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**RESOLVING A COPYRIGHT LAW CIRCUIT SPLIT: THE
IMPORTANCE OF A *DE MINIMIS* EXCEPTION FOR SAMPLED
SOUND RECORDINGS**

INTRODUCTION

Early last year, while doing research for this Note, I heard “Play That Song”—a new single by the band Train—on my local Top 40 radio station.¹ The melody line in the chorus instantly reminded me of “Heart and Soul,” a song I remember tapping out on the piano when I was growing up.² A quick Google search informed me that Train had indeed incorporated the 1938 song into its new single: “[“Play That Song”] is almost a slower, Train version of a hip-hop song with the way [the band uses] . . . the ‘Heart and Soul’ melody as their own family-friendly version of sampling,” wrote one journalist.³

While “sampling” actually is not the best term to describe how Train used the “Heart and Soul” melody (as will be explained in this Note),⁴ that journalist had the right idea: the reproduction and adaptation of original songs to create new ones has grown from its original roots in hip-hop music to become a prevalent feature in mainstream music today.⁵ With technology constantly improving and becoming less expensive, anyone with a computer and some relatively inexpensive software can digitally copy a song and mix his or her own professional-quality tracks.⁶ And as the number of artists copying pieces of older works for use in their own music has increased over the years, so too has the confusion regarding copyright law in this area.

1. TRAIN, PLAY THAT SONG (Columbia Records 2016).

2. Others may instead recall Tom Hanks and Robert Loggia playing the tune on a giant FAO Schwartz keyboard in the movie *Big*. *BIG* (20th Century Fox 1988).

3. Tom Shackelford, *Train Put New Spin on “Heart and Soul” with New Single, “Play That Song,”* AXS (2016), <https://www.axs.com/train-put-new-spin-on-heart-and-soul-with-new-single-play-that-song-107411> [<https://perma.cc/ADG5-JVCC>].

4. “Sampling” will be defined and further discussed herein. See *infra* Section I.B.

5. To see just how prevalent sampling has become, look no further than the website WhoSampled, where a community of 17,000 contributors work to detail the connections between more than 487,000 songs and 164,000 artists from nearly all genres of music. While not all of the songs listed on the site actually contain “samples” according to the legal definition discussed in this Note (some are cover songs and remixes), it is nonetheless an interesting view on the “DNA of music” and a foray into the world of borrowing and reproducing that is such a big part of the music industry today. WHOSAMPLED, <http://www.whosampled.com/> [<https://perma.cc/36LC-64PL>].

6. JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 72 (2006).

Copyright law in the United States attempts to balance the goal of protecting a creator's original works while also avoiding the stifling of further creativity.⁷ It seeks to make it possible for artists to enjoy "the fruits of their creations," without fencing those works off from the rest of the world.⁸ But for many types of copyrightable material, these goals can sometimes be difficult to balance and often end up at odds with each other.

The challenge of balancing these goals is perhaps most clearly illustrated in a recent split between the Sixth and Ninth Circuits. The issue at the center of the split is whether a *de minimis* analysis can be applied when artists "sample" copyrighted sound recordings, thus potentially allowing them to avoid copyright infringement. For many years, the answer to this question was "no," based upon a 2005 ruling by the United States Court of Appeals for the Sixth Circuit.⁹ But in June 2016, the Ninth Circuit came to the exact opposite conclusion, finding that a *de minimis* exception could apply to sampled sound recordings and creating a split between the two circuits.¹⁰

The circuit split must be resolved to eliminate confusion both within the legal community and the music industry, and this Note will argue that the Ninth Circuit's decision is the correct one, that a *de minimis* exception should be allowed in cases involving samples of copyrighted sound recordings. To provide some context for the two circuit court decisions, Part I of this Note will present a brief background of copyright law in general, as well as provide information about digital sampling and the cases that provided legal guidance before the circuit split occurred.¹¹ Part II will discuss the facts, analysis, and conclusion of the Sixth Circuit decision, *Bridgeport Music, Inc. v. Dimension Films*,¹² that provided the precedent in sampling cases involving sound recordings up until June 2016.¹³ Part III will introduce the recent Ninth Circuit case *VMG Salsoul, LLC v. Ciccone*,¹⁴ which created the current split in the circuits.¹⁵ Part IV will analyze both circuits' decisions in an attempt to find which one best matches the intent of Congress, the goal of judicial efficiency, and the fundamental purpose of American copyright law, as well as which has the most positive impact on the music industry.¹⁶ Finally, I will conclude in Part V that the *VMG Salsoul*

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

8. *Id.*

9. *Id.* at 805.

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

11. *See infra* Part I.

