



Clarity to Litigation Concerning Digitally Sampling Sound Recordings: Get a License or Do Not Sample - The Bridgeport Music Decision

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Minc: Clarity to Litigation Concerning Digitally Sampling Sound Recordi
**CLARITY TO LITIGATION CONCERNING
DIGITALLY SAMPLING SOUND RECORDINGS:
GET A LICENSE OR DO NOT SAMPLE – THE
BRIDGEPORT MUSIC DECISION**

I. INTRODUCTION

Many recording artists, especially in the rap industry, sample other artists' music into collages of new sounds for their own recordings.¹ For example, James Brown's well-known riveting howl has become part of the background music for dozens of tracks.² The recent explosion of copyrighted music influencing other artists' work is due in great part to a practice known as digital sampling. Simply put, "digital sampling is the electronic process of using previous sound recordings to create" new musical works.³ It is used in the music industry as an inexpensive avenue for one artist to incorporate another's copyrighted material into new musical compositions.⁴ Digital sampling extracts the distinctive tonal qualities of a particular sound or instrument and inserts it into a new sound recording.⁵

Digital sampling can be broken down into three main steps: digital recording, computer sound analysis, and playback.⁶ Digital recording is the method of converting sound waves from sound recordings into binary digital units ("bits") intelligible to a digital

1. Robert Tomsho, *As Sampling Revolutionizes Recording, Debate Grows Over Aesthetics, Copyrights*, WALL ST. J. ABSTRACTS, Nov. 5, 1990.

2. *Id.*

3. David S. Blessing, Note, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM & MARY L. REV. 2399, 2403 (2004).

4. Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1667-68 (1999).

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

6. Blessing, *supra* note 3, at 2403.

computer.⁷ Computer sound analysis occurs when these bits are received by a computer's digital sampler and are transfigured into computer code.⁸ Once in this form, the sounds can be altered and manipulated by rearranging the codes.⁹ For example, modern electronic devices can copy and manipulate these digital computer codes to change pitch, amplitude, timbre, resonance, vibrato and other alterations.¹⁰ Finally, those sounds are played back and mixed with other songs to create a new recording.¹¹

The modern use of digital sampling provides musical artists access to distinctive sounds with little expenditure.¹² Sampling artists are able to manipulate recognizable sounds that already have wide audience appeal.¹³ This presents a major problem as many artists believe that sampling does not infringe the rights of the copyright owner. Sampling artists believe that by stealing only a "small" part of a copyrighted work and incorporating it into their own, there is no actionable copyright infringement claim.¹⁴ However, this Note will argue that this belief is flawed as sounds are intellectual, copyrightable creations and thus subject to copyright protection; therefore, any unauthorized sampling of a sound, however minimal, constitutes infringement.

In response to the artists' beliefs and the legal uncertainty surrounding the practice of digital sampling, the Sixth Circuit established a bright-line rule in *Bridgeport Music Inc. v.*

7. McGiverin, *supra* note 5, at 1724.

8. *Id.*

9. Randy S. Kravis, Comment, *Does A Song By Any Other Name Still Sound as Sweet?: Digital Sampling and its Copyright Implications*, 43 AM. U. L. REV. 231, 238 (1993).

