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HARRY POTTER AND THE THREE-SECOND CRIME: ARE WE VANISHING THE DE MINIMIS DEFENSE FROM COPYRIGHT LAW?

JULIE D. CROMER*

Enter, stranger, but take heed
Of what awaits the sin of greed,
For those who take, but do not earn,
Must pay most dearly in their turn.¹

I. INTRODUCTION

In the first of the extraordinary *Harry Potter* series, the quote above is etched into a brass plate at the front entrance of the wizard bank, alluding to the powerful goblin magic that guards its contents. Interestingly enough, of all the chapters of magic and mysticism found in *Harry Potter and the Sorcerer's Stone*, this quote is one of three passages also found on the packaging of the compact disc set, perhaps betraying the fear of the distributors of piracy or digital sampling.

Such sentiments appear to have pervaded the U.S. courts as well when considering music sampling and other small pieces of copyrighted works that before may have been excused from infringement by the doctrine of *de minimis non curat lex*—the law does not concern itself with trifles. For example, in *Bridgeport Music, Inc. v. Dimension Films*,² the Sixth Circuit held the *de minimis* doctrine inapplicable to the potential infringement of sound recordings, suggesting that even the tiniest of infringements would render the alleged infringer liable to the copyright owner. The *Bridgeport* decision highlights a dilemma for copyright law: the technological ability to infringe also means the technological ability to detect infringements that are potentially infinitesimal. If the *de minimis* defense is truly unavailable in certain instances, it is likely that courts may restrict its application in others, perhaps leading to its outright revocation.

This Article examines the importance of the *de minimis* doctrine in copyright law and these potential conclusions. It evaluates the history of application of the *de minimis* doctrine in copyright law, establishing that courts have long turned to the doctrine for guidance in copyright decisions. Further, it reviews legislative history to determine whether application of the *de minimis* doctrine is indeed contrary to congressional purposes, as recent decisions suggest, and if there may be sufficient justification for its abolition in connection with sound recordings only. The Article studies the potential effects of the doctrine's elimination, evaluating whether copyright law written without the understood *de minimis* doctrine would be a workable regime. It then looks at other works that rely on technology for their

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1. J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* 72 (Scholastic 1998).
2. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

existence and evaluates whether Congress or the courts have imposed such a bright-line rule on the reproduction rights of those works as well, or if they are going to make such an imposition. Finally, the Article questions whether revocation of the *de minimis* doctrine and the substantial similarity test helps or hinders the “Progress of Science and the Useful Arts” and asks whether policy dictates that the technological ease of copying should in fact lead to the less stringent application of copyright law to future works.

II. DE MINIMIS NON CURAT LEX

Before analyzing the *de minimis* doctrine in connection with copyright law, it is necessary to examine the nature of the defense. The legal maxim *de minimis non curat lex* translates literally into “[t]he law does not concern itself with trifles.”³ In other words, an infraction of the law may be so insubstantial that, although technically a right may have been violated, the violation or the effect of that violation is trivial enough for the court to ignore the infraction altogether. While the debate about the application of the maxim has a fresh contemporary treatment in the field of copyright law, the maxim has a longstanding history that has guided courts for centuries and an application that transcends legal fields.

A. History

While historically little exists to suggest why the maxim itself began to appear in legal opinions,⁴ it is likely that English courts in the seventeenth century had little patience for cases or causes of action that were seen to be trivial or a waste of the courts’ meager resources.⁵ As a matter of common sense, application of the maxim *de minimis non curat lex* can be seen as a means of judicial economy.

The English court system long used some kind of test to determine whether a claim was too insignificant, trivial, or petty to be litigated at bar. At least as early as 1650,⁶ English courts and barristers used the doctrine to prevent the entry of writs of error where the harm to the injured was perceived to be small.⁷ The invocation

3. BLACK’S LAW DICTIONARY 464 (8th ed. 2004).

4. The idea that there are matters too trivial to be brought before a higher authority has longer roots than any English law can suggest. For example, 1 *Corinthians* states:

If any of you has a dispute with another, dare he take it before the ungodly for judgment instead of before the saints? Do you not know that the saints will judge the world? And if you are to judge the world, are you not competent to judge trivial cases?...Is it possible that there is nobody among you wise enough to judge a dispute between believers?...The very fact that you have lawsuits among you means you have been completely defeated already.

1 *Corinthians* 6:1–2, 5, 7 (New International Version).

5. See, e.g., WILLIAM L. BURDICK, *THE BENCH AND BAR OF OTHER LANDS* 3–4 (William S. Hein & Co. 1982) (1939) (discussing the import of the Magna Charta fixing the court in one place: “At other times [the Court] followed [the King] from place to place to the great inconvenience and hardship of suitors, often practically denying them a hearing by reason of the great expense, difficulty of access, and loss of time involved”).

6. See *Marshe’s Case*, In B.R. Rot. 1011, Owen, 147–48, 965, Mich. 32 & 33 Eliz. (1650) (“If a man be indicted before a coroner, quod fugam fecit, if he after reverse the indictment, yet he shall have his goods, for *de minimis non curat lex*....”); see also *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 67 (1874) (citing Blackstone’s definition of boundaries changed by water and noting that “Blackstone takes his definition from Bracton...a judge in the reign of Henry III”).

7. See *Marshe’s Case*, Cro. Eliz. 273–74, 528–29, 1 Leon. 325. Owen, 147. 1 Roll. Abr. 558. Godb. 377. 380. Swinb. 367. 2 Hawk. 654. 1 Salk. 295. Co. Lit. 256. b. Easter Term, 34 Eliz. In B.R. (1653).

of the *de minimis* maxim suggested that the litigation was frivolous and that judicial resources should be reserved for those cases where the damage was greater or the harm more significant. For example, in *Marshe's Case*, a previously convicted man applied to the court for a writ of error; his judgment had been reversed, and he wanted to recover the property taken from him as a result of his conviction. The executor of the property argued against the writ, suggesting that, because the property taken as a result of his conviction could be returned to the man upon his motion, no injury could result to the man to justify the extraordinary relief of the writ.⁸ Similarly, in the 1658 case *Wats v. Dix*, the court found that, where the intent of the parties was manifest in a lease, a small variance in the terms would not serve to offset the lease: “[H]ere the agreement and the intention of the parties is satisfied, and the variance is not considerable, & *de minimis non curat lex*.”⁹

1. American Application

As the American colonies and later the United States began to import legal concepts from English courts, so did they introduce legal maxims such as *de minimis non curat lex*. As early as 1796, only five years into the history of the U.S. Supreme Court, Justice Paterson invoked the concept in a concurring opinion to suggest that the law being discussed was trivial in comparison with the other values at stake at the time:

When this law was passed, the depreciation, I believe, was little felt, and not at all acknowledged. *De minimis non curat lex*, is an old law maxim. I may parody it on this occasion, by saying *De minimis non curat libertas*. When the life, liberty, property, every thing dear to man was at stake, few could have coldness of heart enough to watch the then scarcely perceptible gradation in the value of money.¹⁰

The Supreme Court revisited the legal maxim several times in its first century in diverse areas such as contract,¹¹ admiralty,¹² and property,¹³ and lawyers argued the maxim as a defense before the Court.¹⁴ Far from remaining an antiquated nuance of

8. The court held otherwise. See *Marshe's Case*, *supra* note 6 (holding that an outlawry cannot be reversed by plea but should be handled by writ).

9. See *Wats v. Dix*, Hill. 1649. Banc. Sup. Trin. Car. Rot. 1529. Style, 204-205. 647 (1658) (holding that “[t]he intent of the parties shall not be implied [sic] against the direct rules of law,” *id.* at 648).

10. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 268 (1796) (noting that when a law regarding bond payment was passed, the barely perceptible depreciation was not acknowledged).

11. See *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 103 (1827) (stating that “a corporation, unless it be in matters to which the maxim *de minimis non curat lex* applies, can act or speak, and, of course, contract, only by writing”).

12. See *Steamboat N.Y. v. Rea*, 59 U.S. (18 How.) 223, 227 (1856) (Daniel, J., dissenting) (“[T]his pretension [of maritime jurisprudence] entirely reverses the maxim of that venerable, though neglected common law, *De minimis non curat lex*; a trespass in the harbor of New York would else be a quarry upon which it would disdain to stoop.”).

13. See *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 67 (1870) (relying on *de minimis non curat lex* for the finding that “in [cases involving land gained from the sea] the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining”).

14. See *McAndrews v. Thatcher*, 70 U.S. (3 Wall.) 347, 359 (1866) (arguing that, because the portion of a cargo damaged in a shipping incident only amounted to 1/144 its value, the shipper could not be held liable for contribution); *Barnard v. Adams*, 51 U.S. (10 How.) 270, 299 (1851) (arguing that one moment of hesitation on the part of a ship's crew could not alone determine the contribution interests of the ship).

the law, however, the *de minimis maxim* has guided the decisions of the Supreme Court into the twentieth century. In a boundary dispute between two states, the Supreme Court found that the private property claims of individuals had no bearing on the boundary between the states:

In a great controversy like this, where thousands of acres of land are involved and the rights of hundreds of people, the adverse attitude of two people claiming about 200 acres of land out of 8,000 or more cannot prevent the application of legal and equitable principles usual in such cases for the settlement of a controversy. *De minimis non curat lex*.¹⁵

The Court has also related the maxim to subjects more contemporary than that of state boundary lines, such as family law.¹⁶

The shortened version of the maxim, *de minimis*, has become so commonplace that the Court has come to regard it as an adjective to describe legally trivial or insignificant subject matter without undertaking a full analysis of whether the subject matter is in fact legally trivial or insignificant. For example, the Court found that “associational burdens posed by the hard-money transfer restriction [to fund election expenditures] are so insubstantial as to be *de minimis*.”¹⁷

However, the Court has also made it clear that a *de minimis* defense does not automatically apply to every area of the law. In *Fulton Corp. v. Faulkner*, the Court noted, “Although the Secretary does suggest that the tax is so small in amount as to have no practical impact at all, we have never recognized a ‘*de minimis*’ defense to a charge of discretionary taxation under the Commerce Clause.”¹⁸ The notion that violations of constitutional rights may not be subject to a *de minimis* defense was reinforced as recently as 2004 in a concurring opinion noting that “[t]here are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them.”¹⁹

2. Intellectual Property Applications

The Supreme Court first recognized the possible application of a defense of *de minimis non curat lex* in connection with intellectual property in 1873, when in a patent case three members of the Court dissented from the construction of the statutory rights granted a patentee. The majority found that in a certain class of machines or implements, “when they are once lawfully made and sold, there is no restriction on their *use* to be implied for the benefit of the patentee or his assignees

15. *Maryland v. West Virginia*, 217 U.S. 1, 20 (1910) (displacing several hundred inhabitants of West Virginia and depriving them of their property after holding that the property patents granted to two individuals by the state of Maryland in disputed territory could not override the legal boundary drawn up hundreds of years ago).

16. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 657 (1972) (“The State’s interest in caring for Stanley’s children is *de minimis* if Stanley is shown to be a fit father.”).

17. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 172 (2003); *see also Locke v. Davey*, 540 U.S. 712, 723 (2004) (“We have found nothing to indicate...that these [state constitutional] provisions [prohibiting expenditure of tax dollars to support religion] would not have applied so long as the State equally supported other professions or if the amount at stake was *de minimis*.”).

18. 516 U.S. 325, 333 n.3 (1996) (considering whether North Carolina’s intangibles tax violates the dormant Commerce Clause).

19. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36–37 (2004) (O’Connor, J., concurring).

or licensees.”²⁰ The dissent disagreed but recognized that in certain instances use of a patented machine may be subject to the *de minimis* defense:

If the patented thing be an article of wearing apparel, sold by the assignee within his district, it is confidently asked, cannot the purchaser wear the article outside of the district? The answer to acute suggestions of this sort would probably be found (in the absence of bad faith in the parties) in the maxim *de minimis non curat lex*.²¹

Patent law recognizes legally insignificant differences in patent prosecution as well; the Board of Patent Appeals and Interferences recently noted that “two depressions amounted to a *de minimis* difference from the prior art,” denying protection to the petitioner patent-seeker.²² Trademark law incorporates a *de minimis* analysis into certain aspects of its doctrine, managing to protect both slight infringers and trademark owners simultaneously. The trademark doctrine of progressive encroachment, for example, “allows a trademark owner to tolerate *de minimis* or low-level infringements and still have the right to act promptly when a junior user either gradually edges into causing serious harm or suddenly expands or changes its mark.”²³

Application of the *de minimis* maxim has even longer roots in copyright law. The first published copyright decision incorporating the maxim emerged in 1847, finding that a “trifling” novelty in the arrangement of entries in a dictionary of flowers was not sufficient to garner copyright protection.²⁴ The circuit court noted, “Some similarities, and some use of prior works, even to copying of small parts, are in such cases tolerated, if the main design and execution are in reality novel or improved, and not a mere cover for important piracies from others.”²⁵ The court continued, “A novelty in arrangement, especially so trifling as this, without any new material connected with it, seemed...of questionable sufficiency to be protected by a copyright. The master seemed to be of the same opinion, on the ground ‘*De minimis non curat lex*.’”²⁶

Courts applied the common law defense of *de minimis non curat lex* sporadically, though its principles were embodied in several ways. For example, the Supreme Court has interpreted copyright law to require that more than a trivial amount of originality would be required before the work could be deemed subject to copyright.²⁷ Courts interpreting whether joint authors each had copyright in the work analyzed each author’s contribution individually, finding that, if it were insignificant, he could not be considered a joint author of the work.²⁸

20. *Adams v. Burke*, 84 U.S. (17 Wall.) 453, 457 (1873).