12. 410 F.3d at 792.

13. *See infra* Part II.

14. 824 F.3d at 871.

15. *See infra* Part III.

16. *See infra* Part IV.

decision best fits within the abovementioned contexts, and therefore the *de minimis* exception should be allowed in digital sampling cases.¹⁷

I. BACKGROUND

A. *Brief Overview of Music Copyright Law*

American copyright law is grounded in the Constitution, which gives Congress the power to enact copyright legislation.¹⁸ Article I, Section 8 of the U.S. Constitution grants 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.”¹⁹ In accordance with this enumerated power, Congress began to develop federal copyright law in 1790,²⁰ initially only creating laws to protect books, maps, and charts, but eventually extending those protections to musical works as well.²¹ As creative works and technology have evolved, so has copyright law, which now gives the copyright holder a variety of rights to his or her works, including the right to reproduce, adapt, distribute, publicly perform, and publicly display the copyrighted work.²² These rights are given exclusively to the owner of the copyright (though they can be subdivided, owned, and enforced separately), preventing others from using his or her copyrighted work without permission.²³ If someone other than the copyright owner does exercise one of these rights without permission, he or she has committed copyright infringement, unless the use is permitted by an established defense or limitation.²⁴

One of the rights given exclusively to copyright owners is the right to reproduce—and to authorize others to reproduce—the copyrighted work.²⁵ This is the right that is at issue in the world of digital sampling and copyright law.

17. *See infra* Part V.

18. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT OV-1 (Matthew Bender, Rev. Ed. 2015).

19. U.S. CONST. art. I, § 8, cl. 8.

20. NIMMER & NIMMER, *supra* note 18, at OV-1.

21. Ronald Mark Wells, *You Can't Always Get What You Want but Digital Sampling Can Get What You Need!*, 22 AKRON L. REV. 691, 692 (1989).

22. DAVID J. MOSER, MUSIC COPYRIGHT FOR THE NEW MILLENNIUM 3 (2002). See 17 U.S.C. § 106 (2012) for the list of exclusive rights granted to the holder of a copyright.

23. MOSER, *supra* note 22, at 3, 54. Permission is typically granted by the copyright holder through a license. Licenses are agreements between the copyright holder and the new user that set out how the copyrighted work may be used and what compensation the copyright holder will receive for allowing the use (i.e., royalties). *Id.*

24. *Id.* at 54.

25. *Id.* at 55.

B. What is “Sampling”?

“Sampling” can be described as the process of making a copy of an existing sound recording, typically through the use of technology, and incorporating any portion of that copy into a new recording.²⁶ Artists must digitally record a sound from an existing recording to create a sample, which usually lasts no more than a few seconds at most.²⁷ Modern sampling technology allows artists the opportunity to record specific notes or instruments within the original recording and change the pitch, apply various digital effects, “loop” throughout the background, or mix sampled segments to create a distinctive new piece of music.²⁸

Some of the earliest examples of sampling can be found in the music of the *musique concrète*, a style that was the “brainchild” of French engineer Pierre Schaeffer.²⁹ Schaeffer and his followers cut, spliced, and manipulated pre-recorded tapes to form “collages” of different sounds.³⁰ But sampling did not really reach maturity until the creation of the digital sampler in the 1970s, during which sampling entered the world of hip-hop and eventually “catapulted” into mainstream culture.³¹

The late 1980s have been referred to as sampling’s “golden age.”³² Hip-hop had yet to really be considered commercially successful by much of the music industry, and this attitude gave many hip-hop artists the “opportunity to make music exactly as they imagined it, without restrictions.”³³ Artists experimented with and “stitched together” samples from a variety of different sources to create distinctly new pieces of music.³⁴ Or, they looped well-known hooks from earlier songs.³⁵ At that time, few hip-hop artists had concerns about copyright law, so they were able to open themselves up to a “range of artistic possibilities” that

26. Astride Howell, *Sample This!*, 28 L.A. LAWYER 24, 24 (2005); see also *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2003).

27. Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 275–76 (1996).

28. *Id.* at 276.

29. DEMERS, *supra* note 6, at 73.

30. *Id.* at 73–76; MOSER, *supra* note 20, at 62.

31. John Schietinger, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 210–11 (2005).

32. KEMBREW MCLEOD & PETER DICOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* 19 (2011).

33. *Id.* at 20.

34. *Id.* at 20, 26. One writer describes the work of hip-hop group De La Soul, who became famous for their sampling because “they were able to match their experimental approach with platinum sales”: “They had an aesthetic of taking everything and the kitchen sink and throwing it into the blender... [y]ou’d have all kinds of crazy things coming out of the mix, and it sounded the way like a lot of people heard pop culture at that moment in time.” *Id.* at 20–21 (quoting Jeff Chang).

