

January 2018

A Rose by Any Other Name: Copyright Infringement or De Minimis Sampling

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Mauldin, Levi D. (2018) "A Rose by Any Other Name: Copyright Infringement or De Minimis Sampling," *Liberty University Law Review*: Vol. 12 : Iss. 1 , Article 3.

Available at: http://digitalcommons.liberty.edu/lu_law_review/vol12/iss1/3

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NOTE

A ROSE BY ANY OTHER NAME: COPYRIGHT INFRINGEMENT OR DE MINIMIS SAMPLING

Levi D. Mauldin[†]

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ABSTRACT

Digital sampling is never accidental. It frequently occurs in the context of the music industry. Some even propose that the process is essential to the industry. Yet, what this assertion fails to appreciate is that regardless of the subjectively-perceived essential nature of digital sampling, it is often the unlawful appropriation of another’s copyrighted work. While some

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jurisdictions dismiss these claims as *de minimis*, the illegal nature of digital sampling does not dissipate merely because some court deems it trivial. It remains the intentional, unlawful appropriation of another's copyrighted work.

The Sixth Circuit proposed a bright-line rule whereby any digital sampling, no matter how trivial, is *per se* copyright infringement. This *per se* rule is a deviation from the generally accepted *de minimis* exception that traditionally applies to copyright infringement actions. So, what justified the Sixth Circuit's deviation? The Sixth Circuit rested its holding on the fact that digital sampling requires the intentional unlawful appropriation of another's copyrighted work. While other copyright infringements might also be intentional, it is not a prerequisite. Digital sampling, on the other hand, cannot be performed without such an intent.

When addressed with the identical issue, the Ninth Circuit declined to implement the Sixth Circuit's *per se* rule. The Ninth Circuit, like its Sixth Circuit counterpart, analyzed and interpreted the relevant statutes, yet reached a discordant conclusion. What is interesting, though, is the emphasis the Ninth Circuit placed on the formal principles of logic. Therein lies the problem. Canons of statutory interpretation require a judicial determination of the drafter's intent. While dependence upon the formal principles of logic has a certain charm, it may presuppose an unreliable premise, leading to a potential distortion of the drafter's true intent.

Thus, the two circuits to address the issue of digital sampling and copyrighted sound recordings have reached inherently incompatible conclusions, resulting in a circuit split. This Note will argue that, despite the tradition of *de minimis* application to copyright infringement actions, the Sixth Circuit's *per se* rule with respect to digital sampling and copyrighted sound recordings should prevail. This Note will evaluate both circuits' holdings and the underlying rationale behind each. Furthermore, this Note will propose that, in economic terms, the overall utilitarian goal of American copyright law is best achieved by adopting the Sixth Circuit's *per se* rule.

I. INTRODUCTION

“It is a nice, tidy, ‘logical’ argument but so manifestly contrary to the purpose of the statute as to incite grave doubts, at least in judges who are not in thrall to the syllogistic style of legal reasoning.”

– Richard Posner, Circuit Judge,
United States Court of Appeals for the Seventh Circuit¹

Two of America’s greatest music cities—Nashville and Los Angeles²—are irreparably at odds with one another with respect to the copyright protection afforded to copyrighted sound recordings. The inequality stems from the ever-prevalent use of digital sampling in the music industry. On the one hand, the Sixth Circuit held that any digital sampling of a copyrighted sound recording, no matter how trivial, is per se copyright infringement.³ On the other hand, the Ninth Circuit held that with respect to copyrighted sound recordings, a de minimis exception applies.⁴ The conflict between the Sixth and Ninth Circuits’ interpretation of the federal copyright statutes contradicts the purpose for including the Copyright Clause in the United States Constitution,⁵ leaving only two options for a final determination of the rights of copyright owners: Supreme Court resolution or congressional action.

Because of the disparity between the Sixth and Ninth Circuits, copyright owners in one geographic area are entitled to more protection than owners in another area, solely based upon their physical location. This Note will analyze both the Sixth Circuit’s holding in *Bridgeport Music, Inc. v. Dimension Films* and the Ninth Circuit’s holding in *VMG Salsoul, LLC v. Ciccone*. The premises of both will be examined within the context of the utilitarian foundation underlying all copyright protection and in accordance with the canons of statutory interpretation. Both interpretations will further be analyzed based upon their anticipated economic impact on the music industry. Finally, this Note closes with the determination that the

1. *In re Freedom Group, Inc.*, 50 F.3d 408, 410 (7th Cir. 1995).

2. Gianni Jaccoma, *America’s 12 Greatest Music Cities, Ranked*, THRILLIST (Feb. 14, 2015), <https://www.thrillist.com/travel/nation/best-cities-for-live-music-new-york-memphis-asheville-and-austin>.

3. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799-801 (6th Cir. 2005).

4. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 887 (9th Cir. 2016).

5. See Joshua Crum, *The Day the (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground*, B.Y.U. L. REV. 943, 950 (2008).

Sixth Circuit's interpretation adequately advances the stated purpose of copyright protection.

II. BACKGROUND

Over two centuries ago, the people of the United States recognized the need for copyright protection and consequently granted the federal government authority to provide the desired protection. Predictably, such an accepted and necessary power finds its roots in the United States Constitution. In establishing copyright protection as a foundational principle of American law, the Constitution provides Congress with the authority to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶ The inclusion of this power was more than passively approved; it was, instead, perceived as so inherent that it was “scarcely questioned.”⁷

A. *The Theoretical Underpinnings of Copyright Protection*

Before plunging into the specifics of the statutory creature that is copyright protection, it is necessary to evaluate the underlying theory for copyright protection. The predominant theory justifying copyright protection is utilitarianism.⁸ Utilitarianism is “the philosophical and economic doctrine that the best social policy is that which does the most good for the greatest number of people.”⁹ This doctrine, as the primary justification for copyright protection, is not unique to American copyright jurisprudence.

6. U.S. CONST. art. I, § 8, cl. 8.

7. THE FEDERALIST NO. 43 (James Madison) (“The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors.”) See also ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 24 (2010) (“The vote on the Copyright Clause was not accompanied by any recorded debate at the Constitutional Convention, and it was approved unanimously.”). Note, however, that some attribute this unanimous approval to the fact that the Framers desired the United States to be “culturally competitive” and the intellectual property clause included therein was “an afterthought,” resulting in the clause receiving “less thought than perhaps [it] should have.” *Id.* (citing Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 9 (2002)).

8. See K WALL, *supra* note 7, at 23.

9. *Utilitarianism*, BLACK'S LAW DICTIONARY (10th ed. 2014).

In 1710, England passed the Statute of Anne,¹⁰ which displaced the then-current copyright protection and reflected a theoretical shift.¹¹ The stated purpose of the Statute of Anne was “for the Encouragement of Learning, by Vesting the Copies . . . in the Authors or Purchasers of such Copies, during the Times therein mentioned.”¹² Thus, copyright protection was no longer justified under natural law, but instead sought to promote the general welfare through encouraging learning.¹³ Prior to the passage of the Statute of Anne, however, copyright owners enjoyed a perpetual copyright (in other words, an indefinite monopoly),¹⁴ which was illustrative of a natural law approach. The Statute of Anne “represented a radical theoretical shift” in that it limited the previously perpetual copyright to fourteen years with the possibility of a single renewal.¹⁵ By limiting the duration of ownership and protection, the Statute of Anne implicitly rejected the notion that intellectual property was regarded as a natural right in the same manner as real or traditional personal property.¹⁶

The utilitarian concept of encouraging learning, as opposed to protecting artistic integrity, is also illustrated in Article I of the United States Constitution.¹⁷ American copyright law provides an economic incentive in the form of a limited monopoly to the owner of the copyright for the purposes of promoting what is best for the American people.¹⁸ By its own stated purpose, “the Copyright Clause carefully eschews any embrace of a natural-law or labor theory of intellectual property—a fact made all the

10. Statute of Anne 1710, 9 Ann., c. 19 (Eng.).

11. JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU* 18 (2011).

12. Statute of Anne 1710, 9 Ann., c. 19 (Eng.).

13. See TEHRANIAN, *supra* note 11, at 18 (“The seemingly irrepressible Lockean logic therefore held that by putting labor into their intellectual creations, authors automatically earned a natural property right in their works. This right was perpetual, just like the right to real property or chattel . . .”).

14. *Id.* at 17-18.

15. *Id.* at 18.

16. See KWALL, *supra* note 7, at 25 (“Natural law theory, particularly as developed by John Locke, espouses the God-given right to acquire *external* things, either through exerting labor or by initial possession, and to dispose of such items as desired.”).

17. See U.S. CONST. art. I, § 8, cl. 8 (stating that the purpose of federal copyright protection is to “promote the Progress of Science and useful Arts”).

