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COPYRIGHT INFRINGEMENT IN SOUND RECORDING: HOW COURTS AND LEGISLATURES CAN GET IN VOGUE IN A POST-*CICCONE* WORLD

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INTRODUCTION

From starving artists to superstars, the questions surrounding the legality of sampling portions of other musicians' creations are manifold and complex, and the costs of guessing wrongly on their answers can be astronomical.[1] The legality of sampling has depended for some time on what jurisdiction the inquiry took place in, and has been guided by inconsistently applied doctrines of fair use, *de minimis*, and copyright infringement.[2] The Ninth Circuit's decision in *VMG Salsoul v. Ciccone* in the summer of 2016 brought these inconsistencies to the forefront.[3]

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[1] *See* Ryan Lloyd, Note, *Unauthorized Digital Sampling in the Changing Music Landscape*, 22 J. INTELL. PROP. L. 143, 144 (2014); *see also* Charles Cronin, *I Hear America Suing: Music Copyright Infringement in the Era of Electronic Sound*, 66 HASTINGS L.J. 1187, 1244 (2015) (explaining that statutory damages can "range between $750 and $300,000 . . . per work found to have been infringed"). *See generally* Jeremy Mersereau, *10 Artists Who Were Sued for Unauthorized Samples*, AUX (Nov. 10, 2015), http://www.aux.tv/2015/11/10-artists-who-were-sued-for-unauthorized-samples/ (providing examples of lawsuits over the unlicensed use of other artists' work).

[2] *See* Lloyd, *supra* note 1, at 155–62 (asserting that although some courts have established a bright-line rule regarding musical sampling as copyright infringement per se, others have declined to do so).

[3] *See* VMG Salsoul v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016).

On June 2, 2016, the Ninth Circuit held that the inclusion of a .23-second sample horn hit in Madonna's iconic 1990 song "Vogue," originally from the song "Love Break," did not constitute copyright infringement.[4] This was a remarkable event in copyright law because *Ciccone* represented the first occasion where a circuit court had rejected the Sixth Circuit's bright-line proclamation in *Bridgeport Music v. Dimension Films* that musicians who use even brief snippets from others' musical creations must first obtain a license to do so.[5] For more than ten years, *Bridgeport* was the only attempt by a circuit court to address the issue of whether the *de minimis* defense, which rests on the principle that the law should not bother with trifling matters, can successfully prevail against a copyright infringement claim.[6] With *Ciccone*, the Ninth Circuit sharply rejected the *Bridgeport* standard by recognizing that a *de minimis* defense could apply to samplings of sound recordings.[7] Now that the Ninth Circuit has purposely created a circuit split,[8] the issue is ripe for a clarifying determination.[9] Further complicating matters is the question of whether fair use, defined as the reasonable, relatively limited use of a protected work without its creator's permission, should act as an affirmative defense to a claim of copyright infringement.[10] The doctrines of fair use and *de minimis*

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[4] *See id.*

[5] *See* Bridgeport Music v. Dimension Films, 410 F.3d 792, 801–02 (6th Cir. 2005); Lesley Grossberg, *A Circuit Split at Last: Ninth Circuit Recognizes De Minimis Exception to Copyright Infringement of Sound Recordings*, BAKER HOSTETLER: COPYRIGHT, CONTENT, & PLATFORMS (June 21, 2016), https://www.copyrightcontentplatforms.com/2016/06/a-circuit-split-at-last-ninth-circuit-recognizes-de-minimis-exception-to-copyright-infringement-of-sound-recordings/.

[6] *See* Grossberg, *supra* note 5; *De Minimis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[7] *See Ciccone*, 824 F.3d at 886–87.

[8] *See id.* at 886.

[9] *See* Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 431 (1998) ("Any case involving a circuit split is a potential target for Supreme Court review, even if it involves a mundane matter, because the inconsistency can be a problem in itself.").

[10] *Fair Use*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see* Robert M. Vrana, Note, *The Remix Artist's Catch-22: A Proposal for Compulsory Licensing*

have intersected in increasingly complicated ways with regards to copyright infringement litigation,[11] and a Supreme Court ruling resolving the circuit split would restore predictability and clarity to this area of the law.[12]

The unsettled application of these doctrines has far-reaching implications: musicians are stifled by legal complexities, judges lack a clear directive from the Supreme Court, and the advance of streaming media has opened the door for ever-increasing amounts of litigation in this field.[13] In addition, there has been a recent proliferation of copyright infringement claims against marquee musicians like Robin Thicke, Justin Bieber, and Bruno Mars.[14] The Thicke case demonstrated the financial consequences of the enormous unpredictability of copyright litigation.[15] While the

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for Transformative, Sampling-Based Music, 68 WASH. & LEE L. REV. 811, 817 (2011).

[11] *See generally* NEIL WEINSTOCK, COPYRIGHT'S PARADOX 115 (1st ed. 2008) (describing the effect of copyright as arising from a complicated array of copyright holder rights, sampling practices, and uncertainty about legal standing, *de minimis*, and substantial similarity).

[12] *See* Crystal M. Prais, *Digital Music Sampling: The Fine Line Between Infringement and Inspiration*, N.J. L.J. (Sept. 9, 2016), http://www.njlawjournal.com/id=1202768663677/Digital-Music-Sampling-The-Fine-Line-Between-Infringement-and-Inspiration?mcode=0&curindex=0&curpage=ALL; Herald, *supra* note 9, at 431.

[13] *See* Vrana, *supra* note 10, at 812 (noting that the uncertain law has a "chilling effect" on artists); Lloyd, *supra* note 1, at 163 (arguing that inconsistent judgments have had a "negative effect on both the sampling artists and the rightsholders.").

[14] *See* Complaint, Dienel v. Warner-Tamerlane Publishing Corp., No. 16-978 (M.D. Tenn. filed May 25, 2016); Evan Minsker, *Mark Ronson and Bruno Mars Sued Over 'Uptown Funk'*, PITCHFORK (Oct. 29, 2016), http://pitchfork.com/news/69413-mark-ronson-and-bruno-mars-sued-over-uptown-funk/; Kory Grow, *Robin Thicke, Pharrell Lose Multi-Million Dollar 'Blurred Lines' Lawsuit*, ROLLING STONE (Mar. 10, 2015), http://www.rollingstone.com/music/news/robin-thicke-and-pharrell-lose-blurred-lines-lawsuit-20150310. There is a significant distinction between cases like the Bieber case, which includes an unauthorized sample, and the Williams/Thicke case, which is essentially a case of copying the "look and feel" of a song. This Note deals primarily with sampling music without a license, but the Williams/Thicke case is still significant for its reverberations throughout the industry.

[15] *See* Grow, *supra* note 14.

Bieber and Mars cases are unlikely to resolve the circuit split, they serve as reminders of how badly a clarification in this area of copyright law is needed in order to reduce the huge risks and high costs typical of musical copyright litigation.[16] The question then becomes: what solutions exist to tackle the copyright problem, which is ripe for a showdown at the Supreme Court after *Ciccone*?[17]

This note suggests a four-part solution to resolve the tensions in copyrightable sound recordings magnified by the recent circuit split that necessarily incorporates elements of *de minimis* and fair use, a robust licensing scheme, and administrative oversight.[18] This Note proceeds in three parts. Part I provides a brief overview of copyright law and a historical primer on copyright infringement in the context of digital music sampling, covering the major cases that have shaped musical copyright infringement litigation into its current state. Part II analyzes how the course nearly set by *Bridgeport Music v. Dimension Films* stands to be corrected by *VMG Salsoul v. Ciccone*. Part III proposes a four-part solution to the current challenges facing courts, legislators, creators, and copyright owners in the context of copyright infringement in sound recording. While *Ciccone* by no means resolves the issues surrounding musical sampling and

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[16] Sound recording copyright infringement litigation may drag on for years. *See* Lee Wilson, *If You Want to Sue for Copyright Infringement*, GRAPHIC ARTISTS GUILD, https://graphicartistsguild.org/tools_resources/if-you-want-to-sue (last visited May 25, 2017). *Ciccone* was first decided in 2013, and three years passed before the Ninth Circuit's ruling. VMG Salsoul, LLC v. Ciccone, CV 12-05967 BRO, 2013 U.S. Dist. LEXIS 184127 (C.D. Cal. 2013). The Williams/Thicke case is still on appeal. Brief of Plaintiffs-Appellants-Cross-Appellees, Williams v. Gaye, No. 13-06004 (9th Cir. Aug. 23, 2016). *See, e.g.*, https://consequenceofsound.net/2016/05/10-famous-instances-of-alleged-music-plagiarism/3/.