10. Blessing, *supra* note 3, at 2403. *See also* McGiverin, *supra* note 5, at 1725.

11. Kravis, *supra* note 9, at 238.

12. Brett I. Kaplicer, Note, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227, 228 (2000).

13. *Id.*

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

Dimension Films: get a license or do not sample.¹⁵ In *Bridgeport Music*, Bridgeport Music, which is in the business of music publishing and exploiting musical composition copyrights, Westbound Records, which records and distributes sound recordings, and several other plaintiffs, complained of copyright infringement against No Limit Films.¹⁶ Specifically, Westbound Records sued No Limit Films for the unauthorized use of the copyrighted sound recording of George Clinton, Jr. and the Funkadelics' "Get Off Your Ass and Jam" ("Get Off").¹⁷ Westbound's claims arose because a rap group had sampled a two-second note from the opening guitar solo in "Get Off" and used it throughout their song "100 Miles and Runnin" ("100 Miles").¹⁸ The copied piece was "looped,"¹⁹ the pitch was lowered, and extended to sixteen beats, appearing five different places within the song, with each appearance lasting approximately seven seconds.²⁰ No Limit Films included the song "100 Miles" on the soundtrack of its film *I Got the Hook Up*.²¹ The district court had granted No Limit Films' motion for summary judgment based on its argument that the two-second sample from "Get Off" was de minimis and, therefore, no actionable copyright claim existed.²²

The United States Court of Appeals for the Sixth Circuit reversed.²³ The Sixth Circuit provided guidance for adjudicating copyright issues surrounding digital sampling by applying current copyright law.²⁴ The court noted that copyright laws attempt to

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

16. *Id.* at 393.

17. *Id.* at 394.

18. *Id.*

19. Looping is a term used to describe the repetitive re-playing of the sample within the new work. Susan J. Lantham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling – A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 122 (2003).

20. *Bridgeport Music*, 383 F.3d at 394.

21. *Id.* at 393.

22. *Id.* at 395.

23. *Id.* at 406.

24. *Id.* at 397.

balance many interests. They seek to protect the rights of the creator, encourage artistic creation, and ensure that the public benefits from artistic expression.²⁵ In balancing the parties' interests, the court further stated that compulsory licensing makes it possible for "creators" to enjoy the fruits of their labors, while allowing the public to use the copyrighted work.²⁶ Therefore, the court held that a license is necessary in order to protect the rights of the copyright holder of a sound recording.²⁷ The court rationalized its holding by finding that the requirement of a license does not suppress another artist's creativity in any significant way.²⁸

Bridgeport Music's analysis suggests that unlicensed samplers will always be deemed infringers. This Note proposes that the Sixth Circuit's holding in *Bridgeport Music* is a significant step forward in the debate that has arisen over the practice of sampling. The decision will put an end to digital sampling litigation and accommodate actions asserted by musicians or copyright owners of sound recordings by compensating them for the unlicensed sampling of their work. Part II provides a general overview of copyright law and its function as it relates to sound recordings. Part III discusses the cases leading up to the Sixth Circuit's *Bridgeport Music* decision and their role in the controversy and uncertainty for musicians asserting a copyright infringement claim for digital sampling. This Note concludes by arguing for the enforceability of the bright-line rule set forth by the Sixth Circuit: "Get a license or do not sample."²⁹

25. *Id.* at 398.

26. *Bridgeport Music*, 383 F.3d at 398.

27. *Id.*

28. *Id.*

29. *Id.*

II. BACKGROUND

A. *The Copyright Act*

The source of authority for copyright protection comes from Article I, Section 8, Clause 8 of the U.S. Constitution, which authorizes Congress “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁰ Pursuant to this constitutional authority, Congress adopted the first United States’ copyright statute in 1790 which has subsequently been amended several times.³¹

The Copyright Act of 1976 (“1976 Act”) is the most recent revision and grants copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”³² Thus, in order for a work to qualify for copyright protection, it must be a “work of authorship,” “original,” and “fixed.”³³ The 1976 Act specifically lists eight categories that represent works of authorship;³⁴ however, the word “original” was left undefined. The United States Supreme Court defined “original” in *Feist Publications v. Rural Telephone Service*.³⁵ In *Feist*, the Court held that originality is a constitutional requirement consisting of an independent selection with a minimal degree of creativity.³⁶ For the work to be deemed

30. U.S. CONST. art. I, §8, cl. 8.

31. Act of May 31, 1790, ch. 15, 1 Stat. 124, reprinted in 8 MELVILLE B. NIMMER ET AL., *NIMMER ON COPYRIGHT*, App. 7-41 [D] (2004).