35. *Id.* at 26.

for the most part was not censored by the legal and economic interests of major record labels.³⁶ But as more hip-hop albums found commercial success in the late 1980s and the music industry began seeing the genre as a real source of revenue, the legal landscape also began to change.³⁷

C. *Digital Sampling and Copyright Law*

Although artists using sampled material are directly copying segments of copyrighted songs, it was not actually clear whether unauthorized sampling (i.e., sampling without a license to do so granted by the copyright holder) was illegal until the early 1990s.³⁸ Though there had been some publicized cases of sampling without permission and subsequent threats of copyright lawsuits, most of these were settled outside of court,³⁹ and thus no clear rule was ever established. It was not until 1991 that the uncertainty was finally cleared up.⁴⁰ In *Grand Upright Music Ltd. v. Warner Brothers Records*, the Southern District of New York established that unauthorized sampling was a violation of U.S. copyright law (and, as the judge famously proclaimed, the seventh commandment).⁴¹

The *Grand Upright* decision sparked several other cases involving sampling-related claims and so litigation in the area increased.⁴² But because sampling cases involved songs that contained only segments of original works, instead of exact and whole copies, many courts began applying a *de minimis* analysis—that is, they looked at whether the copying was so small or so trivial

36. *Id.* at 20, 26. Public Enemy is another group well-known for their sampling, and have been seen as taking sampling “to the level of high art while keeping intact hip-hop’s populist heart.” *Id.* at 22. The group apparently did not even bother to clear the many samples in their hit song “Fight the Power” because samplers during that “magical window of time” did not see it is as necessary: “[C]opyright law didn’t affect us yet. [Major labels] hadn’t even realized what samplers did.” *Id.* at 26 (quoting Chuck D).

37. MCLEOD & DiCOLA, *supra* note 32, at 27.

38. MOSER, *supra* note 22, at 62.

39. *Id.* One example of this is the 1990 hit, “Ice Ice Baby” by Vanilla Ice, which sampled the melody line from the song “Under Pressure” by Queen and David Bowie. Vanilla Ice did not obtain permission to use the sample, but the case was never litigated as the threat of a lawsuit prompted a settlement agreement. *Id.*

40. MOSER, *supra* note 22, at 62; *see* *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991).

41. *Grand Upright*, 780 F. Supp. at 183; MOSER, *supra* note 22, at 63. The *Grand Upright* court began with an ominous, “thou shalt not steal,” setting the tone for an opinion that very clearly paints sampling without a license as a “callous disregard for the law and for the rights of others.” *Grand Upright*, 780 F. Supp. at 183, 185.

42. MOSER, *supra* note 22, at 63; *see, e.g.*, *All Nations Music v. Christian Family Network, Inc.*, 989 F. Supp. 863, 865 (W.D. Mich. 1997); *Jarvis v. A & M Records*, 827 F. Supp. 282, 286 (D.N.J. 1993).

that it avoided copyright infringement.⁴³ Most notable of these was *Newton v. Diamond*, a Ninth Circuit case in which the court examined a six-second, three-note segment of a composition by jazz flutist James W. Newton that the Beastie Boys had sampled for one of their own songs.⁴⁴ The court held that the use of a segment of a copyrighted song is *de minimis* “only if the average audience would not recognize the appropriation,” and concluded that the Beastie Boys’ sample fit that definition of a *de minimis* use and therefore was not actionable under copyright law.⁴⁵

At this point it is necessary to make a distinction regarding copyrights for musical works: a single song actually contains two different copyrights, one for the musical composition and another for the sound recording.⁴⁶ The words and music make up the “musical composition” of a song, and this copyright is owned by the songwriter (unless assigned to someone else, like the publisher).⁴⁷ The “sound recording,” on the other hand, is the actual recorded rendition of a song and is usually owned by the record label.⁴⁸

In *Newton*, the plaintiff was the owner of the musical composition copyright and brought the lawsuit based on an alleged infringement of that particular copyright, and thus the analysis of the court focused exclusively on the application of the *de minimis* exception to copyright infringements of compositions.⁴⁹ With *Newton* as precedent, the use of the *de minimis* exception has become well-established in case law involving claims of musical composition copyright infringement.⁵⁰ However, the applicability of a *de minimis* analysis to claims involving sound recordings specifically is much less clear.

