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BRIDGEPORT MUSIC, INC. V. DIMENSION FILMS: HOW THE SIXTH CIRCUIT MISSED A BEAT ON DIGITAL MUSIC SAMPLING

INTRODUCTION

In 1996, DJ Shadow released the landmark album *Endtroducing*.¹ This album contained thousands of “samples,” which are portions of prior sound recordings used to create new compositions.² DJ Shadow culled diverse sounds from “recordings by Björk, Metallica, and ‘60s Swedish folk singer Pugh Rogefeldt,” among many other sources.³ *Endtroducing*’s influence in the musical world was profound: in 2002, *Muzik Magazine* named it the best dance album of all time.⁴ Now, because of a recent federal appellate court decision, the way DJ Shadow and others make music may change forever.⁵

On June 3, 2005, the United States Court of Appeals for the Sixth Circuit issued its final opinion in *Bridgeport Music, Inc. v. Dimension Films*, a significant case in the world of sampling.⁶ In *Bridgeport Music*, the court held that a sound recording copyright owner has the exclusive right to sample the recording, no matter how brief or unrecognizable the sample. A musician wanting to sample the recording must get permission from the copyright owner or else face strict liability for copyright infringement.⁷ This case will impact both how courts handle sampling cases and how musicians create music.

1. DJ SHADOW, *ENDTRODUCING* (Mo’ Wax/FFRR 1996). “DJ Shadow” is the performance name for Josh Davis who resides in suburban San Francisco. Sean Cooper, *DJ Shadow: Biography*, Allmusic, at <http://www.allmusic.com/cg/amg.dll?p=amg&sql=11:bq66mpvd9f8o-T1> (last visited Feb. 19, 2005) (discussing DJ Shadow’s biographical background and providing a comprehensive discography of his work).

2. Carl A. Falstrom, *Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Inc. and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359, 359 (1993–1994) (citing Bruce J. McGiverin, Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1724 (1987)).

3. Jon Dolan, *90 Greatest Albums of the 90s*, SPIN, Sept. 1999, at 126, available at <http://www.solesides.com/winblad/shadowspin0999.html>. The album’s liner notes credit the major samples DJ Shadow used. DJ SHADOW, *supra* note 1.

4. *DJ Shadow: Lord of the Dance*, NME, at <http://www.nme.com/news/100380.htm> (Oct. 1, 2002).

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

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

7. See *id.*

The central argument of this Note is that based on improper legal reasoning and misinterpretation of policy, the Sixth Circuit incorrectly decided *Bridgeport Music*, and as a result, the court's decision will stifle creativity and contravene the purpose of copyright law. Part II of this Note presents a general background on sampling.⁸ This part describes sampling, provides a brief cultural history of sampling, and gives examples of sampling from numerous genres.⁹ Part II also describes the legal background of general copyright and sampling law.¹⁰ Specifically, this part discusses the purposes of copyright law, the two types of music copyrights, the different rights associated with each copyright, and the elements of copyright infringement.¹¹ This part also describes the fair use doctrine and sample licensing and concludes with examples of important sampling cases.¹² Part III discusses *Bridgeport Music*.¹³ Part IV analyzes the Sixth Circuit's decision, and argues that its holding is improper based on past legal precedent and policy grounds.¹⁴ Part V discusses the case's impact, including the effect the court's decision will have on future sampling cases and musicians.¹⁵ Part VI concludes that the Sixth Circuit's holding in *Bridgeport Music* is a problematic and potentially harmful decision.¹⁶

II. BACKGROUND

This two-part section provides background information concerning the practical and legal aspects of sampling. The first section provides a background on sampling in terms of definitions, technical aspects, history, and examples.¹⁷ The second section gives an overview of general copyright and sampling law.¹⁸

A. *Background on Sampling*

The first section of this part provides a general background on sampling. This section explains what constitutes sampling and provides a brief history of the use of sampling in hip-hop music, the genre that

8. See *infra* notes 21–50 and accompanying text.

9. See *id.*

10. See *infra* notes 53–126 and accompanying text.

11. See *infra* notes 53–89 and accompanying text.

12. See *infra* notes 90–126 and accompanying text.

13. See *infra* notes 130–180 and accompanying text.

14. See *infra* notes 181–277 and accompanying text.

15. See *infra* notes 306–325 and accompanying text.

16. See *infra* notes 329–332 and accompanying text.

17. See *infra* notes 21–50 and accompanying text.

18. See *infra* notes 53–126 and accompanying text.

catapulted sampling into mainstream popular culture.¹⁹ This section concludes with specific examples of sampling from a variety of musical genres.²⁰

1. *What Is Sampling?*

Music sampling is the incorporation of portions of an existing song into a new song.²¹ Musicians sample by using technological devices known as “samplers.”²² Since the advent of the digital sampler in the mid-1970s, sampling has become quite easy from a technological standpoint.²³ Essentially, the digital sampler records the original sound onto a computer system, transforming the sound from analog waveform to digital binary code.²⁴ A musician can use a sampler to record his own sounds or those from existing recordings.²⁵ Once the musician digitally captures the sample, he can manipulate and edit it in a variety of ways. For example, the musician can adjust the pitch and echo, repeat the sample in a particular rhythm, and combine the sample with other sounds.²⁶

2. *The History of Sampling in Hip-Hop Music*

Sampling in hip-hop began without the aid of the digital sampler; disc jockeys initially used two turntables and a stereo mixer to sample, combining break beats into compositions that could “last as long as they wanted.”²⁷ Additionally, disc jockeys would have an “MC” provide vocals, or “rap,” along with the beat.²⁸ Studio music producers

19. See *infra* notes 21–46 and accompanying text.

20. See *infra* notes 47–50 and accompanying text.

21. Falstrom, *supra* note 2, at 359.

22. See Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L.J. 147, 148–51 (1989) (discussing the science of sampling and describing specific samplers).

23. See *id.* at 149 (explaining how the invention of the microchip was crucial to the development of sampling technology).

24. See Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 68–71 (1993) (describing the differences between analog and digital sounds); see also Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 181 (2002) (discussing how a sampler transfers analog waves to binary code).

25. McGraw, *supra* note 22, at 150.

26. *Id.* (citing Michael W. Miller, *High-Tech Alteration of Sights and Sounds Divides the Arts World*, WALL ST. J., Sept. 1, 1987, at 1).

27. Wilson, *supra* note 24, at 182 (citing Mtume ya Salaam, *The Aesthetics of Rap*, 29 AFRICAN-AMERICAN REV. 303 (1995)). This Note uses the term “hip-hop” synonymously with the term “rap.” Though the two are often defined differently, such differences are immaterial for the purposes of this Note.

28. *Id.* (citing REEBEE GAROFALO, ROCKIN' OUT 409 (1997)). “MC” is short for “Master of Ceremonies,” “Microphone Controller,” or “Mic Checka.” “MC,” *The Rap Dictionary*, at <http://>

initially used digital samplers “as an editing tool to save them time, money, and resources.”²⁹ As samplers became more affordable, their use spread from recording studios to homes, and disc jockeys began to produce their beats and to record marketable versions of their performances with the aid of samplers.³⁰ These compositions often contained samples of other artists’ recordings, planting the seeds for future copyright law problems, especially given the massive growth of sampling in hip-hop.³¹

3. Sampling Examples

Given the simultaneous rise of hip-hop and sampling, many popular sampling examples come from hip-hop music.³² The Sugar Hill Gang’s hit “Rapper’s Delight,” which sampled Chic’s “Good Times,” is one of the earliest and most recognizable examples of popular sampling.³³ Following the Sugar Hill Gang’s success, hip-hop’s popularity

www.rapdict.org/MC (last visited June 20, 2005). “MC” is essentially a synonym for a rapper. *See id.*

Chuck D, a member of the hip-hop group Public Enemy, described rapping and sampling as follows: “Sampling basically comes from the fact that rap music is not music. It’s rap over music. So vocals were used over records in the very beginning stages of hip-hop in the [7]0s to the early ‘80s.” Kembrew McLeod, *How Copyright Law Changed Hip-hop: An Interview with Public Enemy’s Chuck D and Hank Shocklee*, STAY FREE!, at http://www.stayfreemagazine.org/archives/20/public_enemy.html (last visited Feb. 19, 2005).

29. Wilson, *supra* note 24, at 182 (citing TRICIA ROSE, BLACK NOISE 73 (1994)). Producer Arthur Baker, renowned for his use of samples, described music that employs samples as “a new form of music, just like collages.” McGraw, *supra* note 22, at 152 (quoting Miller, *supra* note 26).

30. Wilson, *supra* note 24, at 182 (citing NELSON GEORGE, HIP-HOP AMERICA 92 (1998); Saalaam, *supra* note 27; Michael Marans, *Affordable Digital Recording*, KEYBOARD, July 1992, at 69).

31. “Rap regularly dominates the Billboard charts,” and in 2002, the top three selling albums were “hip-hop or ‘rap-inflected.’” Chris Johnstone, *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, 401 (2004) (citing Ed Christman, *U.S. Music Industry Marks Strong Rebound in Year*, BILLBOARD, Jan. 16, 1999, at 85; Lynette Holloway, *Pop’s Strong Single Sales*, N.Y. TIMES, Dec. 30, 2002, at C8; John Leland, *Feuding for Profit: Rap’s War of Words*, N.Y. TIMES, Nov. 3, 2002, at A1). Sampling has existed in other forms much earlier than hip-hop or the digital sampler. For example, “Musique Concrète” is a kind of electronic music, “produced from editing together tape-recorded fragments of natural and industrial sounds,” and it “was pioneered in the late 1940s and 1950s, spurred by developments in microphones and the commercial availability of the magnetic tape recorder.” *Musique Concrète*, Jahsonic’s Blog, at <http://www.jahsonic.com/MusiqueConcrete.html> (last update June 10, 2005). For example, the work of early French composer Pierre Schaeffer “involved splicing, speeding up, looping, and reversing recordings of sound sources like trains, piano and rattling cookware.” *Id.* This use of taped sound fragments was, at least by today’s standards, a primitive form of sampling.

32. *See* Johnstone, *supra* note 31, at 401–02 (describing the popularity of hip-hop music in terms of album sales and radio hits, as well as how hip-hop record labels are used in films, clothing lines, and liquor brands).

33. SUGAR HILL GANG, *Rapper’s Delight*, on RAPPER’S DELIGHT: HIP-HOP REMIX (Sugar Hill 1980). When *Rapper’s Delight* was recorded, “the recording technology wasn’t sophisticated

rose throughout the 1980s and 1990s,³⁴ and rappers continually employed prominent samples in their hits.³⁵ Hip-hop producer Sean “P. Diddy” Combs scored several hits that used prominent samples from other popular songs.³⁶ For example, “I’ll Be Missing You” sampled virtually verbatim The Police hit “Every Breath You Take.”³⁷ While P. Diddy got permission to use the sample, two popular rappers of the early 1990s did not, leading to some legal and financial woes.³⁸ MC Hammer used an unauthorized sample of Rick James’s “Super Freak” in his 1990 hit single “U Can’t Touch This,” and MC Hammer subsequently split publishing royalties for the song with Jobete Music, the publisher of “Super Freak.”³⁹ Similarly, Vanilla Ice used the bass line and melody from “Under Pressure” by Queen and David Bowie for his 1990 single “Ice Ice Baby,” and the parties agreed to a settlement under which Vanilla Ice had to surrender 100 percent of the royalties from “Ice Ice Baby” to Queen and David Bowie.⁴⁰

Other hip-hop artists have sampled from different genres to create unique fusions of musical styles. Throughout the 1990s, A Tribe Called Quest sampled portions of jazz compositions by musicians such as Charlie Parker and created a unique fusion of jazz and hip-hop.⁴¹

enough to sample the Chic song, so the Gang hired a house band to play” the sample. Andrew Ross, *Princes Among Thieves: Sampling the ‘80s—Hip-hop Music*, ART FORUM, Mar. 2003, available at http://www.findarticles.com/p/articles/mi_m0268/is_7_41/ai_98918671. Thus, the first commercial hip-hop hit was not made with pure sampling, but rather by re-recording the sample in the studio, a technique that would be permissible based upon the Sixth Circuit’s holding in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005). *Id.*; see *infra* note 170 and accompanying text.

34. See *History of Rap*, Rapworld, at <http://www.rapworld.com/history> (last visited Feb. 19, 2005) (offering a history of hip-hop’s popular development).

35. See Rob Bowman, *MSN Encarta—Rap*, available at http://encarta.msn.com/encyclopedia_761563537/Rap.html (last visited July 26, 2005).

36. P. Diddy used to be known by the stage name “Puff Daddy.” *The Artist Formerly Known As Puff Daddy Changes Name*, CHART ATTACK (Mar. 29, 2001), at <http://www.chartattack.com/damn/2001/03/2902.cfm>. See also Neil Strauss, *Sampling is (a) Creative or (b) Theft?*, N.Y. TIMES, Sept. 14, 1997, §2, at 28.

37. PUFF DADDY, *I’ll be Missing You*, on NO WAY OUT (Bad Boy 1997); cf. THE POLICE, *Every Breath You Take*, on SYNCHRONICITY (A&M 1983).

38. “I’ll Be Missing You” by P. Diddy, Song Facts, at <http://www.songfacts.com/detail.lasso?id=1074> (last visited Feb. 19, 2005); see *infra* notes 39–40.

39. Baroni, *supra* note 24, at 92 n.201 (citing Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 726 (1992); *Sampling: Fair Play or Foul?*, THE FIRM (Jacobson and Colfin, New York, N.Y.), 1991, at 2). These royalties certainly would have helped MC Hammer, who filed for bankruptcy in 1996. Steve Huey, *MC Hammer: Biography*, Allmusic, at <http://www.allmusic.com/cg/amg.dll?p=amg&sql=11:r7xvad8kv8w2~T1> (last visited Feb. 19, 2005).