32. 17 U.S.C. §102(a) (2005).

33. *Id.*

34. *Id.* Literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures; sound recordings; and architectural works. *Id.*

35. *Feist Pubs. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

36. *Id.* at 345.

an independent selection it must have been independently created by the author as opposed to copied from other works.³⁷ Moreover, the originality threshold is low because it can consist of any distinguishable variation of a prior work that is “more than merely trivial.”³⁸ Finally, an original work of authorship must be “fixed” in order to qualify for copyright protection.³⁹

B. Federal Copyright Protection for Sound Recordings

Currently, sound recordings are protected under the 1976 Act, but that was not always the situation. Sound recordings were excluded from protection under the Copyright Act of 1909.⁴⁰ The Constitution refers to copyright protection in terms of “writings”; therefore, since sound recordings were recorded on records and could not be seen, they were denied protection.⁴¹ This lack of federal copyright protection caused serious problems as “virtually one-fourth of all the records and tapes sold in the United States were illegal duplicates.”⁴² This dramatically affected the creations and careers of many artists. In response, entertainment interest groups successfully lobbied Congress to provide federal copyright protection for sound recordings.⁴³ The success of their lobbying efforts culminated in the implementation of the Sound Recording

37. *Id.*

38. 1 MELVILLE B. NIMMER ET AL. NIMMER ON COPYRIGHT § 2.01[B] (2005); *see also* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976)

39. Copyright Act of 1976, 17 U.S.C. § 102(a) (2005). A work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission. 17 U.S.C. § 101 (2005).

40. Ronald Mark Wells, *You Can't Always Get What You Want But Digital Sampling Can Get You What You Need*, 22 AKRON L. REV. 691, 697 (1989).

41. *Id.*

42. *Id.*

43. *Id.*

Act. This Act mandates that any sound recording fixed after February 15, 1972 enjoys federal copyright protection under the 1976 Act.⁴⁴

Under the 1976 Act, musical works are protected by two different copyrights: one in the musical works themselves, including any accompanying lyrics,⁴⁵ and the other in the sound recordings.⁴⁶ Musical works are commonly known in popular music as musical compositions and consist of “two distinct components: music and lyrics.”⁴⁷ The musical composition of the song is the material used to produce a sound recording.⁴⁸ It is this material that the performers, arrangers, and engineers transform into the unique and distinctive sounds that comprise a sound recording.⁴⁹ The 1976 Act defines sound recordings as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”⁵⁰ The requirement of originality for a sound recording “is met by the fixation of the sounds in a master recording.”⁵¹

Copyright ownership of a sound recording is completely distinct from copyright ownership in a musical composition.⁵² Normally, the record company who makes the sound recording purchases the copyrights from each author, making the record company the exclusive owner of the copyrighted sound recording.⁵³ The Sixth Circuit in *Bridgeport* held that “the analysis that is appropriate for determining infringement of a musical composition” is not suitable

44. *Id.*

45. 17 U.S.C. § 102(a)(2) (2005).

46. 17 U.S.C. § 102(a)(7) (2005).

47. Kaplicer, *supra* note 12, at 237 (quoting 6 MELVILLE B. NIMMER ET AL., NIMMER ON COPYRIGHT § 30.01 (2004)).

48. Wells, *supra* note 40, at 696.

49. *Id.*

50. 17 U.S.C. § 101(2005).

51. *Bridgeport Music*, 383 F.3d at 396.

