

**AND THEY SAYIN' IT'S BECAUSE OF THE INTERNET:  
APPLYING THE DE MINIMIS EXCEPTION TO DIGITAL  
SOUND SAMPLING IN THE WAKE OF VMG SALSOUL,  
LLC V. CICCONE**

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ABSTRACT

*For the first time since 2012, a circuit court other than the Sixth Circuit has opined on the application of the de minimis exception to copyright infringement cases involving unauthorized sound sampling. The most recent circuit court to speak on the issue, however, created a circuit split resulting in varying levels of protection for copyright holders depending on what side of the country they bring their cases. In 2012, the Sixth Circuit in *Bridgeport Music, Inc. v. Dimension Films* formulated a bright-line rule rejecting the use of the de minimis exception and requiring samplers to “get a license or get sued.” In the years that followed, the *Bridgeport* decision was widely regarded as a doctrinal failure. In 2016, the Ninth Circuit in *VMG Salsoul, LLC v. Ciccone* handed down a two-to-one decision applying the de minimis exception to sound sampling cases. In dissent, Judge Barry G. Silverman sided with the Sixth Circuit and vehemently opposed the application of the de minimis exception to sound sampling.*

*This Note argues that the Ninth Circuit's approach in *VMG Salsoul* should be adopted and the de minimis exception should be applied to copyright infringement cases involving sound sampling. Additionally, in light of the *VMG Salsoul* decision, this Note revisits the*

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*Sixth Circuit's opinion in Bridgeport and the subsequent commentary. It provides a new perspective on the Sixth Circuit's analysis, unpacks Judge Silverman's dissent, and discusses the underlying policy need to adopt the Ninth Circuit's decision in VMG Salsoul.*

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## INTRODUCTION

Imagine a young man named Zach, who lives in a small town and has a deep passion for creating music. He loves to spend his days making music for his hundreds of followers on YouTube, SoundCloud, and Twitter. Zach is by no means a superstar, or even relatively famous; he is just an average college

graduate trying to pursue his dream of making music for a living. Zach used to spend hours in his cramped dorm room at Berklee College of Music writing songs with his roommate, Juan. Both went to college for music production with the dream of making it big in the industry. Unfortunately, their big break never came while they were in school. After graduation, Zach moved to Tennessee, while Juan returned home to California. Both continued to work tirelessly toward achieving their musical dreams. Fate, however, took them on two drastically different journeys.

Pursuing his ultimate goal, Zach works diligently to perfect his musical compositions. After spending months working on his new song, Zach thinks he has finally finished it, although he believes his song is still missing something. After a long time with no inspiration, Zach opens a folder on his computer that contains several short phrases of music<sup>1</sup> Juan sent him years ago. He finds a short loop of a horn sound that is less than a second long, which he immediately recognizes as the perfect sound to fill the gap between the chorus and the verse of his song. Zach notices one small issue: the horn hit is in the wrong musical key. Just as he learned in his musical engineering courses at Berklee, Zach alters the phrase's pitch and loops it into a longer phrase.

Zach inserts the loop in four places and puts the finishing touches on his song. He uploads the song to YouTube and SoundCloud, shares a link on Facebook, and tweets to his followers about his new song. In the following months, the power of social media works its magic. Taking the internet by storm, Zach's song becomes a viral hit, and Zach is rocketed to the stardom he worked so vigorously to achieve. Suddenly, Zach's life is a whirlwind full of appearances on morning talk shows and discussions with a big record company about a potential record deal. Over the coming months, Zach rides the wave of success. Not everyone, however, views his success fondly. A large Tennessee record company takes notice of Zach's song, and, after

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1. Repeated short phrases of music are commonly referred to as "loops." DANIEL DUFFELL, MAKING MUSIC WITH SAMPLES: TIPS, TECHNIQUES AND 600+ READY-TO-USE SAMPLES 14 (2005).

having multiple producers listen to it, determines that the horn hit Zach used was sampled from one of its copyrighted songs. The next morning, Zach's sense of achievement comes crashing down when he finds himself facing allegations of copyright infringement in federal court.

At Zach's deposition, the record company's attorney asks Zach if he had a license to sample the copyrighted song and how he obtained the sample. Panicking, Zach tells the attorney he did not have a license and that, in fact, he did not even know the horn hit was a copyrighted sample.<sup>2</sup> He further tells the attorney he found the sample in a folder of loops his friend Juan sent him a long time ago. Upon learning this information, the record company investigates Juan's music and learns Juan also produced a song that samples one of its copyrighted songs. The sample Juan used is almost identical in nature to Zach's sample. Juan took a horn hit, altered its pitch, and looped it throughout his song. Unable to bring a copyright infringement suit against Juan in Tennessee, however, the record company files suit against Juan in federal court in California.

Zach and Juan are now both defendants accused of unlawfully copying a sound recording. The only difference between them is the courtroom where each sits: Zach in the Sixth Circuit, and Juan in the Ninth Circuit. At the conclusion of discovery, both Zach and the record company move for summary judgment. In Juan's case, both parties move for summary judgment as well. Both circuit judges rule on the respective motions. In two virtually identical cases, however, Zach is found liable of copyright infringement as a matter of law, but Juan is not. How does such a paradoxical result happen? Two words: *de minimis*.<sup>3</sup>

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2. Many royalty free loops and samples can easily be found online for use by musicians without having to worry about copyright issues. See, e.g., *Royalty Free Horn Loops Samples Sounds*, LOOPERMAN, <https://www.looperman.com/loops/tags/royalty-free-horn-loops-samples-sounds-wavs-download> (last visited Jan. 24, 2018).

3. The *de minimis* exception provides that when a creator copies an insubstantial portion of another's copyrighted work, a court may hold this appropriation of copyrighted material not to constitute copyright infringement. For a more in-depth discussion of the *de minimis* exception, see *infra* Section II.B.1.

Currently, only the Sixth and Ninth Circuits have addressed the issue of whether the de minimis exception applies to copyright infringement cases involving digital sound sampling.<sup>4</sup> Unfortunately, the circuits have taken diametrically opposed viewpoints on the issue. In 2004, the Sixth Circuit applied a bright-line rule barring the use of the de minimis exception in digital sound sampling cases.<sup>5</sup> Conversely, in 2016, the Ninth Circuit extended the de minimis exception to sound sampling cases.<sup>6</sup>

The current circuit split raises numerous issues for litigants and copyright holders alike by creating varying standards of protections for copyright holders. Varying standards not only fail to provide uniform protection for copyright holders but also lead to forum shopping issues.<sup>7</sup> As it currently stands, the Sixth Circuit's bright-line rule can afford plaintiffs a *per se* win if they can demonstrate sampling without a license.<sup>8</sup> Conversely, the Ninth Circuit's de minimis exception requires a fact-intensive inquiry likely to result in lengthier and costlier litigation.<sup>9</sup> Accordingly, the split incentivizes plaintiffs to pursue infringement cases in the Sixth Circuit and incentivizes defendants to have their cases heard in the Ninth Circuit. Absent clarification from the United States Supreme Court or Congress, this circuit split will only become more problematic for litigants and copyright holders alike.

The split between the Sixth and Ninth Circuits should be re-

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4. Although the fact pattern set forth above is a factual dramatization, this was the effect of the split between the Sixth and Ninth Circuits. In *Bridgeport Music, Inc. v. Dimension Films*, the defendant was liable for copyright infringement for sampling three notes, changing the pitch of the notes, and looping them. 383 F.3d 390, 393-94 (6th Cir. 2004). Conversely, in *VMG Salsoul, LLC v. Ciccone*, the defendant was not held liable for copyright infringement for sampling a horn hit, changing the pitch, and using the sample throughout the new song. 824 F.3d 871, 874 (9th Cir. 2016).

5. See *Bridgeport Music, Inc.*, 383 F.3d at 395.

6. See *VMG Salsoul, LLC*, 824 F.3d at 874.

7. Forum shopping generally arises in cases where two courts have concurrent jurisdiction, yet offer different levels of protection on the same issue. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 486 (2011). It occurs when a litigant surveys various jurisdictions and picks the one that is most favorable to his or her case. *Id.*

8. See *Bridgeport Music, Inc.*, 383 F.3d at 398.

9. See *VMG Salsoul, LLC*, 824 F.3d at 874.

solved by adopting the Ninth Circuit's approach of extending the de minimis exception to copyright infringement cases involving sound samples. The Ninth Circuit's decision in *VMG Salsoul, LLC v. Ciccone* provides an analysis consistent with basic copyright doctrine,<sup>10</sup> whereas Judge Silverman's dissent in the same case fails to justify the Sixth Circuit's reasoning for barring the exception.<sup>11</sup> Part II of this Note begins with a brief discussion of sound sampling, the history of copyright law, and the de minimis exception. It then explains the seminal copyright cases involving sound sampling. Part III analyzes the Sixth Circuit's decision in *Bridgeport Music, Inc. v. Dimension Films* and the Ninth Circuit's decision in *VMG Salsoul*. This Note concludes with a discussion of why the Ninth Circuit's decision in *VMG Salsoul* sets forth the correct analysis.

## I. THE EVOLUTION OF SOUND SAMPLING IN THE LAW

### A. What is Sound Sampling?

Sound sampling is "the practice of using previous sound recordings to create new music."<sup>12</sup> Sampling provides artists an inexpensive way to create new and distinct sounds using existing recordings.<sup>13</sup> The digital sound sampling process involves "three main steps: digital recording, computer sound analysis and possible alteration, and playback."<sup>14</sup> In the digital-recording stage, sound waves are recorded and transformed into "binary digital units ('bits')" that are intelligible to a computer.<sup>15</sup> Once processed by a computer, the sample can be altered or manipulated to change its tone, rhythm, or pitch.<sup>16</sup> Finally, play-

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10. *Id.*

11. *Id.* at 888.

12. David S. Blessing, Note, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2403 (2004) (citing AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 1479-81 (3d ed. 2002)).

13. *Id.*

14. Bruce J. McGiverin, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1724 (1987).

15. *Id.*

16. *Id.* at 1725.

back is the “playing back” of the sample, either in a new song or on its own.<sup>17</sup>

Sound sampling is intimately entwined with modern music, especially in hip-hop and mainstream pop.<sup>18</sup> For example, Drake’s chart-topping single “Hotline Bling” sampled Timmy Thomas’s 1970s soul hit “Why Can’t We Live Together.”<sup>19</sup> Other notable examples of sampling include Sublime’s sampling of James Brown’s “Funky Drummer” to create their “Scarlet Begonias”; Run-DMC’s sampling of Aerosmith’s “Walk This Way” to create their iconic cross-over song of the same title; Ice-T’s sampling of Led Zeppelin’s “Whole Lotta Love” in “Our Most Requested Record”; and Puff Daddy’s sampling of Pink Floyd’s “Money” in “It’s All About the Benjamins.”<sup>20</sup> While sampling is most prevalent in hip-hop and pop music, it can be found in all genres of music, from classical to rock.<sup>21</sup>

### B. *Protecting Ideas – A Short Guide to Intellectual Property*

The laws of the United States provide rules for securing and enforcing legal rights to inventions, designs, and artistic expressions,<sup>22</sup> commonly referred to as “intellectual property.”<sup>23</sup> Similar to how property law protects a person’s interest in physical property, intellectual property law protects a person’s interest

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17. *Id.*

18. 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, 856–63 (2011); *Digital Music Sampling: Creativity or Criminality?*, *NAT’L PUB. RADIO* (Jan. 28, 2011), <http://www.npr.org/2011/01/28/133306353/Digital-Music-Sampling-Creativity-Or-Criminality> [hereinafter *NPR Digital Music Sampling*].

19. Andrew Unterberger, *Q&A: Timmy Thomas on Drake Sampling His ‘70s Soul Hit for ‘Hotline Bling’*, *SPIN* (Oct. 5, 2015), <http://www.spin.com/2015/10/timmy-thomas-drake-hotline-bling-why-cant-we-live-together/>; *DRAKE, Hotline Bling*, on *VIEWS* (Cash Money 2016); *TIMMY THOMAS, Why Can’t We Live Together*, on *WHY CAN’T WE LIVE TOGETHER* (Collectibles 1993).

20. *NPR Digital Music Sampling*, *supra* note 18; Mike McPadden, *The 11 Most Sampled Classic Rock Songs in Hip-Hop*, *VH1* (Aug. 26, 2015), <http://www.vh1.com/news/199196/most-sampled-classic-rock-songs-in-hip-hop/>.

21. For a directory of sound samples and to track sampling as it occurs, see *Discover Music Through Samples Covers and Remixes*, *WHOSAMPLED* (2018) <http://www.whosampled.com/>.

22. See *What is IP law?*, *AM. INTELL. PROP. L. ASS’N*, <http://www.aipla.org/about/iplaw/Pages/default.aspx> (last visited Jan. 26, 2018).

23. *Id.*



in “the fruits of [his or her] mental labor.”<sup>24</sup> Intellectual property rights are protected by “federal patent, trademark and copyright laws and state trade secret laws.”<sup>25</sup> Congress’s power to protect intellectual property comes from the Patent and Copyright Clause in Article I, Section 8, Clause 8, of the U.S. Constitution.<sup>26</sup> The Patent and Copyright Clause grants 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.”<sup>27</sup>

The roots of copyright law date back to the ratification of the Constitution.<sup>28</sup> In 1787, James Madison proposed a constitutional provision to allow literary authors to secure copyrights for a limited amount of time.<sup>29</sup> Three years later, Congress passed the Copyright Act of 1790, which officially protected an author’s intellectual interest in maps, books, and charts under federal law.<sup>30</sup> Since copyright protections were first codified, they have continued to expand and evolve.<sup>31</sup> In its most current form, copyright law protects a wide variety of works, including

24. *Id.*

25. *Id.* For a brief overview of patent, trademark, and trade secret laws, see Sue A. Purvis, *Basics of Patent Protection*, U.S. PAT. & TRADEMARK OFF., [https://www.uspto.gov/sites/default/files/about/offices/ous/Cooper\\_Union\\_20130604.pdf](https://www.uspto.gov/sites/default/files/about/offices/ous/Cooper_Union_20130604.pdf) (last visited Jan. 26, 2018).

26. Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 10–11 (2002); *Intellectual Property Clause*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/intellectual\\_property\\_clause](https://www.law.cornell.edu/wex/intellectual_property_clause) (last visited Apr. 2, 2018); *Copyright Timeline: A History of Copyright in the United States*, ASS’N RES. LIBR., [http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.V\\_GtuvQpLcM](http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.V_GtuvQpLcM) (last visited Jan. 26, 2018).

27. U.S. CONST. art. I, § 8, cl. 8; see Solum, *supra* note 26, at 10; Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 5 (2003).

28. THE FEDERALIST NO. 43, at 267 (J. Madison) (New American Library ed., 1961) (discussing congressional power to regulate intellectual property); *United States Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/circs/circ1a.html> (last visited Jan. 26, 2018).

29. U.S. COPYRIGHT OFF., *supra* note 28.

30. Act of May 31, 1790, ch. 15, 1 Stat. 124, *repealed by* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

31. The official name of the Copyright Act of 1790 was the “Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.” *Id.* (protecting an author’s right to reproduction of intellectual materials by granting authors a limited monopoly in the field); U.S. COPYRIGHT OFF., *supra* note 28.

“poetry, movies, CD-ROMs, video games, videos, plays, paintings, sheet music, recorded music performances, novels, software code, sculptures, photographs, choreography and architectural designs.”<sup>32</sup> The recent pace of technological advancement and innovation has pushed copyright law to undergo reformation faster than ever before.<sup>33</sup>

### 1. *Modern copyright law*

On July 30, 1947, pursuant to the language of the Patent and Copyright Clause, copyright law was codified as Title 17 of the United States Code.<sup>34</sup> Since its enactment, Title 17 has undergone four comprehensive revisions,<sup>35</sup> the most recent of which occurred when Congress passed the Copyright Act of 1976 (the Act).<sup>36</sup> The overall goal of the Act is to strike a balance between the protective “interests of authors, . . . and society’s competing interest in the free flow of ideas, information, and commerce . . . .”<sup>37</sup>

At its core, Title 17 grants copyright holders exclusive rights which only they may exercise.<sup>38</sup> Section 106 of the Act states a copyright owner has the exclusive rights to: (1) reproduce, distribute, and, in the case of certain works, publicly perform or display the work; (2) prepare derivative works; (3) in the case of sound recordings, perform the work publicly using a digital audio transmission; and (4) license others to engage in the same acts under specific terms and conditions.<sup>39</sup> Copyright protection

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32. Rich Stim, *Copyright Basics FAQ*, STAN. U. LIBR., <http://fairuse.stanford.edu/overview/faqs/copyright-basics/> (last visited Jan. 26, 2018); see also 17 U.S.C. §§ 101–17 (2016) (detailing the various protections copyright law affords).

33. See U.S. COPYRIGHT OFF., *supra* note 28.

34. *Id.*

35. *Id.*

36. *Id.*

37. David B. Sherman, *Cost and Resource Allocation Under the Orphan Works Act of 2006: Would the Act Reduce Transaction Costs, Allocate Orphan Works Efficiently, and Serve the Goals of Copyright Law?*, 12 VA. J.L. & TECH. 1, 5 (2007) (“[T]he goal of copyright law is to strike a balance between the interests of authors, on one hand, and society’s competing interest in the free flow of ideas, information, and commerce, on the other . . .”).

38. See 17 U.S.C. § 106 (2016); U.S. COPYRIGHT OFF., *supra* note 28.

39. 17 U.S.C. § 106.

does not “extend to any idea, procedure, process, system, . . . principle, or discovery.”<sup>40</sup> Anyone who violates a copyright holder’s exclusive rights may be liable for statutory damages and attorney’s fees, enjoined from using the infringing material, or ordered to destroy the infringing work.<sup>41</sup> Violators are liable regardless of intent or knowledge.<sup>42</sup>

A copyright holder’s rights are not unlimited.<sup>43</sup> For example, Title 17 does not protect several categories of material, such as: “[w]orks that have not been fixed in a tangible form of expression”; “[t]itles, names, short phrases, and slogans”; “[i]deas, procedures, methods, [and] systems”; and “[w]orks consisting entirely of information that is common property and contains no original authorship.”<sup>44</sup> Additionally, the protections afforded to copyright holders are limited by three principal exceptions: *de minimis non curat lex*, fair use, and permission.<sup>45</sup>

The first exception is the *de minimis* use of copyrighted materials. In English, *de minimis non curat lex* means “the law does not concern itself with trifles.”<sup>46</sup> The *de minimis* exception is a judicial doctrine that traces its roots to the United States Supreme Court in 1796.<sup>47</sup> Under the *de minimis* theory, a creator copies a portion of copyrighted material, but the portion copied is so insubstantial that the court holds it does not constitute infringement as a matter of law.<sup>48</sup> The modern application of the *de minimis* exception “focuses on either the amount of the work

40. *Id.* § 102; U.S. COPYRIGHT OFF., *supra* note 28.

41. See 17 U.S.C. §§ 501–12; *Copyright Basics*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ01.pdf> (last visited Mar. 12, 2018).

42. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1098 (2007) (citing *Marder v. Lopez*, 450 F.3d 445, 453 (9th Cir. 2006)); see also 17 U.S.C. §§ 501–12.

43. U.S. COPYRIGHT OFF., *supra* note 41.

44. *Copyright Basics*, BRINGHAM YOUNG UNIV., <https://sites.lib.byu.edu/copyright/about-copyright/basics/> (last visited Jan. 26, 2018).

45. 17 U.S.C. § 107; *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997); U.S. COPYRIGHT OFF., *supra* note 41; Carroll, *supra* note 42, at 1099.

46. *Ringgold*, 126 F.3d at 74.

47. *Ware v. Hylton*, 3 U.S. 199, 268 (1796).

48. *Ringgold*, 126 F.3d at 74 (“[D]e minimis can mean that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.”); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (Matthew Bender, Rev. Ed., 2017).

that has been infringed or the economic value of the damage incurred by the infringing party.”<sup>49</sup>

A second and broader exception is “fair use,”<sup>50</sup> codified at 17 U.S.C. § 107, under which one may use copyrighted material for “a limited and ‘transformative’ purpose, such as to comment upon, criticize, or parody a copyrighted work.”<sup>51</sup> Fair use is an affirmative defense the infringing party must prove to justify its use of the copyrighted material,<sup>52</sup> unlike the de minimis exception which need not be pled.<sup>53</sup>

Last, copyright protections do not extend when the author gives another permission to use the author’s copyrighted material.<sup>54</sup> Permission, also known as licensing, is the process of obtaining consent from “a copyright owner to use the owner’s creative material.”<sup>55</sup> As the term “permission” suggests, the user’s copying of the copyrighted work is only valid if it is within the scope of the licensing agreement.<sup>56</sup> Of the exceptions to Title 17’s protections, the history of the de minimis exception in sound recording cases is particularly complex.

### C. *The De Minimis Exception in Sound Recording*

The de minimis exception has a complicated past in sound recording infringement cases.<sup>57</sup> When copyright infringement

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49. Julie D. Cromer, *Harry Potter and the Three-Second Crime: Are We Vanishing the De Minimis Defense from Copyright Law?*, 36 N.M. L. REV. 261, 266 (2006).

50. Rich Stim, *What is Fair Use?*, STAN. U. LIBR., <http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/> (last visited Jan. 26, 2018).

51. 17 U.S.C. § 107 (2016); Stim, *supra* note 50.

52. Carroll, *supra* note 42, at 1099; Stim, *supra* note 50.

53. Blessing, *supra* note 12, at 2409–10.

54. Rich Stim, *Permission: What Is It and Why Do I Need It?*, STAN. U. LIBR., <https://fairuse.stanford.edu/overview/introduction/permission/> (last visited Jan. 26, 2018).

55. *Id.*

56. Christopher Barnett, *All License Breaches May Not Constitute Copyright Infringement*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=e4b1226a-b6b4-4915-8897-a8e474060481> (last visited Jan. 29, 2018). For example, if a user purchases a license to install software once on his or her home computer, but subsequently installs the program on fifteen computers at his or her place of business, the user will exceed the scope of his or her licensing agreement. *Id.*

57. Mike Suppapola, *Confusion in the Digital Age: Why the De Minimis Use Test Should Be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L.J. 93, 101–11

suits involving sound recordings first arose, the de minimis exception was barred from use.<sup>58</sup> As time progressed, the judicial armor that prevented application of the de minimis exception slowly wore down.<sup>59</sup> Until *Bridgeport* and *VMG Salsoul* were decided, however, there was no clear guidance from the circuit courts regarding the application of the de minimis exception to sound sampling cases from the circuit courts.

### 1. Grand Upright Music Ltd. – “Thou shalt not steal”

The first dispute over the application of the de minimis exception occurred in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*<sup>60</sup> In *Grand Upright Music*, the plaintiff sought a preliminary injunction against defendants for the unlicensed use of the plaintiff’s song entitled “Alone Again (Naturally).”<sup>61</sup> The defendants’ recording artist sampled and looped three words of “Alone Again (Naturally)” throughout defendants’ song entitled “Alone Again.”<sup>62</sup> Judge Kevin Duffy presided over the case in the Southern District of New York.<sup>63</sup> Judge Duffy refused to apply either the de minimis or fair use analysis.<sup>64</sup> Rather, Judge Duffy took to the Bible, stating “[t]hou shalt not steal’

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(2006).

58. See generally *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991) (barring the use of the de minimis exception in a copyright infringement case involving a sound sample); see also Suppapola, *supra* note 57, at 102–03.

59. See generally *Jarvis v. A & M Records*, 827 F. Supp. 282 (D.N.J. 1993) (laying the groundwork for the application of de minimis copying for sound sampling cases); *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at \*3–4 (S.D.N.Y. Aug. 27, 2001) (applying a quantitative/qualitative analysis); *Newton v. Diamond*, 388 F.3d 1189, 1196–97 (9th Cir. 2003) (suggesting that the de minimis exception could apply to sound samples); Suppapola, *supra* note 57, at 105–11.

60. *Grand Upright Music Ltd.*, 780 F. Supp. at 182; Brett I. Kaplicer, Note, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227, 240 (2000).

61. *Grand Upright Music Ltd.*, 780 F. Supp. at 183.

62. *Id.*

63. *Id.*; Ronald Gaither, Note, *The Chillin’ Effect of Section 506: The Battle Over Digital Sampling in Rap Music*, 3 VAND. J. ENT. L. & PRAC. 195, 202 (2001).

64. *Grand Upright Music Ltd.*, 780 F. Supp. at 183–84.

has been an admonition followed since the dawn of civilization.”<sup>65</sup> Judge Duffy granted the plaintiff’s injunction, asserting the defendants callously disregarded the law and rights of others.<sup>66</sup> To cap off his analysis, Judge Duffy referred the matter to the United States Attorney’s Office for prosecution.<sup>67</sup> The United States Attorney’s Office, however, did not take any further action.<sup>68</sup> Although Judge Duffy’s analysis completely barred the use of the de minimis exception, the *Grand Upright Music* decision has largely been disregarded.<sup>69</sup>

2. *Jarvis v. A & M Records – The foundation for the de minimis test*

Two years after *Grand Upright Music*, the New Jersey District Court decided *Jarvis v. A & M Records*.<sup>70</sup> The *Jarvis* decision laid the foundation for the use of the de minimis exception in sound sampling cases.<sup>71</sup> In *Jarvis*, the defendants included a sample of a keyboard riff and a lyrical phrase from the plaintiff’s song.<sup>72</sup> The defendants obtained a license to use the sound recording of the plaintiff’s work but failed to obtain a license to use the musical composition.<sup>73</sup> In the defendants’ motion for summary judgment, they urged the court to apply the “lay audience test.”<sup>74</sup> The defendants argued that infringement should only be found “if the two songs are similar in their entirety.”<sup>75</sup> The court disagreed with the defendants’ characterization.<sup>76</sup> Citing to

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65. *Id.* at 183; Kaplicer, *supra* note 60, at 241–42.

66. *Grand Upright Music Ltd.*, 780 F. Supp. at 185.

67. *Id.*; Gaither, *supra* note 63, at 202–03.

68. *Grand Upright Music Ltd.*, 780 F. Supp. at 185; Gaither, *supra* note 63, at 204; Suppapola, *supra* note 57, at 103.

69. Suppapola, *supra* note 57, at 103 (citing Chris Johnstone, Note, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 407 (2004)).

70. 827 F. Supp. 282 (D.N.J. 1993).

71. Suppapola, *supra* note 57, at 104.

72. *Jarvis*, 827 F. Supp. at 289; Kaplicer, *supra* note 60, at 241–42.

73. Suppapola, *supra* note 57, at 103.

74. *Id.* at 290.

75. *Id.*; Kaplicer, *supra* note 60, at 242.

76. *Jarvis*, 827 F. Supp. at 290; Kaplicer, *supra* note 60, at 242.

*Grand Upright Music*, the court stated, “[i]f it really were true that for infringement to follow a listener must have to confuse one work for the other, a work could be immune from infringement so long as the infringing work reaches a substantially different audience than the infringed work.”<sup>77</sup> The court instead looked to see if the defendants’ use of the plaintiff’s musical composition was quantitatively and qualitatively important to the defendants’ work.<sup>78</sup> Denying the defendants’ motion for summary judgment, the court determined it was unclear whether the copied portions of defendants’ song were qualitatively insignificant as a matter of law because they were “attention grabbing.”<sup>79</sup>

Effectively, the *Jarvis* court suggested that “if a sampler uses a portion of the plaintiff’s work that is both quantitatively and qualitatively insignificant to the plaintiff’s work as a whole, the infringement may not be actionable.”<sup>80</sup> The *Jarvis* court’s qualitative/quantitative analysis would later frame the Ninth Circuit’s acceptance of the *de minimis* test.