40. Ben Challis, *The Song Remains the Same: Music Sampling in the Digital Age*, Music Business Journal, available at <http://www.musicjournal.org/03thesongremainsthesame.html> (last visited June 20, 2005).

41. Ronald Gaither, *The Chillin’ Effect of Section 506: The Battle Over Digital Sampling in Rap Music*, 3 VAND. J. ENT. L. & PRAC. 195, 198 (2001) (citing Jason H. Marcus, Note, *Don’t*

On his successful 2004 album *The College Dropout*, rapper and producer Kanye West infused his productions with a number of soul music samples, by artists such as Chaka Kahn and Marvin Gaye.⁴² West and fellow producers Just Blaze and 9th Wonder have gained critical and commercial acclaim by employing soul and R&B samples in productions for rapper Jay-Z, among many others.⁴³

Some hip-hop producers use samples in more subtle and obscure ways. For example, Timbaland, a popular and innovative producer who has composed hits for artists like Missy Elliott, creates original beats using keyboards and other instruments.⁴⁴ Timbaland then augments his compositions with brief, obscure samples to create richer works.⁴⁵ DJ Premier, another prominent and inventive producer, concocted a unique sampling style by manipulating his samples to be unrecognizable and by crafting extraordinary beats from such sounds.⁴⁶

Sampling is not limited to hip-hop: it arises in a slew of other genres. For example, electronic music artists Boards of Canada use many spoken-word samples to help create beautiful and bizarre atmospheric pieces.⁴⁷ Likewise, British trip-hop artists Portishead and Tricky have both employed samples in their music and have received critical acclaim for their works.⁴⁸ Similarly, British rock band The

Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music, 13 HASTINGS COMM. & ENT. L.J. 767, 767–71 (1991)).

42. See KANYE WEST, *THE COLLEGE DROPOUT* (Roc-A-Fella Records 2004). The album liner notes credit the musicians whose samples West used.

43. See Carl Chery, *All Samples Will Be Paid For*, at <http://www.sohh.com/thewire/read.php?contentID=6214> (Sept. 9, 2004) (discussing *Bridgeport Music* and referring to West, Just Blaze, and 9th Wonder as producers who will be affected by the ruling); see JAY-Z, *THE BLACK ALBUM* (Roc-A-Fella Records 2003) (featuring two productions by West, three by Just Blaze, and one by 9th Wonder).

44. Sasha Frere-Jones, *The Sound*, N.Y. TIMES, Feb. 8, 2004, §6 (Magazine), at 49 (profiling Timbaland and The Neptunes, arguably the most innovative hip-hop producers of the early Twenty-First Century).

45. *Id.*

46. Chery, *supra* note 43; see John Bush, *DJ Premier: Biography*, Allmusic, at <http://www.allmusic.com/cg/amg.dll?p=amg&sql=11:rxh9kept7q7c-T1> (last visited Feb. 19, 2005) (describing DJ Premier's biographical background and providing a comprehensive discography of his production work); NAS, *ILLMATIC* (Columbia Records 1994) (featuring four DJ Premier productions).

47. Ken Micallef, *Northern Exposure—Boards of Canada—Interview*, REMIX, July 2002, available at http://www.findarticles.com/p/articles/mi_m0KYX/is_2002_July_1/ai_88684002; see BOARDS OF CANADA, *MUSIC HAS THE RIGHT TO CHILDREN* (Matador Records 1998).

48. "Trip-hop is a blend of electronica and hip-hop, urban and ethereal, street and ambience." F.A.Q., *World of Trip Hop*, at <http://www.triphop-music.com> (last revision Jan. 23, 2003). Portishead's *Dummy* was named best album of 1994 by the influential British music magazine *Melody Maker*. John Sakamoto, *Portishead Prove Their No Dummy: Dummy Reviewed*, TORONTO SUN, available at <http://kotinetti.suomi.net/heikki.hietala/Reviews/Dummy%20Toronto%20Sun.htm> (last visited Feb. 19, 2005). *Village Voice* music critic Robert Christgau named Tricky's *Max-*

Verve sampled an instrumental orchestral recording of The Rolling Stones's "The Last Time" in their 1997 international hit "Bittersweet Symphony" without permission. As a result, The Verve turned over 100 percent of the royalties to ABKCO, the copyright owners of "The Last Time."⁴⁹ As these aforementioned examples show, sampling certainly plays a vital role in the creation of music in a number of genres.⁵⁰

B. *Legal Background on Copyright Law and Sampling*

This section provides a legal overview of copyright and sampling law. This section discusses the general authority for and purpose of copyright law, the two types of music copyrights, and the elements of copyright infringement, including the tests courts employ to determine whether there has been unlawful appropriation in sampling cases.⁵¹ Additionally, this section examines the fair use doctrine, sample licensing, and important federal sampling cases.⁵²

1. *General Authority for and Purpose of Copyright Law*

The United States Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁵³ The Copyright Clause gives Congress the power to make copyright laws.⁵⁴ Copyright law has two major purposes: (1) "to 'encourage people to devote themselves to intellectual and artistic creation' for the betterment of society and" (2) to "protect the authors of copyrightable works from the 'theft of the fruits of their labor.'"⁵⁵ The Copyright Act of 1976, the most recent

inquaye the best album of 1995. Robert Christgau, *Pazz & Jop 1995: Dean's List*, VILLAGE VOICE (Feb. 25, 1996), available at <http://www.robertchristgau.com/xg/pnj/deans95.php>; see Strauss, *supra* note 36, at 28.

49. Challis, *supra* note 40.

50. Allmusic.com is a comprehensive music database providing artist biographies, discographies, and more, and is an excellent source for further information on any of the artists described in this Note. See generally Allmusic, at <http://www.allmusic.com> (last visited Feb. 19, 2005).

51. See *infra* notes 53–89 and accompanying text.

52. See *infra* notes 90–126 and accompanying text.

53. U.S. CONST. art. I, § 8, cl. 8.

54. *Id.*

55. Baroni, *supra* note 24, at 75 (citing *Goldstein v. California*, 41 U.S. 546, 555 (1973); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.03[E][2], at 13–19 (2004) [hereinafter NIMMER ON COPYRIGHT]). Nimmer emphasizes that copyright protection is not meant "to reward the author but is rather to secure 'the general benefits derived by the public from the labors of authors.'" 1 NIMMER ON COPYRIGHT, § 1.03[A], at 1–88 (citing *New York Times Co. v. Tasini*, 533 U.S. 483, 519 (2001) (Stevens, J., dissenting); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

copyright law enacted by Congress, provides legal protection for "original works of authorship fixed in any tangible medium of expression."⁵⁶ The act is preemptive; any conflicting state law is invalid.⁵⁷

2. *Types of Music Copyrights*

There are two kinds of music copyrights: the musical composition copyright and the sound recording copyright.⁵⁸ The musical composition copyright protects the song itself, including the lyrics and music.⁵⁹ In contrast, "[t]he sound recording copyright . . . protects one particular recording of a musical work."⁶⁰ Though a sound recording copyright is sometimes held by the artist, it is usually held by the record company.⁶¹ A songwriter or publishing company, however, typically holds the music composition copyright.⁶² Sound recordings historically lacked copyright protection.⁶³ Piracy ran rampant prior to 1972 because sound recordings were not afforded the same protection as the musical composition.⁶⁴ This changed with the Sound Recording Amendment of 1971,⁶⁵ which provided copyright protection for sound recordings.⁶⁶ If a sound recording was fixed before February 15, 1972, it is not eligible for protection under the Copyright Act.⁶⁷

56. Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2000); Baroni, *supra* note 24, at 75 (citing 17 U.S.C. § 102(a)). Congress first enacted a federal copyright act in 1790. David S. Blessing, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2405 (2004) (citing Act of May 31, 1790, ch. 15, 1 Stat. 124). The Act has been amended several times since then, the most recent being the 1976 enactment. *Id.* (citing 1 NIMMER ON COPYRIGHT, *supra* note 55, OV-1 to -10). The current version is codified at 17 U.S.C. §§ 101–1332.

57. 17 U.S.C. § 301.

58. Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1669 (1999) (citing 17 U.S.C. § 102).

59. *Id.* (citing 17 U.S.C. § 102(a)). "A musical composition is protected even if it is never recorded, as long as it is 'fixed in a tangible medium of expression.'" *Id.* at n.44 (citing 17 U.S.C. § 102(a)).

60. *Id.* at 1669.

61. *Id.* at 1669–70 (citing ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT IN THE NINETIES* 82 (4th ed. Supp. 1998); Robert G. Sugarman & Joseph P. Salvo, *Sampling Litigation in the Limelight*, N.Y. L.J., Mar. 16, 1992, at 1).

62. *Id.*

63. See Baroni, *supra* note 24, at 77 (citing Maura Giannini, *The Substantial Similarity Test and its Use in Determining Copyright Infringement Through Digital Sampling*, 16 RUTGERS COMPUTER & TECH. L.J. 509, 514 (1990)).

64. *Id.*

65. Sound Recording Amendment of 1971, Pub. L. No. 92–140, 85 Stat. 391 (1971).

66. See Baroni, *supra* note 24, at 77 (citing 17 U.S.C. § 114 (1991); ROBERT KASTENMEIR, *PROHIBITING PIRACY OF SOUND RECORDINGS*, H.R. REP. NO. 92–487 (1971)).

67. *Id.* (citing 17 U.S.C. § 301(c)); see *Fantasy, Inc. v. La Face Records, Inc.*, 43 U.S.P.Q.2d (BNA) 1700 (N.D. Cal. 1997). Pre-1972 sound recordings are entitled to other protections. See *infra* notes 250–255 and accompanying text.

3. *Rights of Music Copyright Owners*

A sound recording copyright owner has the exclusive “right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.”⁶⁸ This owner also has “the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.”⁶⁹ Sound recording copyright owners do not have the same rights as musical composition copyright owners.⁷⁰ Sound recording copyright owners are limited to the actual reproduction of the recording,⁷¹ whereas musical composition copyright owners have the right to publicly perform these works.⁷²

4. *Copyright Infringement*

If the copyright owner believes one of his or her rights has been violated, he or she can bring a copyright infringement suit.⁷³ The three elements of a successful copyright infringement claim are: (1) ownership of a valid copyright, (2) proof of copying, and (3) unlawful appropriation of original elements.⁷⁴

Actual proof of copyright ownership is required in an infringement suit.⁷⁵ A copyright registration certificate constitutes *prima facie*

68. 17 U.S.C. § 114(b).

69. *Id.*

70. *See* 17 U.S.C. §§ 106, 114(b).

71. *Id.* at § 114(b).

72. *Id.* at § 106.

73. *See* Jeffrey R. Houle, Comment, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just A Bad “Rap”?*, 37 LOY. L. REV. 879, 890–91 (1992).

74. Wilson, *supra* note 24, at 183 (citing 4 NIMMER ON COPYRIGHT, *supra* note 55, § 13.01).

75. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). In order to get copyright protection in a sound recording, and thus prove ownership, four requirements must be met: (1) the sound must ‘result from the fixation of a series of musical, spoken, or other sounds;’ (2) the sound must be ‘fixed’ by any method ‘now known or later developed’ in a material object . . . ‘from which [the sounds] can be perceived, reproduced, or otherwise communicated;’ (3) the sound must be fixed in a phonorecord on or after February 15, 1972; and (4) the sound must constitute an ‘original’ work.

Baroni, *supra* note 24, at 77 (citing 17 U.S.C. §§ 101, 102(a), 301(c)). To satisfy the originality requirement, the sound must have been (1) independently made by the author; and (2) display a minimal degree of creativity. *Feist Publ’ns*, 499 U.S. at 345. With regard to originality, copyright protection only covers the “artistic expression, and never the underlying ideas.” Baroni, *supra* note 24, at 76 (citing 17 U.S.C. § 102(b)).

In a sampling case, an alleged infringer may challenge the plaintiff’s ownership by arguing that the sampled portion the plaintiff claims to own is not original and is thus not protected by copyright law. *See* *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 838 (M.D. Tenn. 2002). The alleged infringer has the burden of proving that the sample taken is not original. *Id.* at 839 (citing *ZZ Top v. Chrysler Corp.*, 54 F. Supp. 2d 983, 985 (W.D. Wash. 1999)). Originality depends not just on the notes played, but also on “the use of and aural effect produced by”

evidence of ownership.⁷⁶

In determining whether the alleged infringer has copied as a matter of fact, the general question is whether he or she used the original material “as a model, template, or . . . inspiration.”⁷⁷ Copying can be proved “by defendant’s direct admission or by circumstantial evidence such as evidence of access” to the original work.⁷⁸ Since it is “virtually impossible to offer direct proof of copying” apart from a defendant’s own admission, the plaintiff must typically prove indirect copying through access, which may involve proving that the defendant actually viewed or had knowledge of plaintiff’s work.⁷⁹

When the alleged infringing work does not “wholly and exactly” copy from the original work, unlawful appropriation is established by showing that the alleged infringing work bears a substantial similarity to the original work.⁸⁰ *De minimis non curat lex* (de minimis) refers to

playing the notes in a certain way. *Id.* “Any distinguishable variation resulting from an author’s independent creative endeavor will constitute sufficient originality.” *Id.* (quoting *M.M. Business Forms Corp. v. Uarco, Inc.*, 472 F.2d 1137, 1139 (6th Cir. 1973)).