21. *See id.* at 459 (Bradley, J., dissenting).

22. *In re Chung*, No. 00-1148, 2000 U.S. App. LEXIS 24916, at *4 (Fed. Cir. Oct. 4, 2000) (affirming a rejection of a patent application).

23. *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 823 (7th Cir. 2002) (internal quotation marks omitted) (denying application of the progressive encroachment doctrine in connection with the Humvee grille).

24. *Webb v. Powers*, 29 F. Cas. 511, 520 (D. Mass. 1847) (No. 17,323).

25. *Id.* at 517.

26. *Id.* at 520.

27. *See, e.g., Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding that alphabetical listings are not original and therefore not subject to copyright).

28. *See, e.g., Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1070 (7th Cir. 1994) (finding that “‘de

B. The *De Minimis* Defense in Copyright

The modern application of the *de minimis* common law defense for copyright infringement focuses on either the amount of the work that has been infringed or the economic value of the damage incurred by the infringing party. Courts have interpreted that the defense applies in three distinct ways. First, the *de minimis* defense will apply where the

technical violation of a right [is] so trivial that the law will not impose legal consequences....

Second, *de 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....

....

Third, *de minimis* might be considered relevant to the defense of fair use.²⁹

In judicial opinions, and by Congress, these applications have repeatedly surfaced in copyright law, expanding the visibility of the *de minimis* defense, if not the defense itself.

1. Technical Violation of Copyright

A violation of copyright can be deemed so trivial or insignificant that it does not warrant the legal consequences of litigation. Technical infringements happen every day. Strictly speaking, downloading or printing content off the internet would be making a copy of a "material object[.]...in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated."³⁰ The right "to reproduce the copyrighted work in copies" vests exclusively in the copyright owner,³¹ and the person who "violates any of the exclusive rights of the copyright owner...is an infringer of the copyright."³² Therefore, a person who prints driving directions from a web site on the Internet technically is an infringer. As the Second Circuit has stated:

Trivial copying is a significant part of modern life. Most honest citizens in the world frequently engage, without hesitation, in trivial copying that, but for the *de minimis* doctrine, would technically constitute a violation of the law. We do not hesitate to make a photocopy of a letter from a friend to show to another friend, or of a favorite cartoon to post on the refrigerator. Parents in Central Park photograph their children perched on José de Creeft's Alice in Wonderland

de minimis' requires that 'more than a word or line must be added by one who claims to be a joint author'") (quoting an earlier version of I NIMMER ON COPYRIGHT § 6.07, at 6-21).

29. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74-75 (2d Cir. 1997).

30. 17 U.S.C. § 101 (Supp. 2003).

31. *Id.* § 106(1) (2000 & Supp. 2003). The remaining five rights are the right to prepare derivative works based on the copyrighted works; to distribute copies or phonorecords of the copyrighted work; to perform the copyrighted work publicly; to display the copyrighted work publicly; and to perform a copyrighted sound recording digitally. *Id.*

32. *Id.* § 501(a) (Supp. 2003).

sculpture. We record television programs aired while we are out, so as to watch them at a more convenient hour.³³

Courts rarely use this interpretation of the maxim, specifying insignificant technical violations of copyright, in legal opinions; this use in itself suggests “questions that never need to be answered.”³⁴ However, considering the definitions courts have given to de minimis violations falling under substantial similarity and fair use, which account for violations of insignificant portions of the work itself, it appears that the technical violation interpretation connotes an insignificant economic damage. For example, in *Knickerbocker Toy Co. v. Azrak-Hamway International, Inc.*, although the defendant’s promotional card around plastic packaging containing a toy included an illustration of the plaintiff’s product,³⁵ the Second Circuit affirmed that because it was only an office copy never used, a copyright claim with respect to that card would fall “squarely within the principle of *de minimis non curat lex*.”³⁶ Where sales occur or where the defendant receives royalties for an allegedly infringing product, courts are less likely to employ the technical violation application of the de minimis defense.³⁷ A true de minimis defense suggests that where the plaintiff has suffered no substantial harm from a violation of copyright, that plaintiff is not entitled to a remedy.³⁸

The rationale behind applying the de minimis maxim to those insignificant or trivial violations of copyright is that some violations are simply not worth the time and effort of a lawsuit.³⁹ Because of the low social and judicial economy of such litigation, the law uses the de minimis doctrine to void causes of action in such cases. “When we do such things, it is not that we are breaking the law but unlikely to be sued given the high cost of litigation. Because of the de minimis doctrine, in trivial instances of copying, we are in fact not breaking the law.”⁴⁰

2. Substantial Similarity

Even though it makes sense not to initiate a lawsuit for a relatively insignificant economic loss, economic damage is absent from the test for copyright infringement; the financial harm to the plaintiff or benefit to the defendant is irrelevant when

33. *Davis v. Gap, Inc.*, 246 F.3d 152, 173 (2d Cir. 2001) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447–56 (1984)). The Second Circuit noted that the Supreme Court “found such [time shifting] recording would also be protected by the fair use doctrine.” *Id.* The court also gave another example of trivial copying as when “[w]aiters at a restaurant sing ‘Happy Birthday’ at a patron’s table.” *Id.* *But see* *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 487 (3d Cir. 2003) (noting that “every time you hear the ubiquitous refrain from ‘Happy Birthday’ in a public performance, a subsidiary of AOL/TimeWarner cashes a royalty check,” at least until 2030 when it enters the public domain).

34. *Ringgold*, 126 F.3d at 74 (quoting Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1457 (1997)).

35. 668 F.2d 699, 701 (2d Cir. 1982).

36. *Id.* at 703. *But see* *Walker Mfg., Inc. v. Hoffman, Inc.*, 261 F. Supp. 2d 1054, 1066 (N.D. Iowa 2003) (finding prototype of a sprayer intended for production and sale not a de minimis use of a copyright).

37. *See, e.g., Repp v. Webber*, 914 F. Supp. 80, 84 (S.D.N.Y. 1996) (finding sales of 449 units and royalties in the amount of \$2.22 to be sufficient to defeat a defense predicated upon *de minimis non curat lex*).

38. *See Mihalek Corp. v. Michigan*, 9 F.3d 1548 (6th Cir. 1993) (upholding summary judgment for the defendant).

39. *See Davis v. Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001) (holding that the de minimis doctrine is inapplicable to plaintiff’s sunglasses in defendant’s advertisement because of the combination of circumstances).

40. *Id.* at 173.

determining when the copyright of a work is actually infringed.⁴¹ Through the doctrine of substantial similarity, courts may apply the defense of *de minimis non curat lex* to focus upon the amount of the work infringed, not the amount of financial gain or loss.⁴²

Congress prescribed no test for copyright infringement in the Copyright Act. While, as noted previously,⁴³ a creative work is “infringed” under the Copyright Act when anyone violates any of the exclusive rights reserved in the Act for the holder of the copyright,⁴⁴ the Act gives little guidance regarding the elements of infringement. While other tests, such as the test for the defense of fair use,⁴⁵ were expressly set out by Congress in the 1976 Copyright Act,⁴⁶ courts were without congressional guidance with respect to a statutory test for infringement and were left to rely upon precedent. Courts did not universally express, however, the need or desire for some kind of bright-line test for copyright infringement. As Judge Learned Hand commented, “The test for infringement of a copyright is of necessity vague.... Decisions must... inevitably be *ad hoc*.... [O]ne cannot say how far an imitator must depart from an undeviating reproduction to escape infringement.”⁴⁷

Absent a directive from Congress, courts have forged their own tests for copyright infringement, but again, without much guidance from obvious sources. The clearest directive enunciated by the Supreme Court was when, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, Justice O’Connor wrote that, “[t]o establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁴⁸ The Court did not then expand upon this articulation of the test for copyright infringement, but instead focused almost entirely upon what made a constituent element of a copyrighted work original, leaving the circuit courts to interpret the application of the elements.⁴⁹

Upon first read of the *Feist* test for infringement, an author might assume that her work was protected by a type of absolute liability against an infringer as long as she could provide a valid copyright certificate. However, in order for copying to lead to infringement, the “copying must be actionable.”⁵⁰ “[E]ven where the fact of

41. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01, at 13-5 to -6 (2006).

42. While substantial similarity is not determined by economic indicators, it has been viewed as an appropriate measure of economic effect. See *Green v. Lindsey*, 885 F. Supp. 469, 478 (S.D.N.Y. 1992) (noting that “substantial similarity [of a second work to the original] appropriates the economic value of a plaintiff’s work”); see also Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 87 N.C. L. REV. 547, 574 (2006) (discussing substantial similarity and the *de minimis* defense in the context of musical compositions).

43. See *supra* notes 30–40 and accompanying text.

44. 17 U.S.C. § 501 (2000 & Supp. 2003).

45. See *infra* notes 105–109 and accompanying text.

46. 17 U.S.C. § 107 (2000).

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

48. 499 U.S. 340, 361 (1991) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985)).

49. See *id.* at 361–64.

50. 4 NIMMER & NIMMER, *supra* note 41, § 13.01[B], at 13-8 to -9; see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.* 499 U.S. 340, 361 (1991) (holding that “[n]ot all copying... is copyright infringement” and that the copying of Rural’s white pages telephone directory entries was not actionable copying because of lack of originality).

copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.”⁵¹ Although most circuits have incorporated *Feist’s* two-prong test into their interpretations of copyright infringement,⁵² each tempers it with the notion of substantial similarity, either as a test for unlawful copying⁵³ or of probative similarity, which, with evidence of access, gives rise to a circumstantial inference of copying.⁵⁴ As a result, “[s]ubstantial similarity remains an indispensable element of plaintiff’s proof, even in cases...in which defendant does not contest factual copying.”⁵⁵

a. Origins of the Test

Not every instance of copying amounts to a misappropriation.⁵⁶ In 1926, the Second Circuit stated that “the inquiry actually made [into copyright infringement] was always to ascertain what had been appropriated, if anything, and then decide whether the appropriation was (1) of copyrightable matter, and (2) was substantial,” without going much into what were the sources of what had “always” been done.⁵⁷

In the 1946 case *Arnstein v. Porter*,⁵⁸ the Second Circuit found a situation to clarify what it meant to constitute copyright infringement. In this case, plaintiff Arnstein alleged that Cole Porter’s compositions infringed upon his works.⁵⁹ Although there was no evidence of actual copying, the plaintiff asserted that Porter had access to the copyrighted works, either with the potential physical theft of the works from the plaintiff or by hearing the songs performed publicly on the radio.⁶⁰ The defendant denied any thievery of, or familiarity with, the plaintiff’s works.

51. 4 NIMMER & NIMMER, *supra* note 41, § 13.03[A], at 13-34.1 (quoting *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 2905 (2005)).

52. See *infra* notes 53–54.

53. See, e.g., *Johnson v. Gordon*, 409 F.3d 12, 19 (1st Cir. 2005); *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1012 (7th Cir. 2005); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 943 (10th Cir. 2002); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d Cir. 2001); *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999); see also *Mulcahy v. Cheetah Learning L.L.C.*, 386 F.3d 849, 853 (8th Cir. 2004) (noting that “substantial similarity is the test [the Eight Circuit uses] in determining copyright infringement,” but declining to apply it until the district court found a valid copyright interest).

54. See, e.g., *Fogerty v. MGM Group Holdings Corp.*, 379 F.3d 348, 352 (6th Cir. 2004); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003); *Calhoun v. Lillenas Publ’g*, 298 F.3d 1228, 1232 (11th Cir. 2002); *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 801 (4th Cir. 2001); see also *Cottrill v. Spears*, 87 F. App’x 803, 807 (3d Cir. 2004) (finding it unnecessary to reach question of substantial similarity on summary judgment when plaintiffs failed to prove any access whatsoever).

55. 4 NIMMER & NIMMER, *supra* note 41, § 13.01[B], at 13-13.

56. See Glenn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 501 (1996) (citing *Arnstein v. Porter*, 154 F.2d 464, 472 (2d Cir. 1946)).

57. *Dymow v. Bolton*, 11 F.2d 690, 692 (2d Cir. 1926) (finding a test for infringement that first determined whether the theme of the play was similar and then determined whether it had been appropriated incorrectly).

58. 154 F.2d 464 (2d Cir. 1946).

59. *Id.* at 467. In particular, Arnstein alleged that (1) “Begin the Beguine” infringed upon his works “The Lord Is My Shepherd” and “A Mother’s Prayer”; (2) “My Heart Belongs to Daddy” infringed upon his work “A Mother’s Prayer”; (3) “I Love You” infringed upon his “La Priere”; (4) “Night and Day” infringed upon his unpublished, although once played over the radio, “I Love You Madly”; (5) “You’d Be So Nice to Come Home To” infringed upon his “Sadness Overwhelms My Soul”; and (6) “Don’t Fence Me In” infringed upon his unpublished and never publicly performed song, “A Modern Messiah.” *Id.*

60. *Id.* at 467 (describing plaintiff’s allegation that his “room had been ransacked on several occasions”).