### 3. *Williams v. Broadus* – A glimmer of hope for the *de minimis* test

In 2001, ten years after *Grand Upright Music*,<sup>81</sup> the Southern District of New York revisited copyright infringement involving sound recordings in *Williams v. Broadus*.<sup>82</sup> At issue in *Williams* was a sample within a sample.<sup>83</sup> Plaintiff Marlon Williams sampled two measures from Otis Redding’s “Hard to Handle” in his song, “The Symphony,” without a license.<sup>84</sup> Ten years

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77. *Jarvis*, 827 F. Supp. at 290.

78. *Id.* at 292; Suppapola, *supra* note 57, at 103–04.

79. *Jarvis*, 827 F. Supp. at 292.

80. Suppapola, *supra* note 57, at 104 (citing *Jarvis*, 827 F. Supp. at 292).

81. *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991) (prohibiting the *de minimis* exception in a copyright infringement case involving a sound sample).

82. See No. 99 Civ. 10957 MBM, 2001 WL 984714, at \*1 (S.D.N.Y. Aug. 27, 2001).

83. *Id.*; Suppapola, *supra* note 57, at 104.

84. *Williams*, 2001 WL 984714, at \*1.

later, the defendant, Calvin Broadus—commonly known as Snoop Dogg—sampled a portion of Williams’s “The Symphony” in his song, “Ghetto Symphony,” without a license.<sup>85</sup> Williams brought suit against Snoop Dogg for his unlicensed sampling of Williams’s sound recording.<sup>86</sup> Snoop Dogg moved for summary judgment, arguing that Williams did not have a valid copyright to enforce because he did not have a license to sample the original recording.<sup>87</sup>

The court denied Snoop Dogg’s motion, finding that a “genuine issue of fact exist[ed] as to whether [Williams’s] ‘The Symphony’ [was] substantially similar to ‘Hard to Handle,’ [which would] . . . therefore invalidate[] [Williams’s] copyright.”<sup>88</sup> Notably, the court’s analysis hinted at “the possibility that the recurring use of a small sample could avoid copyright infringement.”<sup>89</sup> The court noted “a reasonable finder of fact could nonetheless conclude that the copied measures of ‘Hard to Handle’—two measures that appear only in the opening of that composition—are not a substantial portion of the work.”<sup>90</sup> Thus, the court applied *Jarvis*’s qualitative/quantitative analysis over the strict *Grand Upright Music* analysis.<sup>91</sup> *Williams* represented a small perforation in the armor barring the de minimis exception in sound recording copyright infringement cases.<sup>92</sup>

#### 4. *Newtown v. Diamond* – *De minimis* use of a sample’s underlying musical composition

The de minimis exception finally emerged in the Ninth Circuit’s decision in *Newton v. Diamond*; however, its application was limited to the underlying musical composition—not the

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85. *Id.*; Reuvan Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 291 (2009).

86. *Williams*, 2001 WL 984714, at \*1; Ashtar, *supra* note 85.

87. *See Williams*, 2001 WL 984714, at \*1.

88. *Id.* at \*5; *see also* Suppapola, *supra* note 57, at 105.

89. Johnstone, *supra* note 69, at 410.

90. *Williams*, 2001 WL 984714, at \*4.

91. Suppapola, *supra* note 57, at 105 (citing Johnstone, *supra* note 69, at 410).

92. *See id.* (citing Johnstone, *supra* note 69, at 410).



sound sample.<sup>93</sup> In *Newton*, the plaintiff, James Newton, composed a jazz piece entitled “Choir.”<sup>94</sup> Newton subsequently licensed the sound recording rights to ECM Records but retained the rights to the underlying musical composition.<sup>95</sup> Eleven years later, the hip-hop group Beastie Boys obtained a license from ECM Records to sample various portions of “Choir,” but they did not obtain a license from Newton to use “Choir’s” musical composition.<sup>96</sup> Newton filed suit, alleging infringement on his musical composition copyright.<sup>97</sup>

The district court held Newton’s musical composition was not entitled to copyright protection because it was not original as a matter of law.<sup>98</sup> Despite this holding, the court considered whether the Beastie Boys’ appropriation was *de minimis*.<sup>99</sup> Like the *Jarvis* court, the district court evaluated the Beastie Boys’ infringement to determine whether it was quantitatively and qualitatively significant to the new work.<sup>100</sup> The court determined the infringement was not significant.<sup>101</sup> Accordingly, the district court determined the Beastie Boys’ use of the plaintiff’s work was *de minimis*.<sup>102</sup>

In a two-to-one decision, the Ninth Circuit affirmed the district court’s decision.<sup>103</sup> The court stated the “dispositive question is whether the copying goes to trivial or substantial elements.”<sup>104</sup> The court held “no reasonable juror could find the

93. See generally *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2003) (applying the *de minimis* exception to the musical composition in a copyright infringement case involving sound sampling), *cert. denied*, 545 U.S. 1114 (2005).

94. *Id.* at 1191.

95. *Id.*; Mark R. Carter, *Applying the Fragmented Literal Similarity Test to Musical-Work and Sound-Recording Infringement: Correcting the Bridgeport Music, Inc. v. Dimension Films Legacy*, 14 MINN. J.L. SCI. & TECH. 669, 680 (2013).

96. *Newton*, 388 F.3d at 1191; Carter, *supra* note 95.

97. *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1247 (C.D. Cal. 2002); Carter, *supra* note 95.

98. *Newton*, 204 F. Supp. at 1253.

99. *Id.* at 1256.

100. *Id.* at 1256–57; Suppapola, *supra* note 57, at 107–08.

101. *Newton*, 204 F. Supp. at 1258–59.

102. *Id.* at 1259; Suppapola, *supra* note 57, at 108.

103. *Newton v. Diamond*, 388 F.3d 1189, 1193–94 (9th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005); Suppapola, *supra* note 57, at 108; see also Carter, *supra* note 95, at 680–81.

104. *Newton*, 388 F.3d at 1195; see also Carter, *supra* note 95, at 681.

sampled portion of the composition to be a quantitatively or qualitatively significant portion of the composition as a whole.”<sup>105</sup> In dissent, Judge Susan P. Graber found that “an average audience would recognize the appropriation of the sampled segment and that Beastie Boys’ use was therefore not de minimis.”<sup>106</sup> Newton appealed the Ninth Circuit’s ruling to the Supreme Court, only to be denied certiorari.<sup>107</sup>

At first glance, the *Newton* decision appears to be a victory for the de minimis exception. But the court merely held that “de minimis use of a *musical composition* [underlying a licensed sample] may preclude a finding of infringement.”<sup>108</sup> The question of whether unauthorized de minimis sampling may escape liability remained unanswered.<sup>109</sup>

D. “Get a License or Do Not Sample” – The Sixth Circuit’s Bright-Line Rule

On September 7, 2004, in *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit became the first circuit court to speak directly on the use of the de minimis exception for unlicensed sampling when a unanimous panel held the exception does not apply to infringement cases involving unlicensed sound sampling.<sup>110</sup>

1. Background

Three years before the *Bridgeport* decision, four plaintiffs filed an action alleging “nearly 500 counts against approximately 800 defendants for copyright infringement and various state law claims relating to the use of samples without permission in new

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105. *Newton*, 388 F.3d at 1195.

106. *Id.* at 1197 (Graber, J., dissenting) (emphasis added); Suppapola, *supra* note 57, at 110–11.

107. *Newton v. Diamond*, 545 U.S. 1114 (2005).

108. Suppapola, *supra* note 57, at 112.

109. *Id.*

110. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 399–402 (6th Cir. 2004).

rap recordings.”<sup>111</sup> The district court severed the original complaint into 476 separate actions.<sup>112</sup> Of the four original plaintiffs, only Bridgeport Music and Westbound Records were involved in the action that led to the *Bridgeport* decision.<sup>113</sup> The action at issue involved the defendant film company, No Limit Films.<sup>114</sup>

Bridgeport and Westbound claimed ownership of the “musical composition and sound recording copyrights [to] ‘Get Off Your Ass and Jam’ [(“Get Off”)] by George Clinton, Jr. and the Funkadelics.”<sup>115</sup> There was no dispute that the rap song “100 Miles and Runnin” (“100 Miles”) sampled Get Off and that defendant No Limit Films included 100 Miles in its film, “I Got the Hook Up” (“Hook Up”).<sup>116</sup> Westbound’s infringement claims were based on a “three-note combination solo guitar ‘riff’ that lasts four seconds” in the opening of “Get Off.”<sup>117</sup> The rap song “100 Miles” sampled two seconds of the guitar riff.<sup>118</sup> The sample’s pitch was lowered, looped, and extended.<sup>119</sup> The altered “Get Off” sample was used in five places of “100 Miles” with each loop lasting “approximately [seven] seconds.”<sup>120</sup>

Bridgeport’s claims were dismissed at summary judgment because Bridgeport previously entered into an agreement with the owners of “100 Miles” to sample “Get Off.”<sup>121</sup> The district court analyzed Westbound’s copying claim under the “fragmented literal similarity” test.<sup>122</sup> The district court determined that the sampling did not “rise to the level of a legally cogniza-

111. *Id.* at 393.

112. *Id.*

113. *Id.*

114. *Id.* Although the case caption involved Dimension Films, all counts against Dimension Films were dismissed with prejudice according to a settlement agreement. *Id.* at 392 n.1.

115. *Id.* at 393; Cromer, *supra* note 49, at 276.

116. *Bridgeport Music, Inc.*, 383 F.3d at 393.

117. *Id.* at 394.

118. *Id.*; Cromer, *supra* note 49, at 276.

119. *Bridgeport Music, Inc.*, 383 F.3d at 394; Cromer, *supra* note 49, at 276.

120. *Bridgeport Music, Inc.*, 383 F.3d at 394; Cromer, *supra* note 49, at 276.

121. *Bridgeport Music, Inc.*, 383 F.3d at 393–94.

122. *Id.* at 394–95. The fragmented literal similarity test is used to determine infringement when there are literal, direct copies of the original work scattered throughout the copying work. Carter, *supra* note 95, at 678.

ble appropriation."<sup>123</sup> Consequently, the district court granted defendant No Limit Films' motion for summary judgment, finding 100 Miles' sampling of "Get Off" to be de minimis.<sup>124</sup> Westbound appealed the district court's ruling.<sup>125</sup>

## 2. *The Sixth Circuit's analysis*

The Sixth Circuit Court of Appeals reversed the district court's holding, finding the de minimis exception inapplicable to sound sampling.<sup>126</sup> It criticized the district court's decision, stating the lower court "emphasized the paucity of case law" on de minimis sound sampling.<sup>127</sup> The court further stated that the district court improperly analyzed the sound recording as if it were a musical composition.<sup>128</sup> Discussing a brief history of music in copyright law, the court observed that although musical compositions have always enjoyed copyright protections, sound recordings gained separate copyright protections in 1971.<sup>129</sup> The court further noted that Congress passed the separate sound recording statute in response to technological advances that made "pirating" sound recordings an "easy task."<sup>130</sup> The Sixth Circuit then offered its legal analysis.<sup>131</sup>

Beginning with Title 17 of the Act, the Sixth Circuit noted that § 114(a) sets forth a sound recording copyright holder's exclu-

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123. *Bridgeport Music, Inc.*, 383 F.3d at 395 (citing *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002)).

124. "After listening to the copied segment, the sample, and both songs, the district court found that no reasonable juror, even one familiar with the works of George Clinton, would recognize the source of the sample without having been told of its source." *Id.*

125. *Id.* at 393. Bridgeport also appealed to the Sixth Circuit; however, its basis of appeal was No Limit Film's use of a different song. For a discussion of the court's ruling on Bridgeport's appeal, see *id.* at 402-04. There were further issues regarding the trial court's grant of attorney's fees and costs to No Limit Films. For a discussion of the court's analysis on these issues, see *id.* at 404-05.

126. *Id.* at 399.

127. *Id.* at 395.

128. *Id.* at 396; Jeremy Scott Sykes, Note, *Copyright – The De Minimis Defense in Copyright Infringement Actions Involving Music Sampling*, 36 U. MEM. L. REV. 749, 769-70 (2006).

129. *Bridgeport Music, Inc.*, 383 F.3d at 398; see *Agee v. Paramount Commc'ns, Inc.*, 853 F. Supp. 778, 787 (S.D.N.Y. 1994), *aff'd in part and rev'd in part*, 59 F.3d 317 (2d Cir. 1995).

130. *Bridgeport Music, Inc.*, 383 F.3d at 398.

131. *Id.*

sive rights.<sup>132</sup> Pursuant to §§ 114(a) and 106, a sound recording copyright holder is entitled to the following exclusive rights:

- (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; . . . and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>133</sup>

The crux of the court's argument, however, relied on § 114(b).<sup>134</sup> Section 114(b) states, "The exclusive right of the owner of copyright in a sound recording under clause (2) of § 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."<sup>135</sup> The court applied a "literal reading" approach, relying solely on the statute's plain meaning.<sup>136</sup> The court interpreted the language to mean that a "sound recording owner has the exclusive right to 'sample' his own recording."<sup>137</sup> The court boiled its interpretation down to a single sentence: "Get a license or do not sample."<sup>138</sup>

The court justified its interpretation with three pragmatic reasons: (1) it promotes judicial economy through easy enforce-

132. 17 U.S.C. § 114(a) (2016); *Bridgeport Music, Inc.*, 383 F.3d at 397.

133. 17 U.S.C. §§ 106, 114(a); *Bridgeport Music, Inc.*, 383 F.3d at 397.

134. *Bridgeport Music, Inc.*, 383 F.3d at 397-98.

135. 17 U.S.C. § 114(b); *Bridgeport Music, Inc.*, 383 F.3d at 397; Sykes, *supra* note 128, at 770.

136. *Bridgeport Music, Inc.*, 383 F.3d at 401-02. The Sixth Circuit refused to utilize any legislative history because digital sampling did not occur in 1971 when sound recordings gained their own statute. *Id.*

137. *Id.* at 398; Sykes, *supra* note 128, at 770.