In 2005, the United States Court of Appeals for the Sixth Circuit imposed a stricter view of sampling in *Bridgeport Music, Inc. v. Dimension Films* by holding that the *de minimis* analysis could not be used in cases where the copyright infringement claims were for sound recordings.⁵¹ Although the court insisted it “did not pull [its] interpretation out of thin air,” there was no judicial precedent for it to follow as it was the first circuit court to examine the issue of whether the *de minimis* exception could be applied specifically to sound

43. KEVIN PARKS, MUSIC & COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX 163 (2012).

44. 388 F.3d 1189, 1190 (9th Cir. 2003).

45. *Id.* at 1190, 1193.

46. Howell, *supra* note 26, at 24, 26. For a clear portrayal of the two different types of musical copyrights and the scope of their protections, see DEMERS, *supra* note 6, at 22.

47. Howell, *supra* note 26, at 24.

48. *Id.* at 24, 26.

49. *Newton*, 388 F.3d at 1191, 1195.

50. See, e.g., *TufAmerica, Inc. v. WB Music Corp.*, 67 F. Supp. 3d 590, 598 (S.D.N.Y. 2014).

51. 410 F.3d 792, 798 (6th Cir. 2005).

recordings.⁵² The opinion was met with criticism⁵³ and sound recording litigation continued in the district courts with varying results,⁵⁴ but the *Bridgeport* holding remained the prevailing precedent with regard to sound recordings and no other circuit court ruled on the issue. This changed in June 2016 when the United States Court of Appeals for the Ninth Circuit came to the opposite conclusion in *VMG Salsoul*, holding that the *de minimis* exception *should* apply to sound recording samples, creating a split in the circuits that will have undesirable consequences for the music industry if left unresolved.⁵⁵

II. THE SIXTH CIRCUIT'S DECISION IN *BRIDGEPORT*

The United States Court of Appeals for the Sixth Circuit was the first circuit court—and before *VMG Salsoul* was decided, the only one—to address whether the *de minimis* exception applies to alleged infringement of copyrighted sound recordings.⁵⁶ The court examined the issue in *Bridgeport*, a 2005 case that centered around a two-second, three-note guitar riff that was looped throughout the song “100 Miles and Runnin’” (“100 Miles”) by hip-hop group N.W.A.⁵⁷

The case actually began as a massive copyright action commenced by the plaintiffs in 2001, alleging nearly 500 claims of copyright infringement against 800 different defendants who had used unlicensed samples of plaintiffs’ songs in their own recordings.⁵⁸ The action was split into hundreds of separate suits, and eventually one, *Bridgeport*, ended up reaching the Sixth Circuit Court of Appeals.⁵⁹

One of the plaintiffs in that specific case, Westbound Records, owned the sound recording copyright to the song “Get Off Your Ass and Jam” (“Get Off”) by George Clinton, Jr. and the Funkadelics.⁶⁰ “Get Off” opens with a three-note electric guitar solo that lasts four seconds.⁶¹ N.W.A. took a two-second sample from that guitar solo, lowered the pitch, and “looped” it so that it lasted about seven seconds, then inserted it five times throughout their song “100 Miles.”⁶² When the N.W.A. song was then featured on the soundtrack for the movie *I Got*

52. *Id.* at 802–03.

53. *See infra* notes 126 and 184 and accompanying text.

54. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016); *see, e.g.*, *Steward v. West*, No. CV 13-02449 BRO (JCx), 2014 U.S. Dist. LEXIS 186012, at *18–33 (C.D. Cal. Aug. 14, 2014); *Batiste v. Najm*, 28 F. Supp. 3d 595, 605, 626 (E.D. La. 2014); *EMI Records Ltd. v. Premise Media Corp.*, No. 601209-08, 2008 WL 5027245, at *4–5 (N.Y. Sup. Ct. Aug. 8, 2008).

55. 824 F.3d at 886.

56. *No Infringement for Trivial Copying of Sound Recording: Ninth Circuit*, PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY, W-002-5454 (June 3, 2016).

57. *Bridgeport*, 410 F.3d at 795–96.

58. PARKS, *supra* note 43, at 163.

59. *Id.*

60. *Bridgeport*, 410 F.3d at 796.