As Congress had not incorporated an explicit test for copyright infringement into the Copyright Act of 1909,⁶¹ the Second Circuit spelled out what it understood to be the test for copyright infringement: copying plus illegal appropriation.⁶² First, the court clarified that to show copyright infringement, the plaintiff must show that his work was copied.⁶³ Copying to the point of infringement by the defendant can be shown in one of two ways. First, the defendant can admit that he copied the work.⁶⁴ Second, copying may be shown through circumstantial evidence.⁶⁵ This evidence consists of the defendant's access to the copyrighted work and a similarity between the copyrighted work and defendant's work.⁶⁶ Such similarity must be "so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result," as determined by experts or trained musicians.⁶⁷ This analysis results in an imperfect inverse relationship between the two elements of circumstantial evidence of copying: If the similarity between the works is striking, very little access to the copyrighted work may be needed to constitute circumstantial evidence; however, if there is no similarity, no amount of access to the copyrighted work will establish that the defendant copied the work.⁶⁸

If the plaintiff establishes copying, the court turns to the second prong of this test, which is unlawful appropriation. For illegal copying to occur, "the copying... [must go] so far as to constitute improper appropriation."⁶⁹ This test is not one to be decided by experts, but by the lay listener.⁷⁰ The similarity necessary for this element need not rise to the level of a striking similarity required to establish copying. Instead, it must be demonstrated whether "defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."⁷¹ In other words, if an audience of average listeners finds similarity between the first work and the second work, or that the two works are "inexcusably alike,"⁷² a finding of infringement may be proper. Although *Arnstein* did not use the phrase, it has been recognized that "Arnstein was merely an alternative way of formulating the issue of substantial similarity."⁷³

The *Arnstein* court reversed a finding of summary judgment for the defendant because it was "unable to conclude that the likenesses [we]re so trifling that, on the issue of misappropriation, a trial judge could legitimately direct a verdict for

61. Pub. L. No. 60-349, 35 Stat. 1075 (1909) (previously codified at 17 U.S.C. §§ 1-216) (repealed 1976).

62. See *Arnstein*, 154 F.2d at 468.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* ("Of course, if there are no similarities, no amount of evidence of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying.")

69. *Id.*

70. See *id.* at 473.

71. *Id.*

72. *Id.*

73. *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1023 n.2 (2d Cir. 1966).

defendant.”⁷⁴ But it also admonished that it did not mean to say that “a plagiarism case can never arise in which absence of similarities is so patent that a summary judgment for defendant would be correct.”⁷⁵ This statement by the Second Circuit suggests that there could be instances where likenesses are in fact so trifling that a trial judge could legitimately direct a verdict for the defendant; and indeed, courts have entered summary judgment for defendants on these grounds.⁷⁶

b. Substantial Similarity and De Minimis

The doctrine of substantial similarity is a natural extension of the doctrine of *de minimis non curat lex*. “To establish that the infringement of a copyright is *de minimis*, and therefore not actionable, the alleged infringer must demonstrate that the copying of the protected material is so trivial ‘as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.’”⁷⁷ The *de minimis* doctrine has also been characterized as the “quantitative component” of substantial similarity, as opposed to “the copying of expression, rather than ideas, facts, works in the public domain, or any other non-protectable elements,”⁷⁸ with some courts using it as a threshold inquiry before a full analysis of substantial similarity can be undertaken.⁷⁹ However, this “quantitative component” can itself be evaluated quantitatively⁸⁰ and qualitatively, as “[a] *de minimis* defense does not apply where the *qualitative* value of the copying is material”⁸¹—rendering a *de minimis* analysis quite similar to the test for substantial similarity or the test for fair use.⁸²

74. *Arnstein*, 154 F.2d at 473.

75. *Id.*

76. *See, e.g.*, *Narell v. Freeman*, 872 F.2d 907, 912–13 (9th Cir. 1989) (holding that two written works were not substantially similar because neither mood, pace, nor sequence were alike, nor was the infringement qualitatively or quantitatively important to either book); *Warner Bros., Inc. v. Am. Broad. Co.*, 720 F.2d 231, 235 (2d Cir. 1983) (finding no substantial similarity between defendant’s “The Greatest American Hero” and plaintiff’s famous “Superman” character); *Burns v. Frontline Gear*, No. 00-CV-70916, 2000 WL 1923514, at *2–3 (E.D. Mich. Nov. 17, 2000) (finding no substantial similarity and stating that “‘a general impression of similarity is not sufficient to make out a case of infringement.’” even in light of presumption of access for a well-known painting (quoting *Mihalek Corp. v. Michigan*, 814 F.2d 290, 295 (6th Cir. 1987))).

77. *See Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (3d Cir. 1998) (citing *Ringgold v. Black Entm’t Television*, 126 F.3d 70, 74 (2d Cir. 1997)).

78. *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 138 (2d Cir. 1998) (citing *Ringgold*, 126 F.3d at 75); *see also* *Rexnord, Inc. v. Modern Handling Sys., Inc.*, 379 F. Supp. 1190, 1194 (D. Del. 1974) (citing *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73, 84–85 (6th Cir. 1943) (“On the principle of *de minimis non curat lex*, it is necessary that a substantial part of the copyrighted work be taken.”)).

79. *See, e.g.*, *Lynx Ventures, L.L.C. v. Miller*, 45 F. App’x 68, 71 (2d Cir. 2002) (vacating denial of motion for preliminary injunction and remanding for consideration of substantial similarity where district court improperly found *de minimis* defense applicable).

80. *See Castle Rock Entm’t*, 150 F.3d at 138 (finding that copying a few fragments from unrelated television programs may have met the *de minimis* doctrine, but that copying 643 fragments from one series “crossed the quantitative copying threshold”).

81. *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 208 (3d Cir. 2002) (finding twenty-seven of 525,000 lines to be qualitatively significant, rendering the appropriation ineligible for the *de minimis* defense); *see also* *Silberman v. Innovation Luggage, Inc.*, No. 01 Civ. 7109(GEL), 2003 WL 1787123, at *8 (S.D.N.Y. Apr. 3, 2003) (finding the defendants’ *de minimis* argument defective where what was copied was “a central and significant element of the copyrighted work”).

82. In *Dun & Bradstreet*, the Third Circuit cited *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), to suggest that the “highly critical” nature of the material taken made the *de minimis* test inapplicable. 307 F.3d at 208. *Harper & Row* dealt with the amount used in a fair use context. 471 U.S. at 552.

Because logically a work cannot be substantially similar to a previous work without some degree of borrowing from the work before, many cases discussing the *de minimis* defense discuss it in the context of the substantial similarity test for infringement. One of the leading decisions reestablishing the maxim in the discourse of copyright law is the Second Circuit opinion in *Ringgold v. Black Entertainment Television, Inc.*⁸³ In *Ringgold*, the plaintiff was an artist who specialized in quilts, putting together colorful and eye-catching pieces. While she had authorized a poster of the quilt, she did not authorize Black Entertainment Television's use of the poster as part of the background in a television series.⁸⁴ The quilt was shown on the screen for a total of 26.75 seconds of a half-hour television program.⁸⁵ The defendant argued that, even if its activity were infringement, it was too slight an infraction for the courts to become involved.⁸⁶

Disagreeing, the Second Circuit noted that the *de minimis* maxim can arise in copyright law in the three contexts stated above.⁸⁷ It listed the quantitative/qualitative components of substantial similarity, observing that while the qualitative component "often turns on the level of abstraction at which the works are compared,"⁸⁸ the quantitative component concerns the amount of the work in fact infringed⁸⁹—the embodiment of the *de minimis* maxim into the substantial similarity test.⁹⁰ In addition, because the work was a visual work, it was necessary that the copied work be "observable in the allegedly infringing work [, including] such factors as focus, lighting, camera angles, and prominence."⁹¹

Ringgold did not find the copying to be *de minimis*. However, the Second Circuit has used the "average lay observer" test to find insufficient copying to deem any infringing activity actionable. In *Sandoval v. New Line Cinema Corp.*,⁹² the Second Circuit determined that the display of photographs as part of the movie *Seven* was subject to the *de minimis* doctrine, finding that the "photographs as used in the movie are not displayed with sufficient detail for the average lay observer to identify even the subject matter of the photographs, much less the style used in creating them."⁹³

While the "observability" test does not translate perfectly to other works such as music, the tests are not difficult to transpose. Whereas visual or pictorial works must not be sufficient for the average lay observer to distinguish the original work, it has been held that in musical compositions "a use is *de minimis* only if the

Dun & Bradstreet did not discuss fair use. See 307 F.3d at 208.

83. 126 F.3d 70 (2d Cir. 1997).

84. *Id.* at 72–73.

85. *Id.* at 73.

86. *Id.* at 74.

87. *Id.*

88. *Id.* at 75.

89. *Id.* at 74.

90. *Id.* at 75 ("Since 'substantial similarity,' properly understood, includes a quantitative component, it becomes apparent why the concept of *de minimis* is relevant to a defendant's contention that an indisputably copied work has not been infringed.").

91. *Id.*

92. 147 F.3d 215 (2d Cir. 1998).

93. *Id.* at 218; see also *Gordon v. Nextel Commc'ns & Mullen Adver., Inc.*, 345 F.3d 922, 924 (6th Cir. 2003) (finding no infringement where the illustration used is never in focus and appears only as distant background).

average audience would not recognize the appropriation."⁹⁴ Unlike copying of visual works, where the likelihood of finding copyright infringement lessens when a work is blurred or obscured from view, decisions regarding *de minimis* appropriations of musical compositions note that the work need not be completely obscured, but may under the doctrine of fragmented literal similarity copy exactly without copying substantial elements.⁹⁵

Regardless of the format of the work, certain constants have emerged regarding the application of the *de minimis* doctrine when it is used as a part of a court's substantial similarity analysis. First, the concept of whether or not a work has quantitative similarity is a subjective analysis, i.e., "there are no bright line rules...and the issue must be decided case by case."⁹⁶ There is no "strict arithmetical formula" that has been applied,⁹⁷ although courts have attempted to fashion a type of rule by reviewing contributions to works that other entities consider to merit value.⁹⁸ This suggests that it would be impossible to create a bright-line rule for *de minimis* except to rule it out altogether, which negates the purpose of the doctrine and contradicts the second observation: Even in the face of undisputed copying, it is possible to employ the *de minimis* defense, with the result of a copying that is undisputed but non-infringing.⁹⁹

Third, a test for whether an amount of copying can meet the low threshold beyond which the *de minimis* doctrine may be applied involves the perceptions of the "average" observer or audience and is true whether the work is literary or musical, visual or aural.¹⁰⁰ This "average observer" test gives rise to the fourth constant: Despite the quantitative nature of the *de minimis* doctrine, a qualitative component must be employed to determine whether the quantity taken constitutes a qualitatively significant amount.¹⁰¹

The final two observations are procedural. Despite isolated decisions to the contrary,¹⁰² the question of *de minimis* copying can be resolved by the trial court on summary judgment, even though the amount copied is a question of fact.¹⁰³ Finally,

94. *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004) (citing *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986)). Therefore, "[t]o say that a use is *de minimis* because no audience would recognize the appropriation is thus to say that the use is not sufficiently significant." *Id.*

95. *See id.* at 5 (citing 4 NIMMER & NIMMER, *supra* note 41, § 13.03 [A][2]). For a full discussion of fragmented literal similarity, see 4 NIMMER & NIMMER, *supra* note 41, § 13.03[A][2]. *See also* Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 441-44.

96. *Silberman v. Innovation Luggage, Inc.*, No. 01 Civ. 7109(GEL), 2003 WL 1787123, at *8 (S.D.N.Y. Apr. 3, 2003).

97. *See Compaq Computer Corp. v. Ergonome, Inc.*, 137 F. Supp. 2d 768, 779 (S.D. Tex. 2001).

98. *See Gordon*, 345 F.3d at 924 (considering three-second "'background or montage'" display for royalty rate for published and pictorial works as instructive for *de minimis* determination) (quoting 37 C.F.R. § 253.8 (2006)).

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

100. *See, e.g., Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004) (musical phrase in a song); *Sandoval v. New Line Cinema*, 147 F.3d 215, 217 (2d Cir. 1998) (photographs displayed in a film); *Ringgold*, 126 F.3d at 77 (quilt displayed on a television program).

101. *See, e.g., Dun & Bradstreet Software Servs. v. Grace Consulting, Inc.*, 307 F.3d 197, 208 (3d Cir. 2002).

102. *See, e.g., Compaq Computer Corp.*, 137 F. Supp. 2d at 779 (denying summary judgment and finding both quantitative and qualitative *de minimis* analyses to be questions of fact).