138. *Bridgeport Music, Inc.*, 383 F.3d at 398; Cromer, *supra* note 49, at 289.

ment; (2) the market will prevent exorbitant licensing prices; and (3) sampling is never an accidental act.<sup>139</sup> Additionally, the Sixth Circuit attempted to explain away the application of the de minimis exception in economic terms.<sup>140</sup> The court believed any sampling constituted taking something of value<sup>141</sup> and that artists sample for three reasons: “(1) [to] save costs, (2) [to] add something to the new recording, or (3) both.”<sup>142</sup>

Acknowledging it was establishing a new rule, the Sixth Circuit discussed other reasons underlying its holding.<sup>143</sup> First, the court noted no judicial precedent existed and the legal literature’s viewpoint merely depended on “whose ox [was] being gored.”<sup>144</sup> Second, the court did not believe its rule would stifle creativity as many recording companies obtain licenses as a matter of course.<sup>145</sup> Third, those in the recording industry have the “ability and know-how” to work out licensing guidelines and fee schedules for sampling.<sup>146</sup> Finally, the Sixth Circuit told record companies to go to Congress if they did not like its interpretation.<sup>147</sup>

With the above analysis laid out, the Sixth Circuit eliminated the de minimis exception from sound sampling cases.<sup>148</sup> Reversing the district court’s grant of No Limit Films’ summary judgment motion, the Sixth Circuit held that sampling without a license constitutes *per se* infringement.<sup>149</sup>

### 3. *Amendment on rehearing*

Following the Sixth Circuit’s decision, No Limit Films filed a

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139. *Bridgeport Music, Inc.*, 383 F.3d at 398–99; Sykes, *supra* note 128, at 771; *see also* Cromer, *supra* note 49, at 279.

140. *Bridgeport Music, Inc.*, 383 F.3d at 399.

141. *Id.*

142. *Id.*

143. *Id.* at 400.

144. *Id.* at 400–01.

145. *Id.* at 401; *see* Sykes, *supra* note 128, at 772.

146. *Bridgeport Music, Inc.*, 383 F.3d at 401.

147. *Id.* at 401–02; Sykes, *supra* note 128, at 772.

148. *Bridgeport Music, Inc.*, 383 F.3d at 399.

149. *Id.* at 402.

petition for an en banc rehearing.<sup>150</sup> The Sixth Circuit denied the petition but granted a panel rehearing.<sup>151</sup> In its order granting the rehearing, the Sixth Circuit also amended its opinion.<sup>152</sup> Most notably, the court included a new footnote stating that it had relied on the principles established in *Grand Upright Music*.<sup>153</sup>

After the rehearing, the Sixth Circuit affirmed and reissued its previous opinion.<sup>154</sup> The reissued opinion was almost identical to the original opinion except for minor, unlisted amendments.<sup>155</sup> For one, it added to its statutory analysis of § 114(b);<sup>156</sup> specifically, a citation to the Sound Recording Act of 1971, which it compared to the Act.<sup>157</sup> In the original *Bridgeport* decision, the Sixth Circuit explained it relied solely on the express language of § 114(b).<sup>158</sup> In its reissued opinion, it indicated that a change in wording from the Sound Recording Act of 1971 to the Copyright Act of 1976 (i.e., adding the word “entirely”) gave the copyright holder the exclusive license to sample.<sup>159</sup> In the end, the Sixth Circuit affirmed its decision to eliminate the use of the de minimis exception in digital sound sampling cases.<sup>160</sup>

### E. *De Minimis Applied – The Ninth Circuit’s Response to Bridgeport*

For twelve years, all other circuit courts remained silent on de

150. *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 649 (6th Cir. 2004).

151. *Id.*; Jennifer R. R. Mueller, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 IND. L.J. 435, 453 (2006).

152. *Bridgeport Music, Inc.*, 401 F.3d at 649–51; Mueller, *supra* note 151.

153. *Bridgeport Music, Inc.*, 401 F.3d at 650.

154. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 795 (6th Cir. 2005).

155. *Compare Bridgeport Music, Inc.*, 410 F.3d at 795, *with Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 399 (6th Cir. 2004).

156. *Compare Bridgeport Music, Inc.*, 410 F.3d at 800–01, *with Bridgeport Music, Inc.*, 383 F.3d at 398.

157. *Compare Bridgeport Music, Inc.*, 410 F.3d at 800–01 (citing Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 (1971)), *with Bridgeport Music, Inc.*, 383 F.3d at 399.

158. *Bridgeport Music, Inc.*, 383 F.3d at 397–98.

159. *Bridgeport Music, Inc.*, 410 F.3d at 801 (citing 85 Stat. at 391).

160. *Id.* at 805.

minimis sound sampling. Finally, in 2016, the Ninth Circuit addressed the issue in *VMG Salsoul, LLC v. Ciccone*, resulting in a two-to-one decision in favor of applying the de minimis exception to sound sampling cases.<sup>161</sup>

### 1. Background

In the early 1980s, a producer named Shep Pettibone produced a song for VMG Salsoul LLC entitled “Ooh I Love It (Love Break).”<sup>162</sup> Ten years later, Pettibone worked with recording artist Madonna to record the mega-hit dance song, “Vogue.”<sup>163</sup> VMG Salsoul brought suit alleging that Pettibone sampled certain sounds from “Love Break” and added them to “Vogue.”<sup>164</sup> VMG Salsoul originally alleged a wide variety of claims including the “improper sampling of strings, vocals, congas, ‘vibraslap,’ and horns” from “Love Break.”<sup>165</sup> After narrowing its claims, however, VMG Salsoul only pursued the improper sampling of a horn hit.<sup>166</sup>

The alleged improper sampling occurred in the form of a single and double horn hit.<sup>167</sup> The district court described the sampling at issue as “a single stab, a sequence that ‘consists of only a single chord or hit,’ lasting for only a quarter second.”<sup>168</sup> The district court initially found the horn hit at issue not sufficiently unique to merit copyright protection because using a horn hit in a percussive matter was a staple in funk, soul, and disco music.<sup>169</sup> The court noted the plaintiff’s own CEO, vice president, and expert admitted that other recordings have used a horn hit to play the chord at issue in works that predated “Love

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161. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016).

162. *Id.* at 874–75.

163. *Id.*

164. *Id.*; *Split 9th Circuit Says Madonna’s Use of Horn Solo Not Infringing*, 28 WESTLAW J. ENT. INDUSTRY 2, at \*1 (2016) [hereinafter WESTLAW JOURNAL].

165. *VMG Salsoul, LLC*, 824 F.3d at 875.

166. *Id.*

167. *Id.*

168. *VMG Salsoul, LLC v. Ciccone*, No. CV 12-05967 BRO (CWx), 2013 WL 8600435, at \*8 (C.D. Cal. Nov. 18, 2013).

169. *Id.*; WESTLAW JOURNAL, *supra* note 164.



Break.”<sup>170</sup>

The district court further concluded that, even if the horn hit was entitled to copyright protection, the copying was *de minimis*.<sup>171</sup> The court applied the “ordinary observer” test to determine whether the defendant’s copying was substantial.<sup>172</sup> When applying this test, the court “looks to the response of the average audience, or ordinary observer, to determine whether a use is infringing” or *de minimis*.<sup>173</sup> Ultimately, the court found “no reasonable audience would find the sampled portions qualitatively or quantitatively significant in relation to the infringing work, nor would [a reasonable audience] recognize the appropriation.”<sup>174</sup> Granting the defendants’ summary judgment motion, the district court held the alleged copying to be *de minimis*.<sup>175</sup>

## 2. *The Ninth Circuit’s analysis*<sup>176</sup>

The Ninth Circuit affirmed the district court’s analysis and held that the *de minimis* exception applies to sound recordings.<sup>177</sup> The Ninth Circuit began its analysis by noting that “[w]hen considering a claimed infringement of a copyrighted sound recording, what matters is how the musicians *played* the notes, that is, how their rendition distinguishes the recording from a generic rendition of the same composition.”<sup>178</sup> The Ninth Circuit quickly dismissed the copying issue, finding that “a reasonable juror could not conclude that an average audience would recognize the appropriation of the horn hit.”<sup>179</sup> The court

170. *VMG Salsoul, LLC*, 2013 WL 8600435, at \*8–9.

171. *Id.* at \*12.

172. *Id.* at \*11.

173. *Id.* (quoting *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004)).

174. *Id.* at \*12.

175. *Id.* at \*8, \*12.

176. The Ninth Circuit’s opinion also discussed other pertinent copyright infringement elements and the copying of the underlying musical composition. For the Ninth Circuit’s discussion on these issues, see *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 877–79 (9th Cir. 2016).

177. *Id.* at 887.

178. *Id.* at 879.

179. *Id.* at 880 (emphasis omitted).

stated its analysis was born out of common sense: the horn hits were less than a second long, only occurred a few times in "Vogue," and did not sound similar to the horn hits in "Love Break."<sup>180</sup> The court further noted that the plaintiff's primary expert originally misidentified the source of the sampled double horn hit.<sup>181</sup> Thus, the court posited that if a musical expert could not discern the copying, an average audience member would not either.<sup>182</sup>

After discussing the triviality of the copying, the court went on to discuss VMG Salsoul's argument that the Ninth Circuit should follow the Sixth Circuit's analysis in *Bridgeport*.<sup>183</sup> The court rejected VMG Salsoul's assertion, stating, "The rule that infringement occurs only when a substantial portion is copied is firmly established in the law."<sup>184</sup> The court explained that the rule's purpose is to give a creator a "legally protected interest" in the "potential financial return" of his or her work.<sup>185</sup> Thus, when the public does not recognize the original work, the copier has not taken from the creator's legally protected interest.<sup>186</sup> The court further noted it was unaware of any other courts, aside from those bound by the Sixth Circuit, that follow the *Bridgeport* analysis.<sup>187</sup> Additionally, the court recognized that it previously stated in *Newton v. Diamond* that the de minimis doctrine "applies throughout the law of copyright, including cases of music sampling."<sup>188</sup>

Next, the court addressed VMG Salsoul's claim that "Congress intended to create a special rule for copyrighted sound re-

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180. *Id.*; Jason B. Binimow, Annotation, *Scope of Exclusive Rights in Sound Recordings Under § 114(b) of Copyright Act of 1976*, 151 A.L.R. Fed. 433, § 6 (2017).

181. *VMG Salsoul, LLC*, 824 F.3d at 880.

182. *Id.*

183. *Id.*

184. *Id.*; WESTLAW JOURNAL, *supra* note 164, at \*2.

185. *VMG Salsoul, LLC*, 824 F.3d at 881 (quoting *Sid & Marty Krofft Television Prods., Inc., v. McDonald's Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977)).

186. *Id.*

187. *Id.*

188. *Id.* (quoting *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2003)); Deborah F. Buckman, Annotation, *Application of "De Minimis Non Curat Lex" to Copyright Infringement Claims*, 150 A.L.R. Fed. 661 (1998).

cordings eliminating the de minimis exception.”<sup>189</sup> It noted that 17 U.S.C. §§ 102 and 106 lack any language suggesting Congress intended to remove the de minimis exception from sound sampling cases.<sup>190</sup> The court then discussed § 114(b), which was the crux of the *Bridgeport* decision,<sup>191</sup> and determined it places express *limits* on the rights of a sound recording copyright holder, such that “[a] new recording that mimics the copyrighted recording is not an infringement, even if the mimicking is very well done.”<sup>192</sup>

Noting that the statute’s plain language does not give guidance on the de minimis issue, the court looked to the Act’s legislative history.<sup>193</sup> The House Report for the Act stated § 114(b)’s goal was to limit the rights of copyright holders.<sup>194</sup> The House Report also explicitly stated “infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted recording are reproduced.”<sup>195</sup> Therefore, the court reasoned, Congress did not intend to expand a sound recording copyright holder’s rights;<sup>196</sup> rather, it intended to apply the fundamental proposition that infringement only occurs when a substantial portion of a work is copied to sound sampling cases.<sup>197</sup> The court concluded the statutory text and legislative history revealed Congress’s intent to extend the de minimis exception to copyrighted sound recordings.<sup>198</sup>

Next, the Ninth Circuit aired its disagreements with the *Bridgeport* decision. The court explained *Bridgeport* “ignored” the statutory structure and purpose of § 114(b).<sup>199</sup> The Ninth

189. *VMG Salsoul, LLC*, 824 F.3d at 881.

190. *Id.* at 882; 17 U.S.C. §§ 102, 106 (2016) (setting forth the basic subject matter of copyright protections).

191. *VMG Salsoul, LLC*, 824 F.3d at 882–83.

192. *Id.* at 883.

193. *Id.*; *Binimow*, *supra* note 180.

194. H.R. REP. NO. 94-1476, at 106 (1976); *VMG Salsoul, LLC*, 824 F.3d at 883.

195. *VMG Salsoul, LLC*, 824 F.3d at 883 (citing H.R. REP. NO. 94-1476, at 106).

196. *Id.* at 884; *Buckman*, *supra* note 188.

197. *VMG Salsoul, LLC*, 824 F.3d at 884.

198. *Id.*; *Buckman*, *supra* note 188.

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

Circuit felt the *Bridgeport* decision improperly interpreted § 114(b) as an expansion—instead of a limitation—on copyright holder rights.<sup>200</sup> Furthermore, the court believed *Bridgeport* erred by failing to consider the legislative history of § 114(b) simply because sampling was not possible in 1971,<sup>201</sup> stating that Congress's intent applies regardless of technological developments because it is necessary to discern the meaning of the statutory structure properly.<sup>202</sup>

The Ninth Circuit further disagreed with the Sixth Circuit's logic that the de minimis exception does not apply because sampling is a "physical taking" solely for economic gain.<sup>203</sup> The Ninth Circuit noted that the possibility of a "physical taking" exists with respect to numerous other artistic works where the de minimis rule applies.<sup>204</sup> It observed that even assuming a theoretical difference between sampling sound recordings and other copyrighted works does not mean Congress "actually adopted a different rule."<sup>205</sup> Moreover, the court explained, the distinction between a "physical taking" and an "intellectual one" based on saving the creator costs is unsupported by the Supreme Court.<sup>206</sup> As the Ninth Circuit stated, "The Supreme Court has held unequivocally that [the Act] protects only the expressive aspects of a copyrighted work, and *not* the 'fruit of the [author's] labor.'"<sup>207</sup>

Lastly, the Ninth Circuit addressed VMG Salsoul's policy arguments.<sup>208</sup> The court stated that policy arguments such as (1) the judicial efficiency of bright-line rules, (2) the market control of licensing prices, and (3) the idea that "sampling is never accidental" were unpersuasive because they are decisions for

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200. *Id.*; see Buckman, *supra* note 188.