18. See KWALL, *supra* note 7, at 23 (“[T]he primary objective of our copyright law is to ensure the copyright owner’s receipt of all financial rewards to which [one] is entitled by virtue of copyright ownership.”). See also NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 5 (2008) (“Copyright law accomplishes [its] objective most obviously by providing an economic incentive for the creation and dissemination of numerous works of authorship.”).

more remarkable by the rather heavy influence of Lockean hermeneutics on the Framers.”¹⁹

Furthermore, the rationale behind the natural law theory relating to real and personal property does not always correlate with the principles of intellectual property.²⁰ For example,

If I allow you to use my car, I am necessarily deprived of its use. But although someone’s unauthorized use of my words or musical notes may damage me in some way (whether economic or moral), it does not deprive me of the continued use of those words or musical notes.²¹

Thus, in opposition to the Lockean hermeneutics²² of a God-given right to acquire and dispose, the statutory creation serves its utilitarian end by providing authors economic incentives.

B. The Statutory Development of American Copyright Protection

As with many foundations of the American legal system, the United States’ version of copyright protection was an extension of English law.²³ Following England’s Statute of Anne—known as “the world’s first ‘modern’ copyright act”²⁴—and pursuant to the Constitution, on May 31, 1790, President George Washington signed into effect the Copyright Act of 1790.²⁵ As demands changed and technology evolved, copyright protection underwent two significant changes: the Copyright Act of 1909²⁶ and the current law, the Copyright Act of 1976.²⁷

19. TEHRANIAN, *supra* note 11, at 19.

20. TEHRANIAN, *supra* note 11, at 20 (“[T]he peculiar characteristic of intellectual property . . . is that no one possesses the less, because every other possesses the whole of it. . . . [T]he natural-law theories that rationalize the protection of physical property may not entirely translate to the realm of intellectual property.”).

21. *Id.*

22. The term “Lockean” refers to “John Locke’s justification of private property, based on the natural right of one’s ownership of one’s own labor, and the right to nature’s common property to the extent that one’s labor can make use of it.” *Lockean labor theory*, BLACK’S LAW DICTIONARY (10th ed. 2014). The term hermeneutics means “[t]he art of interpreting texts, esp. as a technique used in critical legal studies.” *Hermeneutics*, BLACK’S LAW DICTIONARY (10th ed. 2014).

23. TEHRANIAN, *supra* note 11, at 17.

24. TEHRANIAN, *supra* note 11, at 17.

25. Act of May 31, 1790, 1 Stat. 124.

26. Copyright Act of 1909, Pub. L. No. 60-349, March 4, 1909, 35 Stat. 1075.

27. Copyright Act of 1976, Pub. L. No. 94-553, October 19, 1976, 90 Stat. 2541.

The Copyright Act of 1976 was codified under Title 17 of the United States Code. Under the current law, copyright protection covers “original works of authorship fixed in any tangible medium of expression,”²⁸ including sound recordings.²⁹ Notably, in addressing an inherent problem with the Copyright Act of 1909, Section 102 extends protection to mediums that have not yet been developed.³⁰ Combine the practice of extending copyright protection to mediums that have not yet been developed with the shift from protection at publication³¹ to protection at creation³² and the result evinces the congressional intent to provide a wide range of protection to copyright owners.

Moreover, Section 106, which elaborates on the general provisions of Section 102, provides the owner of a copyrighted material with a bundle of exclusive rights.³³ The first and most important exclusive right is the right “to reproduce the copyrighted work in copies or phonorecords.”³⁴ The right to reproduce is at the heart of American copyright jurisprudence. Another exclusive right within the copyright owner’s bundle is the right “to prepare derivative works based upon the copyrighted work.”³⁵ The remaining exclusive rights in the copyright owner’s bundle are the rights to distribute, perform, and display the copyrighted work.³⁶

However, these so-called “exclusive rights” are not absolute.³⁷ Section 114 modifies the scope of the exclusive rights in sound recordings.³⁸ For example, the exclusive rights to reproduce and prepare derivative works “do not extend to the making or duplicating of another sound recording that *consists entirely of an independent fixation* of other sounds, even though such sounds imitate or simulate those in the copyrighted sound

28. 17 U.S.C.A. § 102 (West, Westlaw through Pub. L. No. 114-154).

29. 17 U.S.C.A. § 102(a)(7) (West, Westlaw through Pub. L. No. 114-154).

30. 17 U.S.C.A. § 102(a) (West, Westlaw through Pub. L. No. 114-154).

31. Copyright Act of 1909, Pub. L. No. 60-349, Mar. 4, 1909, 35 Stat. 1075.

32. Copyright Act of 1976, Pub. L. No. 94-553, Oct. 19, 1976, 90 Stat. 2541.

33. 17 U.S.C.A. § 106 (West, Westlaw through Pub. L. No. 114-154).

34. 17 U.S.C.A. § 106(1) (West, Westlaw through Pub. L. No. 114-154).

35. 17 U.S.C.A. § 106(2) (West, Westlaw through Pub. L. No. 114-154). *See also* 17 U.S.C.A. § 101 (West, Westlaw through Pub. L. No. 114-154) (“A derivative work is a work based upon one or more preexisting works, such as a . . . *sound recording* . . . or any other form in which a work may be recast, transformed, or adapted.”) (internal quotations omitted) (emphasis added).

36. 17 U.S.C.A. § 106(3)-(6) (West, Westlaw through Pub. L. No. 114-154).

37. 17 U.S.C.A. § 106 (West, Westlaw through Pub. L. No. 114-154) (stating that the exclusive rights outlined are “[s]ubject to sections 107 through 122”).

38. 17 U.S.C.A. § 114 (West, Westlaw through Pub. L. No. 114-154).

recording.”³⁹ Therefore, assuming Jimi Hendrix’s iconic rendition of the Star-Spangled Banner at Woodstock in 1969 is a copyrighted sound recording, it would not be copyright infringement for another musician to duplicate that performance.⁴⁰

C. Digital Sampling and Sound Recordings

Music, as a useful art, is protected by copyright in two separate and distinct ways. First, protection extends to “musical works, including any accompanying words”⁴¹—i.e., the sheet music, or composition, and the accompanying lyrics, autonomous from any recording.⁴² Second, the “sound recordings” are protected as well.⁴³ A sound recording is a term of art, referring to “works that result from the fixation of a series of musical, spoken, or other sounds,”⁴⁴ or, in other words, the actual recording of the artist performing the aforementioned musical work. It is not necessary for the same person to hold both copyrights. Simply stated,

[A] songwriter can write a song as sheet music having notes for instruments and voices, possibly with lyrics, to form a copyrighted musical work. A band’s recording of the song would be a copyrighted sound recording. The musical work and sound recording owners may not be the same entity; the songwriter may own the musical work, while the band, the producer, or a record company may own the sound recording.⁴⁵

39. 17 U.S.C.A. § 114(b) (West, Westlaw through Pub. L. No. 114-154) (emphasis added).

40. For a recorded version of Jimi Hendrix’s performance, see Kylegood101, *Jimi Hendrix-Star Spangled Banner at Woodstock*, YOUTUBE (Feb. 18, 2012), <https://www.youtube.com/watch?v=MKvnQYFhGCc>.

41. 17 U.S.C.A. § 102(a)(2) (West, Westlaw through Pub. L. No. 114-154).

42. See James A. Johnson, *Thou Shall Not Steal: A Primer on Music Licensing*, 80-JUN N.Y. ST. B.J. 23, 23 (2008); see also Crum, *supra* note 5, at 950.

43. 17 U.S.C.A. § 102(a)(7) (West, Westlaw through Pub. L. No. 114-154). See also Sound Recording Act of 1971, Pub. L. No. 92-140, Oct. 15, 1971, 85 Stat. 391 (amending “title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes”).

44. 17 U.S.C.A. § 101 (West, Westlaw through Pub. L. No. 114-154).

45. Mark R. Carter, *Applying the Fragmented Literal Similarity Test to Musical-Work and Sound-Recording Infringement: Correcting the Bridgeport Music, Inc. v. Dimension Films Legacy*, 14 MINN. J.L. SCI. & TECH. 669, 676 (2013). See also Crum, *supra* note 5, at 950

Furthermore, sampling refers to the process whereby someone who is not the copyright owner of a sound recording takes a previously copyrighted sound recording and uses it to create some other recording.⁴⁶ Digital sampling is merely a type of sampling through the use of a computer.⁴⁷ This process of sampling sound recordings has led to numerous disputes in the music industry. Some of the more recent disputes involve Jay-Z,⁴⁸ Led Zeppelin,⁴⁹ and Pharrell Williams and Robin Thicke.⁵⁰ While the use of sampling is most prevalent in hip-hop music,⁵¹ it “is certainly not just a hip-hop phenomenon. The practice is widely used throughout the music industry.”⁵² However, the prevalence of such a practice does nothing to combat the fact that sampling violates the copyright owner’s exclusive rights.⁵³

(“Under standard industry recording contracts, most artists surrender their sound recording copyrights to the record company that releases the performance.”).

46. See Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 846 n.9 (2011) (“A sample is the portion of pre-existing sound recordings that producers use to create new compositions.”).

47. Johnson, *supra* note 42, at 23 (“Digital sampling is the recording of a sound recording or portion of a sound recording by means of a computer and then using that copy in a new sound recording.”).

48. See Rory Carroll, *Jay Z Wins Copyright Infringement Case over Big Pimpin’ Egyptian Song Sample*, THE GUARDIAN (Oct. 21, 2015), <https://www.theguardian.com/music/2015/oct/21/jay-z-wins-copyright-infringement-case-big-pimpin-sample>.