61. *Id.*

62. *Id.*

the Hook Up, released by defendant No Limit Films, Westbound filed suit alleging unauthorized use of the “Get Off” sound recording sampled in “100 Miles.”⁶³

Although the district court in *Bridgeport* did find that the sample was original, and thus entitled to copyright protection, it ended up granting summary judgment for the defendants under the *de minimis* exception.⁶⁴ The court made this determination by analyzing both the quantitative and qualitative factors of the sample.⁶⁵ It found minimal quantitative copying (the sample was only four seconds of the two and half minute running time of “Get Off,” while the total length of all the looped segments comprised nearly forty seconds of “100 Miles”) and a “lack of qualitative similarity” between the works (the sample was made to sound like police sirens in “100 Miles,” a song about four black men being wrongly pursued by law enforcement, whereas the same riff in “Get Off” kicks off a celebratory dance anthem).⁶⁶ The court found that “no reasonable jury, even one familiar with the works of George Clinton (the author of “Get Off”), would recognize the source of the sample without having been told.”⁶⁷ Thus the *Bridgeport* district court found that the sample used in “100 Miles” did not “rise to the level of a legally cognizable appropriation” and dismissed Westbound’s copyright infringement claims.⁶⁸

However, when the case went up on appeal, the Sixth Circuit reversed the district court’s summary judgment ruling.⁶⁹ The Sixth Circuit’s analysis in *Bridgeport* focused on 17 U.S.C. § 114(a)-(b), the statute detailing the exclusive rights of sound recording copyright owners.⁷⁰ Section 114(b) states that:

The exclusive right of the owner of copyright in a sound recording under clause [two] of section 106⁷¹ 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.⁷²

63. *Id.* at 795. Bridgeport Music, the lead plaintiff in the case, owned the music composition rights to “Get Off” and also brought an action for copyright infringement against the defendants; however, the district court dismissed this claim upon finding the defendants were authorized to use the sample by a previous agreement. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 838 (M.D. Tenn. 2002). This Note will focus specifically on the sound recording claim.

64. *Bridgeport*, 230 F. Supp. 2d at 839, 842–43.

65. *Id.* at 841.

66. *Id.* at 841–42.

67. *Id.* at 842.

68. *Id.* at 841–42.

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

70. *Id.* at 799.

71. Section 106(2) gives owners of sound recording copyrights the exclusive rights “to prepare derivative works based upon the copyrighted work.” 17 U.S.C. § 106(2) (2012).

72. 17 U.S.C. § 114(b) (2012).

The Sixth Circuit reasoned this to mean that the copyright owner maintains the exclusive rights to “sample” his or her own sound recording.⁷³ Therefore, any artist who directly takes “something less than the whole” from the sound recording without prior permission from the copyright owner commits copyright infringement.⁷⁴

In *Bridgeport*, the Sixth Circuit’s analysis both began and ended with the above statute; not only did the court choose not to perform a *de minimis* analysis like the district court, but it went so far as to explicitly conclude that the *de minimis* exception could not apply to copyright infringement claims involving sound recordings at all.⁷⁵ The Sixth Circuit held that the analysis used to determine infringement of a musical composition copyright is not the same as the analysis used in sound recording copyright infringement cases, and in applying a *de minimis* analysis, the *Bridgeport* district court had incorrectly treated the case as if it were a musical composition copyright infringement claim.⁷⁶ Why should the analysis of a copyright infringement claim involving a musical composition be any different from that of a sound recording? To answer that question, the Sixth Circuit first pointed to the previously mentioned statute, which it argued precluded the *de minimis* exception by giving copyright owners exclusive rights to sample their own music.⁷⁷ Additionally, the court noted that sampling a sound recording is not just duplication; it is actual and purposeful copying, “a physical taking rather than an intellectual one.”⁷⁸

The Sixth Circuit listed a variety of policy reasons for creating a bright-line rule instead of allowing defendants to argue against copyright infringement using a *de minimis* exception. First, a bright-line rule makes enforcing copyrights easier.⁷⁹ The Sixth Circuit said that the *Bridgeport* district court opinion “illustrate[d] the kind of mental, musicological, and technological gymnastics that would have to be employed if one were to adopt a *de minimis* or substantial similarity analysis.”⁸⁰ While it did commend the district court judge’s “excellent job of navigating [the] troubled waters” of a *de minimis* analysis, it referenced the earlier split of the *Bridgeport* claims into several hundred different cases—all involving different samples from different songs—and said that considering the time and effort that would be put into analyzing each of those cases, “the value of a principled bright-line rule becomes apparent.”⁸¹ A bright-line rule could make things easier for artists too, as it

73. *Bridgeport*, 410 F.3d at 801.

74. *Id.* at 800; Schietinger, *supra* note 31, at 228.

75. *Bridgeport*, 410 F.3d at 798–99.

76. *Id.* at 798.

77. *Id.* at 800–01.

78. *Id.* at 802.

79. *Id.* at 801.

80. *Bridgeport*, 410 F.3d at 802.