103. *See, e.g., Mihalek Corp. v. Michigan*, No. 92-1641, 1993 U.S. App. LEXIS 29436, at *9-11 (6th Cir. Nov. 9, 1993) (affirming summary judgment while relying in part on defense of *de minimis non curat lex*). The importance of the ability to use summary judgment becomes more evident when determining whether there are

it is appropriate to evaluate whether the infringement satisfied the de minimis defense as part of the “quantitative threshold of substantial similarity” before evaluating it as a potential part of the fair use defense.¹⁰⁴

3. Fair Use

Even though courts generally recognize that a de minimis defense must first be considered in its economic sense and in the sense of substantial similarity,¹⁰⁵ the only congressional implementation of the maxim *de minimis non curat lex* is in the test for the fair use of a copyrighted material. The statutory test of fair use—the justified use of a copyrighted work for which the purpose is not infringement¹⁰⁶—embodies the quantitative similarity that the de minimis defense requires, although courts apply the fair use defense differently and subjectively.¹⁰⁷ Although expressly stated in the Copyright Act that an activity deemed fair use does not constitute infringement of copyright,¹⁰⁸ courts and authorities have considered fair use a defense to an act of infringement, not as a negation of the infringement itself.¹⁰⁹

Because copyright grants a monopoly over written and oral expression,¹¹⁰ copyright law has been perceived to be at odds with the First Amendment principles of free press and free speech.¹¹¹ Exceptions to copyright infringement to protect those principles are codified in the Copyright Act as the test for fair use, which states in its preamble that a use that is “fair” will be “for purposes such as criticism, comment, news reporting, teaching..., scholarship, or research...”¹¹² Congress then clarified a four-part test for fair use, determining that the four factors applicable to such a determination are:

- (1) the purpose and character of the [second] use...;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion [of the copyrighted work] used in relation to the copyrighted work as a whole; and

suitable alternatives to the de minimis defense. *See infra* Part IV.

104. *See Sandoval*, 147 F.3d at 217 (quoting *Ringgold*, 126 F.3d at 74).

105. *See, e.g., id.*

106. 17 U.S.C. § 107 (2000).

107. *Compare, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985) (finding 300 out of 200,000 words not fair use), *with Consumers Union of United States, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1055 (2d Cir. 1983) (finding twenty-nine words out of 2,100 fair use).

108. 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work... is not an infringement of copyright.”); *see BLACK’S LAW DICTIONARY* 634 (8th ed. 2004) (defining “fair use” as “[a] reasonable and limited use of a copyrighted work without the author’s permission, such as quoting from a book in a book review or using parts of it in a parody” and noting that fair use is a defense to infringement claims).

109. *See, e.g., Harper & Row*, 471 U.S. at 554 (discussing a factor that would “negate a defense of fair use”).

110. *See id.* at 546.

111. *See generally* Henry S. Hoberman, *Copyright and the First Amendment: Freedom or Monopoly of Expression?*, 14 PEPP. L. REV. 571 (1987). *But see* *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (finding that, because of the temporal proximity of the Copyright Clause and the First Amendment, “in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles”).

112. 17 U.S.C. § 107; *see also* John C. Knapp, *Laugh, and the Whole World... Scowls at You?: A Defense of the United States’ Fair Use Exception for Parody Under TRIPS*, 33 DENV. J. INT’L L. & POL’Y 347, 348 (2005) (attributing the codification of fair use in the Copyright Act to free speech principles).

(4) the effect of the [second] use upon the potential market for or value of the copyrighted work.¹¹³

Because the third factor suggests that the fair use test should apply if the amount of the copyrighted work is small, it would appear that the Copyright Act preserves the spirit of the *de minimis* defense within fair use and that a separate defense need not apply. Indeed, it has been observed that “[t]he doctrine of fair use has been described as being a ‘partial marriage’ to the maxim of *de minimis non curat lex*.”¹¹⁴ Certain courts have used the terms interchangeably, suggesting that if a work is found to be fair use, the *de minimis* defense applies.¹¹⁵ Others have considered it not in connection with the amount used, but in connection with the economic effect of such a use, blending the effect of the *de minimis* doctrine with the fourth factor as well.¹¹⁶

III. PERCEIVED LIMITATIONS OF THE DE MINIMIS DEFENSE IN COPYRIGHT

The *de minimis* defense to copyright infringement has been explored at length by the common law and codified in statute, but by nature the doctrine has limitations to its application. An appropriation of any economic, quantitative, or qualitative value removes the possibility of a *de minimis* defense from a second comer. Recently, however, a Sixth Circuit decision, while not entirely credible, has suggested additional limitations to the *de minimis* defense, to the point of inapplicability. In particular, it attempted to curtail the *de minimis* defense with respect to the infringement of sound recordings, one of two copyrights available to any single piece of recorded music.¹¹⁷ This issue has proven to be problematic with the practice of music sampling, popularly defined as “the act of taking a portion of one sound recording...and reusing it as an instrument or element of a new recording.”¹¹⁸ Because the practice of sampling often involves fewer than five notes or less than ten seconds of the copyrighted sound recording, and because intended audiences may or may not recognize the work sampled in the second work, courts should question whether the *de minimis* defense might apply to sound recordings to permit this practice.

113. 17 U.S.C § 107.

114. *Mihalek Corp. v. Michigan*, No. 92-1641, 1993 U.S. App. LEXIS 29436, at *10-11 (6th Cir. Nov. 9, 1993) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 n.34 (1984) (quoting ALAN LATMAN, *FAIR USE OF COPYRIGHTED WORKS* (1958))). However, it is unclear that this “‘partial marriage’” was intended to fall within a full fair use analysis or was instead discussing the economic justification, as it is predicated by the clause: “‘In certain situations, the copyright owner suffers no substantial harm from the use of the work.’” *Sony Corp.*, 464 U.S. at 451 n.34 (quoting LATMAN, *supra*).

115. *See, e.g.*, *Jackson v. Warner Bros., Inc.*, 993 F. Supp. 585, 590 (E.D. Mich. 1997) (“‘In situations where the copyright owner suffers no demonstrable harm from the use of the work, fair use overlaps with the legal doctrine of *de minimis*, requiring a finding of no liability for infringement.’”) (quoting *Amsinck v. Columbia Pictures Indus., Inc.*, 862 F. Supp. 1044, 1049 (S.D.N.Y. 1994)).

116. *See, e.g.*, *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1539 (C.D. Cal. 1985) (citing *de minimis* maxim and “‘partial marriage’” quotation with respect to economic effect (quoting *Sony Corp.*, 464 U.S. at 451 n.34)).

117. The other copyright is a copyright in the composition itself, which customarily is awarded to the songwriter.

118. Wikipedia, http://en.wikipedia.org/wiki/Music_sampling (last visited June 11, 2006).

A. Sound Recordings

The recent decision of *Bridgeport Music, Inc. v. Dimension Films*¹¹⁹ raised issues with respect to the statutory treatment of sound recordings and found no viable application of the de minimis defense for this particular medium of copyrighted expression.¹²⁰

1. *Bridgeport Music, Inc. v. Dimension Films*

The copyrighted work in *Bridgeport* involved the recording “Get Off Your Ass and Jam” by George Clinton, Jr. and the Funkadelics.¹²¹ The song opens with a three-note combination solo guitar “riff” lasting four seconds.¹²² The artists Ruthless Attack Muzick and Dollarz N Sense Music copied a two-second sample from “Get Off Your Ass and Jam,” lowered the pitch, looped the sample, and extended it to sixteen beats lasting approximately seven seconds.¹²³ The sample was included five times in rap artists NWA’s song “100 Miles and Runnin,” which in turn was included in the ninety-three-minute movie *I Got the Hook Up*, released by defendant No Limit Films (No Limit).¹²⁴ Plaintiffs Bridgeport Music, Inc., which owned the musical composition copyright, and Westbound Records, Inc., which owned the sound recording copyright, sued No Limit for infringement based on the sample.¹²⁵ After the district court granted summary judgment against Bridgeport,¹²⁶ No Limit moved for summary judgment against Westbound, arguing “the sample was legally insubstantial and therefore does not amount to actionable copying.”¹²⁷ The U.S. District Court for the Middle District of Tennessee granted summary judgment against Westbound as well.¹²⁸

One of the primary issues taken to the court of appeals was the issue of application of the de minimis defense to the defendants’ infringing activity. Following established precedent, the district court made it clear that “the de minimis analysis was a derivation of the substantial similarity element when a defendant claims that the literal copying of a small and insignificant portion of the copyrighted work should be allowed,”¹²⁹ as opposed to contributing to a small and significant portion of the new use. Applying the substantial similarity test and the de minimis defense, the district court found the use of the song did not “rise to the level of a legally cognizable appropriation.”¹³⁰ The Sixth Circuit disagreed. Using

119. 410 F.3d 792 (6th Cir. 2005).

120. *Id.* at 801–02.

121. *Id.* at 795.

122. *Id.* at 796.

123. *Id.*

124. *Id.*

125. *Id.* at 795–96.

126. Bridgeport entered into an agreement with Ruthless Attack Muzick and Dollarz N Sense in December 1998, granting a sample use oral synchronization license to use “Get Off Your Ass and Jam.” *Id.* at 796. This license extended to the artists’ licensees. *Id.*

127. *Id.* at 797. No Limit also argued that the sample was not original enough to be protected by copyright law. The district court found the sample original, and No Limit did not appeal that determination.

128. *Id.*

129. *Id.* at 797–98.

130. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002), *rev’d*, 401

a “literal reading” statutory analysis, the Sixth Circuit found that sound recordings were ineligible for the substantial similarity test dictated by *Arnstein v. Porter* and its progeny.¹³¹

2. Interpretation of 17 U.S.C. § 114

The “literal reading” undertaken by the Sixth Circuit was the interpretation of 17 U.S.C. § 114, which governs the protection of sound recordings under the Copyright Act.¹³² Since 1971, “sound recordings” have received a different treatment than most forms of media in which a copyrighted work may be fixed. By definition:

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.¹³³

Primarily, section 114 serves to limit the application of the section 106 rights, which are not expressly reserved for sound recordings.¹³⁴ Section 114 expressly (1) excludes the rights of public display and public performance altogether,¹³⁵ (2) limits the right of copying or reproduction “to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording”,¹³⁶ (3) limits the right to make derivative works 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”,¹³⁷ and (4) does not limit or impair the right to perform a sound recording digitally.¹³⁸

a. Right to Reproduce

Read literally, as the Sixth Circuit did, section 114 could be interpreted to dispose of the de minimis defense and substantial similarity in connection with

F.3d 647 (6th Cir. 2004), *amended on reh'g*, 410 F.3d 792 (6th Cir. 2005).

131. *Bridgeport*, 410 F.3d at 801–02. The Sixth Circuit was not forced into taking this approach and had ample support for the opposite finding. The bottom line of this opinion—that the de minimis defense is inapplicable in certain instances—is contrary to very recent precedent from its own circuit involving substantial similarity in the film industry. In *Stromback v. New Line Cinema*, 384 F.3d 283 (6th Cir. 2004), the plaintiff sued the producer of the film “Little Nicky” for infringing on his screenplay “The Keeper.” When upholding the district court’s entry of summary judgment for the defendant, the Sixth Circuit enunciated its version of the two-part *Arnstein* test. The first part involves determining which parts of the plaintiff’s work are protected by copyright; the second part involves whether the allegedly infringing work is substantially similar to the protectable elements. *Id.* at 294. According to this test, a prerequisite to a finding of infringement must be that the “ordinary, reasonable observer would find the works, taken as a whole, to be substantially similar.” *Id.* (citing *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 318 (6th Cir. 2004)).

132. *See Bridgeport*, 410 F.3d at 805.

133. 17 U.S.C. § 101 (Supp. 2003).

134. As noted above, only the right to perform digitally pertains solely to sound recordings. *See id.* § 106 (2000 & Supp. 2003).

135. *Id.* § 114(a) (2000).

136. *Id.* § 114(b) (2000).

137. *Id.*

138. *Id.* § 114(d)(4) (2000). The remainder of the section applies to further limitations regarding sound transmissions, statutory licensing of transmissions, and royalties.

sound recordings. The right to reproduce the sound recording makes it a violation of copyright to “duplicate the sound recording” in a copy that “directly or indirectly recapture[s] the actual sounds fixed in the recording.”¹³⁹ As with all of copyright law, this language is up for interpretation. If the interpreter focuses on “actual sounds fixed in the recording,”¹⁴⁰ it is possible that the interpretation will lead to the result that a duplication of any of the sounds in a recording would be an automatic violation of section 114.

This “literal reading” may not be, in fact, what Congress intended and may not even be a literal reading of the Copyright Act. The Sixth Circuit acknowledged that it was announcing a new rule and that it believed the best policy was a straightforward rule, even if such a rule was found nowhere else in copyright law:

The music industry, as well as the courts, are best served if something approximating a bright-line test can be established. Not necessarily a “one size fits all” test, but one that, at least, adds clarity to what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings.¹⁴¹

Yet, the Sixth Circuit proceeded to dictate the “one size fits all” test that it purported it was not doing. Touting ease of enforcement, market controls, and willfulness on the part of the sampling infringer, the court in *Bridgeport* stood by its decision wholeheartedly, hiding behind the statute as dictating its actions, finding that taking a sample was “a physical taking rather than an intellectual one.”¹⁴²

However, this interpretation is faulty because it does not consider the entire meaning of the statute. It is a violation of the right of reproduction to “duplicate the sound recording,” defined as the “work[] that result[s] from the fixation of...sounds.”¹⁴³ The statute does not suggest that the “work” consists of a trivial amount of the sounds in the fixation, but of the entire fixed work. This interpretation is consistent with the legislative history of section 114, which suggests that the purpose behind the section was to prevent compilers from creating pirated music albums or “greatest hits” compilations without the consent of the initial recorder.¹⁴⁴

This is not to say that the reproduction right of a sound recording cannot be violated with any less than a full copy of the work. That would render sound recordings more vulnerable than any other medium protected by copyright, when they have already been considerably limited by the language of section 114 in the first place. It does, however, mean that sound recordings are subject to the same interpretation as any other work fixed in any other medium of tangible expression,

139. *Id.* § 114(b).