The United States District Court for the Central District of California provided an example of an originality analysis in *Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002). In that case, the Beastie Boys, a hip-hop group from New York City, sampled three notes from a flute composition by James Newton, a renowned flutist. Johnstone, *supra* note 31, at 410–11 (citing *Newton*, 204 F. Supp. 2d at 1260; Kendra Hamilton, *Cal State Music Professor Sues Rap Group for Copyright Infringement*, BLACK ISSUES HIGHER EDUC., Oct. 10, 2002). The Beastie Boys obtained a license to sample the sound recording but not the underlying music composition, which led Newton to file a copyright infringement suit. *Id.* at 411 (citing *Newton*, 204 F. Supp. 2d at 1246). The court found that the sampled portion was not original and thus not protected by copyright laws. *Id.* (citing *Newton*, 204 F. Supp. 2d at 1256). The court based this finding on the fact that “the musical composition contained only the notation for generic vocalization” and did not “delineate the techniques necessary to reproduce” Newton’s sound. *Id.* (quoting *Newton*, 204 F. Supp. 2d at 1251). The United States Court of Appeals for the Ninth Circuit affirmed the district court’s ruling on other grounds. *See Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003), *amended by* 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 2005 WL 585458 (June 13, 2005).

76. 4 NIMMER ON COPYRIGHT, *supra* note 55, § 13.01[A], at 13–7 (citing 17 U.S.C. § 410(c)).

77. *Id.*, § 13.01[B], at 13–8 (citing *Castle Rock Entm’t v. Carol Publ’g Group, Inc.*, 955 F. Supp. 260, 264 (S.D.N.Y. 1997), *aff’d*, 150 F.3d 132 (2d Cir. 1998)).

78. ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL KWALL, *INTELLECTUAL PROPERTY: TRADEMARK, COPYRIGHT, PATENT LAW* 405 (1996) (citing *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946)).

79. 4 NIMMER ON COPYRIGHT, *supra* note 55, §13.02[A], at 13–15 (citing *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270 (S.D. Cal. 1945); other citations omitted) (discussing access requirements to prove indirect copying). In sampling cases, the alleged infringer typically admits to direct copying since he sampled the sound directly from the sound recording. *See Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991); *see also Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 838 (M.D. Tenn. 2002).

80. Blessing, *supra* note 56, at 2411 (citing 4 NIMMER ON COPYRIGHT, *supra* note 55, §13.03 [A], at 13–33); *Williams v. Broadus*, No. 99 Civ. 10957 (MBM), 2001 WL 984714, at *3 (S.D.N.Y. Aug. 27, 2001). Some courts and scholars analyze substantial similarity as a part of the copying requirement. *See* 4 NIMMER ON COPYRIGHT, *supra* note 55, §13.02[A]. For the purposes of this case Note, it is treated as an independent third requirement for copyright infringement.

copying that does not meet the substantial similarity standard because it is copying so trivial that it does not gain copyright protection.⁸¹ Substantial similarity occurs in two situations: (1) “where the works as a whole are similar, but not exactly identical,” known as “comprehensive nonliteral similarity;” and (2) “where only a small segment of the works are identical,” known as “fragmented literal similarity.”⁸²

In sampling cases, courts take several different approaches to determine whether substantial similarity exists or, alternatively, whether an alleged infringer’s copying is *de minimis*. The two major tests courts have employed are the ordinary observer test⁸³ and the fragmented literal similarity analysis.⁸⁴ Courts have applied the ordinary observer test,⁸⁵ or the fragmented literal similarity analysis,⁸⁶ or a combination

81. Wilson, *supra* note 24, at 185 (citing *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997)). This Latin phrase translates to “the law does not concern itself with trifles.” *Id.*

82. Blessing, *supra* note 56, at 2411 (citing 4 NIMMER ON COPYRIGHT, *supra* note 55, § 13.03[A]). Fragmented literal similarity “refers to exact copying of a portion of a work.” *Ringgold*, 126 F.3d at 75 n.3 (citing 4 NIMMER ON COPYRIGHT, *supra* note 55, § 13.03[A][2]).

83. The “ordinary observer test” is a general objective test for determining substantial similarity, and asks “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” *Tuff ‘N’ Rumble Mgmt, Inc. v. Profile Records, Inc.*, No. 95 Civ. 0246 (SHS), 1997 WL 158364, at *4–5 (S.D.N.Y. Apr. 2, 1997) (citing *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966)). Under the ordinary observer test, the court is instructed “to listen to the two works in an ordinary manner without trying to detect the disparities between the two works.” Wilson, *supra* note 24, at 185 (citing *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)). If the listener, looking at each song as a whole, finds that the alleged infringing work is quantitatively and qualitatively similar to the original, then the unlawful appropriation requirement is met. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002) (citing *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1257 (C.D. Cal. 2002), *aff’d on other grounds*, 349 F.3d 591 (9th Cir. 2003) and 388 F.3d 1189 (9th Cir. 2004), *cert. denied* 2005 WL 585458 (2005)).

This test is also known as the “qualitative/quantitative *de minimis* analysis.” See *id.* (italics omitted).

84. Under the fragmented literal similarity analysis, the question is whether the alleged infringement, which is copied exactly from the original work, constitutes substantial similarity. Wilson, *supra* note 24, at 185 (citing 4 NIMMER ON COPYRIGHT, *supra* note 55, § 13.03[A][2]). In other words, the court looks only at the similar portions of each song (i.e., the sampled segment), rather than at the entire song. Brief for Appellant at 42 n.7, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (Nos. 02-6521, 03-5738) (citing *Tree Publ’g Co. v. Howard*, 785 F. Supp. 1272, 1275 (M.D. Tenn. 1991)). Under this analysis, substantial similarity is found where either (1) the sample quantitatively constitutes a substantial portion of the original work—either a substantial portion of the alleged infringing work; or (2) though the quantitative similarity may be small, the sampled segment “is qualitatively important” to the original work. *Bridgeport Music*, 230 F. Supp. 2d at 841 n.12 (citing 4 NIMMER ON COPYRIGHT, *supra* note 55, § 13.03[A][2]). The “fragmented literal similarity” analysis is particularly pertinent to sampling because the sampler essentially takes an exact copy of a portion of the original song. Wilson, *supra* note 24, at 185 (citing 4 NIMMER ON COPYRIGHT, *supra* note 55, § 13.03[A][2]).

85. See *Newton*, 204 F. Supp. 2d at 1257.

86. See *Williams v. Broadus*, No. 99 Civ. 10957 (MBM), 2001 WL 984714, at *3–4 (S.D.N.Y. Aug. 27, 2001); see also *Newton*, 388 F.3d at 1195–96.

of both⁸⁷ in sampling cases to determine whether a substantial similarity exists between the two works. Courts have not determined the “requisite quantitative or qualitative threshold” that must be met for the sampling to constitute unlawful appropriation.⁸⁸ All that is known is that if the sampling does not meet substantial similarity, then it is de minimis, and an infringement suit is not actionable.⁸⁹

5. *Fair Use Doctrine*

The fair use doctrine offers an affirmative defense to infringement.⁹⁰ There are four factors that courts consider in the fair use defense: (1) purpose and character of use, (2) nature of use, (3) substantiality of portion used, and (4) impact of use on the potential market for the copyrighted work.⁹¹ Courts must explore and weigh the four factors “together in light of copyright’s purpose of promoting science and the arts.”⁹² A court will analyze fair use only after it has found substantial similarity.⁹³ Thus, it is separate from a de minimis analysis.⁹⁴

6. *Sample Licensing*

To avoid infringement claims, musicians can obtain permission to use the sampled material. Typically, musicians create songs using samples and then have lawyers obtain permission for the use of the samples from the label that released the original recording and from the publisher of the sampled song.⁹⁵ There are five different types of agreements that parties reach in licensing samples: “(1) a free license,

87. See *Bridgeport Music*, 230 F. Supp. 2d at 840 n.11.

88. Wilson, *supra* note 24, at 186 (citing *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997); *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 122 (2d Cir. 1930)).

89. *Id.*

90. Blessing, *supra* note 56, at 2410 (citing 17 U.S.C. § 107 (2000)).

91. *Id.* (citing 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)). Under the “purpose and character of use” factor, commercial use results in the rebuttable presumption that commercial use is not fair use, while nonprofit use is more likely fair use. Baroni, *supra* note 24, at 87 (citing 17 U.S.C. § 107(1); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)). For “the nature of the copyrighted work” factor, fair use is more likely to be found if the copied work is informative rather than creative. *Id.* at 87–88 (citing 17 U.S.C. § 107(2)). For the third factor, courts look at “the amount and substantiality used” from both quantitative and qualitative perspectives. *Id.* at 88. The fourth factor concerns whether the alleged infringing work would negatively dilute the market of the copyright work. *See id.*

92. *Campbell*, 510 U.S. at 569; *see Blessing*, *supra* note 56, at 2410.

93. Blessing, *supra* note 56, at 2410 (citing *Sandoval v. New Line Cinema Corp.*, 147 F.2d 215, 217 (2d Cir. 1998)); *see Challis*, *supra* note 40.

94. *See Challis*, *supra* note 40.

95. Baroni, *supra* note 24, at 91 (citing David Browne, *Settling the Bill: Digital Sampling in the Music Industry*, ENT. WKLY., Jan. 24, 1992, at 54).

(2) a flat fee . . . , (3) a royalty arrangement . . . , (4) co-ownership, and (5) assignment of rights.”⁹⁶ Normally, the artist will pay a flat fee for the sample, usually ranging from \$100 to \$10,000.⁹⁷ The amount of the fee or royalty paid depends “on quantitative and qualitative analyses of the use and whether the sample was cleared before it was used.”⁹⁸ Artists usually do not get clearance for drum samples, very short samples, and samples that are altered unrecognizably⁹⁹ since such samples are usually rhythmic, indistinct, and “easily disguised.”¹⁰⁰

7. Sampling Cases

Most music sampling cases are settled before reaching the trial level.¹⁰¹ Nevertheless, a few cases have made it to federal district and appellate courts.¹⁰²

The first music sampling case to make it to federal court was *Grand Upright Music Ltd. v. Warner Bros. Records*.¹⁰³ There, the defendant, hip-hop artist Biz Markie, admitted that he sampled words and music

96. *Id.* (citing Browne, *supra* note 95; Stan Soocher, *As Sampling Suits Proliferate, Legal Guidelines are Emerging*, N.Y. L.J., May 1, 1992, at 5).

97. *Id.* (citing Soocher, *supra* note 96). “[I]n an extreme example, the rap group 2 Live Crew paid roughly \$100,000 to use sampled dialogue from the 1987 movie *Full Metal Jacket* in their single ‘Me So Horny.’” *Id.* (citing Browne, *supra* note 95).

98. *Id.* The artist is typically liable for unauthorized sampling because record companies include indemnification clauses in their record contracts releasing them from third party liability. *Id.* at 92 (citing *Sampling: Fair Play or Foul?*, *supra* note 39, at 2).

99. Baroni, *supra* note 24, at 91 (citing Sheila Rule, *Record Companies are Challenging ‘Sampling’ in Rap*, N.Y. TIMES, Apr. 21, 1991, at C13). “[O]ne estimate is that 99% of all drum samples are not cleared.” *Id.*

100. *Id.*

101. Susan Latham, Note, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 124 (2003), (citing Stan Soocher, *Judicial Guidelines Mature For Sampling Copyright Issues*, 18 ENT. L. & FIN. (Jan. 2003), available at http://web.lexis-nexis.com/universe/document?_m=ada2f12135d2bb2ac77a9743d0c05424&_docnum=1&wchp=dGLbVtz-zSkVb&_md5=81ebab4103c59b3152d64510ac0dffaa); Wilson, *supra* note 24, at 187 (citing Rebecca Morris, *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)).

102. The district court in *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 840 n.11 (M.D. Tenn. 2002), compiled the following list of sampling cases: *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (involving fair use and parody); *Fantasy, Inc. v. La Face Records*, 43 U.S.P.Q.2d (BNA) 1700 (N.D. Cal. 1997) (stating that Copyright Act does not protect pre-1972 sound recordings). To date, *Campbell* is the only sampling case to reach the United States Supreme Court. In another sampling case, *Tin Pan Apples, Inc. v. Miller Brewing Co.*, No. 88 Civ. 4085 (CSH), 1994 WL 62630 (S.D.N.Y. Feb. 24, 1994), the court ruled that if the defendants sampled the plaintiff’s sound recording, they committed infringement, regardless of any issue involving the musical composition copyright. See DREYFUSS & KWALL, *supra* note 78, at 437 n.21.

103. 780 F. Supp. 182 (S.D.N.Y. 1991); Wilson, *supra* note 24, at 187–88.

from Gilbert O'Sullivan's "Alone Again (Naturally)."¹⁰⁴ In its opinion, which began with the ominous words "Thou shalt not steal," the United States District Court for the Southern District of New York found that the defendant's admission of sampling was enough to constitute copyright infringement; the court therefore did not conduct any substantial similarity or fair use analyses.¹⁰⁵ This case provided "little guidance to ascertain the quantitative and qualitative threshold level for future sampling cases,"¹⁰⁶ and according to the court's literal interpretation of the statute, copyright infringement automatically results once the plaintiff proves copyright ownership and unauthorized sampling.¹⁰⁷

Another important sampling case is *Jarvis v. A & M Records*.¹⁰⁸ In *Jarvis*, defendants Robert Clivilles and David Cole wrote and recorded "Get Dumb! (Free Your Body)," a song that used samples from plaintiff Boyd Jarvis's song "The Music's Got Me."¹⁰⁹ The sample included the vocals "ooh," "move," and "free your body" as well as "distinctive keyboard riffs" from the plaintiff's song.¹¹⁰ The plaintiff sued the defendants for musical composition copyright infringement, and the defendants moved for summary judgment.¹¹¹ The United States District Court for the District of New Jersey denied the motion, holding that it was "not clear as a matter of law that the portions copied from plaintiff's song were insignificant to plaintiff's song."¹¹² Unlike the approach taken by the court in *Grand Upright Music*, the court in *Jarvis* held that a substantial similarity analysis, specifically the fragmented literal similarity test, should be applied at trial after finding that copying occurred.¹¹³

A third key sampling case is *Tuff 'N' Rumble Management, Inc. v. Profile Records, Inc.*¹¹⁴ Plaintiff Tuff 'N' Rumble alleged that the hip-

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

105. *Id.* (citing *Exodus*, 20:15).