81. *Id.*

makes the law much less confusing for those interested in sampling from a copyrighted work.⁸² As the presiding judge in *Bridgeport* so clearly stated, “Get a license or do not sample.”⁸³ The court argued that this strict rule does not stifle creativity in any way, stating that if an artist wanted to incorporate a segment from another song into his or her own, the artist “is free to duplicate the sound of that ‘riff’ in the studio.”⁸⁴

In addition to those judicial efficiency arguments, the court considered the economy of the music industry, pointing out that it is “cheaper to license than to litigate” and reasoning that copyright holders and artists alike would prefer to spend their resources obtaining license agreements rather than litigating costly copyright infringement cases.⁸⁵ In terms of the price of licensing, the Sixth Circuit employed a sort of efficient market theory to keep the license price “within bounds.”⁸⁶ “The sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording,” the court stated.⁸⁷

Finally, in a tone somewhat reminiscent of the “thou shalt not steal” line from the *Grand Upright* opinion, the Sixth Circuit noted that “sampling is never accidental. . . . [w]hen you sample a sound recording you know you are taking another’s work product.”⁸⁸ Sampling is an actual copying, a “physical taking” of a segment of a copyright work, and the Sixth Circuit decided that reasoning was sufficient to ignore a *de minimis* analysis like employed in musical composition copyright infringement cases and instead establish a bright-line rule.⁸⁹

III. THE NINTH CIRCUIT’S DECISION IN *VMG SALSOWL*

Despite the response *Bridgeport* received,⁹⁰ Congress did not take any steps to clarify the law in the years following the decision, nor does it seem that the music industry made any requests for it to do so, as the Sixth Circuit had suggested.⁹¹ And despite the variety of decisions being made by the district courts that were not bound by the Sixth Circuit’s decision, no other circuit court decided to take up the issue.⁹² It was not until *VMG Salsoul* was decided by the Ninth Circuit in June 2016 that the issue of the *de minimis* exception’s

82. *Id.*

83. *Id.* at 801.

84. *Id.*

85. *Bridgeport*, 410 F.3d at 802.

86. *Id.* at 801.

87. *Id.*

88. *Id.*

89. *Id.* at 802.

90. *See supra* note 54 and corresponding text.

91. *Bridgeport*, 410 F.3d at 805.

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

applicability to sound recording copyright infringement claims was discussed again by a circuit court.⁹³

The copyright infringement claim in *VMG Salsoul* revolved around Madonna's popular 1990 song "Vogue."⁹⁴ Shep Pettibone—who, along with Madonna herself, was a defendant in the case—produced the sound recording for the song.⁹⁵ While recording "Vogue," Pettibone sampled sounds from a recording of "Ooh I Love It (Love Break)," a song he had recorded in the early 1980s for the Salsoul Orchestra.⁹⁶ The copied sounds included two different "horn hits" from "Love Break": a "single" horn hit that consisted of an 0.23-second quarter-note chord played predominantly by trombones and trumpets, and a "double" horn hit that consisted of an eighth-note and quarter-note with the same notes and instruments.⁹⁷ Pettibone copied the single horn hit, raised the pitch a half-step, and inserted it five different times through "Vogue."⁹⁸ Those facts led VMG Salsoul, the company that owned the copyrights for "Love Break," to file suit asserting that the defendants violated the "Love Break" sound recording copyright by sampling from the song.⁹⁹

The district court in *VMG Salsoul* granted the defendants' motion for summary judgment, finding that the "Love Break" horn hits were "not sufficiently unique to be a copyrighted element of the sound recording" and therefore not subject to copyright protection.¹⁰⁰ However, the court also performed a *de minimis* analysis and found that even if the horn hits had been protected under copyright law, Pettibone's sampling of them was *de minimis*.¹⁰¹

When the judgment was appealed, the Ninth Circuit also undertook a *de minimis* inquiry to determine whether the sampling was significant enough to

93. *Id.*

94. *Id.* at 874.

95. *VMG Salsoul, LLC v. Ciccone*, No. CV 12-05967 (BRO) (CWx), 2013 WL 8600435, at *1 (C.D. Cal. Nov. 18, 2013).

96. *VMG Salsoul*, 824 F.3d at 875; *Salsoul Orchestra*, WIKIPEDIA, https://en.wikipedia.org/wiki/Salsoul_Orchestra [<https://perma.cc/3B9C-3GGZ>].

97. *VMG Salsoul*, 824 F.3d at 875.

98. *Id.* at 875–76. The plaintiff in the case also challenged another version of "Vogue" created by Pettibone, the "compilation" version, which is about thirty seconds longer and contained a different variation of the sampled horn hits. *Id.* at 876.

99. *Id.* at 874. VMG Salsoul also alleged that the defendants violated its copyright to the music composition of "Love Break," and the court found that "[a] reasonable jury could not conclude that an average audience would recognize an appropriation of the *Love Break* composition." *Id.* at 875, 879. This Note, however, will focus solely on the court's analysis and conclusion regarding the sound recording copyright infringement claim.