140. *Id.*

141. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799 (6th Cir. 2005).

142. *Id.* at 802.

143. 17 U.S.C. § 114(b) (2000); *id.* § 101 (Supp. 2003).

144. See H.R. REP. NO. 92-487 (1971), reprinted in 1971 U.S.C.A.N. 1566, 1567, 1569-70 (discussing the pirating and “widespread unauthorized reproduction of phonograph records and tapes” and attributing millions of dollars of loss to the sale of pirated albums and the intention to prevent pirates from cherry-picking only the successful recordings).

which was intended by Congress.¹⁴⁵ This would mean that sound recordings are subject to the same test for copyright infringement—originality plus copying (access plus misappropriation, demonstrated through substantial similarity). Additionally, this interpretation renders sound recordings subject to the defense of *de minimis non curat lex*, as are other media.

Moreover, legislative history behind section 114 of the Copyright Act establishes that an inquiry into substantial similarity is warranted in instances of infringement of sound recordings. It is clear from the notes of the Committee on the Judiciary that it was not the intent of Congress to do away with a substantial similarity test for sound recordings or to impose a strict liability standard on their use. The Committee noted that “infringement takes place whenever all *or any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced.”¹⁴⁶ This language suggests that, even in actual reproduction, the portion of the sounds reproduced had to be substantial, which could be easily interpreted as Congress’s allusion to the substantial similarity test.¹⁴⁷

Why would a court reject a reasoned approach based on common law precedent and instead impose a hard and fast rule? Practically speaking, the Sixth Circuit could have been saving itself judicial nuisance in future months. As the decision points out, Bridgeport Music and its related entities had alleged “nearly 500 counts against approximately 800 defendants...relating to the use of samples without permission in new rap recordings.”¹⁴⁸ When it noted “hundreds of other cases all involving different samples from different songs,”¹⁴⁹ the Sixth Circuit obviously anticipated a slew of copyright infringement cases based on sampling and opted to hand down a clear rule giving the district court the ability to automatically find infringement upon copying. One cannot ignore the efficiency with which a court could apply this bright-line test as opposed to a case-by-case subjective analysis of each individual set of circumstances, despite the Sixth Circuit’s protestations that “considerations of judicial economy are not what drives this opinion.”¹⁵⁰

b. Right to Create Derivative Works

Had the Sixth Circuit undertaken a stronger interpretation of the derivative works right, it may have had an easier and potentially correct justification for denying summary judgment to defendant No Limit. A strong interpretation of the derivative works right less clearly favors the ability of second comers to sample sound

145. *See id.* at 1572 (“[I]t is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17.”).

146. H.R. REP. NO. 94-1476, at 106 (1976) (Notes of the Comm. on the Judiciary), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721 (emphasis added).

147. The fact that this language was not included in the final statute is not important; section 114 does not include a definition of what substantial similarity is. *See* 17 U.S.C. § 114.

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

149. *Id.* at 802.

150. *Id.* The Sixth Circuit, however, has a tendency to forego a *de minimis* analysis whenever doing so would contravene express language in a statute, even when using the analysis would make better common sense. In interpreting the Fair Debt Collection Practices Act, the Sixth Circuit held that the Act was “‘extraordinarily broad’ and must be enforced as written, even when eminently sensible exceptions are proposed in the face of innocent and/or *de minimis* violations.” *Hartman v. Asset Acceptance Corp.*, No. 1:03-cv-113, 2004 U.S. Dist. LEXIS 24845, at *9 (S.D. Ohio Sept. 29, 2004) (quoting *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992)).

recordings, or perhaps even apply the *de minimis* defense, than the court's reliance on the reproduction of sound recordings, which can be interpreted in more than one way. A derivative work is "a work based upon one or more preexisting works...[in] any...form in which a work may be recast, transformed, or adapted."¹⁵¹ Again, the language of section 114 seems to abolish any hope of substantial similarity or a *de minimis* analysis because, in addition to the entire work, it reserves to the author of the sound recording any derivative work in which the actual sounds fixed in the sound recording are "rearranged, remixed, or otherwise altered in sequence or quality."¹⁵² This language seems to preclude any use of any portion of the work whatsoever in works that are not the original sound recording.

This interpretation, however, is also flawed, or at least is too simplistic. According to statutory interpretation, the actual sounds fixed in the sound recording must be "rearranged, remixed, or altered in sequence or quality." If a second-comer borrows a short phrase from a sound recording—for example, a three-note sequence—those notes have not been rearranged, with respect to one another. Neither have they been altered in sequence or quality if the sounds have been merely transposed from one work to another later work. The notes could possibly have been said to have been "remixed," as some definitions of the word "remix" could include short phrases of notes that have been truly reproduced.¹⁵³ However, a popular definition of "remix" is "an alternate mix of a song different from the original version...often used to create an upbeat version of a song for playing by disc jockeys in nightclubs."¹⁵⁴ In other words, remixing can be used generally to refer to taking an entire sound recording and overlaying it with a different beat or genre. If the notes have not been tampered with, a remix may not have occurred.

If Congress had intended for derivative works to include purely reproduced sounds, why not include the phrase "a portion of" the sounds in a sound recording in the right of reproduction? Instead, Congress left courts with language that was ambiguous and subject to interpretation, rather than clarifying the language when it got the chance in the 1976 Copyright Act.¹⁵⁵

This ambiguity explains where the *de minimis* doctrine could be useful to ensure uniformity within the same category of work. The *de minimis* doctrine applies to negate both the right to reproduce and the right to create derivative works.¹⁵⁶ Under the "literal meaning" test of the Sixth Circuit, it seems that the district court improperly granted summary judgment to the defendant, No Limit, because a "remixing" did in fact occur. This is where the possibility of a *de minimis* test is not

151. 17 U.S.C. § 101 (Supp. 2003).

152. *Id.* § 114(b) (2000).

153. The American Heritage Dictionary defines "remix" as "[t]o recombine (audio tracks or channels from a recording) to produce a new or modified audio recording." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), available at <http://www.bartleby.com/61/66/R0146650.html>. These audio tracks logically could include short phrases of notes.

154. See Wikipedia, <http://en.wikipedia.org/wiki/Remix> (last visited June 12, 2006).

155. See, e.g., *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 776 (E.D. Pa. 2001) (finding Congress silent in the Copyright Act regarding streaming of sound recordings).

156. See *Newton v. Diamond*, 388 F.3d 1189, 1196–97 (9th Cir. 2003) (finding the Beastie Boys' work "Pass the Mic" a derivative work incorporating a sample from Newton's "The Choir," not infringing due to the *de minimis* defense).

only necessary, but mandatory under the Copyright Act.¹⁵⁷ The “remixed” sample used in “100 Miles” involved lowering the pitch, and “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.”¹⁵⁸ However, a sound recording where no alterations occur in the music, but merely sample directly from the music, under a literal reading of section 114 of the Copyright Act, may not give rise to an infringement action, even if the average audience can recognize the source of the sample, causing potential unfairness in its treatment.

3. Illustration: Harry Potter and the Three-Second Crime

To illustrate the suggestion that a court should not be mindful of the *de minimis* defense merely because the medium presented is a sound recording is illogical, consider the problem of a book that is recorded in audio format. When the book is written, the copyright initially vests with the author of the book.¹⁵⁹ Because it is in book format, according to the Copyright Act, the author receives the individual rights to copy, to make derivative works, to distribute, to perform, and to display the book.¹⁶⁰ A person reading the book for fixation on a compact disc or audiocassette tape does not automatically receive a copyright in the performance; that copyright still belongs to the author of the book but is licensed to the reader so that the reader may perform the work in a derivative form.¹⁶¹ The performer will receive a thin copyright in just the performance, so long as the performance is recorded in a tangible medium of expression.¹⁶² That fixation can be created by the performer himself, or the task can be licensed to a third person.

The copyrightable elements in a sound recording will usually, though not always, involve ‘authorship’ both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.¹⁶³

The producer then becomes the “author” of a thin copyright over the sound recording itself.¹⁶⁴

With these multiple levels of authorship, whose rights, then, are infringed when a person takes a few words from the audio recording and incorporates them into a

157. 17 U.S.C. § 114(b).

158. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 795 (6th Cir. 2005) (describing the district court’s findings).

159. 17 U.S.C. § 201(a) (2000).

160. *See id.* § 106 (2000 & Supp. 2003).

161. *See generally* Jane C. Ginsburg, *Authors as “Licensors” of “Informational Rights” Under U.C.C. Article 2B*, 13 *BERKELEY TECH. L.J.* 945, 950 (1998) (discussing proposed amendments to the Uniform Commercial Code).

162. *See* Edward L. Carter & Scott Lunt, *Podcasting and Copyright: The Impact of Regulation on New Communication Technologies*, 22 *SANTA CLARA COMPUTER & HIGH TECH. L.J.* 187, 193 (2006) (discussing the extent of copyright for sound recordings).

163. *See* H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1569.

164. Of course, this is assuming the existence of permissions from all and the absence of licenses or other contracts to keep the copyrights. While the author realizes that these licenses and permissions would exist in the real world—and, in fact, most rights would simply be owned by TimeWarner and a question of ownership or creativity would be moot—the author asks the reader to engage in her own variety of fiction.

later developed song or audio presentation? For instance, the *Harry Potter* children's book series by author J.K. Rowling, including the initial volume *Harry Potter and the Sorcerer's Stone*, has sold an estimated 270 million copies¹⁶⁵ in sixty-two languages.¹⁶⁶ In addition, the first five audio books in the series have sold more than four million copies in North America, thanks in large part to the creativity of *Harry Potter* reader Jim Dale.¹⁶⁷ The copyright of the sound recording is owned by Random House Publishing, Inc.

Suppose rapper "DJ Julie J" creates a commercial rap song for kids, "Listen Up and Read!" The song includes a snippet from the *Sorcerer's Stone* book as it was read by Dale. The snippet consists only of Dale's spoken words, "Harry, Ron, and Hermione," a four-word phrase that appears a number of times in the text and lasting 2.5 seconds on the audio book¹⁶⁸ but amounts to a negligible percentage of the 309-page text as a whole.¹⁶⁹

If DJ Julie J does not receive any authorization before creating the song, she could be infringing on the creative rights of the authors of previous works. But who would be able to recover? J.K. Rowling has created six books, dozens of characters, and hundreds of scenes in the *Harry Potter* series. As the author of the text, Rowling has the rights that a copyright confers. However, if a court performs a true de minimis analysis, four words from a text of more than three hundred pages may amount to a use that is insubstantial, although the source of their appropriation may be apparent to the average observer if the audience is comprised of school children previously exposed to the *Harry Potter* books. Considering only the amount of the book taken, DJ Julie J could raise a defense of de minimis use, and it is likely that she could succeed.

Although his creative contribution to the *Harry Potter* series has included more than 200 distinct voices—including 134 in *Harry Potter and the Order of the Phoenix*¹⁷⁰—Jim Dale has only a thin copyright with few rights to enforce: the rights in the performance. Dale would be able to bring an action to enforce his Section 106 rights. However, again, if a court performs the de minimis analysis, four words from an eight-compact disc series—at most twelve seconds total—is quite insubstantial, and the source of their appropriation may be less apparent to the average observer. Moreover, the amount of creativity that Dale put into those particular words is less than if he were acting out a character, as they are by necessity spoken in as plain a narrative voice as possible.¹⁷¹ Again, considering only the amount of the book taken,

165. See T. K. Arun, *Harry Potter, Globalising Wizard*, ECON. TIMES (India), July 21, 2005, available at <http://economictimes.indiatimes.com/articleshow/1178822.cms.link>.

166. See Meg Milne, *Just Wild About Harry*, EXPRESS ON SUNDAY (UK), May 15, 2005.

167. See Merrill Balassone, *He Says the Magic Words: Actor Jim Dale Expects "Potter" Audiobooks Will Be His Legacy*, L.A. TIMES, Aug. 9, 2005, at E10.

168. See, e.g., J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE*, 192, 235, 266 (Scholastic 1998). Harry Potter, Ron Weasley, and Hermione Granger are the main pre-adult characters in Rowling's *Harry Potter* series.

169. Given a value of approximately 250 words per page, this would amount to 77,250 words; the percentage of the original work actually taken would thus be 0.02% if all four instances of the words were taken as a percentage, 0.005% if only one instance is used as the basis.