[17] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 887 (9th Cir. 2016); Tamany Vinson Bentz & Matthew J. Busch, *VMG Salsoul, LLC v. Madonna Louise Ciccone, et al.: Why a Bright Line Infringement Rule for Sound Recordings is no Longer in Vogue*, VENABLE LLP (June 28, 2016), https://www.venable.com/vmg-salsoul-llc-v-madonna-louise-ciccone-et-al-why-a-bright-line-infringement-rule-for-sound-recordings-is-no-longer-in-vogue-06-28-2016/.

[18] *See, e.g*., Michael W. Carroll, *Fixing Fair Use*, 85 N.C.L. REV. 1087, 1090 (2007) [hereinafter Carroll, *Fixing Fair Use*] (suggesting that the creation of a Fair Use Board in the Copyright Office with authority to issue fair use rulings would be an effective solution).

copyright infringement, it does create an opportunity for a joint legislative-judicial solution.

I. BACKGROUND: COPYRIGHT LAW AND MUSIC SAMPLING

A. Copyright Law

A basic tenet of American law is that the creator of an original work has exclusive rights to any profits or proceeds derived from that work for a certain length of time.[19] The evolution of American copyright law with respect to sound recording has followed the principle that copyright holders alone have the right to perform the work in public, or to license others to perform or otherwise make use of the work.[20] While this fits within the broader themes of copyright law as it has evolved in the United States, copyright law in sound recording has become considerably more complex over time and has become the subject of much litigation and governmental oversight.[21] However, copyright infringement in sound recordings does not necessarily have to be so unpredictable, and this Note suggests several means by which legislatures and courts could make the process more straightforward and less litigious.

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[19] *See A Brief Introduction and History*, U.S. COPYRIGHT OFF., https://www.copyright.gov/circs/circ1a.html (last visited May 25, 2017).

[20] *See id.*

[21] Today the Copyright Office is a large administrative agency, registering half a million claims to copyright per year. *Id.* Copyright cases are not only numerous, but also time-consuming–data from 2005-2008 shows that the "the median Commonplace copyright case took 37 days longer (a little over a month) to terminate than the median comparable civil litigation suit." Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981, 2011–12 (2014); *see also Music Copyright Infringement Resource*, COLUMBIA L. SCH. & USC SCH. OF L., http://mcir.usc.edu/cases/Pages/ (last visited May 25, 2017) ("Since the 1850s federal courts have published over 100 opinions dealing with this issue, but the frequency with which these cases arise has increased markedly over the past twenty years.").

1. The Copyright Act

The Copyright Act of 1790 ("the Act") granted American authors the exclusive right to print or publish their work for a fourteen-year period, with the option to renew that right for another fourteen years.[22] The Act provided that Congress would have power 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."[23] This language was modeled on the English Statute of Anne.[24] The Act has been revised several times since its first appearance, the most recent of these being in 1976.[25]

The Act's purpose was to give creators an incentive to create original works by granting them total control over the use of their works.[26] Article I of the Act carried this out by providing protection of the author's creation from use by non-licensed parties for a set period of time.[27] This early support for the protection of creative works was as grounded in philosophy as it was in practicality; the Constitution sought to encourage creation as a matter of public policy, and the Founders recognized that protecting the profits that could be reaped from creation was one way to further that goal.[28] Congress's promotion of science and the arts was a way to ensure a

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[22] *See Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RES. LIBR., http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.WAJvaJMrLeQ (last visited May 25, 2017) [hereinafter *Copyright Timeline*].

[23] U.S. Const. art. I, § 8, cl. 8.

[24] *See* Wayne M. Cox, Note, *Rhymin' and Stealin'? The History of Sampling in the Hip-Hop and Dance Music Worls and How U.S. Copyright Law & Judicial Precedent Serves to Shackle Art*, 14 VA. SPORTS & ENT. L.J. 219, 219 & n.2 (2015).

[25] *Copyright Timeline*, *supra* note 22.

[26] *Id.*

[27] *See* Jimmy A. Frazier, Comment, *On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TUL. L. REV 313, 334 (1995).

[28] *See* Vrana, *supra* note 10, at 815, n.20 (referring to EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 89–90 (2002), arguing this clause is unique for providing both a purpose and a means of accomplishing that purpose).

steadily growing quantity of original inventions and ideas.[29] However, the Act was not viewed as a static endeavor; as times changed, Congress was tasked with amending the Act to ensure it adequately protected these fundamental interests.[30]

2. Revisions of the Act Over Time

In 1831, the first general revision of the Act brought music under its protection,[31] and for the first time, copyright owners of musical works had the same rights and privileges as other copyright holders.[32] There were three major groups of interests in the musical publishing landscape around the time of the 1831 revision—composers, musical publishers, and the general public—each with their own unique stake in the system.[33] Composers received protections for their works under the Copyright Act; publishers bought copyrights from composers for either a one-time fee or ongoing royalties; and the public, who listened to or performed the musical works.[34] The interplay of those interests continued to dominate the conversation around copyright law for several decades.[35]

Partially in response to an increasing number of interested parties, the 1909 revision of the Act added the right to "arrange or adapt," and "subjected the right to control the creation and

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[29] Lawrence D. Graham & Richard O. Zerbe, Jr., *Economically Efficient Treatment of Computer Software: Reverse Engineering, Protection, and Disclosure*, 22 RUTGERS COMPUTER & TECH. L.J. 61, 71–72 (1996).

[30] *See* Sara K. Stalder, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 633 (2006).

[31] *See* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C.L. REV. 547, 558 (2006).

[32] Marcy Rauer Wagman & Rachel Ellen Kopp, *The Digital Revolution is Being Downloaded: Why and How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, 282–83 (2006).

[33] *Id.* at 283.

[34] *Id.*

[35] *Id.*

distribution of 'mechanical' copies to a compulsory license."[36] Furthermore, it enlarged the scope of protected categories of works and extended the protection term to twenty-eight years.[37] These revisions reflected a series of changes in musical copyright, as the rapid technological advances being made served to increasingly complicate the position of copyright holders and non-holders alike.[38]

The pace of revision of the Copyright Act slowed considerably in comparison to the pace of innovation following the 1909 revisions, manifesting in just two significant events: the 1976 revision of the Act, and the 1998 passage of the Digital Millennium Copyright Act ("DMCA"). The 1976 revision represented a relatively major overhaul of the Act and was undertaken primarily for two reasons: first, to determine the impact of technological developments on copyright; and second, to bring the U.S. Code in accord with international copyright law.[39] Despite these developments, the Act remains, to this day, essentially unchanged.[40] While Congress does periodically make small-scale updates to the Act,[41] there are calls for a major revision to bring the Act further in line with modern technology.[42]

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[36] *Id.* at 283–84. The purpose of these revisions was largely to balance the rights of the composer and the rights of the public; ensuring public access in return for appropriately compensating the composer. *Copyright Timeline*, *supra* note 22.

[37] *Copyright Timeline*, *supra* note 22.

[38] *See id.* (quoting H.R. Rep. No. 2222, 60th Cong., 2nd Sess., p. 7 [1909] ("[I]t has been a serious and difficult task to combine the protection of the composer with the protection of the public.")).

[39] *Id.*

[40] Cox, *supra* note 24, at 219–20.

[41] For two examples of relatively minor edits to the Act, see Copyright Cleanup, Clarification, and Corrections Act of 2010, Pub. L. No 111-295, 124 Stat. 3180 (2010) and Continuing Extension Act of 2010, Pub. L. No. 111-157, 124 Stat. 1116 (2010).

[42] For example, Maria Pallante, from the Register of Copyrights for the United States Copyright Office, appeared before the United States House of Representatives to urge Congress to "think about the next great copyright act . . . to ensure that the copyright law remains relevant and functional," which she notes "may require some bold adjustments to the general framework." *Register of Copyrights United States Copyright Office before the Subcomm. on Courts, Intellectual Prop. and the Internet Comm. on the Judiciary*, 2013 H.R.