100. *VMG Salsoul*, 2013 WL 8600435 at *8, *12.

101. *Id.* at *11. The district court concluded that, "no reasonable audience would find the sampled portions qualitatively or quantitatively significant in relation to the infringing work, nor would they recognize the appropriation." *Id.* at *12.

establish a copyright infringement claim.¹⁰² The court pointed out that the length of the horn hit is “very short,” it occurs only a few times throughout “Vogue” and is easy to miss unless the listener is paying careful attention, and it doesn’t sound the same as the hit in “Love Break” because Pettibone transposed the chord into a different key and added other sounds, effects, and instrument tracks before adding it to “Vogue.”¹⁰³ After analyzing these facts, the court concluded that no average audience member would recognize the appropriation of the horn hit: “Even if one grants the dubious proposition that a listener recognized some similarities between the horn hits in the two songs, it is hard to imagine that he or she would conclude that sampling had occurred.”¹⁰⁴ Therefore, the Ninth Circuit affirmed the district court’s finding that the copying of the sound recording was *de minimis*.¹⁰⁵

In addition to arguing that the “Vogue” sampling amounted to more than a *de minimis* copying, VMG Salsoul urged the Ninth Circuit to follow the Sixth Circuit’s bright-line rule in *Bridgeport* and find that the *de minimis* exception does not apply at all to claims of copyright infringement of sound recordings.¹⁰⁶ However, the Ninth Circuit—after looking closely at case law, copyright statutes, and evidence of congressional intent—decided that the exception *does* still apply, even in allegations specifically regarding sound recordings.¹⁰⁷

Aside from the *Bridgeport* decision, the Ninth Circuit could find no evidence of another court that held that the *de minimis* doctrine does not apply in a certain type of copyright infringement case.¹⁰⁸ Instead, it found that courts consistently applied the *de minimis* analysis in cases of *all* types of copyright infringement, and as stated in dictum in the *Newton* case, the doctrine was meant to apply “*throughout the law of copyright*, including cases of music sampling.”¹⁰⁹ Despite the existence of the *de minimis* exception throughout copyright case law, the plaintiff in *VMG Salsoul* argued “that Congress intended to create a special rule for copyrighted sound recordings, eliminating the *de minimis* exception.”¹¹⁰ But after analyzing copyright statutes and legislative history, the Ninth Circuit rejected this argument as well.¹¹¹

102. *VMG Salsoul*, 824 F.3d at 877. The Ninth Circuit found that the plaintiff had sufficient facts to demonstrate actual copying, and therefore needed to prove that the copying was “significant enough to constitute infringement,” in order “to establish its infringement claim, Plaintiff must show that the copying was greater than *de minimis*.” *Id.* (emphasis added).

103. *Id.* at 880.

104. *Id.*

105. *Id.*

106. *Id.*

107. *VMG Salsoul*, 824 F.3d at 884.

108. *Id.* at 881.

109. *Id.* (emphasis added) (quoting *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2003)).

110. *Id.* at 881 (emphasis added).

111. *Id.* at 884.

Section 102 contains a list of categories of materials that are protected under copyright law, and specifically included in that list are sound recordings.¹¹² The Ninth Circuit noted in *VMG Salsoul* that the statute treats sound recordings the same as the other types of materials: “[N]othing in the text suggests differential treatment, for any purpose, of sound recordings.”¹¹³ Even though, as the plaintiff pointed out, there are some provisions within the code that do deal exclusively with sound recordings or in some specific way limit the protections offered to them, none of those provisions speak to “whether Congress intended to eliminate the longstanding *de minimis* exception for sound recordings in all circumstances”¹¹⁴ The court also pointed to legislative history, which included a passage in which Congress, while discussing statutory protections for sound recordings, stated that “infringement takes place whenever all *or any substantial portion* of the actual sounds . . . are reproduced.”¹¹⁵ The Ninth Circuit found this to be evidence that Congress “clearly understood” the *de minimis* exception to apply to copyrighted sound recordings, just as it did to all other copyright works, and that it intended to maintain that exception for sound recordings.¹¹⁶

One of the Sixth Circuit’s arguments in *Bridgeport* was that the *de minimis* exception should not apply to sound recordings because they are “physical taking[s].”¹¹⁷ The Ninth Circuit disagreed with this determination for three different reasons. First, it pointed out that the *de minimis* exception is allowed in cases involving “physical taking[s]” of other types of copyrightable works, such as photographs.¹¹⁸ The court also reasoned that even if sound recordings do “differ qualitatively from other copyrighted works” so that they could potentially warrant a different rule, that difference does not mean that Congress necessarily adopted a different rule.¹¹⁹ Finally, it criticized the Sixth Circuit’s distinction between an “intellectual taking” and a “physical taking” by citing the Supreme Court’s view that the Copyright Act protects only the “expressive aspects of a copyrighted work,” instead of the “fruit of the [author’s] labor.”¹²⁰ Because no distinction should exist, the court reasoned that *Bridgeport* was simply arguing that expressive content had been taken from the original artist,

112. 17 U.S.C. § 102 (2012).