106. Wilson, *supra* note 24, at 188 (citing Abramson, *supra* note 58, at 1670; Susan Upton Douglass & Craig S. Mende, *Deconstructing Music Sampling; Questions Arise as Practice Becomes Increasingly Common*, N.Y. L.J., Nov. 3, 1997, at S3).

107. *Id.*

108. *Jarvis v. A & M Records*, 827 F. Supp. 282 (D.N.J. 1993).

109. *Id.* at 286.

110. *Id.* at 292.

111. *Id.* at 286.

112. *Id.* at 292.

113. *Id.* at 290-91. The court found that there is no requirement that an ordinary listener would confuse the two works because under such an approach, "a work could be immune from infringement so long as the infringing work reaches a substantially different audience than the infringed work. In such a situation, a hip-hop song, for instance, could never be held to have infringed an easy listening or pop song." *Jarvis*, 827 F. Supp. at 290.

114. No. 95 Civ. 0246 (SHS), 1997 WL 158364, at *1 (S.D.N.Y. Apr. 2, 1997).

hop group Run DMC committed copyright infringement by incorporating portions of a drum track from “Impeach the President” by the Honey Drippers, a song for which the plaintiff owned the sound recording and musical composition copyrights.¹¹⁵ The United States District Court for the Southern District of New York held that the plaintiff failed to prove copying by the defendant.¹¹⁶ In dicta, the court went on to describe the necessity of conducting a substantial similarity analysis once actual copying is found.¹¹⁷ The proper test, according to the court, was “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work,” and courts should look at each song as a whole, rather than “dissecting a work into its constituent elements,” in conducting a substantial similarity analysis.¹¹⁸

Finally, in *Williams v. Broadus*,¹¹⁹ defendant Calvin Broadus (a.k.a. Snoop Dogg) sampled portions of “The Symphony,” a song by the plaintiff, Marlon Williams (a.k.a. Marley Marl), in his 1998 song “Ghetto Symphony.”¹²⁰ In 1988, the plaintiff had incorporated unauthorized samples from Otis Redding’s “Hard to Handle” for “The Symphony.”¹²¹ The plaintiff sued the defendant for copyright infringement, and the defendant moved for partial summary judgment, contending that the plaintiff did not have a valid copyright for “The Symphony” because of the unauthorized Redding sample that it included.¹²² The United States District Court for the Southern District of New York denied the defendant’s motion because it believed that “a genuine issue of material fact exist[ed] as to whether” the plaintiff owned a valid copyright.¹²³ The court found that the plaintiff’s “The Symphony” definitely copied from “Hard to Handle,” although it was unclear whether the copying derived from the musical composition or sound recording.¹²⁴ The court emphasized a fragmented literal similarity approach: “The importance of the copied material to the pre-existing work determines whether there has been an ‘unlawful appropriation’ that the substantial similarity analysis was intended to iden-

115. *Id.*

116. *Id.* at *4.

117. *Id.*

118. *Id.* at *4–5 (citing *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966); *M.H. Segan Ltd. v. Hasbro, Inc.*, 924 F. Supp. 512, 521 (S.D.N.Y. 1996)) (internal quotation marks omitted).

119. No. 99 Civ. 10957 MBM, 2001 WL 984714, at *3 (S.D.N.Y. Aug. 27, 2001).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at *5.

124. *Id.* at *2 n.4, *4.

tify.”¹²⁵ The court held that once copying is found, the substantial similarity analysis applies, rather than a per se infringement rule like the court used in *Grand Upright Music*.¹²⁶

III. SUBJECT OPINION: *BRIDGEPORT MUSIC, INC. v. DIMENSION FILMS*

This part explores *Bridgeport Music, Inc. v. Dimension Films* in detail and describes the facts of the case,¹²⁷ the district court’s holding,¹²⁸ the arguments made on appeal, and the Sixth Circuit’s holding.¹²⁹ For purposes of this discussion, this Note will refer to the district court’s opinion as *Bridgeport Music I* and the Sixth Circuit’s opinion as *Bridgeport Music II*.

A. Facts

On May 4, 2001, plaintiffs Bridgeport Music, Southfield Music, Westbound Records, and Nine Records alleged 476 counts of copyright infringement against nearly 800 defendants for the unauthorized use of samples in hip-hop music recordings.¹³⁰ The district court separated the complaint into 476 separate actions, one of which was *Bridgeport Music I*.¹³¹ The instant controversy arose from the following facts. In their song “100 Miles and Runnin” (“100 Miles”), the hip-hop group N.W.A. used a three-note guitar riff sampled from George Clinton and the Funkadelic’s “Get Off Your Ass and Jam” (“Get Off”).¹³² The sample in question appears at the opening of “Get Off,” is played on a solo electric guitar, and “is an arpeggiated chord,” which means “three notes that, if struck together, comprise a chord, but instead are played one at a time in very quick succession.”¹³³ Meanwhile, in “100 Miles,” N.W.A. looped the sample, thus repeating the sampled portion several times in the song.¹³⁴ The sample itself is a two-second portion of the chord, looped fourteen to six-

125. *Williams*, 2001 WL 984714, at *2 n.4, *4.

126. *Wilson*, *supra* note 24, at 190 (citing *Williams*, 2001 WL 984714, at *4; *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991)).

127. *See infra* notes 130–138 and accompanying text.

128. *See infra* notes 139–157 and accompanying text.

129. *See infra* notes 158–180 and accompanying text.

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

131. *Id.*

132. *Id.* at 796.

133. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 839 (M.D. Tenn. 2002) [hereinafter *Bridgeport Music I*].

134. *Id.*

teen times in the song, and “appears at five different points in the song.”¹³⁵

“100 Miles” was subsequently included on the soundtrack to the film *I Got the Hook Up*, which co-defendant No Limit Films, in conjunction with Priority Records, released in movie theaters on May 27, 1998.¹³⁶ Plaintiffs Bridgeport and Westport Music owned the musical composition and sound recording copyrights to “Get Off.”¹³⁷ As part of the aforementioned complaint, the plaintiffs sued the film’s producers, Dimension Films, No Limit Films, and Miramax Film Corp., for copyright infringement in federal district court in Nashville, Tennessee. The defendants then moved for summary judgment.¹³⁸

B. District Court Holding

In the United States District Court for the Middle District of Tennessee, the defendants did not argue that N.W.A. digitally copied from the sound recording of “Get Off” in “100 Miles.”¹³⁹ Instead, the defendants argued that there was no copyright infringement for two reasons: (1) the sampled portion of “Get Off” “was not original and thus not protected by copyright law,” and (2) the sampled portion of “Get Off” was de minimis and thus copyright law did not protect it.¹⁴⁰

The district court denied the originality argument.¹⁴¹ The district court reasoned that the originality of the sample was not based on the specific chord used but rather on “the use of and the aural effect produced by the way the notes in the chord are played.”¹⁴² The district court concluded that a reasonable jury could find that “the way the arpeggiated chord is used and memorialized in the ‘Get Off’ sound

135. *Id.* at 841.

136. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 796 (6th Cir. 2005) [hereinafter *Bridgeport Music II*]. The film was also released on VHS, DVD, and cable television. *Id.*

137. *Id.*

138. *Bridgeport Music I*, 230 F. Supp. 2d at 830 n.1.

139. *Id.* at 838. The district court made a separate finding regarding Bridgeport’s claim for copyright infringement. The court found that in 1998 Bridgeport entered a “Release and Agreement” with Ruthless Attack Muzick (RAM) and Dollarz N Sense Music (DNSM), the composition copyright owners, “granting a sample use license to RAM, DNSM, and their licensees.” *Bridgeport Music II*, 410 F.3d at 796 (citing *Bridgeport Music I*, 230 F. Supp. 2d at 833–38). The court also found that subsequent to this agreement, Bridgeport gave No Limit Films an oral synchronization license to use “100 Miles” in the soundtrack for *I Got the Hook Up*. *Id.* Since Bridgeport’s claims against the defendants “were barred by the unambiguous terms of the Release and Agreement,” Westbound was left as the lone plaintiff on the infringement issue. *See id.*

140. *Bridgeport Music I*, 230 F. Supp. 2d at 838.

141. *Id.* at 839.

142. *Id.*

recording is original and creative and therefore entitled to copyright protection."¹⁴³

Nonetheless, the district court granted the defendant's motion for summary judgment because they found that the sampled portion was *de minimis* and did not amount to actionable copying.¹⁴⁴ To arrive at this determination, the district court first recognized that the *de minimis* principle can be used as a defense to copyright infringement.¹⁴⁵ Acknowledging that a *de minimis* analysis is "tricky," the district court stressed the importance of balancing the interests copyright law protects against the possible creative stifling caused by "overly rigid enforcement of copyright laws."¹⁴⁶

The district court then turned to the legal standards for a *de minimis* analysis.¹⁴⁷ The court cited the ordinary observer test (also referred to as the "qualitative/quantitative *de minimis* analysis" by the court) and the fragmented literal similarity analysis as the two tests used to determine substantial similarity in sampling cases.¹⁴⁸ In its own analysis, the district court applied a combination of both analyses in a careful comparison of the two songs and found that under either approach, the defendant's sampling did "not rise to the level of legally cognizable appropriation."¹⁴⁹

The district court started by looking at the sample quantitatively and found that the sample in "100 Miles" made up only a very small portion of "Get Off."¹⁵⁰ The district court then analyzed both songs in their entirety and determined that quantitatively, the sampled segment made up a "mere fraction" of "Get Off" as a whole but constituted "a more significant portion" of "100 Miles."¹⁵¹

Taking a qualitative perspective, the district court compared the sample to the original song, and found that the looped sample in "100

143. *Id.*

144. *Id.* at 842-43.

145. *Id.* at 839-40 (citing *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943)).

146. *Bridgeport Music I*, 230 F. Supp. 2d at 840.

147. *Id.* (italics omitted).

148. *Id.* at 840-41.

149. *Id.* at 841.

150. *Id.* This is a reference to the fragmented literal similarity analysis because it compares the quantitative relationship of the sample to the original song rather than to the alleged infringing song. See *supra* note 84 and accompanying text.

151. *Bridgeport Music I*, 230 F. Supp. 2d at 841. This finding falls under the quantitative prong of the ordinary observer test, as it looks at whether the sample is recognizable in the alleged infringing song. See *supra* note 83 and accompanying text. The court stated that neither the lay observer nor reasonable jury would recognize the copied segment in "100 Miles" as being taken from "Get Off," given the striking qualitative differences between the two songs. *Bridgeport Music I*, 230 F. Supp. 2d at 841-42.

Miles” bore a mere passing resemblance to the original because of changes in the pitch and tempo.¹⁵² While in “Get Off” the arpeggiated chord produced “a rising sense of anticipation” at the beginning of the song, the sample in “100 Miles” had the effect of creating “tension and apprehension at the sound of pursuing law enforcement,” resulting in a qualitative difference.¹⁵³ Analyzing the qualitative aspects of the two songs in their entirety, the district court found the tone, purpose, and mood of the two songs to be completely different.¹⁵⁴ For example, the district court described “100 Miles” as a song about men wrongfully pursued by law enforcement, while they deemed “Get Off” a celebratory, party song “essentially about dancing.”¹⁵⁵ According to the district court, the rapper in “100 Miles” expresses “anger, anxiety, and fatalism” throughout the police pursuit described in the song; in “Get Off,” the only lyrics are two expletives followed by “Get off your ass and jam,” which is repeated multiple times.¹⁵⁶ Consequently, the district court found the sampling de minimis, and accordingly held the two works were not substantially similar enough for the copying to constitute unlawful appropriation.¹⁵⁷

C. Sixth Circuit Arguments and Holding

On appeal, Westbound argued that the district court improperly placed on Westbound the burden of proving substantial similarity.¹⁵⁸ Westbound contended that the defendant should bear the burden of proving that the sampling does not meet the substantial similarity threshold because the substantial similarity argument is an affirmative defense to infringement and not an element of Westbound’s infringe-

152. *Id.* at 841. This finding falls under the qualitative prong of the fragmented literal similarity test since it looks at the sample relative to the original song. *See supra* note 84 and accompanying text.

153. *Bridgeport Music I*, 230 F. Supp. 2d at 841.

154. *See id.* at 841–42. This finding falls under the qualitative prong of the ordinary observer test since it looks at both songs in their entirety. *See supra* note 83 and accompanying text.

155. *Bridgeport Music I*, 230 F. Supp. 2d at 842.

156. *Id.*

157. *Id.* at 842–43. No Limit Films filed a post-judgment motion for attorney fees and costs, which the district court granted. *Bridgeport Music Inc. v. Dimension Films*, 410 F.3d 792, 797 (6th Cir. 2005). The Sixth Circuit affirmed this motion, finding no abuse of discretion by the district court. *Id.* at 666.