49. See Ben Sisario, *Led Zeppelin’s ‘Stairway to Heaven’ to Be Scrutinized in Court in Copyright Case*, N.Y. TIMES (June 5, 2016), <http://www.nytimes.com/2016/06/06/business/media/led-zeppelins-stairway-to-heaven-to-be-scrutinized-in-court-in-copyright-case.html>.

50. See Associated Press, *Pharrell Williams and Robin Thicke to Pay \$7.4m to Marvin Gaye’s Family over Blurred Lines*, THE GUARDIAN (Mar. 11, 2015), <https://www.theguardian.com/music/2015/mar/10/blurred-lines-pharrell-robin-thicke-copied-marvin-gaye>. See also William Hochberg, *Why the ‘Blurred Lines’ Disaster Won’t Be Reversed (Even if the Verdict Is)*, DIGITAL MUSIC NEWS (Sept. 12, 2016), <http://www.digitalmusicnews.com/2016/09/12/blurred-lines-disaster-no-reversed/>.

51. Evans, *supra* note 46, at 845-46 (“For decades hip hop producers have relied on the innovative use of existing recordings . . . [as] the hallmark of the type of creativity and innovation born out of the hip hop music tradition.”).

52. *Id.* at 858.

53. For an entertaining justification and explanation on sampling in hip-hop music, see VanillalceArchive, *Vanilla Ice Explains Sampling (Ice Ice Baby – Queen/David Bowie)*, YOUTUBE (Oct. 21, 2014), <https://www.youtube.com/watch?v=K5V0Fx50ViI>. For a reference to the context of the interview compare Queen Official, *Queen – Under Pressure (Official Video)*, YOUTUBE (Sept. 9, 2008), <https://www.youtube.com/watch?v=a01QQZyl-I>, with

Opponents to the “sampling is stealing” mindset, while conceding that the copyright laws require the sampling artist to obtain a license, argue that the current copyright laws fail “to acknowledge the historic role, informal norms and value of borrowing.”⁵⁴ Note the use of the word “borrowing” as if the sampling artist is going to return what was appropriated. Intellectual property rights cannot be borrowed and subsequently returned in the same sense as traditional personal property because “borrowing” implies exclusive use.⁵⁵

Another argument advanced in opposition to the “sampling is stealing” mindset is that the record companies—who are typically transferred the rights to a copyrighted sound recording from the artist in an effort to promote and sell the recording—pursue these suits based on the perceived profitability and not the artistic integrity of the work.⁵⁶ “Thus, while some artists may have no objection to being sampled, their record companies hold the final decision.”⁵⁷ This argument fails to appreciate the benefit of copyright protection that vests in the owner, or transferred owner. The copyright statutes prohibit certain *acts* that violate the copyright owner’s exclusive rights.⁵⁸ The focus is on the *act* in light of the copyright, not the relationship between the owner and the copyrighted creation. Furthermore, protecting artistic integrity, while it may be an incidental result, is not the primary goal of copyright protection. Regardless of the individual who pursues the infringement action, sampling “poses *the greatest danger* to the musical profession because *the musician is being replaced with himself*.”⁵⁹ Sampling, therefore, by its very nature, is at odds with copyright protection.

Finally, because most claims are settled out of court, very few sampling cases actually continue to trial.⁶⁰ Settling out of court alleviates “the potential for injunctions on the sale of the underlying album or worse,

vanillaiceVEVO, *Vanilla Ice – Ice Ice Baby*, YOUTUBE (Mar. 4, 2009), <https://www.youtube.com/watch?v=rog8ou-ZepE>.

54. Evans, *supra* note 46, at 846.

55. TEHRANIAN, *supra* note 11, at 20.

56. Crum, *supra* note 5, at 950.

57. *Id.* at 950-51.

58. See 17 U.S.C.A. § 106 (West, Westlaw through Pub. L. No. 114-154).

59. Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1668 (1999) (emphasis added).

60. See Rebecca Morris, Note, *When Is A CD Factory Not Like A Dance Hall?: The Difficulty of Establishing Third-Party Liability for Infringing Digital Music Samples*, 18 CARDOZO ARTS & ENT. L.J. 257, 274 (2000). See also Crum, *supra* note 5, at 953.

criminal sanctions.”⁶¹ Until the Ninth Circuit’s holding in *VMG Salsoul, LLC v. Ciccone*, the sampling cases that actually reached trial were influenced by the “sampling is stealing” mindset.⁶² Now, however, because of the Ninth Circuit, there is an uneven enforcement of the law, which distorts the purpose of federal laws.⁶³

III. THE CIRCUITS SEND CONTRADICTING MESSAGES

The Sixth and Ninth Circuits are sending antithetical messages as it relates to the level of protection afforded to copyright owners who allege infringement based upon the sampling of copyrighted sound recordings. At the outset, it is important to understand the key concept of the *de minimis* standard. *De minimis* is the colloquial maxim for the Latin phrase *de minimis non curat lex*, which translates to “the law does not concern itself with trifles.”⁶⁴ “In essence, the *de minimis* use defense asserts [a] lack of substantial similarity.”⁶⁵ It is this concept that served as the medium by which the Ninth Circuit justified its rejection of the Sixth Circuit’s holding.⁶⁶

61. Crum, *supra* note 5, at 953.

62. *Id.*

63. *Id.* at 949.

64. Andrew Inesi, *A Theory of De Minimis and a Proposal for its Application in Copyright*, 21 BERKELEY TECH. L.J. 945, 947 (2006) (citations omitted).

65. Carter, *supra* note 45, at 679.

66. While it is not part of the holding in either case, it is important at this juncture to briefly mention the corollary concept of fair use. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005) (“Since the district judge found no infringement, there was no necessity to consider the affirmative defense of ‘fair use.’ On remand, the trial judge is free to consider this defense and we express no opinion on its applicability to these facts.”). The doctrine of fair use, with respect to copyright infringement, has been codified in Title 17 of the United States Code. See 17 U.S.C.A. § 107 (West, Westlaw through Pub. L. No. 114-154). Fair use is an affirmative defense to an infringement claim and thus, must be pled and proven by the defendant. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (stating that “fair use is an affirmative defense”). See also Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 686-91 (2015). The doctrine of fair use states that “reproduction . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is *not an infringement* of copyright.” 17 U.S.C.A. § 107 (West, Westlaw through Pub. L. No. 114-154) (emphasis added). In determining whether fair use applies the following factors are to be considered:

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

A. *Bridgeport Music, Inc. v. Dimension Films and the Sixth Circuit's Bright-Line Rule*

In *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit established a bright-line rule for infringement claims based upon the digital sampling of copyrighted sound recordings.⁶⁷ After examining the relevant statutes, the Sixth Circuit concluded that “a sound recording owner has the exclusive right to ‘sample’ his own recording.”⁶⁸ If that were not clear enough, the Sixth Circuit reiterated this point when it stated, “Get a license or do not sample.”⁶⁹

In *Bridgeport Music*, Bridgeport, along with a few other plaintiffs, effectuated a blitzkrieg-style attack on approximately 800 defendants, alleging nearly 500 claims of copyright infringement.⁷⁰ Bridgeport and Westbound—the remaining plaintiffs—claimed to own, respectively, the musical composition and the sound recording copyrights of “Get Off Your Ass and Jam”⁷¹ (“Get Off”) by George Clinton, Jr. and the Funkadelics.⁷² “Get Off” was sampled in the rap song “100 Miles and Runnin’”⁷³ (“100 Miles”), which was included in the soundtrack to the movie *I Got the Hook Up*.⁷⁴ The Sixth Circuit assumed, because the defendant did not deny it, that “100 Miles” included the allegedly infringed samples from “Get Off.”⁷⁵ The contested sample stemmed from a three-note combination guitar solo that lasts for four seconds.⁷⁶ The sampled portion of this solo, used in “100 Miles,” was a two-second sample of the guitar solo, which was looped and

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

17 U.S.C.A. § 107 (West, Westlaw through Pub. L. No. 114-154).

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

68. *Id.*

69. *Id.*

70. *Id.* at 795.

71. For a reference to the original copyrighted sound recording, see Larry Hinze, *FUNKADELIC “Get Off Your Ass and Jam” 1975 HQ*, YOUTUBE (June 9, 2014), <https://www.youtube.com/watch?v=NMiNDZNIPqc>.

72. *Bridgeport Music, Inc.*, 410 F.3d at 796.

73. For a version of “100 Miles and Runnin’,” see TheEasyEVEVO, *N.W.A. – 100 Miles and Runnin’ (The Explicit)*, YOUTUBE (Mar. 5, 2011), <https://www.youtube.com/watch?v=WOW6-1kOwck>.

74. *Bridgeport Music, Inc.*, 410 F.3d at 796. For a trailer of the film *I Got the Hook Up*, see woluhar1, *I Got the Hook Up (1998) Trailer*, YOUTUBE (Jan. 21, 2012), <https://www.youtube.com/watch?v=nXBFBEWBy5E>.

75. *Bridgeport Music, Inc.*, 410 F.3d at 796.