The Digital Millennium Copyright Act was signed into law on October 28, 1998, bringing several major changes.[43] It implemented two treaties: the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty.[44] It also addressed several critical copyright-related issues, including the liability of online service providers with regards to music piracy.[45] However, considering that this last major update to the Copyright Act was nearly two decades ago, the need for an update is self-evident.

3. The Fair Use Doctrine

The doctrine of fair use can be traced back to the 1710 Statute of Anne, by which English courts proclaimed that "fair abridgements" would not crowd the rights of authors.[46] This remains the core concept of fair use: if it does not hurt the creator or the creator's profit margin, use by another party is not prohibited.[47] Some instances where the use of a copyright-protected work may be deemed acceptable include news reporting, scholarship, criticism, or research.[48] The four factors used to determine whether the use of a work falls under this distinction have not changed since their

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113th Cong. 1st Sess. (2013) (statement of Maria A. Pallante), http://www.copyright.gov/regstat/2013/regstat03202013.html; Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 320 (2013). At a subsequent hearing, "five academics, attorneys and business professionals" testified to lend their support to revision and reform efforts. Jonathan Randles, *Copyright Law Needs Update for Digital Age, Lawmakers Told*, LAW360 (May 16, 2013), http://www.law360.com/articles/439732/copyright-law-needs-update-for-digital-age-lawmakers-told.

[43] *The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary*, U.S. COPYRIGHT OFF., https://www.copyright.gov/legislation/dmca.pdf (last visited May 25, 2017).

[44] *Id.*

[45] *Id.*; *see also* Cox, *supra* note 24, 219.

[46] 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.L. COMM. 691, 702 (2002).

[47] *More Information on Fair Use*, U.S. COPYRIGHT OFF., http://www.copyright.gov/fair-use/more-info.html (last updated Apr. 2017).

[48] 17 U.S.C. § 107 (1992).

implementation: (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 work as a whole; and (4) the effect of the use upon the potential market or value of the work.[49]

The doctrine of fair use permits the unlicensed use of copyright-protected works under particular circumstances, mainly for the purpose of encouraging freedom of expression.[50] Fair use was originally the creation of judges, but it is now codified in the most recent update of the Copyright Act;[51] judges today generally employ it as a means of balancing the rights of authors and the First Amendment rights of the public.[52] Despite its ubiquity in copyright law, fair use remains a somewhat controversial doctrine, due to its inherent malleability and its subjective application by courts.[53] Nonetheless, fair use is essential to freedom of expression in the United States, by promoting the use of copyright-protected works in ways that protect and reward their creators.[54]

3. The *De Minimis* Doctrine

Another potential defense to copyright infringement is the *de minimis* doctrine. Originating in the Latin maxim *de minimis non curat lex*—"the law does not concern itself with trifles"[55]—the *de minimis* doctrine has application in a wide variety of legal settings, but has been a particularly dynamic aspect of copyright

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[49] *Id.*

[50] *See More Information on Fair Use*, *supra* note 47.

[51] 17 U.S.C. § 107.

[52] Brogan, *supra* note 46, at 692–93.

[53] *See* Sonia Katyal et al., *Fair Use: Its Application, Limitations and Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017, 1018 (2007) (arguing that fair use's flexibility, which makes it better able to adapt to changing technologies, also leaves it open to interpretation by widely variant ways). For in-depth treatment of fair use doctrine in the present day, see DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES (2016), https://www.ntia.doc.gov/files/ntia/publications/white_paper_remixes-first_sale-statutory_damages_jan_2016.pdf.

[54] *See More Information on Fair Use*, *supra* note 47.

[55] Deborah F. Buckman, Annotation, *Application of "De Minimis Non Curat Lex" to Copyright Infringement Claims*, 150 A.L.R. Fed. 661, § 2[a] (1998).

infringement law.[56] The applications of the doctrine that are most relevant in this context are instances where the copying of a musical sample is so trivial that it cannot be the basis for a legal action.[57] However, there are two additional situations where the *de minimis* doctrine might either be applied by a court, or invoked by a defendant: first, when a technical violation of a trivial right occurs; and second, in a fair use context, in determining the relative size and substantiality of the copied portion in relation to the entire copyrighted work.[58]

The *Ciccone* ruling makes it likely that the *de minimis* doctrine could be an increasingly important aspect of the future legality of sampling, as the Ninth Circuit relied on the *de minimis* argument in ruling that no copyright infringement had taken place.[59] Therefore, *Ciccone* could potentially signify a *de minimis* revival.[60]

Although the *Bridgeport* court, in mandating that artists must get a license to sample others' music,[61] created an arbitrary bright-line rule with respect to *de minimis*, the question of whether that defense is applicable is a fact-specific inquiry, due to the nearly infinite ways artists might choose to copy or sample a work.[62] What should not be up for debate, however, is that the defense be available. This is the question at the heart of the circuit split created by the *Ciccone* court: is the *de minimis* defense valid against copyright infringement claims in sound recordings? This Note argues that it unquestionably is.

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[56] *Id.*

[57] *See id.*

[58] Jeremy Scott Sykes, Note, *Copyright—The De Minimis Defense in Copyright Infringement Actions Involving Music Sampling*, 36 U. MEM. L. REV. 749, 760 (2006).

[59] *See* VMG Salsoul v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016).

[60] *See Strike a Pose! Madonna Unwittingly Revives De Minimis in Copyright Law*, SEAY FIRM (Nov. 26, 2013), http://theseayfirm.com/strike-a-pose-madonna-unwittingly-revives-de-minimis-in-copyright-law/ [hereinafter *Strike a Pose!*].

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

[62] Jennifer R. R. Mueller, Note, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 IND. L.J. 435, 454 (2006).

B. Copyright, Fair Use, and the De Minimis Defense in Music Sampling

The intersection of fair use, the *de minimis* doctrine, and copyright protection with regard to music is complex, and their application to musical sampling in particular has been volatile, perhaps somewhat due to musical copyright's origins in literary protection.[63] Furthermore, musical sampling is an area of the law where both the fair use and *de minimis* doctrines play an important role, but one that has not always been clearly defined.[64] The Supreme Court has referred to a "partial marriage between the doctrine of fair use and the legal maxim *de minimus non curat lex*,"[65] but has not defined what that relationship should be. The *de minimis* defense is also recognized as a crucial tool for determining whether a license is necessary to sample part of a copyrighted musical work,[66] but this recognition has been upset by the inherent tension between the *Bridgeport* and *Ciccone* rulings. Thus, while both Congress and the Supreme Court have recognized the importance of fair use and the *de minimis* defense in copyright law, it is clear that the law is unsettled in this field.

Both Congress and the Supreme Court have struggled to create and enforce copyright legislation that both respects the rights of creators and the rights of those who wish to make use of past creations.[67] Below, this Note examines key cases that shaped the current state of sound recording copyright infringement.

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[63] *See* Arewa, *supra* note 31, at 555–56; *see also* Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 910 (arguing that copyright has been difficult to apply due to its origins as a solution for book publishers, and the fact that its expansion has not been straightforward).

[64] Vrana, *supra* note 10, 835–36; *see* John Scheitinger, Note, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 246 (2005).

[65] Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 451 (1984).

[66] Scheitinger, *supra* note 64, at 246.

[67] *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 594 (1994) (asserting that commercial use of digital sampling in parody songs fell under fair use protection); Newton v. Diamond, 388 F.3d 1189, 1192–96 (9th Cir. 2004) (asserting that use of three notes from composition was *de minimis* use); Grand Upright Music v. Warner Bros. Records, 780 F. Supp. 182, 185 (S.D.N.Y. 1991)

II. *BRIDGEPORT*: BEFORE AND AFTER

Prior to *Bridgeport*, no court had provided a straightforward *de minimis* analysis in the sound recordings context.[68] For the most part, federal courts applied a *de minimis* analysis and made their own determinations of whether the sampling constituted an actionable offense.[69] *Bridgeport* abruptly ended that practice within the Sixth Circuit by setting a bright-line rule that any musical sampling done without a license constituted copyright infringement.[70] Although the court may have thought that such a rule would streamline music litigation and create clarity, it actually added chaos and unpredictability.[71] *Ciccone* presents an alternate approach, and reflects an opportunity for the courts to achieve greater stability by reinforcing the *de minimis* doctrine in sound recording litigation.[72]

A. Pre-Bridgeport Legal Battles in Digital Sampling

Bridgeport was preceded by several suits that laid the groundwork for the current circuit split.[73] Musical sampling first became the subject of prominent copyright infringement litigation in the 1990s, but the practice predates that time period.[74] The overt use of sampling in hip-hop was a key factor that made it a target for

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(asserting that digital sampling constituted copyright infringement in all circumstances).