201. *VMG Salsoul, LLC*, 824 F.3d at 884.

202. *Id.*; see Buckman, *supra* note 188.

203. *VMG Salsoul, LLC*, 824 F.3d at 885.

204. *Id.*

205. *Id.*

206. *Id.* (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)).

207. *Id.* (quoting *Feist Publ'ns, Inc.*, 499 U.S. at 349).

208. *Id.* at 887.

Congress to make.<sup>209</sup> Additionally, the court found the argument that Congress has not overturned the *Bridgeport* interpretation unpersuasive because “congressional inaction in the face of a judicial statutory interpretation . . . carries almost no weight.”<sup>210</sup>

After discussing its disagreements with the Sixth Circuit, the Ninth Circuit openly acknowledged it was creating a circuit split.<sup>211</sup> The court noted circuit splits in copyright law are particularly troublesome because they lead to “different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide.”<sup>212</sup> Despite acknowledging the weighty implications of its decision, the court decided its independent duty to determine congressional intent outweighed the costs of a circuit split.<sup>213</sup> The court believed this split would have a reduced impact on litigants’ rights because a circuit split was already pervasive among district courts.<sup>214</sup> Affirming the district court’s decision to grant the defendants’ motion for summary judgment, the Ninth Circuit held the copying was *de minimis*.<sup>215</sup>

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209. *Id.* at 887 (quoting *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005)).

210. *Id.* at 886 (citing *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001)).

211. *Id.*; WESTLAW JOURNAL, *supra* note 164, at \*2.

212. *VMG Salsoul, LLC*, 824 F.3d at 886 (quoting *Seven Arts Filmed Entm’t Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1256 (9th Cir. 2013)).

213. *Id.*

214. *Id.*; WESTLAW JOURNAL, *supra* note 164, at \*1–2; *see, e.g.*, *Batiste v. Najm*, 28 F. Supp. 3d 595, 625 (E.D. La. 2014) (determining that it is not clear whether the *Bridgeport* rule should apply because some courts have declined to apply the rule); *Pryor v. Warner/Chappell Music, Inc.*, No. CV-13-04344, 2014 WL 2812309, at \*7 n.3 (C.D. Cal. June 20, 2014) (declining to apply *Bridgeport*’s rule because the Ninth Circuit did not adopt it); *Zany Toys, LLC v. Pearl Enters., LLC*, No. 13-5262 (JAP)(TJB), 2014 WL 2168415, at \*11 n.7 (D.N.J. May 23, 2014) (stating *Bridgeport*’s rule without analysis); *Steward v. West*, No. CV-13-02449-BRO (JCx), 2013 WL 12120232, at \*14 n.8 (C.D. Cal. Sept. 6, 2013) (rejecting *Bridgeport*’s *per se* rule because of court and commentator criticism); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1340–41 (S.D. Fla. 2009) (rejecting *Bridgeport*’s rule); *see also* *EMI Records Ltd. v. Premise Media Corp.*, No. 601209/08, 2008 WL 5027245, at \*1 (N.Y. Sup. Ct. Aug. 8, 2008) (rejecting the Sixth Circuit’s evaluation in *Bridgeport*, 410 F.3d at 799).

215. *VMG Salsoul, LLC*, 824 F.3d at 887.

### 3. *Theft, not creativity* – Judge Silverman’s dissent

While the Ninth Circuit majority wrote a scathing review of the Sixth Circuit’s *Bridgeport* analysis, Judge Barry G. Silverman wrote an equally scathing review of the majority’s analysis.<sup>216</sup> Judge Silverman did not indulge in any of the majority’s reasoning; rather, he favored the *Bridgeport* analysis.<sup>217</sup>

For Judge Silverman, owning a copyright in a fixed sound recording is a valuable property right, and any sampler therefore commits theft.<sup>218</sup> Judge Silverman relied heavily on the distinction between an “intellectual taking” and a “physical taking.”<sup>219</sup> As he explained, sampling is not merely a taking of the sound but of “the sounds as they are fixed in the medium of the copyright holder[’]s choice.”<sup>220</sup> Due to the nature of sampling, therefore, Judge Silverman concluded the de minimis exception is unavailable because it involves a fixed performance.<sup>221</sup>

Judge Silverman further accepted VMG Salsoul’s argument that congressional silence in the wake of *Bridgeport* was indicative of Congress’s intent to ratify the decision.<sup>222</sup> Observing how the Sixth Circuit includes Nashville, Tennessee – the home of the country music industry – Judge Silverman found the *Bridgeport* decision was in no way “hiding . . . in the woods, waiting to be found.”<sup>223</sup> In his view, the prominent location of the Sixth Circuit in relation to the music industry, coupled with *Bridgeport*’s governing of the music industry for eleven years, amounted to implicit congressional acceptance.<sup>224</sup> Ultimately, Judge Silverman voted to adopt the *Bridgeport* analysis.<sup>225</sup>

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216. *Id.* at 888 (Silverman, J., dissenting).

217. *Id.* at 888–90.

218. *Id.* at 888; WESTLAW JOURNAL, *supra* note 164.

219. *VMG Salsoul, LLC*, 824 F.3d at 889.

220. *Id.*

221. *Id.*

222. *Id.* at 889–90.

223. *Id.* at 889.

224. *Id.* at 889–90.

225. *Id.* at 890.

### III. MOVING BEYOND *BRIDGEPORT* AND ADOPTING VMG *SALSOU*

The deep divide between the Sixth and Ninth Circuits must be resolved to create equal protection for all copyright holders and reintroduce certainty for litigants. The circuit split should be resolved in favor of the Ninth Circuit's analysis, which applies the de minimis exception to cases involving unauthorized sound sampling. Foremost, the Ninth Circuit's holding is consistent with basic principles of copyright law. Additionally, Judge Silverman's dissent in the Ninth Circuit's decision does not justify the Sixth Circuit's reasoning. Finally, the Ninth Circuit's decision sets the right policy.

#### A. *Revisiting Bridgeport with VMG Salsou in Mind – A Renewed Take on Old Views*

Since the *Bridgeport* decision in 2004, the Sixth Circuit has been widely criticized for its ruling.<sup>226</sup> Scholars were quick to condemn the *Bridgeport* decision as an illogical, improper application of the law and a barrier that stifles artists' creativity.<sup>227</sup> In light of the Ninth Circuit's analysis in *VMG Salsou*, it is important to reevaluate the fallacies plaguing the Sixth Circuit's decision in *Bridgeport* and to discern whether the *VMG Salsou* decision sets forth the proper analysis. This section revisits the arguments demonstrating why the *Bridgeport* decision was a doctrinal failure and compares the Sixth Circuit's analysis to the Ninth Circuit's in *VMG Salsou*.

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226. See Jeffrey F. Kersting, *Singing A Different Tune: Was the Sixth Circuit Justified in Changing the Protection of Sound Recordings in Bridgeport Music, Inc. v. Dimension Films?*, 74 U. CIN. L. REV. 663, 681–85 (2005) (discussing whether the Sixth Circuit was justified in removing the de minimis exception); Mueller, *supra* note 151, at 462–63 (stating that “[a]ttempting to eliminate the de minimis doctrine from copyright seems absurd,” and proposing alternative tests in the wake of the *Bridgeport* decision); John Schietinger, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed A Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 247–48 (2005) (discussing the impact the *Bridgeport* decision would have on future music production).

227. See, e.g., NIMMER & NIMMER, *supra* note 48 (noting issues with the Sixth Circuit's analysis in *Bridgeport*); Courtney Bartlett, *Bridgeport Music's Two-Second Sample Rule Puts the Big Chill on the Music Industry*, 15 DEPAUL-LCA J. ART & ENT. L. 301, 320–21 (2005) (discussing how the *Bridgeport* decision stifles creativity and causes uncertainty in the music industry).

1. *Not all copying is substantial and the Ninth Circuit recognizes it*

The most important argument for accepting the Ninth Circuit's analysis is not necessarily a new one. The Ninth Circuit correctly recognized that the de minimis exception is consistent with the Act's long-standing principle that copying must be "substantial" to be actionable.<sup>228</sup> The Sixth Circuit's *Bridgeport* opinion failed to address this issue.<sup>229</sup> Following this decision, the leading copyright treatise, *Nimmer on Copyright*, criticized the Sixth Circuit for failing to acknowledge this basic concept.<sup>230</sup> Conversely, the Ninth Circuit squarely addressed this fundamental principle and resolved the case accordingly.<sup>231</sup>

An underlying principle of the Act is that appropriation of another's work must be "substantial" to be actionable infringement.<sup>232</sup> The "substantial" nature of improper copying is an integral element to pleading a prima facie case of copyright infringement.<sup>233</sup> The plaintiff must demonstrate that the defen-

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228. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (stating that trivial copying does not rise to the level of substantial and is noninfringing); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 84 (6th Cir. 1943) ("From numerous cases it may be concluded that in order to sustain an action for infringement of copyright, a substantial copy of the whole, or a material part, must be reproduced."); NIMMER & NIMMER, *supra* note 48 (stating "slight or trivial similarities are not substantial and are therefore noninfringing"); see also *Gordon v. Nextel Commc'ns & Mullen Advert.*, 345 F.3d 922, 924 (6th Cir. 2003) ("In determining whether the allegedly infringing work falls below the quantitative threshold of substantial similarity to the copyrighted work, courts often look to the amount of the copyrighted work that was copied . . ."); *Straus v. DVC Worldwide, Inc.*, 484 F. Supp. 2d 620, 639 (S.D. Tex. 2007) (stating copyright infringement law will not impose legal consequences if unauthorized copying is sufficiently trivial).

229. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 397-402 (6th Cir. 2004).

230. NIMMER & NIMMER, *supra* note 48, § 13.03[A][2][b].

231. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883-84 (9th Cir. 2016).

232. *Ringgold*, 126 F.3d at 74; *Mathews Conveyor Co.*, 135 F.2d at 84; NIMMER & NIMMER, *supra* note 48; see also *Gordon*, 345 F.3d at 924; *Straus*, 484 F. Supp. 2d at 639.

233. Generally, the prima facie elements of a copyright infringement claim require the plaintiff to demonstrate ownership of a valid copyright and copying of constituent elements of the work that are original. *Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). In the absence of direct evidence of copying, however, the plaintiff may prove the second element by demonstrating access and substantial similarity. See, e.g., *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006); *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 316 (6th Cir. 2004); *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996).



dant's appropriation of the plaintiff's work creates "substantial similarity" between the two works.<sup>234</sup> Generally, the de minimis exception functions as a gatekeeper in other forms of copyright infringement actions — such as photography, children's stories, advertisements, and board games.<sup>235</sup>

As previously noted, the Sixth Circuit's *Bridgeport* analysis is devoid of any discussion regarding how the Act defines substantial appropriation.<sup>236</sup> Regardless of the depth of its discussion, the Sixth Circuit's bright-line rule effectively removes this integral element from copyright infringement cases.<sup>237</sup> It substitutes a foundational, substantive principle of copyright law for an irrelevant procedural question. Conversely, the Ninth Circuit's analysis recognized the issue and flaw in the Sixth Circuit's reasoning.<sup>238</sup> It correctly recognized that there must be substantial appropriation for infringement to be actionable.<sup>239</sup> Accordingly, the Ninth Circuit's decision in *VMG Salsoul* sets forth an analysis that is doctrinally compatible with the Act.

## 2. *The Ninth Circuit's superior, holistic construction*

The Ninth Circuit applied a holistic statutory construction approach to discern congressional intent.<sup>240</sup> When interpreting a

234. See, e.g., *Tanikumi v. Walt Disney Co.*, 616 F. App'x 515, 519–21 (3d Cir. 2015) (affirming the trial court's grant of defendant's motion to dismiss because plaintiff failed to establish substantial similarity between the two works at issue); *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 275–76 (6th Cir. 2010) (affirming trial court's grant of defendant's motion for summary judgment for lack of substantial similarity).

235. See *Gordon*, 345 F.3d at 925 (applying the de minimis doctrine to artist renditions of medical illustrations); *Newton v. Diamond*, 388 F.3d 1189, 1191, 1195 (9th Cir. 2003) (applying the de minimis analysis to a musical composition); *Castle Rock Entm't, Inc. v. Carol Publ'g Grp.*, 150 F.3d 132, 138–39 (2d Cir. 1998) (applying the de minimis analysis to a trivia game based off of the television show *Seinfeld*); *Gottlieb Dev., LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 631–33 (S.D.N.Y. 2008) (applying the de minimis principle to the use of a pinball machine in a movie scene); *Prima v. Darden Rests. Inc.*, 78 F. Supp. 2d 337, 350 (D.N.J. 2000) (applying the de minimis principle to a television commercial advertisement).

236. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 397–402 (6th Cir. 2004).

237. See *Funky Films, Inc.*, 462 F.3d at 1076; *Murray Hill Publ'ns, Inc.*, 361 F.3d at 316; *Williams*, 184 F.3d at 587; *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975).

238. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883 (9th Cir. 2016).

239. *Id.* at 883–84.