76. *Id.*

extended for sixteen beats, appearing in five places throughout “100 Miles.”⁷⁷

The district court “concluded that, whether the sampling is examined under qualitative/quantitative *de minimis* analysis or under the so-called ‘fragmented literal similarity’ test, the sampling in this case did not ‘rise to the level of a legally cognizable appropriation.’”⁷⁸ The district court listened to both songs—“Get Off” and “100 Miles”—and determined that “no reasonable juror, even one familiar with the works of George Clinton, would recognize the source of the sample without having been told of its source.”⁷⁹ The “no reasonable juror” determination combined with the small amount sampled—a quantitative analysis—and the lack of similarity between the recordings—a qualitative analysis—resulted in the district court granting the defendant’s motion for summary judgment.⁸⁰ The judgment was appealed not on the grounds that the district court mischaracterized the sample or that there was some genuine dispute as to a material fact but on the ground that “no substantial similarity or *de minimis* inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording.”⁸¹

Because the district court’s analysis mirrored the analysis required for an alleged infringement of a musical composition and not a sound recording, the Sixth Circuit ultimately reversed the district court.⁸² The Sixth Circuit stated that sound recordings should be analyzed differently than musical compositions.⁸³ In support, the Sixth Circuit acknowledged that “[a]dvances in technology coupled with . . . the popularity of hip hop or rap music have made instances of digital sampling extremely common.”⁸⁴ The Sixth Circuit further reasoned that the courts, as well as the music industry, are best served by a bright-line rule, one that “adds clarity to what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings.”⁸⁵ If, however, the Sixth Circuit were to follow the

77. *Id.*

78. *Id.* at 797 (quoting *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002)).

79. *Id.* at 798.

80. *Bridgeport Music, Inc.*, 410 F.3d at 798.

81. *Id.*

82. *See generally id.* at 797-805.

83. *Id.* at 798.

84. *Id.* at 798-99.

85. *Id.* at 799.

musical composition analysis employed the district court, it would have reached the same result as the court below.⁸⁶

In forging a new path for copyrighted sound recordings, the Sixth Circuit began its analysis with many sections of Title 17 of the United States Code.⁸⁷ While outlining the general principles of Title 17, the Sixth Circuit relied primarily on 17 U.S.C. § 114(b), which pertains to the exclusive rights of owners of copyrighted sound recordings.⁸⁸ Section 114(b) states, in relevant part, that

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 *do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds*, even though such sounds imitate or simulate those in the copyrighted sound recording.⁸⁹

The Sixth Circuit found Section 114(b) of Title 17 particularly relevant because the Copyright Act of 1976 added the word “entirely,”⁹⁰ whereas the Sound Recording Act of 1971 merely stated that “the right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds.”⁹¹ From this addition, the Sixth Circuit interpreted 17 U.S.C. § 114(b) as stating that “a sound recording owner has the exclusive right to ‘sample’ his own recording.”⁹²

In support of this bright-line rule, the Sixth Circuit laid out numerous reasons justifying its conclusion. First, there is the ease of enforcement without stifling creativity, because, from what is clear from the text of the statute, an artist may imitate the copyrighted sound recording.⁹³ Second, “the market will control the license price and keep it within bounds.”⁹⁴ Third, and perhaps most importantly, the court stated that

86. *Bridgeport Music, Inc.*, 410 F.3d at 798 n.4.

87. *Id.* at 799-800.

88. *Id.* at 799-801. See also 17 U.S.C.A. § 114(b) (West, Westlaw through Pub. L. No. 114-154).

89. 17 U.S.C.A. § 114(b) (West, Westlaw through Pub. L. No. 114-154) (emphasis added).

90. *Bridgeport Music, Inc.*, 410 F.3d at 800-01; Copyright Act of 1976, Pub.L. 94-553, Oct. 19, 1976, 90 Stat. 2541.

91. Sound Recording Act of 1971, Pub. L. 92-140, Oct. 15, 1971, 85 Stat. 391.

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

93. *Id.*

94. *Id.*

[S]ampling is *never* accidental. It is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another which he had heard before. *When you sample a sound recording you know you are taking another's work product.*⁹⁵

Fourth, the Sixth Circuit stated that adopting a de minimis standard or a substantial similarity analysis would require “mental, musicological, and technological gymnastics.”⁹⁶ The Sixth Circuit, however, immediately qualified this statement by declaring that judicial economy is not the driving force behind the opinion.⁹⁷ In recognition that its holding created a new rule, the Sixth Circuit stated that it “did not pull this interpretation out of thin air”⁹⁸ and proceeded to list, *inter alia*, other statutory and economic justifications.⁹⁹ In sum, with “no existing sound recording judicial precedents to follow”¹⁰⁰ and through statutory interpretation, the Sixth Circuit established the bright-line rule that any digital sampling of a copyrighted sound recording, no matter how trivial, is per se copyright infringement.¹⁰¹

B. *VMG Salsoul, LLC v. Ciccone and the Ninth Circuit's De Minimis Interpretation*

Over a decade after the Sixth Circuit created the bright-line rule in *Bridgeport Music*, the Ninth Circuit concluded that Congress intended to maintain a de minimis exception for copyrighted sound recordings in enacting 17 U.S.C. § 114(b).¹⁰² The Ninth Circuit's holding “that the *de minimis* exception applies to actions alleging infringement of a copyright to

95. *Id.* (emphasis added).

96. *Id.* at 802.

97. *Bridgeport Music, Inc.*, 410 F.3d at 802.

98. *Id.* at 802-03.

99. *Id.* at 802-05.

100. *Id.* at 802.

101. *Id.* at 799-801.

102. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016).

sound recordings”¹⁰³ opposes the Sixth Circuit’s bright-line, per se rule. Thus, the Ninth Circuit consciously created a circuit split.¹⁰⁴

VMG Salsoul centers around Madonna Louise Ciccone’s (colloquially known as “Madonna”) song “Vogue,”¹⁰⁵ which the Ninth Circuit characterized as “a mega-hit dance song.”¹⁰⁶ In *VMG Salsoul*, the plaintiff, VMG, sued Madonna, Shep Pettibone (the producer of “Vogue”), and several others.¹⁰⁷ VMG alleged that when recording “Vogue,” Pettibone “copied a 0.23-second segment of horns from [VMG’s] earlier song, [‘Ooh I Love It’ (‘Love Break’)] and used a modified version of that snippet when recording [‘Vogue’].”¹⁰⁸ The allegedly sampled horn hits appeared in two forms: a “single” horn hit and a “double” horn hit.¹⁰⁹ In support of its claim, VMG submitted evidence that “Pettibone directed an engineer to introduce sounds from [‘Love Break’] into the recording of [‘Vogue’].”¹¹⁰

The district court, in evaluating the case, applied the de minimis exception to the alleged infringement claim and granted the defendants’ motion for summary judgement.¹¹¹ The Ninth Circuit couched the district court’s decision in terms of applying a “longstanding legal rule.”¹¹² This so-called “longstanding legal rule” is that even where a plaintiff has proven the allegations of actual copying, the infringement claim will fail if the copying was trivial.¹¹³ In other words, de minimis copying does not constitute copyright infringement.¹¹⁴

103. *Id.* at 887 (emphasis added) (internal quotations omitted). *See also id.* at 874 (“We hold that the de minimis exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions.”).

104. *Id.* at 887.

105. *Id.* at 874. For version of “Vogue” by Madonna, see Madonna, *Madonna – Vogue* (video), YOUTUBE (Oct. 26, 2009), <https://www.youtube.com/watch?v=GuJQSAiODqI>.

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

107. *Id.* at 874.

108. *Id.* For a version of “Love Break,” see REREPROD JUSTFORFUNK, *SALSOUL ORCHESTRA 1982 ooh i love it love break*, YOUTUBE (Dec. 18, 2011), <https://www.youtube.com/watch?v=9irkIvpoI-A>.

109. *VMG Salsoul, LLC*, 824 F.3d at 875. The Ninth Circuit defined sampling as “the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo.” *Id.*

110. *Id.* at 877.

111. *Id.* at 874.

112. *Id.*

113. *Id.*

114. *Id.*

1. The Majority's Application of the De Minimis Non Curat Lex Standard

The Ninth Circuit began its analysis with its own precedent established in *Newton v. Diamond*, reiterating that “to establish its infringement claim, [the plaintiff] must show that the copying was greater than de minimis.”¹¹⁵ The Ninth Circuit, however, admitted that *Newton* dealt with a copyrighted musical composition, not a copyrighted sound recording.¹¹⁶ Thus, the Ninth Circuit acknowledged that whether the de minimis exception applied to copyrighted sound recordings was an “open question.”¹¹⁷

Although the court, in viewing the facts in the light most favorable to the plaintiff, determined that the sound recording was sampled, the Ninth Circuit, nonetheless, concluded that the copying was de minimis.¹¹⁸ The Ninth Circuit justified this “as a matter of law” conclusion on the facts that the sampled portion lasted less than one-second, only occurred a few times, and was otherwise modified before being inserted into the new song.¹¹⁹ The court also noted a “quirk” in the case in that the plaintiff's expert first misidentified the source of the sampled double horn hit.¹²⁰

Despite the conclusion that the copying was de minimis, VMG insisted that this conclusion was immaterial and argued that the de minimis exception did not apply to copyrighted sound recordings based upon the Sixth Circuit's determination in *Bridgeport Music*.¹²¹ In response, the Ninth Circuit stated that the de minimis exception is firmly established in the law

115. *VMG Salsoul, LLC*, 824 F.3d at 877.