158. Brief for Appellant at 26, *Bridgeport Music II* (Nos. 02-6521, 03-5735). Bridgeport also appealed the district court’s dismissal of its case. *Bridgeport Music II*, 410 F.3d at 797. Bridgeport contended that the district court should have allowed it to file a second amended complaint that would have asserted a new claim of infringement dealing with a different song from *I Got the Hook Up*. *Id.* at 805. The Sixth Circuit ruled that the district court did not abuse its discretion in dismissing the case with prejudice. *Id.* at 806–07.

ment claim.¹⁵⁹ Westbound also argued that since the district court found the sample was important to the overall effect of “Get Off,” the de minimis argument failed.¹⁶⁰

Meanwhile, the defendants argued that the district court properly assigned the burden to Westbound, in accordance with well-settled principles, as part of Westbound’s infringement claim.¹⁶¹ Additionally, the defendants contended that the district court properly found the sampling to be de minimis because it was “only minimally quantitatively significant and lacking in qualitative similarity.”¹⁶²

The United States Court of Appeals for the Sixth Circuit reversed the district court’s grant of the defendants’ summary judgment motion based on its own findings.¹⁶³ The Sixth Circuit found that 17 U.S.C. § 114(b), the statute concerning the scope of exclusive copyrights in sound recordings, explicitly gives sound recording copyright holders the exclusive right to reproduce the sound recording or “‘sample’ [their] own recording.”¹⁶⁴ Even if a musician samples “something less than the whole” directly from the sound recording, the musician commits copyright infringement, unless he or she obtains permission to sample.¹⁶⁵ The Sixth Circuit did not engage in a de minimis analysis at all, instead holding that a court should only perform a de minimis analysis in musical composition copyright cases, not sound recording copyright cases.¹⁶⁶ Thus, the Sixth Circuit reversed the district court’s order of summary judgment for No Limit Films and held that when a person samples directly from another’s sound recording without permission, that person has committed copyright infringement.¹⁶⁷

Though the Sixth Circuit admitted there was “no existing sound recording judicial precedents” for its decision, it offered several justifications in addition to the statute.¹⁶⁸ The Sixth Circuit believed that an easily applicable, bright-line rule would enhance judicial efficiency in this area of law, where there are currently hundreds of sampling cases pending, and that a careful analysis like the one applied by the district

159. Brief for Appellant at 26, *Bridgeport Music II* (Nos. 02-6521, 03-5735).

160. *Id.* at 25.

161. Brief for Appellee at 20, *Bridgeport Music II* (Nos. 02-6521, 03-5738).

162. *Id.* at 35.

163. *Bridgeport Music II*, 410 F.3d at 805, 810.

164. *Id.* at 801. The applicable statute reads: “The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence of quality.” *Id.* at 799 (citing 17 U.S.C. § 114(b) (2000)).

165. *Id.* at 800.

166. *Id.* at 801–02.

167. *Id.* at 798–99.

168. *Bridgeport Music II*, 410 F.3d at 801.

court was not practical.¹⁶⁹ The Sixth Circuit determined that its bright-line rule would not stifle creativity because musicians could still incorporate samples from another work by duplicating the sample in the studio.¹⁷⁰ Alternately, the Sixth Circuit found that obtaining a license is an option and that pricing is kept affordable by market forces.¹⁷¹ The Sixth Circuit emphasized that judicial economy did not solely drive its opinion.¹⁷² Instead, the Sixth Circuit determined that since it is more expensive to litigate a copyright infringement case than to get a license, a bright-line rule is in the best interests of the music industry.¹⁷³ The Sixth Circuit described sampling as an act of purposeful copying, not accidental at all, in which the sampler knowingly takes “another’s work product.”¹⁷⁴ That sample, even if a small part of the sound recording, is valuable to the sound recording copyright owner, who values the sounds fixed in the recording rather than the song itself. According to the court, sampling from such a fixed medium “is a physical taking rather than an intellectual one.”¹⁷⁵

The Sixth Circuit included some additional observations in announcing their new rule. First, the Sixth Circuit determined that a variety of law review articles and other texts supported their view, though they also acknowledged that there is still a great deal of splintered opinion in this field, especially between copyright holders and studio musicians, and the artists.¹⁷⁶ Second, the Sixth Circuit found that this ruling would not stifle creativity given the readiness of many in the music industry to obtain licenses and the availability of unprotected, pre-1972 sound recordings to sample.¹⁷⁷ Third, the Sixth Circuit believed that the record industry could devise its own guidelines, “including a fixed schedule of license fees.”¹⁷⁸ Finally, since there is

169. *Id.* at 802.

170. *Id.* at 801.

171. *Id.* (citing David Sanjek, “Don’t Have to DJ No More”: Sampling and the “Autonomous” Creator, 10 CARDOZO ARTS & ENT. L.J. 607, 621 (1992) (arguing that a sound recording copyright owner could not get a license fee greater than what it would cost a person seeking the license to just duplicate the sample on his own)).

172. *Id.* at 802.

173. *Id.*

174. *Bridgeport Music II*, 410 F.3d at 801.

175. *Id.* at 802.

176. *Id.* at 802–04. The court cites the following articles and texts in its opinion: AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1486–87 (Aspen Law & Business 3d ed. 2002); Abramson, *supra* note 58, at 1668; Houle, *supra* note 73, at 896; A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 163 (1993); Latham, *supra* note 101, at 125; Sanjek, *supra* note 171, at 621; Wilson, *supra* note 24, at 179 n.9, 187 n.97.

177. *Bridgeport Music II*, 410 F.3d at 804.

178. *Id.*

no one way to interpret the copyright statute, those disagreeing with this reading can always go to Congress to get the law clarified; according to the court, the legislature "is the best place for [changes] to be made."¹⁷⁹ For all these reasons, the Sixth Circuit reversed the district court's grant of summary judgment and remanded the case.¹⁸⁰

IV. ANALYSIS

This part assesses the reasoning of the Sixth Circuit's decision on both legal and policy grounds. First, this part explores why the court's legal arguments were improper.¹⁸¹ Then, this part looks at why the court's policy arguments were improper.¹⁸² Finally, this part offers an alternative resolution to the case that avoids the legal and policy problems inherent in the Sixth Circuit's decision.¹⁸³

A. *The Sixth Circuit Should Have Permitted a De Minimis Analysis*

The Sixth Circuit erred by crafting its bright-line rule and not permitting a de minimis analysis.¹⁸⁴ Three specific legal arguments illustrate why this was an error in the court's opinion. First, a de minimis analysis applies to copyright infringement cases in general.¹⁸⁵ Second, neither sampling case law nor the Copyright Act eliminates the de minimis analysis for infringement cases involving the sound recording copyright.¹⁸⁶ Third, failing to conduct the de minimis analysis runs counter to the purposes of copyright law.¹⁸⁷

1. *A De Minimis Analysis Is Applied to Copyright Cases Generally*

A de minimis analysis "applies to copyright actions no less than to other branches of the law."¹⁸⁸ In *Ringgold v. Black Entertainment Television, Inc.*,¹⁸⁹ a copyright case not involving music sampling, the United States Court of Appeals for the Second Circuit discussed in

179. *Id.* at 805.

180. *Id.* at 805, 810. Since that decision, the Sixth Circuit granted partial rehearing to specifically discuss the sound recording copyright issues in the case. *Id.* at 649–50; *see infra* note 333 and accompanying text.

181. *See infra* notes 184–232 and accompanying text.

182. *See infra* notes 233–277 and accompanying text.

183. *See infra* notes 278–303 and accompanying text.

184. *Bridgeport Music II*, 410 F.3d at 798–99.

185. *See infra* notes 186–193 and accompanying text.

186. *See infra* notes 194–212 and accompanying text.

187. *See infra* notes 213–223 and accompanying text.

188. 2 NIMMER ON COPYRIGHT, *supra* note 55, § 8.01[G], at 8–24; *see Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74–77 (2d Cir. 1997).

189. 126 F.3d 70 (2d Cir. 1997).

detail the significance of the de minimis concept in copyright law.¹⁹⁰ The court explained that some legal violations are simply too insignificant or insubstantial to make the defendant liable for them.¹⁹¹ The court described how this de minimis principle is particularly relevant to copyright law because the de minimis principle can be used to identify both insignificant technical violations and those that fall below the substantial similarity threshold.¹⁹² In addition to the Second Circuit's recognition of the importance of the de minimis concept in copyright law, the Sixth Circuit specifically recognized a general de minimis analysis for copyright infringement cases in *Mathews Conveyor Co. v. Palmer-Bee Co.*, another non-sampling copyright case.¹⁹³ Hence, the Sixth Circuit should have followed its own precedent, recognized the importance of the de minimis concept in all copyright law, not just in non sampling cases, and conducted a de minimis analysis in *Bridgeport Music II*.

2. *Neither Sampling Case Law Nor the Copyright Act Eliminate the Use of De Minimis Analysis*

Prior to *Bridgeport Music II*, federal courts conducted a de minimis analysis in most sampling cases in order to determine whether sampling amounted to actionable infringement.¹⁹⁴ Courts did this because some sampling constitutes an infringement so trivial that it “fall[s] below the quantitative threshold of substantial similarity.”¹⁹⁵ In *Tuff ‘N’ Rumble Management, Inc.*,¹⁹⁶ the United States District Court for the Southern District of New York specifically acknowledged that in the Second Circuit, “if actual copying is established, a plaintiff must then

190. *Id.* at 74–76.

191. *Id.* at 74. The court also described a third application of the de minimis principle in copyright law—its relevance to the fair use defense. *Id.* at 75.

192. *Id.* at 74–75. As an example of an insignificant technical violation of copyright law, the court describes placing a photocopy of a newspaper cartoon on one's refrigerator. *Id.* at 74 n.2. In *Ringgold*, the court applied a “qualitative/quantitative” analysis and found that “[t]he de minimis threshold for actionable copying of protected expression has been crossed” where the defendants impermissibly used the plaintiff's poster in its television program . . . for 26.75 total seconds. *Ringgold*, 126 F.3d at 72–73, 77 (italics omitted).

193. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 839–40 (M.D. Tenn. 2002) (citing *Mathews Conveyor v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943)). In *Mathews Conveyor*, the plaintiff claimed that the defendant committed infringement by including in its catalogue sketches of a photograph and engineering drawing appearing in the plaintiff's catalogue. *Mathews Conveyor*, 135 F.2d at 83. The court dismissed a copyright infringement claim on both de minimis and fair use grounds. *Id.* at 85.

194. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 6792 (6th Cir. 2005); *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991). These two cases are exceptions to the use of de minimis analysis application in sampling cases.

195. *Ringgold*, 126 F.3d at 70, 74; see *supra* notes 80–81 and accompanying text.

196. No. 95 Civ. 0246 (SHS), 1997 WL 158364 (S.D.N.Y. Apr. 2, 1997).

show that the copying amounts to an improper appropriation by demonstrating that substantial similarity to protected material exists between the two works.”¹⁹⁷ Aside from *Tuff ‘N’ Rumble*, federal district courts in *Bridgeport Music I*,¹⁹⁸ *Jarvis*,¹⁹⁹ and *Williams*²⁰⁰ have also recognized and applied the de minimis analysis in sampling cases. Though not binding precedent on the Sixth Circuit, these cases demonstrate that a de minimis analysis is still applied in most sampling cases.²⁰¹ Though a de minimis analysis was not conducted in *Grand Upright Music*, a case from the Southern District of New York,²⁰² the decision is not binding precedent on the Sixth Circuit either.²⁰³ Additionally, in conducting a de minimis analysis, none of these courts limited the use of de minimis analysis to musical composition infringement cases as the Sixth Circuit did in *Bridgeport Music II*, and no other court in any sampling case has done so either.²⁰⁴ No binding precedent or trend in the sampling case law justifies the Sixth Circuit’s abandonment of de minimis analysis.²⁰⁵ Other legal precedent and trends actually require use of de minimis analysis.²⁰⁶

Furthermore, neither the language of 17 U.S.C. § 114(b) (which the Sixth Circuit relied on in its analysis)²⁰⁷ nor the legislative history of § 114(b) (which the Sixth Circuit did not rely on), implies that if someone else samples “a de minimis portion of the copyrighted recording,” a court should not conduct a de minimis analysis at all.²⁰⁸ Rather, the

197. *Id.* at *4 (quoting *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992))(internal quotations marks omitted); also citing *Warner Bros. Inc. v. American Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983); 3 *NIMMER ON COPYRIGHT*, *supra* note 55, at § 13.03[A][2], at 13–54 to –55 (1996)); see *supra* notes 115–118 and accompanying text.

198. *Bridgeport Music I*, 230 F. Supp. 2d at 840; see *supra* notes 139–157 and accompanying text.

199. *Jarvis v. A&M Records*, 827 F. Supp. 282, 290–91 (D.N.J. 1993); see *supra* notes 109–113 and accompanying text.

200. *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *4 (S.D.N.Y. Aug. 27, 2001); see *supra* notes 108–126 and accompanying text.

201. See *supra* notes 101–126 and accompanying text.

202. See *supra* notes 103–107 and accompanying text.

203. See *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991).

204. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 798, 803 n. 17 (6th Cir. 2005); Brief of Amicus Curiae Recording Industry Association of America (RIAA) at 9, *Bridgeport Music II* (Nos. 02-6521, 02-5738). According to *Nimmer*, “the ‘practice of digitally sampling prior music to use in a new composition should not be subject to any special analysis.’” Brief of Amicus Curiae RIAA, at 9, *Bridgeport Music II* (Nos. 02-6521, 02-5738) (citing 4 *NIMMER ON COPYRIGHT*, *supra* note 55, § 13.03[A][2] at 13–50).

205. See *supra* notes 86–97 and accompanying text.

206. See *id.*

207. *Bridgeport Music II*, 410 F.3d at 800–01.

208. Brief of Amicus Curiae RIAA at 8, *Bridgeport Music II* (Nos. 02-6521, 03-5738). The RIAA stated that 17 U.S.C. § 114(b) (2000) only grants exclusive rights to the sound recording

statute states that “the exclusive right of a copyright holder is ‘limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.’”²⁰⁹ Based on the word *limited*, “§ 114 is best understood as *limiting* the rights in a sound recording from all other types of derivative activity such as public performances, not as granting a sound recording copyright holder a stronger or additional right.”²¹⁰ In addition, in the legislative history of § 114, the House of Representatives Report states that “a right in a sound recording is infringed ‘whenever all or any *substantial* portion of the actual sounds that go to make up a copyrighted sound recording are reproduced.’”²¹¹ This statement suggests that Congress intended courts to still conduct a de minimis analysis in sound recording infringement cases.²¹² Thus, the Sixth Circuit’s opinion is not supported by prior sampling case law or by the Copyright Act.