[68] *See* Grossberg, *supra* note 5.

[69] Scheitinger, *supra* note 64, at 243.

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

[71] *See* Scheitinger, *supra* note 64, at 246.

[72] *See Id.*; VMG Salsoul v. Ciccone, 824 F.3d 871, 887 (9th Cir. 2016).

[73] *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 571 (1994); Newton v. Diamond, 388 F.3d 1189, 1192–96 (9th Cir. 2003); Grand Upright Music v. Warner Bros. Records, 780 F. Supp. 182, 185 (S.D.N.Y 1991).

[74] Astride Howell, *Sample This! A Ninth Circuit Decision Seems to be in Harmony with the Sixth Circuit's Bright-Line Rule on What Constitutes Infringement in Digital Sampling*, 28 L.A. LAWYER 24, 26 (2005) ("Although hip hop music has been using samples since its origins in the late 1970s, legal challenges to digital sampling first emerged in the early 1990s."); *see Newton*, 388 F.3d at 1192 (asserting that the practice has origins in 1960s Jamaica, when DJs mixed segments of prior recordings into new mixes, overlaid with vocals).

lawsuits.[75] Rather than applying the traditional doctrines of *de minimis* and fair use, courts subjectively applied the criteria for determining what qualified as a "transformative" use in hop-hop.[76] In *Grand Upright Music v. Warner Brothers Records*,[77] the first piece of landmark music sampling litigation, [78] the U.S. District Court for the Southern District of New York bypassed the copyright infringement analysis altogether, and instead framed its decision in a way that clearly showcased its contempt for hip-hop in general, associating the genre on the whole as one of theft.[79]

In *Grand Upright Music*, Gilbert O'Sullivan, the copyright owner, sued rapper Biz Markie for both the use of three words and a portion of the music from his song "Alone Again (Naturally)," on the grounds that he had not granted Markie permission to do so.[80] The court rejected Markie's argument that Grand Upright did not own a valid copyright to the song itself, and compared his conduct to theft.[81] In doing so, the court created the first bright-line rule with regards to musical sampling: digital sampling without permission was copyright infringement, and artists who did so could be subject to criminal penalties.[82] However, *Grand Upright* failed to provide guidance or advice on how to avoid these stiff repercussions, and created a chilling effect on musical artists who feared inconsistent judicial application of copyright infringement standards for musical sampling.[83] The court's rejection of the culture-based argument that

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[75] *See* Arewa, *supra* note 31, at 552 (asserting that the unmistakable use of sampling in hip hop challenges the dominant representation of musical authorship as one that is autonomous, which fails to take into account how much borrowing goes into musical creation).

[76] *Id.* at 579.

[77] *Grand Upright Music*, 780 F. Supp. at 185.

[78] *Id.*; *see* Ryan C. Grelecki, *Can Law and Economics Bring the Funk . . . Or Efficiency?: A Law and Economics Analysis of Digital Sampling*, 33 FLA. ST. U.L. REV. 297, 305–06 (2005).

[79] *See* Arewa, *supra* note 31, at 580 (citing *Grand Upright Music*, 780 F. Supp. at 183).

[80] *Grand Upright Music*, 780 F. Supp. at 183–84.

[81] Grelecki, *supra* note 78, at 301, 306.

[82] *Id.* at 306.

[83] *See* Carl A. Falstrom, Note, *Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros Records, Inc. and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359, 367 (1994) (asserting that Grand Upright

digital sampling is a vibrant addition to the modern musical landscape, and its accusation that Markie's sole purpose in sampling O'Sullivan's creation was to sell large quantities of albums, relegated musical sampling to a kind of theft.[84] Musical sampling had been essentially outlawed, and as a result it became much less commonly practiced.[85] *Grand Upright* brought an end to extensive sampling and ensured that artists would cease to create albums composed of many samples due to the risk of litigation.[86]

While *Grand Upright* represented a blow to musical artists who had previously sampled music freely, the doctrine of fair use in musical copyright infringement received support from the Supreme Court in *Campbell v. Acuff-Rose Music*.[87] A rap music group known as 2 Live Crew created a parody of the Roy Orbison song, "Oh, Pretty Woman."[88] The song was registered for copyright protection at the time of its creation in 1964, and Acuff-Rose refused to grant permission to 2 Live Crew to use the song for a parody.[89] Nonetheless, 2 Live Crew released the song in various formats, and were sued nearly one year later by Acuff-Rose.[90] In its decision, the Sixth Circuit held that the "blatantly commercial purpose" of the song prevented the parody from being a fair use.[91] This was similar

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created a more hostile climate for artists who wished to sample music); Chris Johnstone, Note, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 407 (2004) (noting that Grand Upright increased self-policing of sampling in the music industry out of fear of litigation).

[84] *See Grand Upright Music*, 780 F. Supp. at 185.

[85] *See* Chris Richards, *The Court Case That Changed Hip-Hop—From Public Enemy to Kanye—Forever*, WASH. POST (July 6, 2012), https://www.washingtonpost.com/opinions/the-court-case-that-changed-hip-hop--from-public-enemy-to-kanye--forever/2012/07/06/gJQAVWr0RW_story.html?utm_term=.dec92d179345.

[86] *See* Damon Krukowski, *Plagiarize This: A Reasonable Solution to Musical Copyright After Blurred Lines*, PITCHFORK (Mar. 19, 2015), http://pitchfork.com/features/oped/9613-plagiarize-this-a-reasonable-solution-to-musical-copyright-after-blurred-lines/.

[87] Campbell v. Acuff-Rose Music, 510 U.S. 569, 572 (1994).

[88] *Id.*

[89] *Id.* at 572–73.

[90] *Id.* at 573.

[91] Campbell v. Acuff-Rose Music, 972 F.2d 1429, 1439 (6th Cir. 1992).

to the *Grand Upright* decision in that the court considered the commercial profitability of a song in determining whether it constituted an instance of copyright infringement.[92] The Supreme Court granted certiorari to determine whether a commercial parody song might fall under the protection of the fair use doctrine, and concluded unanimously that it could.[93] The Court presented a thorough fair use analysis, breaking from the Sixth Circuit's analysis by noting that a work's commercial character is but one element in analyzing fair use, and ultimately remanded the case on two out of the four fair use factors.[94] The case never proceeded to that point, however, as the parties settled out of court and came to a licensing agreement that abruptly ended the litigation.[95] *Campbell* is now recognized as a landmark case in copyright law with regard to fair use in parody songs, due to the broad protection from copyright infringement claims it afforded musical artists.[96]

In 2003, the Ninth Circuit handed down a pro-*de minimis* decision in *Newton v. Diamond*, and a circuit split began to take form.[97] The case arose when the hip-hop group Beastie Boys sampled a six-second, three-note segment, of a composition by jazz flutist James W. Newton.[98] Although the group had obtained a license to sample a copyrighted recorded performance, they had not obtained a license for the underlying composition, which was also copyrighted.[99] The Ninth Circuit held that the use of the composition was *de minimis* and therefore not actionable.[100] *Newton* represented the first time an appellate court had ruled on the applicability of the *de minimis* defense to cases of copyright infringement in music

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[92] *See id.* at 1436–37 (1992); Grand Upright Music v. Warner Bros., 780 F. Supp. 182, 185 (S.D.N.Y 1991).

[93] *Campbell*, 510 U.S. at 579–81, 590–94.

[94] Thomas Irvin, *"If That's the Way It Must Be, Okay:" Campbell v. Acuff-Rose on Rewind*, 36 LOY. L.A. ENT. L. REV. 137, 139–41 (2016) (arguing that Campbell was an unlikely and ironic savior, as the song was not actually a parody).

[95] *See id.* at 140.

[96] *See id.* at 137–38.

[97] Newton v. Diamond, 349 F.3d 591, 594 (6th Cir.2003).

[98] *Id.* at 592.