116. *Id.*

117. *Id.* at 877-78.

118. *Id.* at 880 (“After listening to the audio recordings submitted by the parties, we conclude that a reasonable juror could *not* conclude that an average audience would recognize the appropriation of the horn hit.”).

119. *Id.*

120. *VMG Salsoul, LLC*, 824 F.3d at 880 (“[A] highly qualified and trained musician listened to the recordings with the express aim of discerning which parts of the song had been copied, and he could not do so accurately. An average audience would not do a better job.”).

121. *Id.* Furthermore,

[I]t seems like the only way to infringe on a sound recording is to re-record sounds from the original work, which is exactly the nature of digital sound sampling. Then the only issue becomes whether the defendant re-recorded sound from the original. This suggests that the substantial similarity test is inapplicable to sound recordings.

Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just A Bad “Rap”?*, 37 LOY. L. REV. 879, 896 (1992).

and, based upon the leading treatise, can be traced back to the mid-1800s.¹²² The Ninth Circuit also stated that no other courts outside of the Sixth Circuit have applied *Bridgeport Music's* per se rule.¹²³ Thus, the Ninth Circuit concluded that the de minimis exception applies, unless there is some evidence of congressional intent to the contrary.¹²⁴

In order to evaluate Congress's intent, the Ninth Circuit first looked to the relevant statutes, specifically 17 U.S.C. §§ 102, 106, and 114(b), and determined that there was no indication from the text of the statutes to indicate a differing treatment for copyrighted sound recordings.¹²⁵ Next, the Ninth Circuit looked to the legislative history and specifically quoted House Report No. 94-1476,¹²⁶ which states, in relevant part, that

[I]nfringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.¹²⁷

Based upon this report, the Ninth Circuit concluded that Congress did not intend to expand the rights of a copyright owner with respect to sound recordings.¹²⁸ The Ninth Circuit also concluded from the "any substantial portion" part of the House Report that Congress intended for a de minimis exception to apply.¹²⁹

Finally, the Ninth Circuit rejected *Bridgeport Music's* interpretation of 17 U.S.C. §§ 106 and 114(b) for two additional reasons. The first was on the grounds that *Bridgeport Music* wrongfully inferred an expansion of protection from a section of the Code that limited the rights of copyright owners.¹³⁰ The second was on the premise the Sixth Circuit's holding constituted a logical fallacy.¹³¹ With regards to the Sixth Circuit's logical fallacy, *Bridgeport Music* determined that because copyright protection for

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

123. *Id.* at 881.

124. *Id.*

125. *Id.* at 881-83.

126. *Id.* at 883.

127. H.R. REP. NO. 94-1476, at 106 (1976), as reprinted in 1976 U.S.S.C.A.N 5659, 5721.

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

129. *Id.*

130. *Id.*

131. *Id.*

sound recordings *does not extend* to other recordings made of entirely independent sounds, it *does extend* to other recordings that are not made of entirely independent sounds.¹³² The Ninth Circuit discredited *Bridgeport Music*'s holding by stating that “[a] statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances. In logical terms, it is a fallacy to infer the inverse of a conditional from the conditional.”¹³³

Thus, the Ninth Circuit concluded that Congress intended to maintain the *de minimis* exception for copyrighted sound recordings.¹³⁴ The Ninth Circuit consciously created a circuit split, but, nonetheless justified its determination because “the goal of avoiding a circuit split cannot override our independent duty to determine congressional intent.”¹³⁵ The Ninth Circuit reinforced its creation of a circuit split because the leading copyright treatise criticized the *Bridgeport Music* decision and because a circuit split already existed since no courts outside of the Sixth Circuit were implementing *Bridgeport Music*'s *per se* rule.¹³⁶ Therefore, the Ninth Circuit held that the *de minimis* exception applies to copyrighted sound recordings.¹³⁷

132. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800-01 (6th Cir. 2005).

133. *VMG Salsoul, LLC*, 824 F.3d at 884. The Ninth Circuit also provided a helpful analogy to emphasize its point.

For example, take as a given the proposition that “if it has rained, then the grass is not dry.” It does not necessary follow that “if it has not rained, then the grass is dry.” Someone may have watered the lawn, for instance. We cannot infer the second if-then statement from the first. The first if-then statement does not tell us *anything* about the condition of the grass if it has not rained.

Id. at 885.

134. *Id.* at 886.

135. *Id.* The Ninth Circuit felt justified in its conclusion despite the fact that three years earlier it stated,

[T]he creation of a circuit split would be particularly troublesome in the realm of copyright. Creating inconsistent rules among the circuits would lead to different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide.

Id. (quoting *Seven Arts Filmed Entm't Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1256 (9th Cir. 2013)).

136. *Id.* (“Although we are the first circuit court to follow a different path than *Bridgeport*'s, we are in well-charted territory.”).

137. *Id.* at 874.

2. The Dissent: Coming to the Defense of *Bridgeport Music*

The dissent began by characterizing a copyrighted sound recording as “the stock-in-trade” of artists, then characterized sampling as the physical and unlawful use of another’s property.¹³⁸ After defining these terms of art, the dissent, without mincing words, stated, “In any other context, this would be called theft. It is no defense to theft that the thief made off with only a ‘de minimis’ part of the victim’s property.”¹³⁹ The dissent proceeded to criticize the majority for its holding based upon a treatise, rather than the Sixth Circuit’s decision in *Bridgeport Music*.¹⁴⁰ The dissent acknowledged—like the majority—that after the Ninth Circuit’s holding in *Newport* that the question of whether the de minimis exception applies to copyrighted sound was an “open question.”¹⁴¹ It was the dissent’s view, however, that the Sixth Circuit in *Bridgeport Music* answered this question.¹⁴²

And just exactly what is the Sixth Circuit’s radical holding in [*Bridgeport Music*] that the majority finds so distasteful? It’s this: if you want to use an *identical copy* of a portion of a copyrighted fixed sound recording—we’re not taking about “substantially similar” tunes or rhythms, but an actual *identical copy* of a sound that has already been recorded in a fixed medium—get a license.¹⁴³

The dissent began with the text of the relevant statutes.¹⁴⁴ Based on 17 U.S.C. §§ 106 and 114, the dissent reiterated that the owner of a copyrighted sound recording has the exclusive right to sample their own recording.¹⁴⁵ In other words, it is the owner of the copyright and no one else, who may legally sample the copyrighted work.¹⁴⁶ This right, however, is not

138. *VMG Salsoul, LLC*, 824 F.3d at 888 (Silverman, J. dissenting).

139. *Id.* But see TEHRANIAN, *supra* note 11, at 20 (discussing the inherent differences between physical property and intellectual property).

140. *VMG Salsoul, LLC*, 824 F.3d at 888 (Silverman, J. dissenting) (characterizing the Sixth Circuit’s holding as “a decision that has governed the music industry in Nashville—‘Music City’—and elsewhere for over a decade without causing either the sky to fall in, or Congress to step in.”).

141. *Id.*

142. *Id.*

143. *VMG Salsoul, LLC*, 824 F.3d at 888 (Silverman, J. dissenting).

144. *Id.* at 888-89.

145. *Id.* at 888.

146. *Id.*

absolute.¹⁴⁷ It is qualified by 17 U.S.C. § 114(b) which, in relevant part, states that the exclusive rights of a copyright owner “do not extend to . . . another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”¹⁴⁸ Thus, the dissent concluded that the Sixth Circuit’s interpretation of the statute was accurate.¹⁴⁹ The dissent then characterized the majority’s logical fallacy argument as a “rhetorical exercise” that distorted the plain meaning of the statute when all provisions are read together.¹⁵⁰ “That right,” the dissent explained, “was not invented by the Sixth Circuit: it already exists in the statutes,”¹⁵¹ statutes that make no mention of a *de minimis* exception, especially in the context of exclusivity.¹⁵²

Mirroring the Sixth Circuit, the dissent further emphasized the differences between sound recordings and musical compositions.¹⁵³ The dispositive difference, according to the dissent, is that when someone infringes upon the copyrighted sound recording, it is more than an intellectual taking.¹⁵⁴ It is a physical one.¹⁵⁵ The dissent supported this distinction by stating that it is not only the song that is appropriated, but it is also the medium in which the artist chose to fix the recording.¹⁵⁶ “This is unlike indiscernible photographs used, not for their content (which cannot be made out), but to dress a movie set.”¹⁵⁷ The appropriation of both the

147. See 17 U.S.C.A. § 114(b) (West, Westlaw through Pub. L. No. 114-154).

148. 17 U.S.C.A. § 114(b) (West, Westlaw through Pub. L. No. 114-154). See also *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 888 (9th Cir. 2016) (Silverman, J. dissenting) (“In other words, the world at large is free to imitate or simulate the creative work fixed in the recording (like a tribute band, for example) so long as an actual copy of the sound recording itself is not made.”).

149. *VMG Salsoul, LLC*, 824 F.3d at 888-89 (Silverman, J. dissenting).