3. *Not Conducting a De Minimis Analysis Is Contrary to the Purposes of Copyright Law*

Finally, the Sixth Circuit should have conducted a de minimis analysis because not doing so runs counter to the purpose of copyright law, namely the encouragement of artistic creation.²¹³ Though the court applied the copyright statute appropriately to find that sampling does amount to an exact duplication,²¹⁴ the refusal to conduct a de minimis analysis creates a burdensome bright-line rule.²¹⁵ Essentially, if a musician samples anything from another’s sound recording, no matter how much he or she manipulates it or how brief the sample, he or she must get permission to use it or be liable for infringement.²¹⁶ Sam-

copyright owner to manipulate the sounds from his recording and does not allow him such rights over “recordings that do not include any of the ‘actual sounds’ from his recording.” *Id.* Accordingly, the RIAA contended that the Sixth Circuit could not conclude that an alleged infringer has no defenses because there is nothing in the language of § 114(b) to suggest such a conclusion. *Id.* at 7–8.

209. Note, *Copyright Law—Sound Recording Act—Sixth Circuit Rejects De Minimis Defense to the Infringement of a Sound Recording Copyright—Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004), 118 HARV. L. REV. 1355, 1359 (2005) (quoting 17 U.S.C. § 114(b)) (emphasis added).

210. *Id.*

211. *Id.* at 1360 (quoting H.R. REP. NO. 94-1476, at 106 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5721) (emphasis added).

212. *Id.*

213. See *supra* notes 54–55 and accompanying text.

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

215. Renee Graham, *An Anti-Sampling Court Ruling Limits the Options of Hip-Hop’s Best*, BOSTON GLOBE, Sept. 16, 2004, at D1.

216. See *Bridgeport Music II*, 410 F.3d at 798–99.

pling a small or unrecognizable portion of a sound recording is no longer a viable option for some musicians, at least not without risking an infringement suit or possibly paying a hefty price for a license.²¹⁷

By abandoning the de minimis analysis, the Sixth Circuit has indirectly discouraged musicians from sampling. As illustrated earlier²¹⁸ and will be discussed later²¹⁹ in this Note, sampling is a viable art form that has the potential to be inventive and influential. Therefore, the Sixth Circuit's rule, forbidding a de minimis analysis when a sound recording is sampled without permission,²²⁰ goes against the aim of copyright law—to encourage artistic creation by giving value and protection to works.²²¹ Additionally, protecting a de minimis sample does not effectuate the other aim of copyright law, protecting the rights of copyright owners. The original work's copyright owner is not really protected in this situation because the original work is not even recognizable in the alleged infringing work, a separate and unique creative piece.²²² In other words,

[e]nforcing copyright for de minimis sampling is like requiring a painter to obtain a license for the canvas upon which he paints. The sample is simply used as the *starting point* for a creative work; although it provides an important foundation for the work, it is not *identifiable* with the final product and the creativity of the work stands on its own.²²³

Based on this analogy, it is hard to see how protecting a de minimis sample also protects the copyright owner of the original work. Consequently, the Sixth Circuit's opinion conflicts with the purposes of copyright law.

B. *The Sixth Circuit's Judicial Efficiency Argument Is Not Persuasive*

Another legal problem in *Bridgeport Music II* involves the Sixth Circuit's judicial efficiency argument. The court ruled that for the sake of judicial efficiency, a bright-line rule was necessary in this area of law, where there are currently hundreds of other sampling cases

217. Marjorie Heins, *Commentary: Trashing the Copyright Balance*, FREE EXPRESSION POL'Y PROJECT (Sept. 21, 2004), at <http://www.fepproject.org/commentaries/bridgeport.html>; see *infra* notes 241–249 and accompanying text for a further discussion of licensing.

218. See *supra* notes 32–50 and accompanying text.

219. See *infra* notes 256–277 and accompanying text.

220. See *Bridgeport Music II*, 410 F.3d at 798–99.

221. See *supra* notes 54–57 and accompanying text.

222. Nate Lindell, *Are Courts Really Copyright-Competent?*, at http://solum.typepad.com/copyfutures/2004/10/are_courts_real.html (Oct. 7, 2004).

223. *Id.* (first italics omitted).

pending, and a de minimis analysis would not be practical.²²⁴ Since the Constitution specifically authorizes Congress to make laws to promote artistic creativity,²²⁵ and the court's bright-line rule runs counter to that purpose,²²⁶ the court's judicial efficiency argument is hardly a persuasive reason to make such a drastic ruling.

Additionally, by relying on this efficiency argument, the court's ruling conflicts with the fair use defense.²²⁷ Under 17 U.S.C. § 107, fair use is a defense to copyright infringement.²²⁸ Nothing in this statute forbids using the defense in a sound recording copyright infringement claim.²²⁹ The Supreme Court has ruled that evaluating the fair use defense requires a case-by-case analysis of the four factors articulated in § 107, and that such a determination cannot be boiled down to a bright-line rule.²³⁰ Nonetheless, the Sixth Circuit adopted a bright-line rule for sound recording infringement cases involving sampling.²³¹ Because the Sixth Circuit adopted this rule primarily for judicial efficiency, there are two possible interpretations of the court's opinion regarding fair use: (1) the court sought to eliminate the option of a fair use defense in sound recording infringement cases, which violates § 107, or (2) the court's reasoning is "fatally flawed."²³² In light of the fair use defense, the rationale behind the court's efficiency argument is flawed indeed.

C. Policy Analysis

Aside from the legal problems in the Sixth Circuit's decision, the court's policy arguments are flawed as well. Specifically, the court adopted the following policies to support its ruling: (1) duplicating sounds in the studio is a viable alternative to sampling, (2) licensing is a practical alternative to sampling, (3) pre-1972 sound recordings are

224. *Bridgeport Music II*, 410 F.3d at 802.

225. U.S. CONST. art. I, § 8, cl. 8.

226. See *supra* notes 213–222 and accompanying text.

227. See Brief of Amicus Curiae RIAA at 10–11, *Bridgeport Music II* (Nos. 02-6521, 03-5738).

228. 17 U.S.C. § 107 (2000); see *supra* notes 90–94 and accompanying text.

229. 17 U.S.C. § 107.

230. *Id.*; Brief of Amicus Curiae RIAA at 10, *Bridgeport Music II* (Nos. 02-6521, 03-5738) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)). *Campbell* is the lone sampling case to reach the Supreme Court. The case is not discussed in detail in this Note because it involves the extent to which parodic sampling of a copyrighted song constitutes fair use. *Campbell*, 510 U.S. at 569–70.

231. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005).

232. Brief of Amicus Curiae RIAA at 11, *Bridgeport Music II* (Nos. 02-6521, 03-5738) (citing 17 U.S.C. § 107). In its brief, RIAA argued that this flaw in the court's opinion, along with others, provided ample reason for the Sixth Circuit to grant No Limit Films' petition for rehearing. *Id.* at 1; see *infra* note 333 and accompanying text.

still available to sample, and (4) the creativity and importance of sampling is minimal.

1. *Duplicating a Sample in the Studio Is Not a Viable Alternative to Sampling*

First, the court found that duplicating a sample in the studio is a viable alternative to sampling.²³³ In actuality, this is not a viable option. Though wealthy musicians funded by a major label may be able to afford to purchase instruments²³⁴ and studio time,²³⁵ many musicians lack the resources to do this.²³⁶ Sampling was borne of impoverished musicians and their inability to afford instruments, let alone studio time.²³⁷ Additionally, re-recording cannot capture the same sound as the original recording.²³⁸ Hank Shocklee of Public Enemy, a hip-hop group that incorporated hundreds of samples in their album *It Takes a Nation of Millions to Hold Us Back*, described the differences between sampling from old records and using studio instrumentation, in the wake of stricter copyright enforcement:

We were forced to start using different organic instruments, but you can't really get the right kind of compression that way. A guitar sampled off a record is going to hit differently than a guitar sampled in the studio. The guitar that's sampled off a record is going to have all the compression that they put on the recording, the equalization.

233. *Bridgeport Music II*, 410 F.3d at 801.

234. See generally *Guitar Center*, at <http://www.guitarcenter.com> (last visited Feb. 19, 2005) (noting the great expense of musical instruments).

235. Kevin Maney, *Recording Studio on Your Laptop Could Make You a Rock Star*, USA TODAY, at http://www.usatoday.com/tech/columnist/kevinmaney/2004-08-24-homerecording_x.htm (Aug. 24, 2004). Roger McGuinn, former guitarist for The Byrds, describes how one session at a Nashville studio cost him \$6,000 to make one song. *Id.* For an album containing thirteen tracks, the studio time would have cost approximately \$75,000. *Id.* By recording with computer software, McGuinn saves quite a bit of money. *Id.*

236. See Graham, *supra* note 215. "Independent artists, artists who can't afford fees, and rebels who just don't want to get permission for every chord or riff they copy, are silenced" by this opinion. Heins, *supra* note 217.

237. See Baroni, *supra* note 24, at 70; Karen Malone, *Hop Scotch Versus Hip-Hop: Questions of Youth Culture, and Identity in a Postmodern World*, Australian Association for Research in Education, at <http://www.aare.edu.au/02pap/mal02539.htm> (last update Sept. 12, 2004) (detailing hip-hop's rise from poverty to prosperity). Author Chris Johnstone eloquently depicts the plight from which hip-hop was born:

[T]he Bronx borough of New York City was perceived as a microcosm of desolate American urban hopelessness. Within this economically barren wasteland, the city's culture cultivated a colorful new form of musical art, organically sown from the seeds of the past. What was born as a fringe musical movement has evolved into an American cultural mainstay. Today, hip-hop music experiences tremendous mainstream success, both as a credible art form and as a business.

Johnstone, *supra* note 31, at 397-98 (citing GEORGE, *supra* note 30, at 9-10).

238. See McLeod, *supra* note 28.

It's going to hit the tape harder. . . . Something that's organic is almost going to have a powder effect. It hits more like a pillow than a piece of wood. So those things change . . . the feeling you can get off of a record.²³⁹

Composer and sampler Jan Hammer echoed this sentiment when he stated, "There's no way to re-create what [individual artists] *sound* like—the nuances they bring to music."²⁴⁰ These financial constraints and artist testimonials demonstrate that reproduction of sounds using instruments rather than sampling from a recording is not a truly viable alternative.

2. *Sample Clearance Is Not Always Easy and Affordable*

Second, clearance of samples is not as affordable and simple as the court claims—it is often incredibly expensive and extremely difficult for both major labels and independent artists.²⁴¹ Even with more financial resources, major label artists are still harmed by the court's bright-line rule requiring clearance of all samples. The costs of sample clearance can be very large, "adding tens of thousands of dollars to album production costs" and consuming a sizable portion of even the largest recording budget,²⁴² and some rightly fear it may become too

239. See *id.* Chuck D of Public Enemy rapped about digital sampling in his song "Can I Get a Witness?": "Caught, now in court 'cause I stole a beat / This is a sampling sport / Mail from the courts and jail / Claims I stole the beats that I rail . . . I found this mineral that I call a beat / I paid zero." *Id.* (internal quotation marks omitted).

240. Baroni, *supra* note 24, at 80 (citing Tom Moon, *Music Sampling or Stealing: Who Owns the Sounds of Music?*, ST. LOUIS POST DISPATCH, Jan. 24, 1988, at 3E) (internal quotation marks omitted).

241. Simply put, sample clearance "costs . . . a lot of money." Baroni, *supra* note 24, at 93 (quoting Browne, *supra* note 95); see *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801, (6th Cir. 2005). A major label artist is one who is under contract with one of the large record companies, such as Warner Music Group, BMG Entertainment, Universal Music Group and Sony Music. See John Borland, *RIAA Asks Judge to Pull All Major-Label Songs Off Napster*, at http://news.com.com/RIAA+asks+judge+to+pull+all+major-label+songs+off+Napster/2100-1023_3-241801.html (June 13, 2000). Independent artists are those not supported by major labels and typically lack the large recording and advertising budgets available to major label artists.

242. Baroni, *supra* note 24, at 92. For example, sample clearance and the accompanying legal fees for the hip-hop group De La Soul's second album, which contained more than 50 samples, cost over \$100,000. *Id.* (citing Browne, *supra* note 95). Hank Shocklee offered a description of how these sampling costs can quickly accumulate:

[Sample clearance is] very, very costly. The first thing that was starting to happen by the late 1980s was that the people were doing buyouts. You could have a buyout—meaning you could purchase the rights to sample a sound—for around \$1,500. Then it started creeping up Then they threw in this thing called rollover rates. If your rollover rate is every 100,000 units, then for every 100,000 units you sell, you have to pay an additional \$7,500. . . . Now you're looking at one song costing you more than half of what you would make on your album.

McLeod, *supra* note 28.

costly to sample altogether.²⁴³ While clearing the most prominent samples is already expensive,²⁴⁴ having to clear every single sample pushes costs higher and creates more administrative hurdles.²⁴⁵ In addition, gauging how much clearance fees will cost is very unpredictable, because they are often arbitrarily determined and can be completely unrelated to record sales.²⁴⁶ Though major label artists may be able to afford a certain amount of clearance, the Sixth Circuit's rule essentially prevents independent artists with limited financial resources from sampling unless they are willing to sample without permission and risk an infringement suit.²⁴⁷ Overall, sample clearance is time-consuming, expensive, unpredictable, and "a legal and administrative hassle."²⁴⁸ Contrary to the Sixth Circuit's opinion, licensing is not a viable alternative to sampling, particularly for de minimis sampling, for both major label and independent musicians.²⁴⁹

3. *Using Pre-1972 Sound Recordings Is an Improper Sampling Alternative*

Third, the availability of pre-1972 sound recordings, which the court says are not protected by copyright law, is also not a valid alternative.²⁵⁰ Though not protected by the Copyright Act, pre-1972 sound recordings are protected by state statutes and common law.²⁵¹ Additionally, the Copyright Act does provide protection for pre-1972

243. Baroni, *supra* note 24, at 92 (citing Sheila Rule, *Record Companies Are Challenging "Sampling" in Rap*, N.Y. TIMES, Apr. 21, 1992, at C13).