52. Kaplicer, *supra* note 12, at 235.

53. *Id.*

to determine infringement of a sound recording.⁵⁴ Therefore, an artist who samples from both the underlying musical work and the sound recording would need two separate licenses from each copyright holder to protect himself from an actionable copyright infringement claim.⁵⁵

C. Limited Rights for Sound Recordings

The Copyright Act of 1976 grants copyright owners certain exclusive rights with respect to the copyrighted work.⁵⁶ These rights are limited to copyright owners of sound recordings. One limitation is that copyright protection extends only to the exact sounds that the owner creates.⁵⁷ The actual reproduction standard dramatically limits the sound recording author's copyright.⁵⁸ Sampling artists are only restricted from "pirating"⁵⁹ the actual, specific sound sample.⁶⁰ Therefore, if the underlying sound source is available, the artist is free to record a simulation using her own set of sounds, musicians, and recording processes.⁶¹

Another limitation to the exclusive rights of copyright owners of sound recordings is that they do not enjoy a right of performance or the right to publicly display the copyrighted work.⁶² A right of performance is the exclusive right of the copyright owner to authorize the public performance of her copyrighted work.⁶³ This right, which is granted to the composer of the underlying musical composition, entitles the copyright owner to royalties if she

54. *Bridgeport Music*, 383 F.3d at 396.

55. Wells, *supra* note 40, at 698.

56. 17 U.S.C. § 106 (2005).

57. *Id.*

58. *Id.* "The exclusive right . . . fixed in the recording." *Id.*

59. Piracy is defined as "the unauthorized and illegal reproduction or distribution of materials protected by copyright, patent or trademark law." BLACK'S LAW DICTIONARY 1169 (7th ed. 1999).

60. See 17 U.S.C. § 114(b) (date).

61. Kaplicer, *supra* note 12, at 236.

62. ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL K WALL, INTELLECTUAL PROPERTY 488 (2d ed. 2004).

63. Kaplicer, *supra* note 12, at 235.

decides to allow another to play the copyrighted musical work in public.⁶⁴ Because no such right exists in sound recordings, many establishments such as night clubs, restaurants and radio stations gain substantial benefits from playing sound recordings without having to pay damages to the authors who created them.⁶⁵ Therefore, even though the 1976 Act provides that the owner of a copyright in a sound recording “has the exclusive right ... to prepare a derivate work in which the actual sounds fixed in the sound recording rearranged, remixed, or otherwise altered in sequence of quality,”⁶⁶ “the world at large is free to imitate or simulate the creative work fixed in the recording so long as an actual copy of the sound recording itself is not made.”⁶⁷

III. ANALYSIS

A. The Traditional Infringement Test

The Copyright Act provides that “anyone who violates any of the exclusive rights of the copyright owner as provided by section 106 . . . is an infringer of the copyright.”⁶⁸ To prove a statutory violation of copyright infringement for unlawful sampling, a plaintiff has traditionally been required to meet a three-part test. First, the copyright owner must prove ownership of a valid copyright in the sound recording.⁶⁹ Second, the copyright owner must prove that the defendant copied the plaintiff’s copyrighted work.⁷⁰ This can be illustrated through direct proof, eyewitness testimony, an admission made by the defendant, or circumstantial proof, shown by the defendant’s access to the copyrighted work

64. Wells, *supra* note 40, at 698.

65. *Id.*

66. 17 U.S.C. § 114(b).

67. *Bridgeport Music*, 383 F.3d at 398.

68. 17 U.S.C. § 501 (2005).

69. Kravis, *supra* note 9, at 244.

70. Kaplicer, *supra* note 12, at 235.

combined with sufficient similarity between the two works.⁷¹ Third, the artist must prove that the defendant's copying constitutes unlawful appropriation of the artist's copyright, also known as illicit copying.⁷²

Unlawful appropriation is usually determined through the application of a substantial similarity test.⁷³ This involves a subjective assessment of the facts to decide whether an objective observer would conclude that there was a significant taking of the protected expressions of a copyrighted work.⁷⁴ In the context of a music infringement suit, unlawful appropriation is extremely difficult to define and apply as there has been no bright-line rule determining what constitutes substantial similarity in music.⁷⁵ However, courts generally agree that the requisite level of similarity between two works must be more than *de minimis* in order to constitute actionable copying.⁷⁶

On the other hand, the Second Circuit in *Arnstein v. Porter* took a *qualitative* approach in determining whether two works were substantially similar.⁷⁷ In order to determine unlawful

71. *Id.*

72. *Id.*

73. *Id.* at 238.