170. See Balassone, *supra* note 167. The number earned Dale a place in the Guinness World Book of Records for the most voices in a single audio book. *Id.*

171. The words "Harry, Ron and Hermione" generally apply to text that describes a particular event; this

DJ Julie J could raise a defense of de minimis use and it is likely that she could succeed.

In addition to a de minimis defense, assuming that “Listen Up and Read!” is a commercial-length song (which average approximately three minutes), the infringement may be insufficient to rise to the level of substantial similarity. However, even though the doctrines of *de minimis non curat lex* and substantial similarity would likely prevent either Dale or Rowling from recovering under traditional copyright infringement, if the Sixth Circuit’s *Bridgeport* decision is permitted to stand, Random House—which merely employed the producer who performed the technical task of fixing Dale’s voice onto a compact disc—could have a viable cause of action against DJ Julie J. Compared to the creative efforts of J.K. Rowling and Jim Dale in creating the *Sorcerer’s Stone* storyline and performance, intriguing enough to captivate an audience of millions, the amount of creativity contributed by the corporate entity that fixes the performance onto a compact disc is negligible—indeed, a de minimis amount. However, in this bizarre distinction between sound recordings and the rest of the creative world, it is the only entity that has an ironclad chance of recovery.¹⁷²

The *Harry Potter* illustration above demonstrates that the application of a test that includes infringement, without any possibility of a de minimis defense merely because the copyrighted work is a sound recording, can be preposterous, leading to results that are both inequitable and nonsensical. Under the Copyright Act, the interpretation of the rights afforded a sound recording for a musical work is no different than the rights afforded a sound recording for a written work and may in fact present a stronger argument for a test for infringement that depends upon the reaction of listeners. The need for an audience is paramount in music and sampling cases; it has been noted that “artists require an audience for relevance.”¹⁷³ If in fact the existence of an audience is important to the author of a particular medium of a copyrighted work, it is logical that the infringement of that work should be determined using the audience-sensitive test of de minimis. And, since the manner in which that has been accomplished to date has been through the application of some form of test for substantial similarity, which relies on the lay audience to determine not the scope but the existence of infringement, the Sixth Circuit’s blanket disregard for substantial similarity or a de minimis test is not only improper, but reckless.

B. Application Beyond Sound Recordings

Much of the emphasized protection for sound recordings relies on the technological medium in which the recordings are necessarily fixed. Even though

author has not yet found whether they appear in any character’s dialogue.

172. This is not to say that the sound recording artists can never have the same degree of creativity as the performer or the writer, author, or composer of the underlying work. It is also possible that the individual author of the underlying work will retain the copyrights to all derivative works, which is fully within her rights. However, given the expense that goes into creating a marketable sound recording, it is more likely that the owner of the sound recording will be a corporate entity than an individual.

173. Kenneth M. Achenbach, Comment, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 195 (2004).

untrue when Congress authored section 114 of the Copyright Act,¹⁷⁴ with current technology, it is easier to copy a sound recording and to create a derivative work using parts of that sound recording.¹⁷⁵

The sound recording is not the only work that has been impacted by a technological improvement in the medium of fixation. More than ever, written materials are available in a format that makes the ease of copying considerable.¹⁷⁶ As in music, the problem of direct, total reproduction has increased exponentially. However, with the exception of the additional protections afforded by the Copyright Protection and Management Systems Act¹⁷⁷ to an already-fixed work, nothing has been done to afford digital copies of the same work an additional copyright or a higher standard based solely on the medium of the work.¹⁷⁸

The abolition of substantial similarity or the *de minimis* defense with respect to sound recordings sets a dangerous precedent for these works, as well as for copyrighted works for which there exists only a small amount of originality. An example of this inherent danger is illustrated with a compilation or database. As in sound recordings, Congress went to great lengths to define the scope of the rights afforded a compilation.¹⁷⁹ A copyright in a compilation may protect the author's "selection, coordination and arrangement," but does not afford any protection to the underlying information.¹⁸⁰ Thus, the "preexisting materials or data" that are selected, coordinated, or arranged in a compilation, as defined by statute, are not protectable by copyright.¹⁸¹ As clarified by the Supreme Court in *Feist*, "facts are not copyrightable;...compilations of facts generally are."¹⁸² As a result, the copyright afforded is "thin."¹⁸³

Admittedly, the current scope of protection for a database is narrow but is not nonexistent,¹⁸⁴ and it is therefore possible to interpret the appropriation of a small amount of the data in a database as infringement. While the language of the existing

174. In 1971, the primary medium on which to record sounds was "16-track 2-inch tape, mixed down to [one-fourth]-inch, and without using computers." Paul Tingen, *John Frusciante's Creative Explosion*, ELEC. MUSICIAN, Jan. 2005, at 64, 70.

175. See, e.g., Denis T. Brogan, Note, *Fair Use No Longer: How the Digital Millennium Copyright Act Bars Fair Use of Digitally Stored Copyrighted Works*, 16 ST. JOHN'S J. LEGAL COMMENT. 691, 713-14 (2002) (discussing the application of the fair use doctrine to the problem of copying via the Internet).

176. See, e.g., Michael W. Smith, *Bringing Developing Countries' Intellectual Property Laws to TRIPS Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalize an Intellectual Property Regime*, 31 CASE W. RES. J. INT'L L. 211, 219 n.47 (1999) (citing ELISABETH UPHOFF, INTELLECTUAL PROPERTY AND U.S. RELATIONS WITH INDONESIA, MALAYSIA, SINGAPORE AND THAILAND 12 (1991) ("[A]dvances in reproduction technology have made it much easier to copy books, audio/videotapes, movies, etc.")). For example, Project Gutenberg has 18,000 free books online; the site encourages users to copy and disseminate those books that are in the public domain. See Project Gutenberg, www.gutenberg.org (last visited June 14, 2006) (identifying that two million books online are downloaded each month).

177. 17 U.S.C. §§ 1201-1332 (2000 & Supp. 2003).

178. See, e.g., *The Computer Software Rental Amendments Act of 1990: The Nonprofit Library Lending Exemption to the "Rental Right"*, 41 J. COPYRIGHT SOC'Y U.S.A. 231, 260.

179. 17 U.S.C. § 101 (Supp. 2003).

180. 17 U.S.C. § 102(b) (2000) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

181. *Id.* § 101.

182. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991).

183. *Id.* at 349.

184. See *id.*

statute would likely mandate against a finding of infringement in all but the most extreme of cases, such judicial consideration may be taken into account when crafting an American version of the European Union Database Directive (the Directive),¹⁸⁵ which affords increased rights to the creators of databases. For a substantial investment in a database, the author can prevent a party from extracting substantial amounts of data from the database and reutilizing the data in its own product.¹⁸⁶ An extraction is the “permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form.”¹⁸⁷ A reutilization is “any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission.”¹⁸⁸

The amount of the database appropriated is highly relevant to the Directive, because the creator has a cause of action when an infringer appropriates a portion of the database contents that is substantial, quantitatively or qualitatively.¹⁸⁹ If a very small portion of the database contents—even if it only amounts to one piece of data—is of great commercial value (or great potential commercial value), or if an insubstantial part of the database is repeatedly extracted or reutilized, it is possible under the Directive to have a qualitative extraction or reutilization.¹⁹⁰

The Directive does not directly affect the rights of American authors because it does not purport to offer reciprocal rights to those creators who are citizens of countries that do not recognize a database right.¹⁹¹ Perhaps as a result, since the Directive was enacted in 1996,¹⁹² the House of Representatives has had legislation on the calendar purporting to grant a *sui generis* right or a super-copyright for databases in each session except one.¹⁹³ The probability of a new statutory “information property right” may increase with the recent creation of an “intellectual property czar” in the Commerce Department.¹⁹⁴

Without the possibility of a *de minimis* defense, or at least the specific delineation of what constitutes “extraction” or “reutilization” in a new database right, copyright law runs the risk of contradicting itself. First, it is possible that there could be an intellectual property right in facts, but that is expressly impermissible in the Copyright Act.¹⁹⁵ Moreover, the elimination of a *de minimis* defense or substantial similarity threshold for copying creates a right in a database that runs perilously close to running afoul of the First Amendment freedoms of

185. Council Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the Legal Protection of Databases, available at <http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html>.

186. See *id.* art. 7, §§ 1–2; *id.* art. 10, § 1.

187. *Id.* art. 7, § 2(a).

188. *Id.* art. 7, § 2(b).

189. *Id.* art. 7, § 1.

190. *Id.*

191. See *id.* ¶ 56 (noting that the right should be offered to third-country nationals “only if such third countries[]offer [sic] comparable protection”).

192. See *id.* art. 17.

193. H.R. 3261, 108th Cong. (2003); H.R. 354, 106th Cong. (1999); H.R. 1858, 106th Cong. (1999); H.R. 2652, 105th Cong. (1997). No database legislation has been filed in the 109th Congress to date.

194. See *Bush Names International Intellectual Property Czar*, IP L. BULL., July 22, 2005, available at <http://lists.essential.org/pipermail/a2k/2005-July/000537.html>.

195. 17 U.S.C. § 102(b) (2000).

speech and the press by giving database creators potential monopolies over individual data on a strict liability basis.

C. *Strict Liability in Copyright?*

Yet another perceived potential limitation of the de minimis test in copyright infringement is the mistaken belief that copyright infringement is in fact a tort rooted in strict liability—liability without fault.¹⁹⁶ This is contrary to both the original philosophy behind copyright and the intent of the legislature for two reasons, as evidenced most recently in the Copyright Act of 1976.¹⁹⁷ First, copyright infringement is not in fact subject to a strict liability analysis. Second, even if copyright could be considered to be within the parameters of strict liability, the fact that a statute provides for strict liability does not preclude the application of the de minimis defense in certain instances of trivial violations.

1. Application of Strict Liability to Copyright

Historically, strict liability has not been used in copyright infringement to negate a de minimis defense. The blanket statement, “[s]trict liability has long been a part of Anglo-American copyright law,” espoused by scholars to suggest that even the innocent infringer will be held accountable for copyright infringement, has not historically applied to determine whether or not an act of copying is substantial enough to constitute infringement in the first place.¹⁹⁸ When taking on this viewpoint, scholars cite what they perceive to be the *Feist* test for infringement of a copyright—“(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”¹⁹⁹ This Article has already pointed out the problems with applying the test that *Feist* mandates without considering the additional requirements of substantial similarity.²⁰⁰

However, even those who find longstanding traditions of strict liability question its existence in connection with copyright infringement, noting that “the culpability of the infringer has long been an important factor in assessing liability.”²⁰¹ In fact, earlier copyright statutes incorporated “‘intent to evade the law’” as part of the test for copyright infringement.²⁰²

The application of strict liability in copyright common law has been relatively recent, introduced primarily in terms of secondary liability for copyright infringement. In the 1984 opinion *Sony Corp. of America v. Universal City Studios, Inc.*,²⁰³ the Supreme Court legitimized the concept of secondary liability when it

196. See BLACK'S LAW DICTIONARY 934 (8th ed. 2004) (defining “strict liability”).

197. 17 U.S.C. §§ 101–1332 (2000 & Supp. 2003).

198. See Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 355 (2002).

199. *Id.* at 356 (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)).

200. See *supra* Part III.A.2.

201. See Ciolino & Donelon, *supra* note 198, at 359.

202. See, e.g., *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 348 (1908) (quoting the relevant provision at that time); *Werckmeister v. Am. Tobacco Co.*, 207 U.S. 375, 379–80 (1907) (quoting the same); *Thornton v. Schreiber*, 124 U.S. 612, 613–14 (1888) (quoting the same). Unfortunately, these cases did not interpret this language of the statute.

203. 464 U.S. 417 (1984).

considered whether the manufacturers of video tape recorders (VTRs) were liable to the entertainment industry for any acts of copyright infringement that the consumers of VTRs committed with respect to copyrighted works.²⁰⁴ Although the Court ultimately held that the manufacturers were not liable,²⁰⁵ the decision gave additional credence to the concept of secondary liability.

Since the decision in *Sony Corp.*, courts have begun to hold, albeit sporadically, that the incorporation of secondary liability suggests that copyright is indeed a strict liability statute. Citing no precedent, courts have made the blanket statement that “copyright is a strict liability statute,”²⁰⁶ and, therefore, instances of copying on the part of a direct infringer could give rise to automatic liability on the part of the secondary infringer.²⁰⁷

Yet this drastic increase in culpability has yet to carry favor with the majority of courts, including the Supreme Court. The June 2005 Supreme Court decision *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*²⁰⁸ dealt specifically with contributory and vicarious infringement on the part of a peer-to-peer file sharing service. The Supreme Court considered whether the courts below could properly enter summary judgment favoring the defendants based on the traditional secondary liability tests.²⁰⁹ Instead of suggesting that any infringement was subject to a strict liability analysis, the Supreme Court crafted an additional level of analysis that courts must consider in addition to the tests, one that considers the intent of the potential secondary infringer.²¹⁰ This suggests that even the Supreme Court considers copyright infringement not to be a tort of true strict liability but instead a tort that considers fault.