[99] *Id.*

[100] *Id.* at 594.

sampling.[101] The court conducted an in-depth analysis of the compositional elements of the sample, the scope of the copying, and the substantiality of the use, as well as the court's own 1986 ruling in *Fisher v. Dees*, which observed that "a use is *de minimis* only if the average audience would not recognize the appropriation."[102] However, *Newton* represented only a limited victory for digital samplers.[103] While the decision did reflect a firm acceptance of the *de minimis* defense in the context of musical sampling, it was silent on *de minimis* exceptions for sampling sound recordings.[104] That question would be addressed one year later by the Sixth Circuit in *Bridgeport Music v. Dimension Films*.[105]

B. Bridgeport Music v. Dimension Films

In 2001, Bridgeport Music ("Bridgeport") and Westbound Records ("Westbound") alleged almost five hundred instances of copyright infringement against roughly eight hundred defendants.[106] Bridgeport owned the musical composition copyright and Westbound owned the sound recording copyright for George Clinton's song "Get Off Your Ass and Jam," a two-second portion of which was sampled by the rap group NWA in their song "100 Miles and Runnin."[107] Westbound appealed the district court's decision to grant summary judgment to the song's copyright holder,

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[101] *See* Sykes, *supra* note 58, at 764.

[102] *Newton*, 349 F.3d at 594–96 (citing Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986)).

[103] *See* Michael Suppola, *Confusion in the Digital Age: Why the De Minimis Use Test Should Be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L.J. 93, 111 (2006).

[104] *See id.* at 112.

[105] Bridgeport Music v. Dimension Films, 410 F.3d 792, 798–800 (6th Cir. 2005).

[106] *Id.* The court interpreted 17 U.S.C. § 114(b) to mean that artists may imitate portions of music, but cannot use the actual recordings themselves. *Id.* at 800.

[107] *Id.* at 795–96; *see* B.J. Steiner, *Today in Hip-Hop: N.W.A. Drops "100 Miles and Runnin" EP*, XXL MAG (Aug. 14, 1990), http://www.xxlmag.com/news/hip-hop-today/2015/08/today-in-hip-hop-n-w-a-releases-100-miles-runnin-ep/.

Dimension Films, claiming that the use of the sample was *de minimis*.[108]

The Sixth Circuit reversed the district court's grant of summary judgment on the infringement claim, issuing a new maxim for digital samplers: "Get a license or do not sample."[109] The court echoed the Supreme Court's reasoning in *Campbell* that 17 U.S.C. § 114(b), the subsection of the Copyright Act that lays out the scope of exclusive rights in sound recordings, justified the creation of a bright-line rule that dispensed with the *de minimis* analysis altogether, stating that it was unnecessary in instances where the defendant did not dispute sampling a sound recording without a license.[110] *Bridgeport* and *Newton* do not together constitute a circuit split, as each holding confined itself to one portion of the sampling-as-copyright-infringement equation.[111] However, the vast chasm between the *de minimis* rationales employed in their conclusions demonstrated the potential for deep schisms between courts in the future on this issue, which have indeed come to fruition after *Ciccone*.[112]

The Sixth Circuit's decision in *Bridgeport* was unduly harsh, and the court should not have overlooked the creative and cultural value of sampling in general.[113] By refusing to acknowledge that sampling is a form of creative composition, the court dramatically

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[108] *Bridgeport*, 410 F.3d at 795.

[109] *Id.* at 801–05.

[110] *Id.* at 798.

[111] *See generally* Tracy L. Reilley, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 370 (2008) (explaining that the *Newton* court limited its opinion to an analysis of composition use, whereas the *Bridgeport* court limited itself to sound recording copyrights). *See contra* John S. Pelletier, Note, *Sampling the Circuits: The Case for a New Comprehensive Scheme for Determining Copyright Infringement as a Result of Music Sampling*, 89 WASH. U. L. REV. 1161, 1183 (2012) (referring to a virtual circuit split as a result of these holdings).

[112] *See* Pelletier, *supra* note 110, at 1187–88 (outlining the issues with the application of the *de minimis* doctrine in both Bridgeport and Newton).

[113] Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 95, 121–22 (2007); Joshua Crum, *The Day the (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground*, 2008 BYU L. REV. 943, 961–64.

limited a key form of artistic expression.[114] Indeed, *Bridgeport* had an immediate chilling effect on digital sampling.[115] Some district courts have relied on language from *Bridgeport*, such as the Southern District of New York, which stated as recently as 2015 that "[b]revity does not preclude copyright protection."[116] However, many district courts outside of the Sixth Circuit have declined to follow *Bridgeport*, and even rebuked it in their decisions.[117] While the Sixth Circuit's command to either get a license to sample or refrain from sampling altogether has not created lasting precedent in courts outside its borders, it stood as the principal authority on the *de minimis* doctrine in sampling until 2016.[118]

C. VMG Salsoul v. Ciccone

The Ninth Circuit's ruling in *Ciccone* was a landmark decision in musical copyright infringement litigation.[119] The court broadly attacked the Sixth Circuit's reasoning in *Bridgeport*, and purposely created a circuit split that underscored the unsettled nature of music sampling liability.[120] This has created two wildly divergent treatments of the *de minimis* doctrine across two circuits that handle a high volume of musical sampling litigation, which will likely result in vastly different bodies of case law and an increased likelihood that parties to copyright infringement lawsuits will engage in forum shopping.[121] The problems and uncertainty posed

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[114] *See* Brandes, *supra* note 113, at 121–22.

[115] KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 114 (1st ed. 2011).

[116] Fischer v. Forrest, 2015 U.S. Dist. LEXIS 4395, 15 (S.D.N.Y. 2015).

[117] *See* VMG Salsoul v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016).

[118] *See* Grossberg, *supra* note 5.

[119] *See* Bill Donaghue, *The Top 10 Copyright Rulings of 2016*, LAW360 (Dec. 21, 2016) https://www.law360.com/articles/874934/the-top-10-copyright-rulings-of-2016.

[120] Mark Wittow & Eliza Hall, *Ninth Circuit and High German Court Weigh In On Music Sampling*, LAW360 (Aug. 9, 2016), https://www.law360.com/articles/824098/9th-circ-and-german-high-court-weigh-in-on-music-sampling.

[121] *See id.*

by this circuit split show that a clarifying ruling on music sampling is ripe for a Supreme Court determination.[122]

1. *Ciccone*–a Direct Challenge to *Bridgeport*

Similar to *Grand Upright*, *Campbell*, *Newton*, and *Bridgeport*, the chief issue in *Ciccone* was a musical sample.[123] VMG Salsoul, the owner of Salsoul Records and copyright holder of many of the label's releases, alleged that in 1990, Madonna's producer had copied a .23-second horn hit from a song it held copyright to called "Love Break," modified it, and used it in "Vogue" without permission.[124] The horn hit appeared in two forms: a "single" hit of a quarter-note chord and a "double" hit of an eighth-note chord, followed by a quarter-note chord of the same notes.[125] VMG Salsoul argued that this constituted copyright infringement of both the composition and the sound recording. There was no dispute that actual copying occurred, but the parties contested whether the copying constituted an infringement.[126]

Madonna prevailed in the district court, which allowed that a *de minimis* sample would not constitute infringement, and that even if actual copying had been proven, the claim would fail due to its triviality.[127] On appeal, the Ninth Circuit affirmed the judgment, breaking with the reasoning in *Bridgeport* and reaffirming that there is no basis to assume an exception to the *de minimis* defense in sound recording.[128] The court held that the copied sound recording was virtually unidentifiable, as not even an expert could identify the horn hit as being from another song.[129] Therefore, the court found that a reasonable jury could not conclude that an average audience would recognize the sample as being from "Love Break," and the fact that a highly qualified expert could not identify the source of the horn

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[122] *Id.*

[123] VMG Salsoul v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016).

[124] *Id.* at 875.

[125] *Id.*

[126] *Id.* at 876–77.

[127] *Id.* at 874.