74. *Id.* at 237.

75. See *Marks v. Leo Feist, Inc.*, 290 F. 959 (2d Cir. 1923) (finding that the taking of six bars does not constitute an infringement); *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393 (S.D.N.Y. 1952) (holding that the taking of only four bars is substantial and is an infringement). Compare *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (referring to the substantial similarity test as the abstractions test which requires the court to separate the uncopyrightable ideas from the original expression, and then compare the two works to see if they are substantially similar) with *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (requiring an examination of both works as a whole to determine if the allegedly infringing work would be recognizable by an ordinary observer as having been taken from the copyrighted work).

76. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70 (2d Cir. 1997). A *de minimis* use entails copying which "has occurred to such a trivial extent as to fall below the *quantitative* threshold of substantial similarity." *Id.* at 76 [emphasis added].

77. *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

appropriation, the court inquired “whether defendant took from plaintiff’s work so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.”⁷⁸ This test means that a digital pirate could sample actual sounds that are unique, but insignificant, to a sound recording without incurring any liability if it is found not to be substantially similar. This directly contradicts copyright law’s prohibition of duplicating actual sounds in a sound recording.⁷⁹ The Sixth Circuit in *Bridgeport Music* held that both the de minimis and substantial similarity inquiry were inappropriate when applied to sound recordings and, therefore, the only requirement for finding infringement of a copyright in a sound recording is unauthorized copying.⁸⁰

B. Sixth Circuit Bright-Line Rule: Get a License or Do Not Sample

The need for a bright-line rule is illustrated by the inconsistent decisions announced in the few sampling cases brought to court. The first case to confront unlicensed digital sampling⁸¹ was *Grand Upright Music Ltd v. Warner Bros. Records, Inc.*⁸² There, the rap artist Biz Markie sampled three words and a portion of music from the master recording of Gilbert O’Sullivan’s composition and recording of “Alone Again (Naturally).”⁸³ Markie used the sample in his song “I Need a Haircut.”⁸⁴ The district court presumed that

78. *Id.* at 473.

79. 17 U.S.C. § 114(b). Sound recording copyright holders have 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.” [emphasis added] *Id.*

80. *See Bridgeport Music*, 383 F.3d at 399-00.

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

82. *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (1991).

83. *Id.*

84. *Id.*

Biz Markie's use of the sample infringed O'Sullivan's copyright interest because he admitted to sampling the work.⁸⁵ This presumption foreshadowed the Sixth Circuit's decision in *Bridgeport Music* to take a literal interpretation of the applicable statute in order to determine an actionable copyright infringement claim for digitally sampling sound recordings.⁸⁶ The *Grand Upright* court never analyzed whether the defendant's work was substantially similar to the plaintiff's work; it solely questioned whether the plaintiff owned the work as the defendant's copyright of the infringing work was already established with direct proof.⁸⁷ Furthermore, the court powerfully condemned unauthorized sampling by opening its opinion with a phrase from the Old Testament, "though shalt not steal,"⁸⁸ and closing by referring the case to the U.S. Attorney for consideration of possible criminal penalties.⁸⁹ The opinion and its language struck fear into the music industry, leaving behind the impression of a *per se* bar to unlicensed digital sampling.⁹⁰

In *Jarvis v. A&M Records*,⁹¹ however, the district court used a different analysis to determine whether digital sampling constituted copyright infringement. The copyrighted work at issue in *Jarvis* was the plaintiff's song entitled "The Music's Got Me."⁹² Jarvis sued record producers Robert Clivilles and David Cole for copyright infringement. The defendants digitally sampled sections of Jarvis's artistic creation in three versions of their song, "Get Dumb! (Free Your Body)."⁹³ The court rejected the defendant's argument that in order for an infringement of plaintiff's song to

85. *Id.* at 183.