240. See *id.*

statute, depending on the court's preference, the court will look to the plain meaning of the statute, legislative intent, and/or other potential identifying characteristics, such as the title or location of the provision within the larger statutory scheme.<sup>241</sup> Critics argued that the *Bridgeport* analysis was incomplete because it failed to apply the plain meaning of § 114(b) properly, to use the legislative history, and to consider the provision's location within the United States Code.<sup>242</sup> The Ninth Circuit takes each of these elements into account and reaches a better result.<sup>243</sup>

First, the Ninth Circuit's plain meaning analysis of § 114(b) did not read extra judicial limits into the statute.<sup>244</sup> Section 114(b)'s plain language places no limits on the use of the de minimis principle;<sup>245</sup> looking to the text, there is no language that expressly or implicitly limits the use of the de minimis exception in sound sampling cases.<sup>246</sup> It is difficult to fathom why Congress would choose to abrogate a bedrock principle of copyright law without a single explicit or implicit reference.<sup>247</sup> The Sixth Circuit's analysis effectively interprets a statutory limit with no basis. Conversely, the Ninth Circuit's plain meaning

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241. When engaging in statutory interpretation courts should:

give effect to legislative intent; look first to the 'ordinary, plain meaning' of the language; do not add or delete language; do not apply forced or subtle interpretations; keep in mind the statutory context; consider the purpose, aim, or policy of the Legislature; avoid constructions inconsistent with common sense; [and] presume that each section is to work harmoniously with others.

*TransCare Md., Inc. v. Murray*, 64 A.3d 887, 891 (Md. 2013); see also *Student Loan Fund of Idaho, Inc. v. U.S. Dep't. of Educ.*, 272 F.3d 1155, 1165 (9th Cir. 2001) (stating that a court should first engage in a textual analysis of the statute and, if the statutory language is unclear, use the legislative history to aid in statutory interpretation).

242. See, e.g., M. Leah Somoano, *Bridgeport Music, Inc. v. Dimension Films: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?*, 21 BERKELEY TECH. L.J. 289, 302-06 (2006); Schietinger, *supra* note 226, at 232-33; Kersting, *supra* note 226, at 683-85.

243. *VMG Salsoul, LLC*, 824 F.3d at 882-84.

244. *Id.*

245. See 17 U.S.C. § 114 (2016).

246. See *id.*; see also *NIMMER & NIMMER*, *supra* note 48, § 13.03[A][2][b] (noting that the plain-meaning statutory construction of the Section 114(b), from which the Sixth Circuit derived its analysis, only states that the person who makes a "sound alike" recording is exempt from liability).

247. See 17 U.S.C. § 114.

analysis recognized the absence of language limiting the use of the de minimis exception and sought further guidance.<sup>248</sup>

Second, the Ninth Circuit correctly recognized Congress's intent. In the wake of *Bridgeport*, the Sixth Circuit was criticized for failing to utilize any legislative history to justify its interpretation.<sup>249</sup> The Ninth Circuit addressed and considered the House Report on § 114(b),<sup>250</sup> whereas the Sixth Circuit did not consult any legislative history.<sup>251</sup> The House Report confirms infringement upon a copyright owner's exclusive sound recording rights is only actionable if it is substantial.<sup>252</sup> In relevant part, the House Report regarding § 114 states:

infringement takes place whenever *all or any 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 audiovisual work.<sup>253</sup>

Although the House Report's language does not expressly direct courts to apply the de minimis test in copyright actions involving sound records, it does state that infringement takes place when "any substantial portion" is taken.<sup>254</sup> This language is consistent with the basic principle that copying must be substantial to be actionable.<sup>255</sup> Thus, the House Report confirms Congress's intent to apply the substantial copying requirement

248. *VMG Salsoul, LLC*, 824 F.3d at 882–84.

249. See, e.g., *Somoano*, *supra* note 242; *Schietinger*, *supra* note 226, at 232–33; *Kersting*, *supra* note 226, at 683–86.

250. *VMG Salsoul, LLC*, 824 F.3d at 883.

251. *Bridgeport Music Inc. v. Dimension Films*, 401 F.3d 647, 799–805 (6th Cir. 2005).

252. H.R. Rep. No. 94-1476, at 106 (1976).

253. *Id.* (emphasis added).

254. *Id.*

255. See, e.g., *Gordon v. Nextel Commc'ns and Mullen Advert.*, 345 F.3d 922, 924 (6th Cir. 2003); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).

to sound sampling cases.<sup>256</sup> The Ninth Circuit correctly applied Congress's intent.

Finally, to discern more clearly Congress's intent, the Ninth Circuit examined the statutory layout, looking to § 114(b)'s location within the broader statutory framework of Title 17.<sup>257</sup> The Sixth Circuit was criticized for failing to reason that § 114 was a statute limiting copyright holder rights rather than expanding them.<sup>258</sup> The Ninth Circuit addressed this issue by utilizing Title 17's statutory framework.<sup>259</sup> Section 106 sets forth the general protections afforded to copyright owners.<sup>260</sup> As the first sentence of § 106 denotes, §§ 107 through 122 state the exact scope of protection afforded to each type of copyrightable material.<sup>261</sup> Therefore, §§ 107 through 122 provide limitations and qualifications to the general rights afforded to copyright holders under § 106.<sup>262</sup> Additionally, the plain language of § 114 heavily limits the rights set forth in § 106.<sup>263</sup> Subsection (a) of § 114 states: "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)."<sup>264</sup> Based on § 114's location among other limiting statutes and plain language, the Ninth Circuit correctly concluded that § 114(b) was a limiting statute.<sup>265</sup> Accordingly, the Ninth Circuit provided a more complete and doctrinally consistent construction of § 114(b).<sup>266</sup>

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256. H.R. Rep. No. 94-1476, at 106 (1976).

257. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883 (9th Cir. 2016).

258. *NIMMER & NIMMER*, *supra* note 48, § 13.03[A][2][b].

259. *VMG Salsoul, LLC*, 824 F.3d at 882-84.

260. Section 106 is entitled "Exclusive rights in copyrighted works." 17 U.S.C. § 106 (2016).

261. *Id.* (citation omitted) ("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 . . .").

262. See *id.* (demonstrating that § 106 provides the general rights of copyright holders while §§ 107 through 122 limit the rights of copyright holders); see also *NIMMER & NIMMER*, *supra* note 48, § 13.03[A][2][b] (noting that § 114(b) is a statute of limitation).

263. See 17 U.S.C. § 114 (2016).

264. *Id.* § 114(a) (citations omitted).

265. See *id.*; see also *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 882-84 (9th Cir. 2016); *NIMMER & NIMMER*, *supra* note 48, § 13.03[A][2][b].

266. See *VMG Salsoul, LLC*, 824 F.3d at 882-84.

While the Sixth Circuit drew its own conclusions from a single word in the statute, the Ninth Circuit considered numerous sources to discern congressional intent.

3. *Straying from the path – Addressing the counterarguments to the Ninth Circuit’s holistic statutory construction*

The Sixth Circuit’s statutory construction in *Bridgeport* strayed far from its usual statutory construction analysis.<sup>267</sup> The counterargument to the Ninth Circuit’s interpretation is that strict statutory construction, which only considers the statute’s text, is a valid interpretation method.<sup>268</sup> The Sixth Circuit’s construction in *Bridgeport*, however, does not receive deference because it fails to comport with the Sixth Circuit’s standard statutory interpretation procedure.

The Sixth Circuit follows a text-focused method of statutory construction, only looking beyond the statutory text when it finds the text ambiguous.<sup>269</sup> When the Sixth Circuit finds an ambiguity in a statute’s text, it consistently uses the statute’s legislative history to determine the meaning.<sup>270</sup> In *Bridgeport*, the

267. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799–801 (6th Cir. 2005) (stating in its amended opinion that it relied on the Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) in its statutory construction).

268. *See, e.g., Olden v. LaFarge Corp.*, 383 F.3d 495, 502 (6th Cir. 2004); *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56 (2012).

269. *See Olden*, 383 F.3d at 502 (“Rules of statutory construction teach that generally a court cannot consider the legislative history of a statute in interpreting its meaning unless the statute is ambiguous.”); *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 988 (6th Cir. 2000) (“When a statute is unambiguous, resort to legislative history and policy considerations is improper.”); *In re Lucas*, 924 F.2d 597, 600 (6th Cir. 1991) (“It is an axiom of statutory construction that resort to legislative history is improper when a statute is unambiguous.”). *But see In re Vause*, 886 F.2d 794, 801 n.11 (6th Cir. 1989) (citing *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1183 (6th Cir. 1982), *aff’d*, 464 U.S. 165 (1984)) (“Even when the statutory language appears plain, the legislative history must nevertheless be examined to ascertain congressional intent.”).

270. *See Olden*, 383 F.3d at 502–03 (considering statutory language in conjunction with the statute’s legislative history); *Montgomery v. Huntington Bank*, 346 F.3d 693, 700 (6th Cir. 2003) (discussing the Sixth Circuit’s previous interpretation of a statute by using its legislative history); *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 988–89 (applying the legislative history to resolve a statutory ambiguity); *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924, 926–27 (6th Cir. 2000) (stating that legislative history is applicable because of ambiguous statutory text).

Sixth Circuit did not state whether it found § 114(b)'s text ambiguous.<sup>271</sup> Rather, it quickly concluded that the word "entirely" in § 114(b) made all unlicensed sound sampling actionable.<sup>272</sup> The Sixth Circuit, however, must have found an ambiguity in § 114(b)'s text because it looked beyond its text to that of the Sound Recording Act of 1971 during its panel rehearing.<sup>273</sup> This raises the question: Why did the Sixth Circuit dismiss the Act's legislative history in favor of a different act with no on-point commentary?

Although the Sixth Circuit explained that it chose not to review the legislative history because sound sampling technology did not exist in 1971,<sup>274</sup> this reasoning is unpersuasive. In the broad range of statutes the court has constructed over the years, the Sixth Circuit has never declined to review legislative history simply because of technological advancements.<sup>275</sup> A potentially more troubling issue is whether the Sixth Circuit included a citation to the previous draft of the Sound Recording Act of 1971 to squeeze its doctrine into previously decided case law.<sup>276</sup> As noted earlier, the original *Bridgeport* opinion did not cite to any source justifying its construction of § 114(b).<sup>277</sup> Instead, the citation to the Sound Recording Act of 1971 only appeared after amendment on rehearing.<sup>278</sup> Regardless of whether it was a faulty construction analysis or an *ex post* attempt at bolstering, the amendment raises serious concerns about the reliability of the Sixth Circuit's statutory construction analysis in *Bridgeport*

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271. *Bridgeport Music, Inc.*, 410 F.3d at 799-801.

272. *Id.*

273. *See id.* (relying on the Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971), in its statutory construction argument).

274. *Id.*

275. *See Olden*, 383 F.3d at 502; *Montgomery*, 346 F.3d at 699-700; *In re Koenig Sporting Goods, Inc.*, 203 F.3d at 988-89; *Wheeling-Pittsburgh Steel Corp.*, 221 F.3d at 926-27; *In re Lucas*, 924 F.2d 597, 600 (6th Cir. 1991); *In re Vause*, 886 F.2d 794, 801 n.11 (6th Cir. 1989).

276. *Compare Bridgeport Music, Inc.*, 410 F.3d at 799-801 (including a citation to the Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971)), *with Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 2004) (omitting any reference to a supporting authority).

277. *Compare Bridgeport Music, Inc.*, 410 F.3d at 800-01, *with Bridgeport Music, Inc.*, 383 F.3d at 398.

278. *Bridgeport Music, Inc.*, 410 F.3d at 801.

and lends credence to the Ninth Circuit's decision in *VMG Salsoul*. Therefore, the counterargument that the Sixth Circuit's plain meaning interpretation is valid is flawed.

#### 4. *VMG Salsoul – A doctrinally stronger decision*

When comparing *Bridgeport* and *VMG Salsoul*, it is evident *VMG Salsoul* addresses and resolves the deficiencies critics recognize in *Bridgeport*. Moreover, the *VMG Salsoul* analysis furthers the Act's overall goals. Therefore, the Ninth Circuit's in-depth analysis in *VMG Salsoul* provides the correct doctrinal argument. While the doctrinal reasoning alone should be sufficient to persuade the average person that the de minimis exception belongs in sound sampling actions, some—like Judge Silverman—still believe it does not.<sup>279</sup>

##### B. *Judge Silverman's Dissent – No New Ammunition for the Bridgeport Analysis*

In his dissent, Judge Silverman agreed with the Sixth Circuit that the de minimis exception should not apply to copyright infringement cases involving sound sampling.<sup>280</sup> Aside from the Sixth Circuit's arguments addressed above, Judge Silverman pushed two main arguments: (1) sampling is a physical taking, and (2) congressional silence in the wake of the *Bridgeport* decision should yield deference to *Bridgeport*.<sup>281</sup>

##### 1. *Physical versus intellectual – Dismissive to producers and arbitrary at best*

Judge Silverman's disgust for the use of the de minimis exception in sound sampling cases is premised on the notion that sampling is a physical—rather than an intellectual—appropriation.<sup>282</sup> There are two major issues, however, with this charac-

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279. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 888–90 (9th Cir. 2016) (Silverman, J., dissenting).

280. *Id.*

281. *Id.*

282. *Id.*

terization: (1) Judge Silverman's fixation on the fixed nature of sound recording ignores the underlying intellectual property, and (2) the physical nature of sampling is merely arbitrary judicial line drawing.

- a. Focusing on the fixed aspect of sound recordings oversimplifies the intellectual power required to create the source recording

Judge Silverman's characterization of sampling as merely a physical appropriation is an oversimplification of recording and ignores the extensive knowledge required to create a polished recording.<sup>283</sup> Recording is not merely a means of preserving audio but also a complex art form requiring specialized knowledge.<sup>284</sup> In fact, numerous top universities around the country offer bachelor's and master's degrees in recording and production.<sup>285</sup> Recording requires an incredibly in-depth knowledge about sophisticated recording programs, sound dynamics, microphone technology, and a general creative and technological aptitude.<sup>286</sup> Much like a songwriter uses personal

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283. *Id.*

284. See, e.g., Jesse McKinley, *To See Recorded Music as an Art Form*, N.Y. TIMES (Oct. 30, 2002), <http://www.nytimes.com/2002/10/30/arts/to-see-recorded-music-as-an-art-form.html>.