[128] *Id.*

[129] *Id.* at 878–81.

justified a ruling that its use was *de minimis*.[130] The court argued strenuously in favor of the availability of the *de minimis* defense in copyright infringement litigation, directly attacking *Bridgeport*'s holding as having no grounding in legislative history.[131] The court relied on the leading copyright treatise in its defense of the *de minimis* exception,[132] as well as 17 U.S.C. § 106, noting that nothing in its text suggested that the exception should be any less available than in other types of copyright infringement claims.[133] Finally, the court dispensed with VMG Salsoul's argument that the third sentence of § 114(b) somehow carved out an exception for sound recordings, and declined to find an implicit expansion of rights in a statement expressly limiting them.[134] This decision was directly at odds with the *Bridgeport* rule, and created a circuit split between two jurisdictions with large caseloads of music industry litigation.[135]

2. Potential Implications and Outcomes

Ciccone could make an impact in the courts and the music industry more broadly in several ways.[136] It seems unlikely that the Supreme Court would support the *Bridgeport* rule if it heard a musical copyright infringement litigation case.[137] The classic issue

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[130] *Id.* at 880.

[131] *Id.* at 878–82.

[132] *Id.* at 880–81.

[133] 17 U.S.C. § 106 (2002); *Ciccone*, 824 F.3d. at 881–82.

[134] *Ciccone*, 824 F.3d at 882–83 ("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.").

[135] Wittow & Hall, *supra* note 120.

[136] *See infra* Section II.C.2; *see also* Wittow & Hall, *supra* note 120 ("A Supreme Court decision recognizing the de minimis rule with respect to sound recording sampling would provide musicians and music producers somewhat greater freedom to creatively sample other works, to a limit degree, but would not eliminate the current legal requirement for a sampler to get a license for any recognizable or substantial sample.").

[137] *See* Mike Mireles, *Is Music Sampling Back in Vogue?*, MUSIC LAW UPDATES (June 3, 2016), http://musiclawupdates.blogspot.com/2016/06/is-

of whether a bright-line rule is preferable to uncertainty might be one factor for the Court to consider, and perhaps it would find in favor of the *Bridgeport* rule on those grounds, but ultimately it seems more likely that the Court would find the Ninth Circuit's reasoning in *Ciccone* more persuasive.[138] The Ninth Circuit's reasoning was steeped in legislative history, and the court had the advantage that it could point to ten years of case law that declined to follow *Bridgeport*, which demonstrates a lack of support for its holding.[139] If a musical copyright infringement case reaches the Supreme Court, it could either follow *Bridgeport*'s reasoning and declare that all sampling requires a license, or follow *Ciccone*'s reasoning favoring the availability of a *de minimis* defense.[140] This Note proposes that the Supreme Court should do the latter, and resolve the current uncertainty in music sampling law in favor of creative license.

III. A FOUR-PART SOLUTION

The Supreme Court and Congress should take action to clarify copyright infringement law and legislation. First, a ruling from the Supreme Court resolving the *Ciccone*/*Bridgeport* split is necessary to end confusion in this area of the law.[141] The Supreme Court should adopt the Ninth Circuit's reasoning in *Ciccone* recognizing the *de minimis* defense to copyright infringement. The Court must recognize the realities of musical creation to ensure that copyright

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music-sampling-back-in-vogue.html (suggesting that the "solid analysis" of the Ninth Circuit is more likely to prevail); Wittow & Hall, *supra* note 120.

[138] *See* Mireles, *supra* note 137 ("The Ninth Circuit position arguably creates uncertainty, but if Congress did not intend special rules for sampling sound recordings and the musical genres that rely on sampling, then maybe we shouldn't have them."); Editorial, *Appeals Court Cuts Music Samplers Some Slack*, L.A. TIMES (June 7, 2016), http://www.latimes.com/opinion/editorials/la-ed-music-copyrights-20160606-snap-story.html [hereinafter Editorial, *Appeals Court*] (arguing the Supreme Court should follow the Ninth Circuit's reasoning because a bright-line rule gives copyright holders too much control over every sound that goes into their work).

[139] VMG Salsoul v. Ciccone, 824 F.3d 871, 881–84 (9th Cir. 2016).

[140] *Ciccone*, 824 F.3d at 874; Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005).

[141] Grossberg, *supra* note 5; Wittow & Hall, *supra* note 120.

law keeps pace with musical innovation.[142] A ruling from the Supreme Court strengthening the *de minimis* defense and refuting *Bridgeport* would protect creators and artists without infringing on the rights of copyright holders.[143]

Second, Congress should reaffirm the fair use doctrine to resolve uncertainty in copyright infringement litigation. The fair use defense is too uncertain as it currently stands, and Congress should expand the four-factor test and clarify the boundary lines of fair use, while maintaining its crucial flexibility.[144] Third, Congress should also implement a compulsory mechanical license scheme, by which means copyright owners would license the use of their rights against payment either set by law or determined by contract.[145] Alternatively, Congress might instead create a sample-based copyright management system that would enable copyright holders to regulate and accept payment for access to their intellectual property.[146] Finally, Congress should further expand upon these potential solutions by creating an administrative agency to oversee their implementation. These actions would be a positive step forward for copyright infringement law, and would provide clarity

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[142] Editorial, *Appeals Court*, *supra* note 138.

[143] *See* Julie D. Cromer, *Harry Potter and the Three-Second Crime: Are We Vanishing the De Minimis Defense from Copyright Law?*, 36 N.M. L. REV. 263 (2006).

[144] *See generally* Vrana, *supra* note 10, at 832–33 (explaining that the fair-use doctrine is "meant to be flexible" and listing the four factors of the fair-use analysis).

[145] *See id.* at 850–55; Krukowski, *supra* note 86 (supporting the concept of compulsory mechanical licensing as a reasonable solution in the current high-risk musical copyright infringement landscape). *See generally* Heather McDonald, *What You Should Know About Compulsory Mechanical Licenses*, BALANCE (Oct. 14, 2016), https://www.thebalance.com/what-you-should-know-about-compulsory-mechanical-licenses-2460917 (explaining the basics of a compulsory mechanical license).

[146] *See* Drew B. Hollander, "*Why Can't We Be Friends?": How Congress Can Work With the Private Sector to Solve the Digital Sampling Conundrum*, 18 VA. J.L. & TECH. 229, 250–52 (2014).

and guidance to an area of the law that is currently very risky for musical artists.[147]

A. Part One: Strengthen De Minimis

Ciccone has set up an excellent opportunity for the Supreme Court to resolve a circuit split on the issue of whether musical sampling can ever be *de minimis*.[148] In *Ciccone*, the Ninth Circuit repudiated the Sixth Circuit's declaration that all musical sampling required a license.[149] The Supreme Court should follow this reasoning and reaffirm the viability of the *de minimis* exception.[150]

The *de minimis* doctrine has been a longstanding feature of copyright law.[151] Courts have long recognized the utility of the doctrine, as it prevents the judiciary from becoming clogged with cases of little import.[152] Furthermore, it recognizes that an act of copying frequently does not directly translate to an act of economic harm.[153] Overly restrictive copyright legislation has a stifling effect

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[147] *See* Stan Soocher, *A Look at the Post-'Vogue' De Minimis World*, INSIDE COUNSEL (Dec. 6, 2016), www.insidecounsel.com/2016/12/06/a-look-at-the-post-vogue-de-minmis-world?page=2&slreturn=1488159512.

[148] VMG Salsoul v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016); Tamany Vinson Bentz & Matthew J. Busch, *VMG Salsoul, LLC v. Madonna Louise Ciccone, et al.: Why a Bright Line Infringement Rule for Sound Recordings is no Longer in Vogue*, VENEABLE LLP: PUBLICATIONS (June 28, 2016), https://www.venable.com/vmg-salsoul-llc-v-madonna-louise-ciccone-et-al-why-a-bright-line-infringement-rule-for-sound-recordings-is-no-longer-in-vogue-06-28-2016/.

[149] *Ciccone*, 824 F.3d at 874–75.

[150] *Id.* at 885–87.

[151] The earliest instance of a possible *de minimis* defense dates from the mid-nineteenth century. Cromer, *supra* note 145, at 265 ("Application of the *de minimis* doctrine 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. 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." (citations omitted)).

[152] *See id.* at 288.