86. *Bridgeport Music*, 383 F.3d at 399. A sound recording owner has the exclusive right to "sample" his own work and if the sample is unlicensed then there is infringement. *Id.*

87. *Grand Upright*, 780 F. Supp at 183.

88. *Exodus* 20:15.

89. *Grand Upright*, 780 F. Supp. at 185.

90. Latham, *supra* note 19, at 124.

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

92. *Id.* at 286.

93. *Id.*

exist the two songs must be similar in their entirety.⁹⁴ The court reasoned that if this argument was valid, then “a work could be immune from infringement so long as it reaches a substantially different audience [from] the infringed work’s.”⁹⁵ Therefore, the court announced a new inquiry for determining whether a digital sample constitutes copyright infringement: “whether the defendant appropriated, either quantitatively or qualitatively, constituent elements of the work that are original such that the copyright rises to the level of unlawful appropriation.”⁹⁶

On the other hand, a different inquiry into copyright infringement for unlicensed digital sampling was announced in *Newton v. Diamond*.⁹⁷ In *Newton*, accomplished jazz flutist James W. Newton sued members of the musical group The Beastie Boys for digitally sampling and looping the opening six seconds of Newton’s sound recording “Choir” in the defendants’ song “Pass the Mic.”⁹⁸ The sampled sounds appeared over forty times throughout the song.⁹⁹ The Beastie Boys had obtained a license to sample the sound recording but did not have a license to sample the underlying composition.¹⁰⁰ The Ninth Circuit began its infringement analysis by stating that in order for an infringement claim to be actionable, “there must be substantial similarity between the plaintiff’s and the defendants’ works.”¹⁰¹ The court noted that such similarity should be “measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff’s work as a whole.”¹⁰² The court further acknowledged that in order for the infringement to be actionable, the copying must be more than trivial, thus reflecting the de

94. *Id.* at 290.

95. *Id.*

96. *Id.* at 291.

97. *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003).

98. *Id.* at 592.

99. *Id.* at 593.

100. *Id.*

101. *Id.* at 594.

102. *Newton*, 349 F.3d at 596.

minimis test.¹⁰³ The court held that the plaintiff had failed to demonstrate any quantitative or qualitative significance in the unlicensed sample and, therefore, the works were not substantially similar.¹⁰⁴ In other words, the Beastie Boys' use of the "Choir" composition was a de minimis use.¹⁰⁵ Even though the *Newton* court provided some insight into how to consider copyright infringement claims in the digital sampling context, the court's analysis dealt solely with the unlicensed digital sampling of a musical composition and not of a sound recording.¹⁰⁶

Finally, the Sixth Circuit in *Bridgeport Music* gave guidance on how to evaluate a digital sampling copyright infringement claim for sound recordings. The court held that the substantial similarity test was inapplicable toward infringement claims dealing with sound recordings.¹⁰⁷ In finding that there was no role for a substantial similarity test in a digital sampling suit, the court relied on a literal reading of the copyright statute.¹⁰⁸ Section 114(b) of the Copyright Act provides that the exclusive right of the copyright owner in a sound recording under 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 or quality.¹⁰⁹ The court interpreted the literal meaning of the statute as prohibiting the usurpation of any exact sound from a song; thus allowing a sound recording owner the "exclusive right to sample his own recording."¹¹⁰ This interpretation demands that no one can "lift or sample something less than the whole" of the sound recording without infringing on the copyright.¹¹¹ Therefore, because the statute by its own words

103. *Id.* *De minimis non curat lex* – "the law does not concern itself with trifles." *Id.*

104. *Id.* at 598.

105. *Id.*

106. *Id.*

107. *Bridgeport Music*, 383 F.3d at 397.