2. De Minimis Defense to Strict Liability Laws

Even though revocation of the de minimis doctrine appears to suggest a doctrine of fault liability,²¹¹ rather strict liability,²¹² the resultant confusion could lead to questions regarding the treatment of the de minimis maxim in connection with strict liability interpretations. Statutes that have been recognized as imposing strict liability on violators take two diametrically opposed approaches to the incorporation of the de minimis doctrine within their frameworks: exclusion and inclusion.

204. *Id.* at 420.

205. *Id.* at 456.

206. *Religious Tech. Ctr. v. Netcom On-line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995); *see also Educ. Testing Servs. v. Simon*, 95 F. Supp. 2d 1081, 1087 (C.D. Cal. 1999) (“There is no need to prove anything about a defendant’s mental state to establish copyright infringement; it is a strict liability tort.”).

207. *See Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (finding an internet service provider strictly liable). *But see CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004).

208. 125 S. Ct. 2764, 2779 (2005).

209. The test for vicarious liability consists of an act of direct infringement by a third party, the defendant’s financial benefit from the infringement, and the defendant’s control of the infringer; the test for contributory liability consists of an act of direct infringement by a third party, the defendant’s knowledge of the infringing activity, and the defendant’s material contribution to the infringing activity. *See, e.g., Religious Tech. Ctr.*, 907 F. Supp. 1361.

210. *Grokster*, 125 S. Ct. at 2779.

211. *See BLACK’S LAW DICTIONARY* 932 (8th ed. 2004) (defining “fault liability” as “[i]iability based on some degree of blameworthiness”).

212. *See supra* note 196 and accompanying text.

First, certain areas of the law exclude the *de minimis* defense wholesale. An example is the area of environmental law, which has reinforced the concept of liability without fault in several statutes. Courts have noted that “[t]he Clean Water Act imposes strict liability for [the Honouliuli National Pollution Discharge Elimination System] and does not excuse ‘*de minimis*’ or ‘rare’ violations,”²¹³ and that “the *de minimis* character of individual instances arising under the [Comprehensive Environmental Response, Compensation and Liability Act] is of no consequence.”²¹⁴

This adoption of a policy excluding the *de minimis* defense from instances of strict liability seems to be in line with what is considered to be the true definition of strict liability in the first place. What differentiates a tort in strict liability from others is one of fault: regardless of the amount of fault, even in instances of no fault, a defendant can be found liable for a violation.²¹⁵ The quantitative amount is irrelevant, as evident in the area of environmental law: Because the very heart of environmental law is the health of humans, animals, plants, earth, air, and water, the smallest amount of pollution may lead to harm to one or more of them.²¹⁶

However, even when human health is potentially at stake, the concept of holding every infraction liable for breaking the law may be untenable, causing certain areas of the law to include a *de minimis* analysis in the rubric for the most trivial of violations. For example, in the laws of food safety, any instance of food adulteration is a violation of the Food and Drug Act.²¹⁷ However, an exception is made for “unavoidable natural defects” (known in the industry as “filth”), because it is impossible to discover and destroy every single natural fragment from food that derives from natural sources.²¹⁸ By definition, the “adulteration” of food is a violation of the Food and Drug Act.²¹⁹ However, because the harm to consumers is potentially without effect, these *de minimis* infractions, as expressed by maximum tolerances in the FDA/CFSAN Defect Action Levels handbook, are viewed as acceptable by the Food and Drug Administration.²²⁰

Neither model is clearly analogous to copyright law. Any harm to the holder of a copyright is economic, not physical, and as such is relatively petty when compared with an infraction of laws regulating substances that may result in human illness or

213. *Hawaii's Thousand Friends v. City & County of Honolulu*, 821 F. Supp. 1368, 1392 (D. Haw. 1993).

214. *See United States v. Domenic Lombardy Realty, Inc.*, 204 F. Supp. 2d 318, 328 (D.R.I. 2002) (citing *United States v. Olin*, 107 F.3d 1506, 1510 (11th Cir. 1997)).

215. *See, e.g., DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 614 (4th ed. 2001) (“Strict liability of course means that the actor is liable even if he exercised the greatest possible care in his activities.”).

216. For example, according to the Environmental Protection Agency’s National Primary Drinking Water Regulations, although the maximum contaminant level goal for benzene is zero, the maximum contaminant level allowed is 0.005 mg/L. 40 C.F.R. § 141, subpt. Q, app. B, no. 55 (2006). Exposure to benzene at levels above this amount can lead to anemia, decreased blood platelets, and increased risk of cancer. *Id.*

217. *See* 21 C.F.R. § 110.110(a) (1997) (“Some foods, even when produced under current good manufacturing practice, contain natural or unavoidable defects that at low levels are not hazardous to health.”).

218. *Id.*

219. *See* 21 U.S.C. § 342 (2000 & Supp. 2003).

220. F.D.A., THE FOOD DEFECT ACTION LEVELS (rev. 1998), available at <http://vm.cfsan.fda.gov/~dms/dalbook.html>. For example, ground oregano may have up to an average of 1,250 insect fragments per ten grams; chocolate may have up to ninety insect fragments or one rat hair per hundred grams; and up to six percent of potato chips by weight may contain rot.

death.²²¹ However, when considering the harm to the individual copyright owner that may be affected by a *de minimis* violation of copyright law, the resultant injury is more akin to one in food and drug law, where the health of an individual may be adversely impacted, as opposed to one in environmental law, where the general public may suffer harm. Moreover, proponents of a strong public domain may argue that, as a result of an overprotective copyright, the general public would be harmed because such a copyright would discourage creative works incorporating pieces of prior works.²²²

IV. ALTERNATIVES TO A DE MINIMIS DEFENSE

In a historically litigation-prone society,²²³ and in light of increased attention afforded intellectual property since the widespread expansion of digital technology,²²⁴ a defense of *de minimis non curat lex* may seem wholly illogical, especially given the number of defenses already available to incidents of copyright infringement. While in certain instances there may appear to be viable alternatives to a *de minimis* defense, in actuality they cannot come close to protecting the activities, which should not give rise to a cause of action in the first place.

A. Alternatives by Contract

A possible alternative to the employ of a *de minimis* defense is, of course, licensing, which would provide an alternative to an out-and-out violation of copyright law with permission granted from the copyright owner.²²⁵ The Sixth Circuit dictated as much to samplers with its edict, "Get a license or do not sample."²²⁶ Organizations such as Lawrence Lessig's Creative Commons have attempted to facilitate licensing to make it more accessible to the average composer, offering lawyer-free licenses to aspiring, sampling artists.²²⁷

But providing for a mere license may not be enough and does not address the larger issue. Hilary Rosen, former CEO of the Recording Industry Association of America, notes that "[t]he biggest problem in commercial sampling isn't that artists don't know how to give away pieces of their work; it's that they and their producers

221. This has not kept the Sixth Circuit from finding *de minimis* violations of other financial statutes to be actionable. See *supra* notes 98, 131.

222. See, e.g., Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 400-01 (2003) (discussing academic and legislative attempts to strengthen the public domain).

223. See generally Marc Galanter, *Reading the Landscapes of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 6 (1983) (discussing "the alleged high rates of disputing and litigation").

224. See, e.g., Stephen B. Davis, Vice President, Strategic & Legal Affairs, Corbis, Corp., Columbia-VLA Journal of Law & the Arts Roundtable on Electronic Rights, in 20 COLUM.-VLA J.L. & ARTS 605, 655-56 (1996) (noting an increased awareness of intellectual property issues among the creative community resulting from digital rights discussions).

225. Even though the Copyright Act preempts the application of state laws, prohibiting them from extending protections or exemptions to subject matter within the scope of copyright, 17 U.S.C. § 301(a) (2000), courts have been careful not to preempt the application of contracts to copyrighted material. See, e.g., *ProCD v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (finding shrinkwrap licenses not preempted by section 301 of the Copyright Act).

226. *Bridgeport Music v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

227. See Lawrence Lessig, *Creative Freedom for All*, WIRED, Nov. 2004, at 188.

want to get paid more—a lot more—for smaller bits of their songs.”²²⁸ Without a *de minimis* defense to copyright infringement of sound recordings, even with licensing, the creative efforts of the next generation of musicians are certain to involve increased expense.²²⁹

Moreover, forcing licenses upon every author who uses a two-note or three-note series of recorded music could potentially be impracticable for artists not supported by major labels, further chilling creativity. For example, one can imagine a song that is highly creative, highly original, but that uses two or three notes from a multitude of sound recordings consisting of three to five seconds apiece. If the compilation of sound recordings is copied three times for a three-minute song, that would require twelve to twenty distinct samples. Because “[m]ost publishers [of original music that is sampled in a later song] won’t take less than 20% ownership—no matter how minor the sample,”²³⁰ such an original work could result in zero ownership in the final work once all license rights have been doled out.

Finally, while a compulsory license may be sufficient protection for second-comers in the areas of music, visual arts, and literature, the issue becomes more problematic when dealing with a use such as databases or computer programs. Recognition of a compulsory license to use *de minimis* parts of a database, for example, implicitly recognizes a monopoly on factual information in the database holder.²³¹ A compulsory license for *de minimis* lines of code from a computer program would definitely stymie the “Progress of Science and the useful Arts,”²³² as portions of code become almost generic in short periods of time.

B. Reliance on Substantial Similarity and Fair Use

As noted above, the *de minimis* doctrine seems to be subsumed within the tests of substantial similarity and of fair use, rendering a second analysis unnecessary. The test of substantial similarity includes a quantitative component that seems to embrace and in some ways mirror the *de minimis* test,²³³ and the test for fair use employs the third factor in the four-part test to specify the quantitative amount of the material used.²³⁴ It is logical that if a use of a copyrighted work raises *de minimis* possibilities, one would first examine whether an economic violation applies, then whether it falls within the scope of substantial similarity, and then whether the use could be excluded by fair use.²³⁵

228. Hilary Rosen, *How I Learned to Love Larry*, WIRE, Nov. 2004, at 188, 189.

229. See, e.g., *Nash v. CBS*, 899 F.2d 1537, 1540 (7th Cir. 1990) (“Once a work has been written and published, any rule requiring people to compensate the author slows progress in literature and art, making useful expressions ‘too expensive’ forcing authors to re-invent the wheel, and so on.”).

230. Jim Bessman, *Music Publishing: Sampling’s Big Score*, BILLBOARD, June 14, 2003, at 43 (quoting David Hirshland, Executive Vice President, Bug Music).

231. See, e.g., Catherine Colston, *Challenges to Information Retrieval—A Global Solution?*, 10 INT’L J.L. & INFO. TECH. 294, 299 (2002) (discussing the proposition that, because not only the collection of information but also “its free flow thereafter” may be monopolized under a sui generis database right, a compulsory license may be necessary).

232. U.S. CONST. art. I, § 8, cl. 8.

233. See *supra* notes 78–79 and accompanying text.

234. See *supra* notes 114–115 and accompanying text.

235. See *Sandoval v. New Line Cinema*, 147 F.3d 215, 217 (2d Cir. 1998) (noting that the *de minimis* defense should be evaluated in the context of substantial similarity before applying it through fair use).

In reality, however, this third factor has not been a reliable way to permit second-comers to incorporate a quantifiably insignificant amount of a copyrighted work into a later work for a number of reasons. First, the quadruplicate nature of the fair use defense dissuades a court from considering any one factor alone to negate a finding of infringement. As the *Ringgold* court noted:

Even if the third factor favors the defendants, courts considering the fair use defense... must be careful not to permit this factor too easily to tip the aggregate fair use assessment in favor of those whom the other three factors do not favor. Otherwise, a defendant who uses a creative work in a way that does not serve any of the purposes for which the fair use defense is normally invoked and that impairs the market for licensing the work will escape liability simply by claiming only a small infringement.²³⁶

Conversely, where a defendant's use may be quantifiably insignificant, a court may still consider the purpose of the work to be purely commercial and outside the scope of fair use.²³⁷

Additionally, courts have made it clear that the third factor does not prevent a quantifiably insignificant amount from constituting infringement if the portion of the work used is qualitatively significant. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, for example, the Supreme Court undertook a detailed analysis of the third fair use factor to determine that, while a relatively quantifiably insignificant amount of President Gerald Ford's memoirs had been taken by the reporting newspaper, the portion was the "heart" of President Ford's work and therefore could not be considered insignificant.²³⁸ The Court noted, "In view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the 'magazine took a meager, indeed an infinitesimal amount of Ford's original language,'"²³⁹ even though the amount of material copied was insubstantial.

Even though Congress has not afforded weight to any one factor over another, courts have readily acknowledged that they contribute less significance to the third factor as related to the other three factors of the fair use test. In *Harper & Row*, the court found that the fourth factor, "effect of the use upon the potential market[,] ... is undoubtedly the single most important element of fair use."²⁴⁰ The Supreme Court also stated that analysis of the third factor cannot stand alone, but must take place in conjunction with an analysis of the purpose and character of the use.²⁴¹ The Ninth Circuit stated that "where the ultimate (as opposed to direct) use is as limited as it was here, [the third] factor is of very little weight,"²⁴² and that "under circumstances, a court will conclude that a use is fair even when the protected work is copied in its entirety."²⁴³ Thus, even though the unpredictability of the analysis

236. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 80 (2d Cir. 1997).

237. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

238. See generally *id.*

239. *Id.* at 566 (quoting a Second Circuit opinion, 723 F.2d 195, 209 (2d Cir. 1983)).