244. *See supra* notes 95–100 and accompanying text.

245. Rule, *supra* note 243. Rule states that if artists were required to get clearance beyond the obvious samples they employ, "[t]he cost of clearing samples, already expensive, would rise even higher with the additional cost of paying for drumbeats." *Id.*

246. Baroni, *supra* note 24, at 93. "Lawyers have to plan elaborate negotiation strategies based on a number of qualitative and quantitative positions concerning the sampled piece and its use." *Id.*

247. *See* Graham, *supra* note 215; Heins, *supra* note 217.

248. Baroni, *supra* note 24, at 93 (citing Browne, *supra* note 95) (internal quotation marks omitted). From the musician's perspective, the legal hassles of sample clearance pose still another burden. As DJ Shadow described, "[l]awyers make it totally impossible to clear more than one sample per song, because they all want 75 percent, no matter how big or how small the use is." Kylee Swenson, *Collage Constructionist—DJ Shadow Interview*, REMIX, July 2002, available at http://www.findarticles.com/p/articles/mi_m0KYX/is_2002_July_1/ai_88684017.

249. *See supra* note 205 and accompanying text.

250. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 804 (6th Cir. 2005).

251. Brief of Amicus Curiae RIAA at 13–14 n.3, *Bridgeport Music II* (Nos. 02-6521, 03-5738) (listing the state statutes and cases providing protection for pre-1972 recordings); Robert W. Clarida, *Pre-1972 Sound Recordings*, Legal Language Services, at <http://www.legallanguage.com/lawarticles/Clarida007.html>. (Dec. 2000) (discussing the copyright protections available for pre-1972 sound recordings).

sound recordings from outside the United States.²⁵² By stating that pre-1972 sound recordings are not protected, the court seems to encourage sampling freely from such recordings, a direct contradiction to the rest of the court's opinion, which condemns sampling, describing it as "a physical taking rather than an intellectual one."²⁵³ This contradiction is difficult to reconcile with the court's anti-sampling stance. The Recording Industry Association of America (RIAA) found the contradiction troubling, and in their amicus brief, they further argued that by stating that pre-1972 sounds lack copyright protection, the court encouraged violations of the copyrights of those who own pre-1972 sound recordings.²⁵⁴ Still, even if there were no protections for pre-1972 sound recordings, allowing artists to sample only pre-1972 songs without permission cuts off thirty years of music available for sampling, thus limiting creative options for current artists who plan to sample a de minimis portion.²⁵⁵

4. *The Court Misunderstands the Creativity and Importance of Sampling*

Finally, the Sixth Circuit generally misunderstands the creativity and importance of sampling. The court's first misunderstanding is that not all sampling involves outright "copy and paste" theft from previous songs.²⁵⁶ The Sixth Circuit improperly describes sampling as a physical rather than intellectual taking.²⁵⁷ On the contrary, music critic Neil Strauss states, "Since its inception, sampling has offered its practitioners myriad new ways of remaking a song in their own image—to slice and dice a song so drastically that they don't even have to call it by its original name."²⁵⁸ For example, DJ Shadow offered

252. Brief of Amicus Curiae RIAA at 15, *Bridgeport Music II* (Nos. 02-6521, 03-5738) (citing 17 U.S.C. § 104(a) (2000)).

253. *Bridgeport Music II*, 410 F.3d at 802; Brief of Amicus Curiae RIAA at 15, *Bridgeport Music II* (Nos. 02-6521, 03-5738).

254. Brief of Amicus Curiae RIAA at 15, *Bridgeport Music II* (Nos. 02-6521, 03-5738).

255. For samplers, a diversity of sound resources is integral to the creation of music: a single song may contain one hundred samples derived from an array of eras and genres. Swenson, *supra* note 248. DJ Shadow describes the importance of having a variety of sound sample options:

I always gravitate toward records that I feel are obscure, because I know if I sample it and can't clear it . . . then hopefully the odds are in my favor that it's not gonna be heard. Also, there's less chance that somebody is going to sample the same thing.

Id.

256. See *Bridgeport Music II*, 410 F.3d at 800–01.

257. *Id.* This statement echoes the "anti-sampling" sentiment of *Grand Upright Music*, which started with the ominous words "Thou shalt not steal." *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting *Exodus* 20:15).

258. Strauss, *supra* note 36.

the following description of how he morphed a drum sample from an old record into a wholly different sound in one of his songs:

What the drums on 'Walkie Talkie' are now [on DJ Shadow's 2002 album *The Private Press*]²⁵⁹ and what they were on the record are totally different On the original record, it's just sort of average-sounding, and it actually isn't even a drum break. It just goes, pssssshhh, kuh-boom-boom, and then the vocalists start singing again. So I took that, put it into the MPC [a sequencer], made a fake pattern, put that into the VP [a sampler/vocal processor], gave it all this huge weight and distortion with the internal effects, plugged it back into the MPC, rechopped it and made it sound completely different.²⁶⁰

Although some sampling does involve simply taking the entirety of another song and putting vocals over it,²⁶¹ other sampling, as DJ Shadow describes, involves much more effort, skill, and invention.²⁶²

The court's second misunderstanding is that a great deal of sample-based music is highly respected, influential, and creative. Nowhere in its opinion does the court give any credence to sampling as a valid art form.²⁶³ Instead, it consistently regards sampling as a form of theft, a "taking [of] another's work product."²⁶⁴ This Note provides numerous examples of highly creative and respected samplers that have arisen; sampling is more than just lazy theft.²⁶⁵ Quite simply, "Sampling is so important. It's the foundation of . . . hip-hop [S]amples [have become] an instrument to create new sounds."²⁶⁶ As stated by music critic Joshua Ostroff, sample-based albums like DJ Shadow's *Endtroducing*²⁶⁷ and Beck's *Odelay*²⁶⁸ "have taught us it is possible to

259. DJ SHADOW, *THE PRIVATE PRESS* (MCA Records 2002).

260. Swenson, *supra* note 248. Music critic Neil Strauss contrasts songs employing obvious samples from old hit singles, such as Wyclef Jean's "We Just Trying to Stay Alive," which sampled "the chorus and bass line of the Bee Gees' disco classic 'Stayin' Alive,'" with those who take a more inventive approach to sampling like Public Enemy and the electronic group The Chemical Brothers. Strauss, *supra* note 36.

261. See *supra* notes 32–40 and accompanying text.

262. Swenson, *supra* note 248.

263. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798–805 (6th Cir. 2005).

264. *Id.* at 801.

265. See *supra* notes 41–50 and accompanying text.

266. *Can Hip-Hop Live Without Sampling?*, at <http://www.sixshot.com/articles/4259> (last visited Feb. 19, 2005) (quoting Shawn Gee, co-manager of the hip-hop group The Roots). This article goes on to state:

Samples inspire producers to create a new piece of music. Sometimes they use a sound like a snare or a kick drum that no one else may even notice in a recording. Part of their talent is the ability to find different sounds to sample. Restricting the use of samples . . . is also 'taking away the fun.'

Id. (quoting hip-hop producer Hi-Tek). Aside from its importance to hip-hop, sampling is also significant to other genres of music. See *supra* notes 47–50 and accompanying text.

267. See *supra* notes 1–4 and accompanying text.

use other people's music to realize a unique and personal vision."²⁶⁹ Additionally, sampling has continually helped inspire fresh and intriguing music. For example, DJ Premier, one of the most influential hip-hop producers of all-time,²⁷⁰ cited sampling pioneer Marley Marl²⁷¹ as the major influence on his production style, illustrating how sampling can help spark the creation of new music through generations.²⁷² Beyond influencing music creation, sampling has influenced instrument creation.²⁷³ RZA, the mastermind producer behind the hip-hop group Wu-Tang Clan,²⁷⁴ expressed a desire to take his experiences with sampling and hip-hop to new levels by creating his own sampling equipment:

I'm currently developing a new sampling machine that's more DJ-friendly than any sampling machine out right now. It will also be more physical than any other sampling machine out right now. Most sampling machines are just a computer interface where you press buttons. This'll have a computer interface but it'll also have a physical element to it that will definitely bring a very special twist to the art of making hip-hop music.²⁷⁵

268. Proving once again the vitality of sampling, *Odelay* topped "many year-end critics' polls," sold "over two million copies," and won two Grammy awards. Steve Huey, *Beck: Biography*, Allmusic, at <http://www.allmusic.com/cg/amg.dll?p=amg&sql=11:wjxl1fde5cgo1> (last visited Feb. 19, 2005).

269. *Id.* Further testifying to the validity and importance of sampling, *Entertainment Weekly* named Danger Mouse's *The Grey Album* the best album of 2004. David Browne, *Records of the Year*, ENT. WKLY., Dec. 31, 2004–Jan. 7, 2005, at 132. *The Grey Album* is composed of samples of rapper Jay-Z's vocals from *The Black Album* played over samples from The Beatles' *White Album*. *Id.*

270. See *supra* note 46 and accompanying text.

271. Marley Marl was a party to the lawsuit in the *Williams* case. See *supra* notes 119–126 and accompanying text.

272. Luke Fox, *Premo Therapy—DJ Premier*, POUND MAG., Dec. 2003, available at <http://www.poundmag.com/21/premo.html>. DJ Premier described Marley Marl's influence with the following:

He had an offbeat scratch style, and his beats were so ahead of everybody else's funk. . . . I was wondering how he got his kicks and snares to sound like the old records that came from the '70s . . . [O]nce I started seeing he was actually grabbing a single snare and an actual kick and taking that to create a new pattern, and then putting music over it, I was just blown away.

Id.

273. See Mike Eskenazi, *Interview: Robert Diggs, a.k.a. the RZA*, TIME, Nov. 17, 2000, at <http://www.time.com/time/sampler/article/0,8599,88614,00.html>.

274. *Enter the Wu-Tang (36 Chambers)*, the Wu-Tang Clan's highly successful 1993 debut album, featured eerie samples of kung fu movies, soul records, and spare piano riffs. Stephen Thomas Erlewine & Steve Huey, *Wu-Tang Clan: Biography*, Allmusic, at <http://www.allmusic.com/cg/amg.dll?p=amg&uid=SUB03041111152&sql=11:dxfyxqwgldse~T1> (last visited Feb. 19, 2005) (describing Wu-Tang Clan's biographical background and providing a comprehensive discography of the group's work); WU-TANG CLAN, *ENTER THE WU TANG (36 CHAMBERS)* (Loud Records 1993).

275. Eskenazi, *supra* note 273.

In addition, the popularity of sampling has helped make sampling equipment more affordable and available to the masses, giving more people the opportunity to create new music.²⁷⁶ Unfortunately, the Sixth Circuit's misguided opinion will restrict that opportunity significantly.²⁷⁷

C. *Proper Resolution of the Case*

This final analysis section proposes an alternative resolution to the Sixth Circuit's decision. This resolution involves conducting a *de minimis* analysis that combines the ordinary observer test and the fragmented literal similarity analysis.

1. *Conduct a De Minimis Analysis*

Given the sundry legal and policy problems with the Sixth Circuit's opinion, the question becomes: how should the case have been decided? The Sixth Circuit did not engage in a *de minimis* analysis once it found that actual reproduction occurred.²⁷⁸ There are alternatives to this approach, and as discussed earlier,²⁷⁹ these alternatives are normally how courts decide sampling cases.²⁸⁰ The primary alternative is to conduct a *de minimis* analysis,²⁸¹ and this is exactly what the court should have done, after they found that the actual reproduction standard was met by N.W.A.'s copying.²⁸²

2. *What Is the Appropriate De Minimis Analysis?*

Once it is settled that some sort of *de minimis* analysis should be conducted, the next determination is what kind of analysis is appropriate. In sampling cases, courts have typically conducted the ordinary observer test,²⁸³ the fragmented literal similarity analysis,²⁸⁴ or a com-

276. Wilson, *supra* note 24, at 182 (citing Salaam, *supra* note 27). Today, samplers can be purchased for a few hundred dollars. See *Blowouts*, zZounds.com, at <http://www.zzounds.com/prodsearch?form=prodsearch&q=samplers> (last visited Feb. 19, 2005). DJ Shadow started his sampling career with a \$100 turntable. Swenson, *supra* note 248. From these humble beginnings, DJ Shadow is now regarded as one of the forty greatest American musicians. *The 40 Greatest US Bands Today, Part One*, Guardian Unlimited, available at <http://www.guardian.co.uk/arts/page/0,10607,1068609,00.html> (last visited Feb. 19, 2005).

277. See *infra* notes 308–327 and accompanying text.

278. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–02 (6th Cir. 2005).

279. See *supra* notes 184–223 and accompanying text.

280. See *supra* notes 194–208 and accompanying text.

281. See *supra* notes 80–82, 85–89 and accompanying text.

282. See *supra* notes 188–223.

283. See *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1257 (C.D. Cal. 2002), *aff'd on other grounds*, 349 F.3d 591 (9th Cir. 2003) and 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 2005 WL 585458 (2005).

bination of both.²⁸⁵ Some scholars, however, believe the issue is much more complicated than choosing and applying a test. Because of inconsistent application of these tests and the lack of a set threshold for substantial similarity, judicial de minimis analyses are often unclear, “circular[,] and unhelpful.”²⁸⁶ Legal scholars have thus suggested alternative analyses in sampling cases such as retailored compulsory licensing schemes,²⁸⁷ an economic approach to the de minimis analysis,²⁸⁸ legislative remedies outside of copyright law,²⁸⁹ and a reformulation of de minimis and substantial similarity guidelines.²⁹⁰

Though all of these alternatives are valid, intriguing, and plausible, one need look no further than the district court’s own opinion in *Bridgeport Music I* to find a workable de minimis analysis.²⁹¹ Essentially, the court conducted a de minimis analysis that combined the ordinary observer test and the fragmented literal similarity analysis.²⁹² The court’s analysis can be broken down into three steps that could be applied in future sampling cases: (1) whether the sample constitutes a trivial portion of the original song, (2) whether the sample is quantitatively recognizable in the alleged infringing song,²⁹³ and (3) whether the two songs are qualitatively similar.²⁹⁴ All these questions are analyzed objectively from the “ordinary observer” perspective.²⁹⁵ It is es-

284. See *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *3–4 (S.D.N.Y. Aug. 27, 2001).

285. See *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 840 n.11 (M.D. Tenn. 2002).

286. Johnstone, *supra* note 31, at 416; see *supra* note 89 and accompanying text.

287. See Johnstone, *supra* note 31, at 416; see generally Kenneth M. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination Of Compulsory Licensing For Sample-Based Works*, 6 N.C. J.L. & TECH. 187 (2004); Baroni, *supra* note 24.