[153] *Id.* at 289.

on innovation and is a threat to the Constitution's inherent promise to promote science and the arts, and the potential economic harm caused by small amounts of copying is an invisible threat by comparison.[154] The time has never been better for a strengthening of *de minimis*, now that songs can be parsed for their composite samples on a microscopic level that was previously unimaginable.[155] While the rule that every sample requires a license may seem straightforward to enforce, in a world where every split-second of music can be itemized to its core, it is too burdensome.[156]

If the Supreme Court declines to resolve the *Ciccone*/*Bridgeport* split, or does not have the opportunity to do so, Congress should independently act, rather than allow divergent interpretations of the *de minimis* doctrine to create two vastly different bodies of copyright case law.[157] While Congress did not act in response to the *Bridgeport* ruling, that case alone did not create the split that now exists.[158] The 1976 overhaul of the Copyright Act "clearly intended

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[154] *See generally* 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 (2011) (advocating that the Constitution's promise to promote creativity and innovation would be better served by less restrictive legislation, particularly in hip hop because producers have always relied on the innovative use of existing recordings to create completely new works, without fear of legal action).

[155] *See* Michael Rancic, *Why a Canadian Composer's Controversial 80s Work is Still Ahead of Today's Copyright Laws*, THUMP (July 13, 2016), https://thump.vice.com/en_us/article/john-oswald-copyright-interview ("The website WhoSampled indexes not only samples, but remixes and interpolations . . . ").

[156] *Id.*

[157] Donaghue, *supra* note 119. VMG Salsoul has declined to appeal the case, and there is not currently a petition before the Supreme Court on this particular issue.

[158] Schmeiser et al., *Law Alert–'De Minimis' Exception for Copyright Infringement of Sound Recordings*, SCHMEISER OLSEN & WATTS LLP (June 8, 2016), http://www.iplawusa.com/law-alert-de-minimis-exception-for-copyright-infringement-of-sound-recordings/ ("[B]ecause Congress has not amended the copyright statute in response to *Bridgeport*, the court should conclude that *Bridgeport* correctly interpreted congressional intent . . . The court stated that the Supreme Court has held that congressional inaction in the face of a judicial statutory interpretation, even with respect to the Supreme Court's own decisions affecting the entire nation, carries almost no weight, and rejected the argument.").

for the *de minimis* rule to apply to all sound recordings," and Congress should act now to reaffirm that intent.[159]

B. Part Two: Reaffirm Fair Use

The second component of a proposed solution involves affirming the vital role that fair use plays in copyright law.[160] Fair use must continue to be a valid defense for artists whose use of others' works in their own output passes the current four-factor test.[161] However, fair use should be a less expensive means of defense.[162] Redesigning the doctrine of fair use "to allow unfettered access for transformative uses" has often been suggested as one solution to the murky problems of copyright infringement in sound recording.[163] This includes calls for the doctrine to be changed so that the transformative use of protected works would no longer require securing a license.[164] This new, transformative inquiry might actually include something of a bright-line item in the form of an explicit limit on how long a sample could be.[165]

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[159] Press Release, Brennan Center for Justice and Electronic Frontier Foundation File Brief to Protect Creative Copying in Sound Recordings (Jan. 21, 2005), http://www.fepproject.org/press/bridgeport.html.

[160] *See Fair Use Index*, U.S. COPYRIGHT OFF., http://www.copyright.gov /fair-use/ (last updated June 2017) (stating that fair use is a critical and longtime principle in copyright law).

[161] *See* 17 U.S.C. § 107 (1992).

[162] *See, e.g.*, Jonathan Bailey, *What Does Madonna's Court Victory Mean For Sampling?*, FUTURE OF MUSIC COALITION (July 19, 2016, 11:57 PM), https://futureofmusic.org/blog/2016/07/19/what-does-madonnas-court-victory-mean-sampling ("[S]etting *de minimus* aside, defendants are still free to use fair use as an affirmative defense, and in the right cases, may indeed find success doing so. Of course, few such cases actually make it to trial because of the high cost of litigation.").

[163] Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 552 (2006).

[164] *See id.* at 555.

[165] *Id.* at 555–56 (arguing why redefining fair use is problematic; for example, this is another subjective analysis, which could lead to yet more contradictory determinations by courts).

There are valid reasons to resist expanding the fair use doctrine. First, apart from the fact that there is currently no sustained call to dramatically redefine fair use, such as there is for an overhaul of copyright infringement law, it is likely that this would only provide courts more opportunities to hand down subjective and contradictory rulings, clarifying nothing.[166] Second, courts must be careful to balance competing interests: a wholesale expansion of fair use would result in the loss of critical protections for creators, while a policy of more stringent fair use protections would stifle creators.[167] However, these concerns overlook that fair use is a flexible doctrine, and could likely be molded into something very similar to its current state, but with additional features to make it a better fit for the current needs of copyright law.[168] For example, digital sampling's effect on sales of copyrighted songs can actually be quite positive, but there is no current allowance for this type of market effect in current fair use analysis.[169]

Another way that either Congress or the Supreme Court should bring fair use into the twenty-first century would be via the addition of an ownership clause whereby a recipient would retain ownership of any work without any original material.[170] The adoption of a model based on best practices for fair use model, put forth by the Center for Media & Social Impact, is another way that fair use could be reaffirmed.[171] The fair use doctrine is unlikely to be challenged

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[166] *Id.*

[167] *See* Terry Hart, *Reaffirming the Principles of Fair Use*, COPYHYPE (Feb. 3, 2014), http://www.copyhype.com/2014/02/reaffirming-the-principles-of-fair-use/.

[168] Vrana, *supra* note 10, at 832–33. *See generally* W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study*, 67 OKLA. L. REV. 443 (2015) (noting that current fair use analysis is binary, focusing only on economic harms, when it should also take into account the market benefit of sampling works. For example, sales of sampled music may actually rise when their sampling brings them somewhat back into public view, a type of resurrection that could be a valid factor in conducting a fair use analysis).

[169] *See* Schuster, *supra* note 168.

[170] Adam G. Holofcener, *Article: Music as Biotech: Remixing the UBMTA for Use With Digital Sampling*, 3 AM. U. INTELL. PROP. BRIEF 8, 19 (2012).

[171] *Id.* at 20 n.151 ("A 'Best Practices in Fair Use' creates an agreement between the industry and the creators on what will be considered Fair Use. Therefore, for example, creators do not have to guess whether their appropriation

in the Supreme Court anytime soon, as it is central to freedom of speech and expression.[172] Furthermore, the protections affirmed in the *Campbell* decision are robust and have been followed by widespread recognition of the critical role that First Amendment rights play in copyright law.[173] Still, a successful answer to copyright law's problems in this realm should necessarily reaffirm fair use and adapt the doctrine to fit seamlessly in modern times.[174]

C. Part Three: Implement A Licensing System

In addition to doctrinal changes to *de minimis* and fair use, a system for licensing the use of copyrighted works apart from existing schema would be an effective step towards reducing the high volume of litigation and uncertainty with regard to musical sampling.[175] In the current environment of high-risk litigation, such a system would allow artists to copy or borrow intellectual property and use it in their own work on the condition that they paid the owner a royalty fee, while neutralizing the threat of expensive court battles.[176]

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of a scene from an industry created film will get them wrapped into litigation. The bounds of Fair Use are set and followed without court intervention."); *see Codes of Best Practices*, CENTER FOR MEDIA AND SOCIAL IMPACT, http://cmsimpact.org/codes-of-best-practices/ (last visited May 25, 2017).

[172] *See generally* Joel M. Gora, *Introduction; The Past, Present and Future of Free Speech*, 25 J.L. & POL'Y 1 (2017) (asserting that the current Supreme Court is extremely protective of free speech).

[173] *See* Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441, 505 n.332 (2016) ("Copyright legislation that restricts an individual's expressive choices and copyright rules that limit the media's capacity to perform the democratic roles of a free press should be found unconstitutional under the First Amendment." (quoting C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 951 (2002))).

[174] For support of this idea, as well as suggestions on how fair use and a licensing system could work together, see Menell, *supra* note 175, at 505 ("Congress can bolster protection for freedom of speech by expressly stating that the compulsory license does not alter the traditional fair use privilege.").

[175] *See* Krukowski, *supra* note 86; Reilley, *supra* note 111, at 402–06 (laying out the arguments in favor of and against either a compulsory licensing system or a voluntary licensing system).

[176] Krukowski, *supra* note 86.