150. *Id.* at 888.

151. *Id.* at 889.

152. *Id.*

153. *Id.*

154. *VMG Salsoul, LLC*, 824 F.3d at 889 (Silverman, J. dissenting).

155. *Id.* See also *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (“[S]ampling is never accidental. . . . When you sample a sound recording you know you are taking another’s work product.”).

156. *VMG Salsoul, LLC*, 824 F.3d at 889 (Silverman, J. dissenting).

157. *Id.* at 889.

recording and the medium “makes a *de minimis* analysis inapplicable, since sampling or pirating necessarily involves copying a fixed performance.”¹⁵⁸

Finally, the dissent pointed to the congressional inaction in the wake of the Sixth Circuit’s decision in *Bridgeport Music*, and the benefits of *Bridgeport Music*’s functional, dependable, and easily ascertainable bright-line rule.¹⁵⁹ The dissent noted that Congress has taken no action in response to the *Bridgeport Music* ruling, despite the clear invitation from the Sixth Circuit to act if its interpretation was in error.¹⁶⁰ “While it’s true that congressional inaction in the face of judicial interpretation is not ironclad evidence of [congressional] approval, it’s not chopped liver either.”¹⁶¹

In the final paragraph, the dissent aptly summarized and concluded by stating

True, *Get a license or do not sample* doesn’t carry the same divine force as *Thou Shall Not Steal*, but it’s the same basic idea. I would hold that the *de minimis* exception does not apply to the sampling, copying, stealing, pirating, misappropriation—call it what you will—of copyrighted fixed sound recordings. Once the sound is fixed, it is tangible property belonging to the copyright holder, and no one else has the right to take even a little of it without permission.¹⁶²

IV. INTERPRETATION OR IMPLEMENTATION: THE BATTLE OF THE CANONS OF CONSTRUCTION

Following the Ninth Circuit’s determination, only two circuits have addressed the narrow issue of whether a *de minimis* exception applies to infringement actions based upon the digital sampling of copyrighted sound recordings. In answering this question, both circuits examined the same statutes and addressed similar factual scenarios, and yet, the two reached inherently conflicting conclusions.

158. *Id.* “The defendants wanted horns to punctuate their song, so they took the plaintiff’s copyrighted recording of horns. The horn hit is brief, but clearly perceptible and does its job.” *Id.*

159. *Id.* at 889-90.

160. *Id.* at 889. See also *Bridgeport Music, Inc.*, 410 F.3d at 805.

161. *VMG Salsoul, LLC*, 824 F.3d at 889 (Silverman, J. dissenting) (internal citation omitted).

162. *Id.* at 890.

Both circuits agree that imitating a copyrighted sound recording is not copyright infringement provided that no actual copying was done.¹⁶³ This agreement directly derives from the third sentence of 17 U.S.C. § 114(b), which states that

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 [i.e., the exclusive rights to reproduce and prepare derivative works] do not extend to the making or duplication of another sound recording that consist entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.¹⁶⁴

What is interesting, though, is the similarity in the language used by both circuits. The Sixth Circuit stated that there is no infringement “so long as an actual copy of the sound recording itself is not made,”¹⁶⁵ while the Ninth Circuit stated that there is no infringement “so long as there was no actual copying.”¹⁶⁶ In *Bridgeport*, the Sixth Circuit assumed, because it was not denied, that there was actual copying, and held that there was infringement.¹⁶⁷ In *VMG Salsoul*, however, the Ninth Circuit, for the purposes of summary judgment, also assumed that there was actual copying, but held that there was no infringement.¹⁶⁸ By its own interpretation of 17 U.S.C. § 114(b), the Ninth Circuit stated that there is not infringement “so long as there was *no* actual copying,”¹⁶⁹ implying that there is infringement where there *is* actual copying. The Ninth Circuit did not interpret 17 U.S.C. § 114(b) as stating that there is only infringement so

163. See *VMG Salsoul, LLC*, 824 F.3d at 883 (majority opinion) (“A new recording that mimics the copyrighted recording is not an infringement, even if the mimicking is very well done, *so long as there was no actual copying.*”) (emphasis added); *Bridgeport Music, Inc.*, 410 F.3d at 800 (“This means that the world at large is free to imitate or simulate the creative work fixed in the recording *so long as an actual copy of the sound recording itself is not made.*”) (emphasis added). Note the similarity in the language used by both circuits in reaching this agreement.

164. 17 U.S.C.A. § 114(b) (West, Westlaw through Pub. L. No. 114-154).

165. *Bridgeport Music, Inc.*, 410 F.3d at 800.

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

167. *Bridgeport Music, Inc.*, 410 F.3d at 796, 805.

168. *VMG Salsoul, LLC*, 824 F.3d at 877, 887.

169. *Id.* at 883 (emphasis added).

long as there something more than de minimis copying; instead, it spoke in definite terms.¹⁷⁰

In any event, the circuits reached incompatible conclusions by relying upon what each deemed a natural reading of the text of the statute.¹⁷¹ After examining the relevant statutes, the Sixth Circuit concluded that because one cannot sample the entire recording, one cannot sample “something less than whole.”¹⁷² In the Sixth Circuit’s view, the major justification for this conclusion stems from the language that Congress used and the subtle differences between the Sound Recording Act of 1971 and the Copyright Act of 1976.¹⁷³ In sum, the Sixth Circuit based its conclusion on several practical reasons, discussed above,¹⁷⁴ and on the purpose of copyright protection: “to strike a balance between protecting original works and stifling further creativity.”¹⁷⁵

The Ninth Circuit not only examined the relevant statutes, but also relied heavily upon outside sources to support its conclusion. The Ninth Circuit relied primarily on the “leading copyright treatise,” *Nimmer on Copyright*.¹⁷⁶ The Ninth Circuit also relied upon dicta from one of its own previous cases, *Newton v. Diamond*, which the Ninth Circuit admitted did not address the issue presented in *VMG Salsoul*.¹⁷⁷ In addition, the Ninth Circuit justified the de minimis exception on the premise that “[i]f the public does not recognize the appropriation, then the copier has not benefitted from the

170. Note that after the Ninth Circuit stated its interpretation of 17 U.S.C. § 114(b), it went on to state that

But the quoted passage [the third sentence of 17 U.S.C. § 114(b)] does not speak to the question that we face: whether Congress intended to eliminate the longstanding de minimis exception for sound recordings in all circumstances even where, as here, the new sound recording as a whole sounds nothing like the original.

Id.

171. *See id.* at 883-84 (“That passage strongly supports the *natural reading* of § 114(b), discussed above.”) (emphasis added); *Bridgeport Music, Inc.*, 410 F.3d at 805 (“We have taken a *literal reading* approach.”) (emphasis added) (internal citations omitted).

172. *Bridgeport Music, Inc.*, 410 F.3d at 800.

173. *Id.* at 800-01.

174. *See supra* Part III.A.

175. *Bridgeport Music, Inc.*, 410 F.3d at 800.

176. *VMG Salsoul, LLC*, 824 F.3d at 880-85. Note that the Sixth Circuit used and cited other sources as well, but its reliance was not as prevalent as the Ninth Circuit’s.

177. *See id.* at 877-78 (stating that *Newton* does not answer the question presented and that “it is an open question in this circuit whether the [de minimis] exception applies to claims of infringement of a copyrighted sound recording”). *See also id.* at 881.

original artist's expressive content."¹⁷⁸ The Ninth Circuit further stated that even if there were some ambiguity in the text of the statute, the legislative history—again, something considered outside the text of the statute—supported its conclusion.¹⁷⁹ Accordingly, the Ninth Circuit found that the Sixth Circuit “ignored the statutory structure”¹⁸⁰ of 17 U.S.C. § 114(b) such that it inferred “an *implicit expansion* of rights into Congress’ statement of an *express limitation* on rights.”¹⁸¹ Finally, the Ninth Circuit, relying upon *Nimmer*’s analysis, stated that the Sixth Circuit’s conclusion was a logical fallacy.¹⁸²

A. *Statutory Interpretation: Determining the Intent of Congress*

While there are some primary rules that courts utilize to interpret statutes, “there is no unified, systematic approach for unlocking meaning in all cases.”¹⁸³ Regardless, the starting point for interpreting any statute is the text of the statute.¹⁸⁴ “A basic principle of statutory interpretation is that courts should ‘give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.’”¹⁸⁵ The purpose

178. *Id.* at 881. Compare that statement with the Sixth Circuit’s characterization of sampling.

[E]ven when a small part of a sound recording is sampled, the part taken is something of value. No further proof of that is necessary than the fact that the producer of the record or the artist on the record intentionally sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both. For the sound recording copyright holder, it is not the “song” but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.

Bridgeport Music, Inc., 410 F.3d at 801-02. Also, consider the idea that sampling “poses the greatest danger to the musical profession because the musician is being replaced with himself.” Abramson, *supra* note 59, at 1668.

179. *VMG Salsoul, LLC*, 824 F.3d at 883-84

180. *Id.* at 884.

181. *Id.* at 883.

182. *Id.* at 884-85.

183. LARRY M. EIG, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, at *Summary* (2011).

184. *Id.* at 3.

