry,"[196] and will continue to become increasingly popular with advancements in technology. Courts should find a solution to allow for its use, rather than punish for its use. The bright-line rule advocated for by the Sixth Circuit is harmful to musical creativity and the judicial economy alike. By following in line with the Ninth Circuit's proper interpretation of 17 U.S.C. § 114(b), the Supreme Court will bring nationwide clarity and balance to the issue of unauthorized sampling in sound recordings.

Michaela S. Morrissey *

195. *Id.*

196. Clark, *supra* note 52, at 158.

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