There have been several proposals for a new licensing system that would modernize copyright law and adapt it so it shared some of the same features of the current licensing system for cover songs.[177] There are also calls for the creation of a secondary market-as-licensing-system, and rewards to be reaped by both creators and rights holders.[178] Courts might be enticed to embrace these kinds of revised frameworks, as they would remove difficult and time-consuming fair use determinations from their dockets.[179] However, critical to the success of this kind of endeavor would be ensuring that the license-pricing model was fair to both extremely successful musical artists as well as smaller, independent creators.[180] The current licensing system in place involves a complex rate-setting process.[181] This system, adjudicated by the Copyright Royalty Board and involving a large cast of interested parties, determines the rates and terms for making and distributing music under compulsory licenses.[182] While it might be difficult to implement such a system on a larger scale with greater applicability, this legislative process

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[177] *See* Hollander, *supra* note 146, at 250–52; Krukowski, *supra* note 86; Menell, *supra* note 174, at 505; Vrana, *supra* note 10, at 850–60.

[178] Hollander, *supra* note 146, at 254 ("Consolidating and coordinating the licensing of sound recordings would therefore allow the music industry to profit from this form of musical creation without monitoring costs. Likewise, sampling artists would avoid the trouble of securing and negotiating licenses and would have an incentive to disclose the use of samples as a means from shielding themselves from liability.").

[179] *See id.* at 249.

[180] *See* Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 278–81, 295 (1996) (arguing that fairness in this regard would be hard to regulate, in stating that, "while copyright does not distinguish between copying major and minor talents, the industry's current practice places significant emphasis on the stature of the sampled artist and the success of the sampled song"). *See generally* DANA A. SCHERER, CONGRESSIONAL RESEARCH SERV., MONEY FOR SOMETHING: MUSIC LICENSING IN THE 21ST CENTURY (2016), https://fas.org/sgp/crs/misc/R43984.pdf (discussing fairness of current pay structures in music licensing).

[181] Ed Christman, *Copyright Royalty Board? Statutory, Mechanical Performance? A Primer for the World of Music Licensing and Its Pricing*, BILLBOARD (Aug. 18, 2016), http://www.billboard.com/articles/business/7476929/music-licensing-pricing-primer-copyright-royalty-board-statutory-mechanical-performance.

[182] *Id.*

of negotiation would arguably be preferable to the environment of high-risk litigation that currently dominates copyright infringement in musical sampling.[183]

In early 2016, the Department of Commerce's Internet Policy Task Force published a white paper which essentially eliminated the idea of creating either a new exception or a compulsory license system anytime in the near future.[184] While the landscape of copyright infringement case law with regard to musical sampling has changed in the past year,[185] the Department of Commerce's paper suggests that there is currently no momentum to implement reform.[186] However, while it is difficult to predict how the landscape of copyright law might change in the next few years, there are sure to be renewed calls for reform.[187] Congress should heed those calls and implement an appropriate licensing system that would modernize copyright infringement law, in line with strengthening the fair use and *de minimis* doctrines.

D. Part Four: Create an Administrative Agency

The creation of an administrative agency would be a positive step forward for copyright law.[188] This could take several forms; for

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[183] *See* Dienel v. Warner-Tamerlane Publ'g Corp., No. 3:16CV00978 (M.D. Tenn. filed May 25, 2016).

[184] DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, *supra* note 53, at 4 ("The Task Force concludes that the record has not established a need to amend existing law to create a specific exception or a compulsory license for remix uses."). Interestingly, one criticism of the compulsory license suggestion put forth by Peter S. Menell "stressed the importance of retaining the right to say 'no' to uses of their works that do not qualify as fair, especially when they find them offensive," as fair use is disinterested in the offense creators may take at the legal use of their works. *Id.* at 18; *see* Campbell v. Acuff-Rose Music, 510 U.S. 569, 572–73 (1994).

[185] Grossberg, *supra* note 5.

[186] DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, *supra* note 53, at 19.

[187] *See* Brian Josephs, *Recording Academy, Nile Rodgers Congratulate Donald Trump in Letter Urging Copyright Reform*, SPIN (Dec. 2, 2016), http://www.spin.com/2016/12/nile-rodgers-donald-trump-recording-academy/.

[188] *See* Stan Leibowitz, *Copyright: Hope v. Reality*, MILKEN INST. REV. (Jan. 21, 2014), http://www.milkenreview.org/articles/copyright-hope-v-reality ("In

example, if Congress opted to create a new licensing scheme, an administrative agency overseeing the scheme would be helpful to ensure compliance.[189] Alternatively, Congress might create an agency tasked with making fair use determinations.[190] Professor Michael Carroll, for example, has proposed the creation of a Fair Use Board within the Copyright Office that would declare whether the use of a work falls under fair use.[191] The effect of its rulings would be similar to a no-action letter from the Securities and Exchange Commission or a ruling from the Internal Revenue Service.[192] Another agency-based proposal, by Professor Jason Mazzone, suggests that an administrative agency should either create regulations determining what constitutes fair use and attempt to prevent infringements of those regulations, or issue regulations and determine whether a use constitutes fair use prior to litigation.[193] Mazzone argues that agency regulation would protect free speech, restore uniformity to fair use evaluations, and promote the fair use of copyrighted works.[194] While these and similar proposals have been characterized as being oblivious to reality, they provide a valuable framework for how Congress should act.[195] These proposals would help to remove some of the uncertainty from musical copyright infringement litigation, providing guidance to artists and setting clear boundaries for what would constitute legal sampling.

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fact, the contemporary debate over how best to reconcile the some times conflicting goals of copyright regulation is really a modern rendition of a centuries-old argument.").

[189] *See, e.g.*, Matthew Fagin et al., *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 571 (2002) (asserting that the power of enforcement inherent in administrative agencies is helpful in regulating conduct).

[190] *See generally* Carroll, *Fixing Fair Use*, *supra* note 18, at 1129–30 (advocating for the creation of a Fair Use Board, which artists could apply to for a ruling, rather than seek a license from the copyright holder).

[191] *Id.* at 1090.

[192] *Id.*

[193] Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 399 (2009).

[194] *Id.* at 435–36.

[195] Sepehr Shahshahani, *The Nirvana Fallacy in Fair Use Reform*, 16 MINN. J.L. SCI. & TECH. 273, 305 (2015).

The creation of an administrative agency would not detract from either the fair use or *de minimis* doctrines, and in fact an administrative agency could effectively operate alongside them.[196] As Professor Oren Bracha has asserted, there is no reason why there must be an exclusive reliance upon either fair use doctrine or a statutory scheme for resolving potential copyright infringement claims.[197] A combination of strict rules and open-ended standards is ideal for copyright law in general, and a hybrid regime would make sense for sound recording as well as digitization.[198]

CONCLUSION

The Ninth Circuit's ruling in *Ciccone* may have marked a significant turning point for digital sampling in copyright law.[199] By ruling that minor sampling may qualify as *de minimis* use, the Ninth Circuit signaled that it was willing to break with the Sixth Circuit's *Bridgeport* decision and deliberately create a circuit split.[200] If the Supreme Court has the opportunity to resolve this split, it should look to the Ninth Circuit's persuasive reasoning, supported by legislative history and public policy concerns, and find that there is no exception for the use of the *de minimis* defense in sound recordings.[201]

The joint four-part solution outlined above combines elements of practicality, fairness, expediency, and flexibility in a way that should both facilitate creation of new musical compositions and protect creators from copyright infringement. Even if only some of these components are put into action, it will represent an important advancement in the realm of sound recording in copyright

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[196] *See, e.g.*, Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1867–68 (2007) (asserting that copyright infringement claims with regard to digital publications could be settled both via fair use determinations or an administrative/statutory regime).

[197] *Id.*

[198] *See id.* at 1856–63, 1867–69.

[199] VMG Salsoul v. Ciccone, 824 F.3d 871 (9th Cir. 2016).

[200] *Id.* at 887; Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005); Grossberg, *supra* note 5.

[201] *Ciccone*, 824 F.3d at 880–86.

infringement. While it is tempting to apply a bright-line rule to this complex situation, the complexities and issues inherent in copyright law today—not unlike issues in the past—reject such a solution, just as courts have rejected the proposed rule in *Bridgeport*.[202] An ideal solution would be one that strengthened *de minimis* doctrine, reaffirmed fair use, established a licensing system, and created an administering body to oversee it. Congress and the courts should take these steps to bring copyright infringement law into the twenty-first century.

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[202] *Id.*