240. *Id.*

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

242. *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1526-27 (9th Cir. 1992).

243. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001).

of the factor may be as likely to favor fair use as it is to weigh against it, that very unpredictability renders the statutory language a slim guarantee that a *de minimis* defense may be upheld with any regularity through fair use.

As a result, although the doctrine of fair use is intended to broaden the scope of the public domain so that freedom of speech is secure, interestingly, the ability to apply the *de minimis* defense within its parameters is narrow. Because of its nature as a defense to infringement, in theory, the fair use analysis becomes relevant only once a work is found substantially similar enough to infringe.²⁴⁴ However, substantial similarity is also not comprehensive enough to constitute a panacea for *de minimis* violations. First, substantial similarity is focused on the insignificant *use* of the work, in other words, whether the second-comer's use will allow for the average observer to recognize the appropriation. This potentially excludes a type of violation where the average observer recognizes the appropriation, but the plaintiff has suffered little to no economic harm as a result of the appropriation. Not all of these "technical" violations of copyright, as suggested above, would be appropriately analyzed using a substantial similarity rubric.²⁴⁵

1. Procedural Considerations

Regardless of whether the *de minimis* infringement has economic or similarity insignificance, the continued employ of the maxim *de minimis non curat lex* as its own defense has import for the intention of judicial economy. Because copyright infringement is an exclusively federal cause of action,²⁴⁶ an action of copyright infringement by its nature should be mindful of the preservation of principles of efficiency, both temporal and economic.²⁴⁷ In a perfect world, if a violation or damage is indeed *de minimis*, a litigant would not bring the action in the first place.

When litigants *do* bring causes of action, including causes of action possibly excluded by the *de minimis* doctrine, however, the Federal Rules of Civil Procedure allow for mechanisms to dispose of those causes of action without necessitating an expensive jury trial. The success of those mechanisms—such as a motion to dismiss for failure to state a claim²⁴⁸ or a motion for judgment on the pleadings²⁴⁹—is dependent upon the lack of a legally sufficient basis to bring a cause of action, as opposed to the relative weight of the evidence.²⁵⁰ When a violation of copyright is economically insignificant to the plaintiff or is indistinguishable to the average observer, the infringement should not be actionable as a matter of law by virtue of

244. See John Schietinger, Note & Comment, *Bridgeport Music Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat in Digital Sampling*, 55 DEPAUL L. REV. 209, 220 (2005) ("A court will analyze fair use only after it has found substantial similarity.") (citing David S. Blessing, *Who Speaks Latin Anymore? Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2410 (2004)).

245. See *supra* note 29 and accompanying text.

246. See 28 U.S.C. § 1338(a) (West, Supp. 2005) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to...copyrights.... Such jurisdiction shall be exclusive of the courts of the states in...copyright cases.")

247. FED. R. CIV. P. 1 ("[The Rules of Civil Procedure] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.")

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

249. FED. R. CIV. P. 56.12(c).

250. See FED. R. CIV. P. 12(b)(6), 12(c).

de minimis non curat lex. Such a rule would further the policy purposes of the Federal Rules of Civil Procedure.

These motions can be used early on in litigation proceedings to prevent the unauthorized exercise of jurisdiction over defendants and over actions. A litigant may have difficulty choosing a forum for a *de minimis* infringement due to a potential lack of personal jurisdiction. "Because a copyright is an intangible, incorporeal right, it has no situs apart from the domicile of the proprietor, and hence, a copyright infringement action must be based upon *in personam* jurisdiction,"²⁵¹ which governs the personal liabilities of the defendant and not the status of any piece of property.²⁵² In order for a court's exercise of one of these types of personal jurisdiction over a defendant to meet constitutional procedural due process, the cause of action must arise out of the defendant's minimum contacts with the forum state.²⁵³ The defendant must have purposefully availed itself of the benefits and protections of the forum state where the cause of action arose and must have been able to reasonably anticipate being haled into court there.²⁵⁴ The unilateral action of another may not be sufficient to draw a defendant into the forum state.²⁵⁵ Even if these minimum contacts are established, a court's exercise of jurisdiction over a defendant may not meet constitutional due process standards if the exercise of jurisdiction offends notions of fair play and substantial justice.²⁵⁶ If the cause of action does not arise out of a defendant's minimum contacts with the forum state, a court must exercise jurisdiction through general personal jurisdiction, based on a defendant's systematic and continuous contacts with the forum state.²⁵⁷

Absent an infringer's specific and continuous contacts with the forum state, the court must be able to exercise personal jurisdiction based on the defendant's specific contacts with the forum state.²⁵⁸ However, this may create a problem when dealing with an infringement that may satisfy the test of *de minimis non curat lex*. An infringement that is insignificant enough to call into question whether it is actionable may similarly call into question whether the contacts are significant enough with a forum state to meet the required minimum contacts or cause the defendant to be aware that he is purposefully availing himself of the benefits and protections of the forum state. Without the *de minimis* defense as a matter of law, a court may improperly exercise personal jurisdiction over a defendant while determining whether its *de minimis* activity was substantially similar after

251. See 3 NIMMER & NIMMER, *supra* note 41, § 12.01[C], at 12–33 (2005).

252. See generally *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

253. *Id.* at 316.

254. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Hanson v. Denckla*, 357 U.S. 235, 254 (1958).

255. See *World-Wide Volkswagen*, 444 U.S. at 287–99.

256. See *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano County*, 480 U.S. 102, 109–10 (1987) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

257. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *Int'l Shoe*, 326 U.S. at 314–22.

258. See, e.g., *Int'l Shoe*, 326 U.S. at 317–18 (noting specific *in personam* jurisdiction arising out of a defendant's specific contacts with forum state is necessary where a defendant does not have sufficient contacts with or presence in the forum state for general *in personam* jurisdiction).

potentially lengthy discovery and motion proceedings. This could especially create jurisdictional problems for international defendants.²⁵⁹

Moreover, without a separate defense that can be asserted as a matter of law before trial, a federal court may improperly extend subject matter jurisdiction. A court may exercise supplemental jurisdiction over those causes of action that normally would be deemed legally insufficient if there is original jurisdiction over a primary claim substantially related to the insufficient causes of action.²⁶⁰ A case involving a single copyright claim has original jurisdiction in the federal courts.²⁶¹ Litigants may add causes of action to a complaint asserting copyright infringement under supplemental jurisdiction, even if the cause of action asserting copyright infringement may be rebuffed by a *de minimis* defense. Without the ability to determine whether a claim of copyright infringement is not actionable early in the litigation, a federal court may opt to continue to exercise jurisdiction over the claims over which it had no jurisdiction in the first place, as dismissal of those claims is discretionary.²⁶²

2. Policy Considerations

The effects of a limitation on the application of the *de minimis* effects are potentially far-reaching. Far from being an acknowledged boon for the entertainment industry, the *Bridgeport* decision has drawn mixed reviews from the music world. A civil disobedience group attempted a grassroots campaign to protest the decision, inviting activists to “download the copyrighted riff and use it to craft new, 30-second songs,” resulting in “hundreds of diverse submissions.”²⁶³ This decision is also at odds with many in the music industry itself. Rapper Chuck D said in an interview with *Wired*, “If you’re taking bits of music and organizing them in a way that makes the result a distinctly personal creation, then I don’t feel that you’re infringing on copyright.... Sound should be considered up for grabs.”²⁶⁴

In addition to affecting the entertainment industry, however, a limitation of the *de minimis* doctrine such as the one that the Sixth Circuit imposed has definite implications for the field of copyright law. Even if such a restriction is limited to sound recordings, neither the abolition of the substantial similarity test nor the alteration of the fair use test would advance the aims of Congress with respect to copyrighted works. Moreover, such a limitation promotes the notion that copyright infringement is subject to a strict liability standard, something that has not been

259. See generally Rochelle Dreyfuss, *The ALI Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?*, 30 BROOK. J. INT’L L. 819 (2005) (discussing principles of jurisdiction over international defendants).

260. See 28 U.S.C. § 1367(a) (2000).

261. *Id.* § 1338(a) (2000).

262. See *id.* § 1367(c)(2) (giving a district court discretion as to whether to decline jurisdiction once jurisdiction over the primary claim has been dismissed). Of course, the court has discretion at the beginning of the litigation as well, once original jurisdiction has been established; however, it may be more likely to choose to exercise supplemental jurisdiction if the copyright claim providing original jurisdiction is dismissed early in the proceedings.

263. Rob Gurwitt, *Get Off Your Ass and Culture Jam: How a Pair of Gen Y Activists Became Pioneers in Cyber Disobedience*, MOTHER JONES, Jan. 1, 2005, at 22.

264. Eric Steuer, *The Remix Masters*, WIRED, Nov. 2004, available at http://www.wired.com/wired/archive/12.11/beastie.html?pg=4&topic+=beastie&topic_set=.

evident in judicial opinions interpreting copyright laws. Further, even though the Sixth Circuit was careful to mention that the scope of the decision extended only to the medium of sound recordings, it is possible that the logic of the decision could be extended, purposely or otherwise, to other media protected by copyright.²⁶⁵

Again looking to the law concerning databases, copyright does not exist merely as a reward to those who put in effort to copyright their works.²⁶⁶ An illustration exists again in the Supreme Court's treatment of databases in *Feist* with respect to the "sweat of the brow" doctrine. The basic principle of the "sweat of the brow" doctrine was "that copyright was a reward for the hard work that went into compiling facts."²⁶⁷ The Court rejected this approach: "[T]o accord copyright protection on this basis alone distorts basic copyright principles, in that it creates a monopoly in public domain materials, without the necessary justification of protecting and encouraging the creation of "writings" by "authors"."²⁶⁸ As demonstrated by the *Harry Potter* example earlier, a copyright in the sound recording of a copyrighted work potentially affords the author less protection than the person that merely fixes a performance of the work. This potentially rewards the entity that invests the least creativity.²⁶⁹ However, far from receiving more copyright protection, perhaps a new creative work based on a new mode of technology should receive *less* copyright protection than the protection afforded the work that represents the first expression of an original creative work in the first place, allowing the creative work to become the building blocks for new works to come.²⁷⁰

V. CONCLUSION

In a coincidental choice of words, the Supreme Court in *Feist* stated that "copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity."²⁷¹ It makes sense that de minimis portions of a copyrighted work contain only a de minimis quantum of creativity. The abolition of the de minimis defense with respect to any medium covered by the Copyright Act does not serve to promote creativity but instead serves to stifle it. As

265. The *Bridgeport* decision itself noted that the district court had impermissibly applied a test intended for music compositions to sound recordings. By its own reasoning, this type of cross-medium analysis is something that courts not realizing the imperceptible distinctions in copyright law are likely to do.

266. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'") (quoting U.S. CONST. art. I, § 8, cl. 8)).

267. *Id.* at 352.

268. *Id.* at 354 (quoting 1 NIMMER & NIMMER, *supra* note 41, § 3.04[B][1], at 3-22.12).

269. See *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)); Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613 (2001); Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395 (2003). In the recent *Grokster* opinion, Justice Souter framed the tension between creativity and technology as such: "The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off." *Grokster*, 125 S. Ct. at 2775.

270. For a further discussion of the size of a work that should be entitled to original copyright protection, see Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 636 (2005) (concluding that "microworks" do not deserve copyright protection).

271. *Feist*, 499 U.S. at 363.

the Seventh Circuit has noted, "Intellectual (and artistic) progress is possible only if each author builds on the work of others."²⁷² The oft-quoted constitutional directive for Congress with respect to intellectual property is to "promote the Progress of Science and the useful Arts."²⁷³ Without some reliance on prior works, such progress is impossible.

In *Harry Potter and the Prisoner of Azkaban*, teenage Harry, annoyed with his visiting aunt,²⁷⁴ caused her to "inflat[e] like a monstrous balloon,"²⁷⁵ in direct violation of wizard laws. Harry was certain that this would land him in Azkaban, the wizard prison. Yet, he then engaged in the following dialogue with the Minister of Magic, Cornelius Fudge:

"I broke the law!" Harry said. "The Decree for the Restriction of Underage Wizardry!"

"Oh, my dear boy, we're not going to punish you for a little thing like that!" cried Fudge. ... "It was an accident! We don't send people to Azkaban just for blowing up their aunts!"²⁷⁶

Obviously, the parallels are imperfect, but the message is clear: Some violations of the law are too insignificant to assign guilt or liability. *De minimis non curat lex*: The law does not concern itself with trifles. From its longstanding roots in English law to applications for new technology in the future, it is—and should remain—a necessary defense to the tort of copyright infringement. After all, if the wizarding world can recognize an offense too insignificant for liability, perhaps, then, so should we.

272. *Nash v. CBS*, 899 F.2d 1537, 1540 (7th Cir. 1990).

273. U.S. CONST. art. I, § 8, cl. 8.

274. Actually, Marjorie Dursley was Harry's Aunt Petunia's husband's sister, but he had always been forced to call her "Aunt" Marge. J.K. ROWLING, *HARRY POTTER AND THE PRISONER OF AZKABAN* 45 (Scholastic 1999).

275. *Id.* at 29.

276. *Id.* at 45.