288. See generally Blessing, *supra* note 56.

289. See generally Abramson, *supra* note 58.

290. See generally Latham, *supra* note 101.

291. See *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 841–42 (M.D. Tenn. 2002).

292. See *supra* notes 147–157; see also notes 83–84 and accompanying text for a description of the two tests. Since the Sixth Circuit was reviewing the district court’s grant of summary judgment, the standard of review was de novo, thus allowing the Sixth Circuit to conduct its own de minimis analysis. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 797 (6th Cir. 2005).

293. Latham gleaned these first two factors of a de minimis analysis from two cases outside the realm of digital sampling. Latham, *supra* note 101, at 140–41 (citing *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70 (2d Cir. 1997); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986)).

294. The qualitative analysis is crucial because “even passages with relatively few notes may be qualitatively significant. The opening melody of Beethoven’s Fifth Symphony is relatively simple and features only four notes, but it certainly is compositionally distinctive and recognizable.” *Id.* at 142 (quoting *Newton v. Diamond*, 349 F.3d 591, 598–99 (9th Cir. 2003), *cert. denied*, 2005 WL 585458 (2005) (Graber, J., dissenting)) (internal quotation marks omitted).

295. *Bridgeport Music I*, 230 F. Supp. 2d at 840–41.

sential to analyze the two songs qualitatively in order to give full consideration to how the sample is employed.²⁹⁶ Additionally, on the quantitative level, incorporating both analyses allows the court to examine the sample from two perspectives: a broad view of both songs in their entirety (qualitative/quantitative analysis)²⁹⁷ and a narrow view of the sample in question relative to the plaintiff's original song (fragmented literal similarity).²⁹⁸ This is a flexible test that gives adequate consideration to the interests of both copyright owners and artists. By making a sensitive and fair assessment of the two songs and allowing de minimis sampling in some instances, this analysis avoids the trappings of the Sixth Circuit's bright-line rule that discourages sampling and artistic creation.²⁹⁹ At the same time, this analysis protects the copyright owner by adopting a fact-specific analysis to see if his or her rights have been infringed: if the sample constitutes the "heart of the work," this test will certainly catch unlawful appropriation.³⁰⁰ As stated by law student Kenneth M. Achenbach:

While a bright line rule can be convenient at times, it is not the most appropriate approach to sampling cases. Sampling jurisprudence incorporates cases involving both widely ranging fact patterns and a continually evolving technological landscape. There is variation both in the individual forms of the works in question as well as the processes by which those forms were created. Equitable results in such cases are dependent upon a judicial standard with the flexibility to deal with such variation.³⁰¹

Still, with this analysis, issues and problems remain. An objective, case by case analysis may ignore precedent and create inconsistencies for courts, which in turn may not provide clear guidelines for samplers and those in the music industry.³⁰² Plus, there is the lingering issue of

296. Wilson, *supra* note 24, at 193. "[A] qualitative analysis may include inquiry into the peculiarity of the appropriation taken from the original work or an inquiry into the alleged infringer's purpose for choosing that particular work." *Id.* at 186 (citing *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 218 (2d Cir. 1998); *Roy Exp. Co. Establishment of Vaduz, Lichtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1106 (2d Cir. 1982)). "The qualitative component concerns the copying of expression, rather than ideas, a distinction that often turns on the level of abstraction at which the works are compared." *Ringgold*, 126 F.3d at 75 (citing 4 NIMMER ON COPYRIGHT, *supra* note 55, at § 13.03[A][1]).

297. See *Bridgeport Music I*, 230 F. Supp. 2d at 840; *supra* note 146 and accompanying text.

298. "The quantitative component generally concerns the amount of the copyrighted work that is copied, a consideration that is especially pertinent to exact copying." *Id.* (citing 4 NIMMER ON COPYRIGHT, *supra* note 55, at § 13.03[A][1]).

299. See *supra* notes 213–223 and accompanying text.

300. See Wilson, *supra* note 24, at 186–87 (internal quotation marks omitted). The Sixth Circuit admitted that if it had followed the district court's analysis, it would arrive at the same result as the district court. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

301. Achenbach, *supra* note 287, at 200.

302. Blessing, *supra* note 56, at 2415–16.

uncertain thresholds of infringement that such a test cannot resolve.³⁰³ Nonetheless, the district court's analysis helps matters by providing a model analysis for future courts that takes into account a full spectrum of facts in determining whether infringement has occurred.³⁰⁴ At its heart, such an analysis remains true to the original aims of copyright law because it will encourage artistic creation and still protect the interests of copyright owners.³⁰⁵ The district court in *Bridgeport Music I* helped clarify some questions that previous sampling cases posed and provided much better guidance for future sampling cases than the Sixth Circuit's problematic approach. Thus, the combination of the ordinary observer and the fragmented literal tests does not restrict artistic creation, still protects copyright owners, and avoids the legal and policy pitfalls of the Sixth Circuit's decision in *Bridgeport Music II*.

V. IMPACT

This section discusses the impact of the Sixth Circuit's ruling in *Bridgeport Music II*. First, it explores the impact that the case will have on the law, particularly on copyright law and sampling law.³⁰⁶ Second, it explores the case's impact on the music community and society in general.³⁰⁷

A. Impact on the Law

Bridgeport Music II will have an immediate impact on the law. First, this case will have a significant negative impact on copyright law, specifically in the music sampling realm. The case creates an easily applicable bright-line rule aimed to simplify adjudication of sampling cases and make for more efficient litigation.³⁰⁸ The result of such a bright-line rule, however, will be actually more litigation and claims.³⁰⁹ As journalist Renee Graham writes, "the open-ended nature of this ruling invites all kinds of frivolous lawsuits that will benefit neither artists nor fans."³¹⁰ This is because the per se rule that the court champions assures victory for the copyright owner, at least in

303. Johnstone, *supra* note 31, at 416.

304. See Soocher, *supra* note 101. Soocher notes that the district court helped answer questions about distinguishing the fragmented literal similarity test from the ordinary observer test by stating that both tests lead to the same result in the case. *Id.*

305. See *supra* notes 54–57 and accompanying text.

306. See *infra* notes 308–317 and accompanying text.

307. See *infra* notes 318–327 and accompanying text.

308. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005).

309. Graham, *supra* note 215.

310. *Id.*

those courts that follow the Sixth Circuit's opinion, and thus encourages the owner to bring a lawsuit anytime their music is sampled, no matter how insignificant.³¹¹ Though a bright-line rule may make deciding cases more efficient, a rise in the number of infringement claims will frustrate judicial efficiency.³¹² By inviting more infringement claims, courts will not only be burdened with more litigation, but record labels, musicians, publishing companies, and others will face the risk and expense of litigation if they do not obtain a license for every possible sample.³¹³

Aside from decreasing efficiency, the case also diminishes the importance of the crucial *de minimis* analysis. The Sixth Circuit decision to forego a *de minimis* analysis could easily be adopted by federal courts as persuasive authority.³¹⁴ The music industry has long depended on a *de minimis* analysis in determining whether licensing is necessary. This case abandons a well-established practice and could be used to punish those musicians who sampled properly prior to the creation of this bright-line rule, resulting in liability and litigation for such parties.³¹⁵ As discussed earlier in this Note, the *de minimis* analysis plays a pivotal role in carrying out the goals of copyright law.³¹⁶ Without this analysis, courts completely discourage artists from sampling, thus silencing a creative and influential art form.³¹⁷

B. *Impact on the Music Community and Society*

This case will also impact the music community and, on a broader scale, society in general. Without a doubt, this case will hamper future artistic creation.³¹⁸ For example, though some musicians lazily sample an entire song,³¹⁹ others, like hip-hop producers Prince Paul, the Dust Brothers, and Hank Shocklee, "layered hundreds of samples and snippets to create a collage of sound fashioned into a new song. It is artistry in the tradition of Brian Wilson or Ornette Coleman, both of whom always worked without boundaries in stretching the possibili-

311. *See id.*

312. *See id.*

313. *See supra* notes 241–249 and accompanying text.

314. *See supra* notes 241–249 and accompanying text.

315. Brief of Amicus Curiae RIAA at 11–12, *Bridgeport Music II* (Nos. 02-6521, 03-5738). Some scholars have questioned whether this will actually happen since it is debatable whether these "pre-existing rules" ever existed. Gary Young, *6th Circuit Clamps Down on 'Sampling,'* NAT'L L.J., Sept. 30, 2004, available at <http://www.law.com/jsp/article.jsp?id=1096473910640>.

316. *See supra* notes 184–223 and accompanying text.

317. *Id.*

318. Graham, *supra* note 215.

319. *See supra* notes 35–40 and accompanying text for more information on P. Diddy, Vanilla Ice, and MC Hammer.

ties of their music.”³²⁰ Now, these artists must do one of the following: (1) get clearance for every sample used, a daunting financial and practical task,³²¹ (2) forego clearance of every sample and risk an expensive infringement lawsuit that the musician will not win under *Bridgeport Music II*'s bright-line rule; or (3) find a new way to make music altogether. None of these options is particularly attractive.

Additionally, though major label musicians with more financial resources may be able to afford sample clearance and licensing,³²² independent musicians and those with limited financial resources will be thoroughly harmed by this ruling.³²³ Not only will they be unable to afford sample clearance, but they also cannot risk a lawsuit given their limited financial resources. Considering that “[n]ot all good music today is created in entertainment industry studios,” some commentators fear that independent artists will be silenced altogether by the Sixth Circuit’s opinion.³²⁴ Journalist Davey D. Cook bleakly declared:

In the long run, [the Sixth Circuit ruling] will lead to mediocrity in the music People may say, ‘Well, why is [Sean “P. Diddy” Combs] just sampling Rick James, that’s not very creative.’ But if you sit down and talk to him, he’ll break it down that he could have done more creative stuff—a Rick James riff, a James Brown beat—but it would have cost him an arm and a leg.³²⁵

Furthermore, “a single party with a diverse portfolio of copyrights [could] exert disproportionate influence on the entire market” by using this decision to prevent artists from sampling their works.³²⁶ This decision limits the options artists have and restricts creativity contrary to the purposes of copyright law because as the Supreme Court has stated, “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim, by this incentive, is to stimulate artistic creativity for the general public good.”³²⁷ The Sixth Circuit’s decision does nothing for the “general public good” because the case unnecessarily restricts artistic creativity.

VI. CONCLUSION

What happens to DJ Shadow now? Can he still freely create epic compositions compiled of hundreds of samples and molded into some-

320. Graham, *supra* note 215.

321. *Id.* See *supra* notes 241–249 and accompanying text for a discussion of sample clearance.

322. Young, *supra* note 315.

323. *Id.*; see Lindell, *supra* note 222.

324. Heins, *supra* note 217.

325. Graham, *supra* note 215 (quoting journalist Davey D. Cook).

326. Achenbach, *supra* note 287, at 200.

327. *Id.* (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

thing wholly unique and personal? *Bridgeport Music II* limits his ability to do so because the Sixth Circuit placed significant restraints on his creativity.³²⁸ Under the Sixth Circuit's bright-line rule, he will need to get sample clearance for every sample he uses, no matter how brief, altered, or manipulated from the original it may be.³²⁹ *Bridgeport Music II* sets a dangerous precedent in the Sixth Circuit, requiring any sampler to get permission to use it or else risk an infringement suit.³³⁰ Barring a Supreme Court ruling to the contrary, other federal district and circuit courts may follow the precedent set by this opinion.

Nonetheless, there remains competing case law, statutory interpretation, and other arguments and sources requiring a de minimis analysis, all of which encourage artistic freedom and promote creativity of musicians.³³¹ The district court holding in *Bridgeport Music I* actually provides a helpful template to deal with problems of digital sampling infringement.³³² Thus, the Sixth Circuit's decision is not necessarily the death knell for sampling. The decision poses an obstacle, however, to musicians who sample and presents problems for future courts to untangle, particularly in deciding whether to apply a de minimis analysis.

Music critic Ryan Schreiber writes, "DJ Shadow, a white guy from San Francisco, sets out to prove to the world that he's got skillz [*sic*]. He sold me in the first five minutes. This record is incredible. It's like nothing I've ever heard before."³³³ As a result of the Sixth Circuit's opinion, not only will musicians like DJ Shadow be silenced, but such passionate fan reactions will be as well.

*John Schietinger**

328. See *supra* notes 306–325 and accompanying text.

329. See *supra* notes 316–325 and accompanying text.

330. See *supra* notes 163–180 and accompanying text.

331. See *supra* notes 188–223 and accompanying text.

332. See *supra* notes 291–303 and accompanying text.

333. Ryan Schreiber, Record Review, *DJ Shadow*, ENDTRODUCING (*Mo' Wax/FFRR 1996*), at <http://www.pitchforkmedia.com/record-reviews/d/dj-shadow/entroducing.shtml> (last visited Feb. 19, 2005).

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