285. *Bachelor of Music in Music Production and Engineering*, BERKLEE C. MUSIC, <https://www.berklee.edu/mpe/major> (last visited Jan. 31, 2018) [hereinafter *Berklee Musical Engineering Degree*] (advertising bachelor's and master's degree programs in music production); *Music Industry*, DREXEL U., [http://catalog.drexel.edu/undergraduate/collegeofmediaartsanddesign/musicindustry/?\\_ga=1.78333654.334737428.1457376285](http://catalog.drexel.edu/undergraduate/collegeofmediaartsanddesign/musicindustry/?_ga=1.78333654.334737428.1457376285) (last visited Jan. 31, 2018) (advertising a bachelor's degree program in "Music Industry" with a focus in "Recording Arts and Music Production"); *Music Technology Programs*, N.Y.U., <https://steinhardt.nyu.edu/inquiry/musitech-2015> (last visited Jan. 31, 2018) (advertising bachelor's and master's degree programs in music technology to teach students how to produce music and "explor[e] the cutting edge of technology and music.").

286. Pro Tools, one of the most popular music production programs, has a 1342-page "Reference Guide" for users. AVID TECH., INC., PRO TOOLS REFERENCE GUIDE VERSION 12.6.1 (2016), [http://akmedia.digidesign.com/support/docs/Pro\\_Tools\\_Reference\\_Guide\\_12.6.1\\_94324.pdf](http://akmedia.digidesign.com/support/docs/Pro_Tools_Reference_Guide_12.6.1_94324.pdf). Shure, a leading manufacturer of recording and performance microphones, offers a 40-page beginner's guide to recording with microphones. GINO SIGISMONDI ET AL., MICROPHONE TECHNIQUES FOR RECORDING (2014), [http://cdn.shure.com/publication/upload/837/microphone\\_techniques\\_for\\_recording\\_english.pdf](http://cdn.shure.com/publication/upload/837/microphone_techniques_for_recording_english.pdf). *Home Recording for Musicians for Dummies* provides 384 pages of "simple explanations" for beginners. JEFF STRONG, HOME RECORDING FOR MUSICIANS FOR DUMMIES 1 (5th ed. 2014); see also *Audition*, BERKLEE C. MUSIC,



specialized knowledge of scales, tones, and song structure to compose a piece of music,<sup>287</sup> a recording engineer uses personal specialized knowledge of recording software and sound dynamics to capture a piece of music.<sup>288</sup> Like a musical artist copying another artist's melody to build on that artist's unique style, a producer will sample another producer's sound recording to build on that producer's unique style of production.<sup>289</sup> Thus, to reduce sampling merely to a physical taking ignores the underlying specialized knowledge integral to the recording process.

In response, one might argue the overprotection of the Sixth Circuit's bright-line rule makes sense because sound recordings *do* require such specialized knowledge to create. When the focus is placed on the intellectual underpinnings of recording, however, the Sixth Circuit's bright-line rule makes little sense when applied to sampling.<sup>290</sup> In *Gordon v. Nextel Communica-*

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<https://www.berklee.edu/admissions/undergraduate/audition> (last visited Jan. 31, 2018) (requiring students to perform an audition to gain admission into the undergraduate program).

287. See *Songwriting*, BERKLEE C. MUSIC, <https://www.berklee.edu/songwriting> (last visited Jan. 31, 2018) (offering a bachelor's degree in song writing, which "focus[es] on [developing] melody writing, harmonic techniques, and lyric structur[ing]" skills).

288. See *Berklee Musical Engineering Degree*, *supra* note 285 (stating that the music production program gives its students the specialized knowledge to "multitrack record, overdub, edit, and mix both live ensemble and electronically produced sources" and "multitrack record, overdub, edit, and mix using complex analog and digital audio systems").

289. "Throughout history, composers such as Bach, Handel, Mozart, Beethoven, and Tchaikovsky borrowed from their predecessors to create new compositions." Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 94 (2007) (citing GEORGE GROVE ET AL., *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS* 5–41 (Stanley Sadie ed., 2d ed. 2001)); see TRAVIS SCOTT, *Through the Late Night*, on BIRDS IN THE TRAP SING MCKNIGHT (Epic Recs. 2016) (using a rhythmic pattern identical to Kid Cudi's famous song "Day 'N' Nite (nightmare)"); MARK RONSON, *Uptown Funk* (feat. Bruno Mars), on UPTOWN SPECIAL (RCA 2015) (taking the rhythmic pattern and rhyming scheme of Trinidad James's "All Gold Everything"); J COLE, *No Role Modelz*, on 2014 FOREST HILLS DRIVE (Columbia 2014) (sampling a speech made by President George W. Bush); THE CONTORTIONIST, *The Parable*, on LANGUAGE (Ent. One Music 2014) (sampling a talk by Alan Watts on voluntary and involuntary actions to add an ethereal feel to the end of the song and album); FIT FOR AN AUTOPSY, *When the Bulbs Burn Out*, on THE GREAT COLLAPSE (Ent. One Music 2017) (sampling Leonardo DiCaprio's testimony before Congress on climate change to create a feeling of despondency); VEIL OF MAYA, *Punisher*, on ECLIPSE (Sumerian Recs. 2012) (sampling a YouTube video at 2:02 that parodies their musical style); *Discover Music Through Samples Covers and Remixes*, *supra* note 21 (demonstrating a collection of over 489,000 songs and 164,000 artists who have used samples to create a new song).

290. Compare *Gordon v. Nextel Comms.*, 345 F.3d 922, 924 (6th Cir. 2003) (copying of plaintiff's physical artwork was *de minimis*), with *Bridgeport Music, Inc. v. Dimension Films*, 383

tions, the plaintiff medical artist brought a copyright infringement suit against an advertising agency for airing a television advertisement containing two of his copyrighted illustrations.<sup>291</sup> The defendant took exact copies of two of the plaintiff's medical illustrations, enlarged them, and displayed them in a television advertisement.<sup>292</sup> The Sixth Circuit held this use was de minimis.<sup>293</sup> Compare *Gordon* to the Sixth Circuit's decision in *Bridgeport*, where the defendant took a three-note sample from plaintiff's song, lowered the pitch, and added it to the background of the defendant's song.<sup>294</sup> In both instances, the creator of the work used specialized knowledge to create a copyrightable work in a *fixed* medium.<sup>295</sup> The defendant in each case took the fixed medium, slightly altered it, and used it in another creation.<sup>296</sup> There is no factual difference between the two cases besides one involving a sound wave and the other, an illustration.<sup>297</sup> In *Gordon*, the defendant incurred no liability based on the de minimis exception; in *Bridgeport*, the defendant was *per se* liable.<sup>298</sup> The only logical explanation for extending the use of the de minimis exception in *Gordon* and not *Bridgeport* is that the *Bridgeport* court failed to consider properly the intellectual nature of recording.<sup>299</sup> Therefore, the oversimplification of sam-

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F.3d 390, 399 (6th Cir. 2004) (copying plaintiff's fixed sound recording does not qualify for the de minimis principle).

291. *Gordon*, 345 F.3d at 923.

292. *Id.*

293. *Id.* at 924.

294. *Bridgeport Music, Inc.*, 383 F.3d at 394.

295. *Gordon*, 345 F.3d at 924 (finding that defendant reproduced plaintiff's artwork that was in a fixed medium); *Bridgeport Music, Inc.*, 383 F.3d at 394-96 (finding that defendant sampled the plaintiff's fixed sound recording).

296. *Gordon*, 345 F.3d at 924 (finding that defendant enlarged plaintiff's original illustration); *Bridgeport Music, Inc.*, 383 F.3d at 394 (finding that defendant lowered the pitch of the sampled section and transformed it into a looping pattern).

297. Compare *Gordon*, 345 F.3d at 924 (copying plaintiff's physical artwork), with *Bridgeport Music, Inc.*, 383 F.3d at 394 (copying plaintiff's fixed sound recording).

298. Compare *Gordon*, 345 F.3d at 924 (holding that defendant's copying was de minimis), with *Bridgeport Music, Inc.*, 383 F.3d at 394-96 (holding that de minimis exception did not apply to defendant's copying and therefore the defendant was liable for infringement).

299. Additionally, compare the appropriation that occurred in *Gottlieb Development, LLC v. Paramount Pictures Corp.*, with the appropriation in *Bridgeport*. In *Gottlieb*, the court held that the

pling to only a physical appropriation is illogical. Sampling involves an intellectual appropriation and therefore should be treated like all other forms of intellectual appropriation.

b. Physical versus intellectual is merely arbitrary line drawing

The “physical versus intellectual” distinction is merely arbitrary line drawing without any real purpose. The “physical” aspect of digital sampling is not exclusive to the digital sampling issue.<sup>300</sup> Using this premise to exclude the de minimis exception from sound recordings serves no logical purpose.

For example, consider a digital artist who likes a particular design incorporated as part of a digital rendering made in Photoshop.<sup>301</sup> To build on the original work, the artist takes a screenshot of the digital rendering, crops a section containing the desired design, and pastes the small pattern into a larger digital painting the artist is creating. Next, imagine the artist takes the same steps as above, but instead of the original picture being a digital rendering made in Photoshop, it is a digital picture of a physical design. In both cases, the end result is identical.

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defendant’s use of the plaintiff’s actual copyrighted pinball machine in its movie was de minimis. 590 F. Supp. 2d 625, 631–33 (S.D.N.Y. 2008). In this instance, the defendants physically placed the plaintiff’s actual pinball machine in their movie. *Id.* Now compare this to *Bridgeport*, where the plaintiff sampled and altered two seconds of a guitar solo. *Bridgeport Music, Inc.*, 383 F.3d at 394. Even if one subscribes to the “physical versus intellectual” distinction, these cases are irreconcilable. If the inquiry for copyright infringement was truly focused on this physical versus intellectual distinction, the pinball machine appropriation in *Gottlieb* would be one of the most egregious examples, but it is not.

300. See *Gordon*, 345 F.3d at 924 (finding the use of exact copies of plaintiff’s medical illustrations was de minimis); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268 (5th Cir. 1988) (holding that the use of thirty characters out of fifty pages of source code was not significant); *Gottlieb Dev., LLC*, 590 F. Supp. 2d at 632 (finding that use of plaintiff’s actual physical pinball machine in a movie was de minimis); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1522, 1559 (M.D. Fla. 1993) (considering the de minimis principle where defendant used plaintiff’s photographs in its newspaper, but ultimately concluding the use was too significant to qualify for the exception).

301. Photoshop is software that allows the user to “[c]reate and enhance photographs, illustrations, and 3D artwork; [d]esign websites and mobile apps; [and] [e]dit videos, simulate real-life paintings, and more.” *Adobe Photoshop CC*, ADOBE SYS. INC., <http://www.adobe.com/products/photoshop.html> (last visited Mar. 11, 2018) (alteration in original).

A court that precludes the de minimis exception based solely on the “physical” and “intellectual” distinction would find infringement in the first hypothetical situation—but not the second. Technically, the “fixed medium” was copied in the first hypothetical because the original work’s source was a digital rendering. Thus, any distinction in this scenario is arbitrarily placing form over substance. As the Supreme Court has held, copyrights protect expression, not the physical product.<sup>302</sup> While it sounds persuasive, the argument based on sampling being a “physical” taking is merely an exercise in arbitrary line drawing and places form over substance.

2. *Congressional silence is not dispositive, nor should it be read as an endorsement of the Bridgeport decision*

Congressional silence in the wake of the *Bridgeport* decision is not an endorsement of the Sixth Circuit’s rule. Judge Silverman asserts Congress’s silence in the wake of *Bridgeport* should be construed as evidence of an implicit acceptance of the Sixth Circuit’s bright-line rule.<sup>303</sup> This is ultimately a hollow argument because, as the Supreme Court held and as Judge Silverman conceded, “congressional inaction in the face of judicial interpretation is not ironclad evidence of Congressional approval.”<sup>304</sup> Nonetheless, Judge Silverman still believes Congress’s inaction is not “chopped liver”;<sup>305</sup> though in reality—considering the surrounding circumstances—Congress’s inaction is nothing more.

The Supreme Court has often hesitated to accept congressional inaction as evidence affirming a court’s statutory con-

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302. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

303. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 888–89 (9th Cir. 2016) (Silverman, J., dissenting).

304. *Id.* at 889; *see also* *Alexander v. Sandoval*, 532 U.S. 275, 292–93 (2001); *Patterson v. McKean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (quoting *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 671–72 (1987)) (Scalia, J., dissenting) (“It is ‘impossible to assert with any degree of assurance that congressional failure to act represents’ affirmative congressional approval of the Court’s statutory interpretation.”).

305. *VMG Salsoul, LLC*, 824 F.3d at 889.

struction.<sup>306</sup> Speaking on the issue of congressional inaction, the Supreme Court has stated, “As a general matter . . . [the] argumen[t] deserve[s] little weight in the interpretive process.”<sup>307</sup> In one instance, however, the Court did infer congressional intent from congressional silence.<sup>308</sup>

In *Merrill Lynch*, the Court inferred congressional intent to ratify lower court decisions regarding a particular statutory provision when Congress comprehensively revised the statutory scheme but did not amend the specific provision.<sup>309</sup> *Bridgeport*, however, differs significantly from *Merrill Lynch*. In *Merrill Lynch*, the Court noted Congress comprehensively revised the statute in question, which broadened “its coverage and increased the penalties for violations of its provisions.”<sup>310</sup> On the other hand, Congress has not comprehensively revised Title 17 since the *Bridgeport* decision,<sup>311</sup> and the relevant portions of Title 17 have only been amended three times.<sup>312</sup> In fact, each time Congress amended Title 17, it either amended unrelated subsections or fixed technical cross-references.<sup>313</sup> Specifically, Congress’s only amendment to § 114(b) fixed an internal cross-reference.<sup>314</sup> Therefore, unlike in *Merrill Lynch*, where Congress

306. *Alexander*, 532 U.S. at 292–93; *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994); *Patterson*, 491 U.S. at 175 n.1; *Johnson*, 480 U.S. at 671–72. *But see* *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381–82 (1982) (inferring congressional intent to ratify lower court decisions regarding a particular statutory provision when Congress comprehensively revised the statutory scheme but did not amend the relevant provision).

307. *Cent. Bank of Denver, N.A.*, 511 U.S. at 187.

308. *Merrill Lynch*, 456 U.S. at 381–82.