185. *Id.* at 13 (internal citation omitted). See also *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .”).

of this exercise is to ascertain the intent of Congress, which may also require examining the purpose of the statute.¹⁸⁶

Sometimes, unfortunately, examining the entirety of the statute is not enough. The statute may, nonetheless, remain ambiguous. Courts should be wary of “waving the wand of ambiguity” in order to serve some other political purpose. In other words, certain canons of interpretation can function as a “mere pretext because judges may pick and choose among them to achieve whatever result they desire.”¹⁸⁷ If, in interpreting the statute, the court determines that some ambiguity exists, the court will then employ certain canons of interpretation.

There are two main types of canons of interpretation: linguistic canons and substantive canons.¹⁸⁸ Linguistic canons are “neutral, analytical guides for discerning the meaning of particular text that might otherwise appear unclear.”¹⁸⁹ A substantive canon, on the other hand, “subordinates the general, linguistic canons of statutory construction, as well as other interpretive principles, to overarching presumptions, that unless rebutted, favor particular substantive results.”¹⁹⁰ In interpreting statutes, courts may invoke either, both, or portions of each canon to interpret any given statute.

1. Inferred Intent from the Provisions Set Forth in Title 17

If a simple examination of the text of a statute fails to resolve the issue, then the court will attempt to ascertain the intent of Congress in enacting the statute. To determine congressional intent, the court should look to the purpose of the statute as well as the language and structure of the statute,

186. *EIG*, *supra* note 183, at 3. As Justice Jackson put it, “However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.” *SEC v. Joiner*, 320 U.S. 344, 350-51 (1943).

187. *EIG*, *supra* note 183, at 5.

188. *See generally id.* at 4, 22.

189. *Id.* at 4. Linguistic canons are sometimes characterized to as a “textualist-based means of interpretation.” *Id.* at 1 (internal quotations omitted). “Textualism considers the law to be embodied in the language of the statute, as expressed in its plain meaning, which can be discerned through the aid, as necessary, of various judicially developed rules of interpretation.” *Id.* (internal quotations omitted).

190. *Id.* at 18. Substantive canons may be characterized as an “intentionalist-based means of interpretation [referring to] the Court’s approach toward relying on legislative history and other extrinsic considerations.” *Id.* at 1 (internal quotations omitted).

reading the entire statute as a harmonious whole. If this exercise proves futile, then different canons of interpretation may be used to assist the court.

The intent of Congress, which is derived from the purpose, language, and structure of the statute, was, in the broadest context, to give effect to the Copyright Clause of the Constitution.¹⁹¹ In giving effect to this provision of the Constitution, Congress sought to strike a balance between protecting original works of authorship and stifling creativity.¹⁹² By enacting the Copyright Act of 1976 and thereby eliminating the Copyright Act of 1909, Congress determined that to better balance the scales it was necessary to increase the protection afforded to copyright owners, thus illustrating the purpose of the copyright statute.¹⁹³

The structure of the copyright statute is a common structure used in many federal statutes: (1) define the terms; (2) state a broad, general rule; and (3) provide exceptions and limits to the broad, general rule. The language of the statute is simple. If any complexities exist, they are explained through either the definitions section, i.e., 17 U.S.C. § 101, or clarified by the context of the provision. Similarly, the intent of the copyright statute is clear. The statute was intended to increase protection afforded to copyright owners, which is verified through a simple comparison of the Copyright Act of 1909 and the Copyright Act of 1976.¹⁹⁴

The Ninth Circuit opposed the Sixth Circuit, stating that sound recordings were not intended to be treated any differently than other copyrighted works.¹⁹⁵ However, a casual examination of the statute suggests otherwise.¹⁹⁶ Responding to the Sound Recording Act of 1971, Congress created a special provision just for sound recordings where it laid out the limits of the exclusive rights with respect to sound recordings.¹⁹⁷ The relevant limitation, confined in Section 114(b), states that the exclusive rights to reproduce and prepare derivative works of the owner of a copyrighted sound recording do not extend to another recording that

191. See U.S. CONST. art. I, § 8, cl. 8.

192. See *supra* Part II.A.

193. See *supra* Part II.B.

194. See *supra* Part II.B.

195. See *e.g.*, *VMG Salsoul v. Ciccone*, 824 F.3d 871, 881-82 (9th Cir. 2016) (“[Section 102] treats sound recordings identically to all other types of protected works; nothing in the text suggests differential treatment, for any purpose, of sound recordings compared to, say, literary works.”).

196. See *supra* Part II.B.

197. See *generally* 17 U.S.C.A. § 114 (West, Westlaw through Pub. L. No. 114-154).

consists entirely of independent sounds.¹⁹⁸ That's it. The rights stop there, at the line where another recording consists entirely of independent sounds. The very nature of an exclusive right implies that it extends all the way up to that point.

So, why did the Ninth Circuit reject this interpretation? To borrow the words from Judge Silverman's dissent, "[W]hat is the Sixth Circuit's radical holding in [*Bridgeport*] that the [Ninth Circuit] finds so distasteful?"¹⁹⁹ The Ninth Circuit rejected this reading of the statute based on numerous reasons, none of which stem from the text of the statute. The holding is based upon a treatise,²⁰⁰ dicta from one of its own cases,²⁰¹ formal principles of logic,²⁰² the legislative history,²⁰³ and precedent established well before the enactment of the Sound Recording Act of 1971 and the Copyright Act of 1976.²⁰⁴

Regardless of such extrinsic considerations, the text reveals that Congress did not intend to create, or maintain, a *de minimis* exception for infringements of copyrighted sound recordings. The Ninth Circuit misinterpreted the plain text of the statute to achieve what it deemed to a better result. While the Ninth Circuit may disagree with the statute, it does not have the power to change it.

2. Formal Principles of Logic

One of the Ninth Circuit's more subtle errors was its reliance upon the formal principles of logic.²⁰⁵ Using logic to justify an assertion obviously has a certain charm, because, honestly, who can argue with logic? The logical argument, however, is misplaced.²⁰⁶ Interpreting a statute is supposed to be

198. 17 U.S.C.A. § 114(b) (West, Westlaw through Pub. L. No. 114-154).

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

200. *VMG Salsoul, LLC*, 824 F.3d at 880 (majority opinion).

201. *Id.* at 881 ("Indeed, we stated in dictum in *Newton* that the [*de minimis* doctrine] applies *throughout the law of copyright*, including cases of music sampling.") (internal quotations omitted).

202. *Id.* at 884-85.

203. *Id.* at 883-84. This, admittedly, is the Ninth Circuit's strongest argument for its interpretation of the statute.

204. *Id.* at 880-81.

205. *VMG Salsoul, LLC*, 824 F.3d at 884-85.

206. In addition to contradicting the purpose of entire statute, characterizing an argument (or, in this case, an interpretation) as a "logical fallacy" does not automatically render the conclusion false or otherwise unacceptable. For example, Professor Rice states,

an exercise to determine the intent of the legislature.²⁰⁷ Using the formal principles of logic presupposes that Congress wrote the statute in accordance with these principles, but that presupposition is not bulletproof.

The Ninth Circuit stated that

[The Sixth Circuit] inferred from the fact that “exclusive rights . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds,” the conclusion that exclusive rights do extend to the making of another sound recording that does not consist entirely of an independent fixation of other sounds. . . . A statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances. In logical terms, it is a fallacy to infer the inverse of a conditional from the conditional.

For example, take as a given the proposition that “if it has rained, then the grass is not dry.” It does not necessarily follow that “if it has not rained, then the grass is dry.” Someone may have watered the lawn, for instance. . . . The first if-then statement does not tell us anything about the condition of the grass if it has not rained. Accordingly, even though it is true that, “if the recording consists entirely of independent sounds, then the copyright does not extend to it,” that statement does not necessarily mean that “if the recording does not consist entirely of independent sounds, then copyright does extend to it.”²⁰⁸

If the formal principles of logic are applied to this provision *in isolation*, then the Ninth Circuit’s assertion is entirely true. However, these principles are not the rule of thumb for interpreting statutes. A reading of the text of *the entire statute* shows that applying these principles runs counter to the purpose of the statute.

[T]he impact of the logical fallacy has its limits. While the fallacy is a powerful tool for exposing and diffusing the influence of an illogical argument, it does not necessarily invalidate the conclusion. Instead, it only invalidates the form of the argument purporting to support the conclusion. . . . If an argument’s structure is logically invalid, the result is that the argument cannot be used to support the truth of the conclusion. Another, logically sound, argument might still be crafted to support the conclusion.

Stephen M. Rice, *Conspicuous Logic: Using the Logical Fallacy of Affirming the Consequent as a Litigation Tool*, 14 BARRY L. REV. 1, 22 (2010).

207. See EIG, *supra* note 183, at 3.

208. *VMG Salsoul, LLC*, 824 F.3d at 884-85 (internal citations omitted).

Because these rights are exclusive, having been characterized as such by Congress,²⁰⁹ except for the stated limitations,²¹⁰ the logical argument opposes the clear purpose of the statute. Stated differently, the very nature of an exclusive right implies that the copyright owner retains the sole right to reproduce, etc., up until the new sound recording “consists entirely of an independent fixation of other sounds.”²¹¹ Therefore, by the language of the statute, Section 114 protects everything less than a completely new sound recording consisting of entirely independent sounds.