108. *Id.*

109. 17 U.S.C. §114(b) (2005) [emphasis added].

110. *Bridgeport Music*, 383 F.3d at 397.

111. *Id.* at 398.

excludes the use of a substantial similarity test,¹¹² the extent to which a sampling artist alters the actual sound or whether the ordinary lay listener can or cannot recognize the song is irrelevant. The Sixth Circuit recognized that a sampling artist is “free to imitate or simulate the copyrighted sound recording himself as long as an actual copy of the sound recording itself is not made.”¹¹³ While the Sound Recording Act allows imitations which are substantially similar to the original, the new test is simply whether someone has used the exact sounds of a copyrighted song.¹¹⁴ If actual sounds are appropriated, then the *Bridgeport Music* test requires that the digital pirate be held liable for copyright infringement, regardless of how much she has altered the original sound.¹¹⁵

Notably, the Sixth Circuit also relied on policy arguments in establishing why a de minimis taking or substantial similarity test should not enter an infringement analysis for digital sampling. Unlike appropriating a small portion from a musical composition, any part of a sound recording taken by another, whether small or insignificant, “is something of value.”¹¹⁶ In addition, sampling artists intentionally sample the copyrightable sounds because it saves them money by not obtaining a license and adds quality – which has already gained public appeal – to their new recording.¹¹⁷ By removing any vagueness in license requirements, the court’s decision created a bright-line rule which will substantially reduce the number of lawsuits and promote a faster resolution of these disputes by eliminating the uncertainty over the legality of sampling.¹¹⁸

112. Latham, *supra* note 19, at 125.

113. *Bridgeport Music*, 383 F.3d at 398.

114. Houle, *supra* note 14, at 896 (quoting H.R.Rep. No. 2222, 60th Cong., 2d Sess. 106 (1909)). “Mere imitations of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another’s performance as exactly as possible.” *Id.*

115. Kravis, *supra* note 9, at 252.

116. *Bridgeport Music*, 383 F.3d at 399.

117. *Id.*

118. Kravis, *supra* note 9, at 272.

Digital sampling is the foundation of hip-hop music.¹¹⁹ Therefore, rap artists may argue that the *Bridgeport Music* decision dramatically hinders their creativity and forces many artistic talents to go underground. Some artists may also argue that sampling actually helps increase record sales of the sampled artist. For example, today a younger generation of listeners buys James Brown's records because they have heard a sample of his work in another song.¹²⁰ However, no matter what the artists may argue, sampling without a license constitutes copyright infringement.¹²¹ When an artist samples a sound recording, he knows that he is taking another artist's product.¹²² Therefore, copyright owners have an instant claim of copyright infringement when a song is sampled without their permission, as this constitutes the unauthorized use of copyrightable material owned by another.

IV. CONCLUSION

Digital sampling has transcended the scope of existing copyright law, leaving musicians to speculate as to whether unlicensed sampling constitutes infringement. The law must regulate samplers to protect copyright owners from the unauthorized use of their music. This can occur only with the enactment of a bright-line rule requiring a license in order to sample. The *Bridgeport Music* court drew this bright-line rule where one naturally exists and correctly abandoned a de minimis analysis altogether. There is no longer a need to hypothesize about the ramifications of digital sampling, an artist either gets a license or does not sample. This bright-line rule is straightforward and applicable to all digital sampling infringement actions. In addition to this bright-line rule, the Copyright Act should be amended to clarify the meaning of Section 114. Otherwise, digital sampling left uncensored poses a

119. Kaplicer, *supra* note 12, at 227.

120. Chris Reynolds, Sampling the Future, Technicianonline.com at <http://www.technicianonline.com> (last visited Sept. 17, 2005).

121. *Bridgeport Music*, 383 F.3d at 398.

122. *Id.* at 399.

great threat to the livelihoods of all musicians by having their music distorted through sampling artists who profit from sales of the unlicensed work.

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