309. *Id.*

310. *Id.* at 365–66; see An Act to Amend the Commodity Exchange Act to Strengthen the Regulation of Futures Trading, to Bring All Agricultural and Other Commodities Traded on Exchanges Under Regulation, and for Other Purposes, Pub. L. No. 93–463, 88 Stat. 1389 (1974).

311. See Copyright Cleanup, Clarifications, and Corrections Act of 2010, Pub. L. No. 111–295, 124 Stat. 3180; Webcaster Settlement Act of 2009, Pub. L. No. 111–36, 123 Stat. 1926; Webcaster Settlement Act of 2008, Pub. L. No. 110–435, 122 Stat. 4974; *Preface*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/title17/92preface.html> (last visited Jan. 31, 2018).

312. See generally 124 Stat. at 3180 (amending certain provisions for technical corrections, clarifications on wording, and repealing expired provisions); 123 Stat. at 1926 (amending only Section 114(f)(5)); 122 Stat. at 4974 (amending only Section 114(f)(5)); U.S. COPYRIGHT OFF., *supra* note 311.

313. 124 Stat. at 3180; 123 Stat. at 1926; 122 Stat. at 4974.

314. 124 Stat. at 3180 (“(f) CORRECTION OF INTERNAL REFERENCES. — (1) Section 114(b)

made comprehensive statutory changes but left the provision at issue untouched, here, Congress only made isolated amendments to Title 17.<sup>315</sup> As the Supreme Court stated, where Congress “has made only isolated amendments . . . [i]t is “impossible to assert with any degree of assurance that congressional failure to act represents” affirmative congressional approval of the Court’s statutory interpretation.”<sup>316</sup> Therefore, Judge Silverman’s argument that Congress’s silence on the *Bridgeport* decision should be taken as evidence of a congressional endorsement of *Bridgeport*’s decision is without merit.

### 3. *No good justifications for a bad doctrine*

Judge Silverman’s dissent does not provide any further justification for the Sixth Circuit’s bright-line rule. His argument for sampling being a physical rather than an intellectual taking is nothing more than a failure to recognize recording’s intellectual underpinnings and is arbitrary line drawing. Moreover, Congress’s silence on the *Bridgeport* decision fails to lend support to Judge Silverman’s argument due to a lack of a comprehensive statutory overhaul.

#### C. *“Get a License or Do Not Sample” Sets the Wrong Policy*

The Sixth Circuit’s decision in *Bridgeport* sets the wrong policy in copyright infringement actions for two principal reasons. First, the Sixth Circuit’s bright-line rule inherently values the “property” aspect of “intellectual property” more than the “intellectual” aspect. Second, copyright law generally does not favor the use of bright-line rules in its analyses.

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is amended by striking ‘118(g)’ and inserting ‘118(f).’”).

315. Compare *Merrill Lynch*, 456 U.S. at 365–66 (inferring congressional intent to adopt lower court’s construction where there was a major statutory overhaul and congressional silence on the issue), and 88 Stat. at 1389 (amending the original act to expand coverage and penalties), with 124 Stat. at 3180 (amending certain provisions for technical corrections, clarifications on wording, and repealing expired provisions), and 123 Stat. at 1926 (amending only Section 114(f)(5)), and 122 Stat. at 4974 (amending only Section 114(f)(5)).

316. *Alexander v. Sandoval*, 532 U.S. 275, 292–93 (2001) (quoting *Johnson v. Transp. Agency*, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting)).

### 1. Taking the intellectual out of intellectual property

The Ninth Circuit's decision in *VMG Salsoul* sets the correct policy because it does not value the physical more than the intellectual substance. Perhaps the most important reason for adopting the Ninth Circuit's analysis is one not directly stated in either opinion. The Sixth Circuit's bright-line rule requiring a license to sample sends the message that the physical recording is more valuable than the composition. This message creates a valuation that is incompatible with the underlying principles of intellectual property law.

As previously noted, the de minimis exception is used extensively in copyright infringement cases that involve other forms of media—including television, movies, and books.<sup>317</sup> In each decision to apply the de minimis exception, there is an underlying policy determination, which balances the value of the new creation against the original owner's rights.<sup>318</sup> By declining to apply the de minimis exception to sound sampling cases, the Sixth Circuit removed this valuation from all future sound sampling decisions. What the *Bridgeport* court did was create a *per se* valuation stating that the fixed nature of a sound recording outweighs *all* future creative uses.<sup>319</sup> This is problematic because it implies that the creator's underlying production has no value and that the value of the creator's production is the tangible audio wave that comes from the creator's intellectual efforts.<sup>320</sup>

317. See *Gordon v. Nextel Commc'ns and Mullen Advert.*, 345 F.3d 922, 924-25 (6th Cir. 2003); *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003), *amended and superseded by* 388 F.3d 1189, 1191 (9th Cir. 2004); *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 138 (2d Cir. 1998); *Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 632-33 (S.D.N.Y. 2008); *Prima v. Darden Rests.*, 78 F. Supp. 2d 337, 350 (D.N.J. 2000).

318. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (citing H.R. REP. NO. 60-2222, at 7 (1909)); *Wall Data Inc. v. L.A. Cty. Sheriff's Dep't*, 447 F.3d 769, 777 (9th Cir. 2006) (quoting THE FEDERALIST NO. 43, at 267 (James Madison) (New American Library ed. 1961)) (stating that the basic goal of copyright law is "to put copyrighted works to their most beneficial use so that 'the public good fully coincides . . . with the claims of individuals.');" *Matel, Inc. v. Walking Mountain Prod.*, 353 F.3d 792, 799 (9th Cir. 2003) ("At its core, the Act seeks to promote the progress of science and art by protecting artistic and scientific works while encouraging the development and evolution of new works."); Sherman, *supra* note 37, at 4.

319. See *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 2004).

320. *Id.* (valuing the fixed nature over the future creative uses of sound sampling).

At a basic level, this is incompatible with copyright and intellectual property law. It is almost as if the bright-line, “get a license” test takes “intellectual” out of “intellectual property.” The foundations of intellectual property law were laid by the founding fathers who devised methods to protect mapmakers and authors from having their ideas stolen while promoting the education of society.<sup>321</sup> The fundamental goal of these laws was not to prevent others from stealing the paper the authors’ maps were drawn on or the pages their words were printed on, but to protect the composition of ideas and foster creation.<sup>322</sup> When the Sixth Circuit chose the “get a license or do not sample” rule, they inherently chose to value the physical nature of a recording over the underlying intellectual property,<sup>323</sup> a policy valuation that is inconsistent with the goals and original intent of copyright protection.<sup>324</sup> In reality, the “get a license or do not sample” formula presents a conversion claim served in a copyright infringement blanket.<sup>325</sup>

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321. Act of May 31, 1790, ch. XV, § 1, 1 Stat. 124, *repealed by* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075; Douglas M. Nevin, *No Business Like Show Business: Copyright Law, the Theatre Industry, and the Dilemma of Rewarding Collaboration*, 53 EMORY L.J. 1533, 1535 (2004); U.S. COPYRIGHT OFF., *supra* note 28.

322. 1 Stat. 124, 124–26 (granting authors the right to print, re-print, or publish their work for fourteen years, not the right to the paper the information was printed on) (*repealed* 1909); *see also* Marcy Rauer Wagman & Rachel Ellen Kopp, *The Digital Revolution is Being Downloaded: Why and How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, 275 n.11 (2006) (stating that the purpose of copyright law, as stated in the Constitution, is to promote progress of knowledge and learning); Wayne M. Cox, *Rhyming 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, 225 (2015).

323. *See Bridgeport Music, Inc.*, 383 F.3d at 394, 398.

324. *See* 1 Stat. 124, 124–26 (*repealed* 1909); Nevin, *supra* note 321, at 1535–36; U.S. COPYRIGHT OFF., *supra* note 28.

325. “The gist of [a conversion claim] is the exercise, or intent to exercise, dominion or control over the property of another in denial of, or inconsistent with, his or her rights in the property.” Stuart M. Speiser, *Conversion in General*, 7 AM. L. TORTS § 24:1 (2016). Generally, a conversion claim involving intellectual property is preempted by the Act. 17 U.S.C. § 301(a) (2016); *Miller v. Holtzbrinck Publishers, L.L.C.*, 377 F. App’x 72, 73–74 (2d Cir. 2010). Despite federal preemption by the Act, a conversion claim can still exist if the intellectual property is “reduced to a tangible form.” *Quantlab Techs. Ltd. v. Godlevsky*, 719 F. Supp. 2d 766, 778 (S.D. Tex. 2010); *see also* NIMMER & NIMMER, *supra* note 48, § 1.01[B][1][i]. Thus, when the Sixth Circuit formulated its rule, it essentially destroyed the distinction between a copyright infringement claim and a conversion claim.



## 2. *Copyright law has never favored a bright-line rule*

The Ninth Circuit's approach should be adopted because copyright law disfavors bright-line tests. The complexity of intellectual property law stems from the great amount of subjectivity that is inherently involved.<sup>326</sup> Copyright infringement cases require comparing two works to determine if the new work is so similar to the original that copying can be inferred.<sup>327</sup> What one judge may view as insubstantial copying, another may view as an egregious act of appropriation.<sup>328</sup> The "get a license or do not sample" rule attempts to circumvent this issue by drawing a bright line that removes the subjective inquiry for sampling.<sup>329</sup> The interjection of an objective bright-line rule, however, is improper because copyright law disfavors bright-line tests.

Since the Act was passed in 1976, it has never endorsed or encouraged the use of bright-line rules.<sup>330</sup> Additionally, accord-

326. See, e.g., *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) ("[A]n inquiry into the substantial similarity between a copyrighted work and the allegedly infringing work must be made on a case-by-case basis, as there are no bright-line rules . . ."); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1398 (9th Cir. 1997) (noting that the substantial similarity inquiry requires a subjective evaluation of both works); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("The test for infringement of a copyright is of necessity vague . . . [and] [d]ecisions must therefore inevitably be ad hoc.").

327. *NIMMER & NIMMER*, *supra* note 48, § 13.03[A] ("[S]ubstantial similarity between the plaintiff's and defendant's works is an essential element of actionable copying.").

328. See generally *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312 (6th Cir. 2004) (reversing trial court's finding of substantial similarity); *Robinson v. New Line Cinema Corp.*, 211 F.3d 1265 (4th Cir. 2000) (deciding in a two-to-one opinion that a reasonable jury could find infringement); *BellSouth Advert. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 999 F.2d 1436 (11th Cir. 1993) (deciding in a six-to-one opinion that no infringement took place); *North Coast Indus. v. Jason Maxwell, Inc.* 972 F.2d 1031 (9th Cir. 1992) (reversing the trial court's grant of summary judgment in favor of defendant finding that there was enough evidence to have the trier-of-fact determine substantial similarity).

329. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 399 (6th Cir. 2004) ("When [a judge] considers that he has 800 other cases all involving different samples from different songs, the value of a principled bright-line rule becomes apparent.").

330. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1266 (11th Cir. 2001) ("There is no bright line that separates the protectable expression from the nonprotectable idea in a work of fiction."); *Segrets, Inc. v. Gillman Knitware Co., Inc.*, 207 F.3d 56, 65 n.9 (1st Cir. 2000) (rejecting a bright-line test that would allow one to avoid liability by making a set number of changes to a garment); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 71 (2d Cir. 1999) ("Copyright law does not admit of simple, bright-line rules."); *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987) (explaining "[n]o bright line rule exists" for infringement of musical

ing to the leading treatise on copyright law: "No easy rule of thumb can be stated as to the quantum of . . . similarity permitted without crossing the line of substantial similarity."<sup>331</sup> The question whether two works are sufficiently similar to support a finding of infringement has always been a "classic jury question."<sup>332</sup> Thus, to change the inquiry from a subjective comparison between two works to an objective "did he or she get a license consideration" is to fundamentally change basic copyright law principles contrary to the doctrine's basic notions. Although the Sixth Circuit's bright-line test may serve judicial efficiency,<sup>333</sup> efficiency cannot be placed above doctrine. Therefore, because copyright law does not favor bright-line tests, the Ninth Circuit's approach in *VMG Salsoul* should be adopted.

#### CONCLUSION

In conclusion, the split between the Sixth and Ninth Circuits should be resolved by adopting the Ninth Circuit's approach in *VMG Salsoul*. The de minimis exception should apply to copyright infringement cases involving unauthorized sound sampling. The Ninth Circuit's holding is consistent with basic copyright law principles. Moreover, Judge Silverman's dissent in the Ninth Circuit's decision does not provide further justification for the Sixth Circuit's reasoning. Ultimately, the Ninth Circuit's decision sets the right policy.

Copyright infringement is a murky area of law, filled with deep factual inquiries into technical, complex, and abstract ideas. These inquiries often end with widely varying results due to the subjective nature of factual determinations. Bright-line rules can help ease the associated burdens, but they should not be placed above settled doctrine. The case is no different for sound sampling.

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composition).

331. NIMMER & NIMMER, *supra* note 48, § 13.03[A][2][a].

332. *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 943 (10th Cir. 2002), *cert. denied*, 537 U.S. 1066 (2002); *Baxter*, 812 F.2d at 425, *cert. denied*, 484 U.S. 954 (1987); *Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982), *cert. denied*, 459 U.S. 826 (1982).

333. *Bridgeport Music, Inc.*, 383 F.3d at 399.

While a small circuit split on a fairly specific issue may seem insignificant, it is important to remember the real-world issues this split creates. Currently, there are two varying levels of protection for copyright holders. This discrepancy not only fails to provide uniform protection for all but also causes forum shopping. If forum shopping occurs, due justice will not be served, and a copyright holder's rights will either be abused or over-protected. Furthermore, the longer the split lingers, the deeper and murkier it may become. Fortunately, the split between the Sixth and Ninth Circuits is young, having only occurred in mid-2016. Thus, Congress and the Supreme Court have ample opportunity to quash this split before it becomes unwieldy and have the power to prevent two artists, like Zach and Juan, from suffering diametrically opposed and paradoxical results at the hands of two little words: *de minimis*.