In addition, using principles of logic has often been repudiated.²¹² Judge Richard Posner, for instance, stated that

[F]or there can be nothing very impressive about the fact that lawyers and judges, like everyone else, employ simple syllogisms. . . . For this reason, and in light of earlier discussion in this article, it should come as no surprise that the way in which lawyers actually “reason by analogy” is often, and misleadingly, syllogistic (technically, enthymematic).²¹³

Posner further expressed that “[i]nsofar as judges and lawyers do use logic, it is the simplest methods of logic they use.”²¹⁴ In sum, the Ninth Circuit’s reliance on the formal principles of logic lacks persuasion because it only serves as an extrinsic canon of interpretation with the ability to mislead and, in this instance, actually runs counter to the purpose of the statute.

209. See 17 U.S.C.A. § 106 (West, Westlaw through Pub. L. No. 114-154).

210. See 17 U.S.C.A. § 114(b) (West, Westlaw through Pub. L. No. 114-154).

211. *Id.*

212. See *In re Freedom Grp, Inc.* 50 F.3d 408, 410 (7th Cir. 1995) (“It is a nice, tidy, ‘logical’ argument but so manifestly contrary to the purpose of the statute as to incite grave doubts, at least in judges who are not in thrall to the syllogistic style of legal reasoning.”)

213. *Id.* at 844. Judge Posner continued by providing an example of how reasoning by analogy may be misleading, stating that

The property lawyer who says that oil and gas should be analogized to rabbits or deer or other wild animals is really saying that the rule on wild animals (“the rule of capture”) is an instance of a more general rule that subsumes oil and gas: namely the rule that there are no possessory property rights in fugitive resources. The problem is then to justify the general rule, which cannot be done syllogistically or by analogies.

Id.

214. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 835 (1988).

B. Utilitarianism and Economics

Although utilitarianism—the primary justification for copyright protection²¹⁵—is a “philosophical and economic doctrine,”²¹⁶ this Note will only examine the economic aspect.²¹⁷ In order to “promote the Progress of Science and useful Arts”²¹⁸ some level of protection is required, because if intellectual “property is made available to any and all upon creation, there is no incentive for creators to create. For example, if songwriters cannot profit from their ability to pen that platinum ballad, they are less likely to even put the pen to paper.”²¹⁹

As stated by the Sixth Circuit, the purpose of copyright protection is “to strike a balance between protecting original works and stifling further creativity.”²²⁰ An economic analysis, however, encompasses more than the balancing act required by the trade-off analysis; it requires an additional cost-benefit analysis. “Property rights confer two types of economic benefit, static and dynamic.”²²¹ Static benefits, for example, include the right to exclude.²²² Dynamic benefits, on the other hand, enable owners to reap where they have sown.²²³ Conversely, there are costs that accompany these benefits. The cost of creating an original expressive work—one that qualifies for copyright protection—has two components.²²⁴ First, there is the cost of

215. See *supra* Part II.A.

216. *Utilitarianism*, BLACK’S LAW DICTIONARY (10th ed. 2014).

217. An in-depth study into all the complexities of economics is beyond the purview of this Note. The purpose of this Section of the Note is to provide an elementary analysis and examination of some of the economic factors implicated through de minimis sampling of copyrighted sound recordings.

218. U.S. CONST. art. I, § 8, cl. 8.

219. Ryan C. Grelecki, Comment, *Can Law and Economics Bring the Funk ... or Efficiency?: A Law and Economics Analysis of Digital Sampling*, 33 FLA. ST. U. L. REV. 297, 311 (2005). For another example, consider that

Without [the prospect to reap what one has sown] the incentive to sow is diminished. To take an example from intellectual property, a firm is less likely to expend resources on developing a new product if competing firms that have not borne the expense of development can duplicate the product and produce it at the same marginal cost as the innovator

WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 13 (2003).

220. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005).

221. LANDES & POSNER, *supra* note 219, at 12.

222. *Id.*

223. *Id.* at 13.

224. *Id.* at 37.

creating the work (a fixed cost) and second, there is the cost of reproducing copies (a variable cost).²²⁵

Allowing others to sample copyrighted sound recordings deprives the owner of both economic benefits. There is no longer a full-fledged right to exclude. There will be an uncertain level of appropriation allowed before the right to exclude will be enforced by the courts, and this level of uncertainty creates an additional cost. Furthermore, sampling, by its very nature, allows the sampler to reap what another has sown, depriving the owner of this benefit. Although the owner is not completely deprived of the benefit—due to the inherent differences between intellectual property and other types of personal property (for example, a car)—there will be some level of benefit obtained by the sampler at the expense of the owner. Moreover, allowing sampling at any level allows the sampler to derive a benefit without any cost of creation, although there may be some inherent cost in the manner used to obtain the sample.

Allowing de minimis copying, however, adds another variable cost to both the owner and the sampler, and it is an uncertain cost: the cost of litigation. The owner must assume the cost to prosecute the claim and the sampler must assume the cost to defend against the claim. Thus, allowing de minimis copying increases the potential costs involved, while decreasing the benefits. That is not to say that all copyright infringement actions (for example, musical compositions) should eliminate the de minimis exception, but sampling sound recordings is fundamentally different than any other type of copyright infringement.²²⁶

While vesting private ownership in intellectual property may create holdouts—i.e., owners who refuse to grant a license to third parties—the dilemma is mitigated by the fact that holding out is, in nearly every case, not economically efficient.²²⁷ This is because the rights or benefits of copyright protection are transferable and, in most cases, must be transferred in order to maximize the profit. Nevertheless, “[t]he reality of the music industry is that digital sampling is cheaper and easier If the participants in the

225. *Id.*

226. The Sixth Circuit provides an unambiguous explanation of how sampling differs from other types.

[S]ampling is never accidental. It is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another which he had heard before. When you sample a sound recording you know you are taking another’s work product.

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

227. Grelecki, *supra* note 219, at 313 (“Most folks have figured out that keeping these copyrights to themselves is not the most financially sound decision.”).

market act rationally, they will sample.”²²⁸ The incentive to sample may also be exacerbated by the fact that the sampler may not have the ability to recreate the sampled material. Some may urge that this unreasonably tips the scale towards unduly stifling creativity. Economics, however, suggests otherwise. This would-be sampler—who has an idea of how to incorporate a sample into a new, presently profitable creation—will be forced to enter the market place in order to produce the new creation. Forcing would-be samplers into the market alleviates the problem that sampling “poses the greatest danger to the musical profession,” because the musician is no longer being replaced with himself.²²⁹ Therefore, when the economic considerations are taken into account, the Sixth Circuit’s interpretation is the most economically efficient response to whether there should be a de minimis exception for digitally sampling copyrighted sound recordings.

V. CONCLUSION

As technology advances, statutory copyright protection endeavors to keep up. Congress sought to alleviate some of the foreseeable problems of technological advances by enacting the Copyright Act of 1976,²³⁰ but despite its best efforts, disputes remain. The Founders wisely vested the ability to control copyright protection in the federal government so that the protection afforded to those who create original works of authorship fixed in a tangible medium would enjoy the same protection throughout the country.²³¹

As of June 2, 2016, however, an irresolvable circuit split surfaced as to whether a de minimis exception applies to infringement claims premised upon the digital sampling of copyrighted sound recordings.²³² In 2005, the Sixth Circuit established a bright-line rule whereby any sampling was per se infringement.²³³ In 2016, when confronted with the same issue, the Ninth

228. *Id.* at 327. The author of this article goes on further to state,

If the probability of getting caught and having to pay a judgment or fine, or having to pay a license, or having to just stop using a sample altogether does not decrease the benefit gained by the ease of digital sampling, artists will act rationally and continue to sample without first seeking consent.

Id. at 327-28.

229. Abramson, *supra* note 59, at 1668.

230. See Copyright Act of 1976, Pub. L. No. 94-553, October 19, 1976, 90 Stat. 2541.

231. Crum, *supra* note 5, at 949-50.

232. Compare *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) with *VMG Salsoul v. Ciccone*, 824 F.3d 871 (9th Cir. 2016).

233. *Bridgeport Music, Inc.*, 410 F.3d at 801 (6th Cir. 2005).

Circuit declined to adopt the Sixth Circuit's approach and held that a de minimis exception applies.²³⁴

This circuit split is unwarranted. After examining the text of the relevant statutes and following the general guidelines on determining congressional intent, it becomes clear that the Sixth Circuit adopted the accurate approach.²³⁵ Furthermore, copyright protection is based upon a utilitarian theory, encompassing philosophy and economics.²³⁶ An economic analysis illustrates that the utilitarian goal of copyright protection is best served through the Sixth Circuit's interpretation.²³⁷ Nevertheless, a circuit split remains. Because of the sharp split between the Sixth and Ninth Circuits, the ultimate determination will be left to either the Supreme Court of the United States or Congress. Either way, this split must be resolved in order to ensure uniformity and consistency in the application of the laws throughout the United States.

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

235. *See supra* Part IV.A.1.

236. *Utilitarianism*, BLACK'S LAW DICTIONARY (10th ed. 2014).

237. *See supra* Part IV.B.