113. *VMG Salsoul*, 824 F.3d at 881–82. The court also cites 17 U.S.C. § 106 (2012) as another example of Congress treating sound recordings identically to other types of copyrightable works. *Id.* at 882.

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

115. *Id.* at 884 (quoting H.R. Rep. No. 94-1476, at 61 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674).

116. *Id.*

117. *VMG Salsoul*, 824 F.3d at 885; *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005).

118. *VMG Salsoul*, 824 F.3d at 885.

119. *Id.*

120. *Id.* (alteration in original) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)).

and “that is always true, regardless of the nature of the work, and the *de minimis* test nevertheless applies.”¹²¹

The Ninth Circuit also dismissed VMG Salsoul’s argument that the *Bridgeport* rule should stand as a matter of policy, as well as its argument that because Congress did not amend the copyright statute in response to the *Bridgeport* ruling, the Sixth Circuit’s decision should stand.¹²² “The Supreme Court has held that congressional inaction in the face of a judicial statutory interpretation . . . carries almost no weight,” the Ninth Circuit stated in its opinion, pointing out that Congress’s inaction had “even less import,” considering the fact that many district courts declined to follow the *Bridgeport* rule.¹²³ It also responded directly to the Sixth Circuit’s policy reasons for creating the *Bridgeport* bright-line rule, such as easy enforceability, by stating that “[t]hose arguments are for a legislature, not a court. They speak to what Congress *could decide*; they do not inform what Congress *actually decided*.”¹²⁴

It is clear in *VMG Salsoul* that the Ninth Circuit did not take lightly its decision to disagree with the Sixth Circuit, as it was well-aware of the “particularly troublesome” nature of a circuit split, particularly in the world of copyright, where inconsistent rules “lead to different levels of protection in different areas of the country.”¹²⁵ But, citing its “independent duty to determine congressional intent” and the alternative of being forced to “blindly follow” a rule it believed to be incorrect just because another circuit decided the issue first, it chose to maintain the applicability of the *de minimis* exception to actions alleging infringement of a copyright to sound recordings.¹²⁶ The court also pointed out that the leading copyright treatise, *Nimmer on Copyright*, disagreed with the *Bridgeport* opinion, and that nearly every district court outside of the Sixth Circuit has declined to follow the *Bridgeport* opinion when faced with the issue of applying the *de minimis* exception to copyrighted sound recordings; although the Ninth Circuit was the first federal circuit court to come to a different conclusion than *Bridgeport*, it was “in well-chartered territory.”¹²⁷

IV. ANALYSIS OF THE *BRIDGEPORT* AND *VMG SALSOU*L CIRCUIT SPLIT

There is no doubt that a circuit split in any area of the law is an unwelcome occurrence. Disagreement among the courts creates uncertainty about the law. If people are expected to conform to a law, it is only fair that its meaning and applicability is clearly communicated to them so they can follow it

121. *VMG Salsoul*, 824 F.3d at 885 (emphasis added).

122. *Id.* at 886.

123. *Id.* at 886–87.

124. *Id.* at 887.

125. *Id.* at 886.

126. *VMG Salsoul*, 824 F.3d at 886–87.

127. *Id.* at 886.

accordingly.¹²⁸ And as the Ninth Circuit noted in *VMG Salsoul*, a circuit split in the area of copyright law is particularly problematic, as “inconsistent rules among the circuits would lead to different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide.”¹²⁹ It is therefore in the best interest of both the legal community and the music industry to see the resolution of this circuit split over the use of the *de minimis* exception in sound recording copyright cases. After analyzing both circuits’ decisions, the best resolution would be to follow the Ninth Circuit’s ruling and allow a *de minimis* exception in copyright infringement cases involving sound recording claims. As discussed below, this is the rule that would best fit within the contexts of Congress’s role in making copyright law, efficiency among the courts, and the general purpose and aims of copyright law, and would have the most positive impact on the music industry.

A. *The Role and the Intent of Congress*

The ability to create copyright law is an enumerated power given to Congress in Article I, Section 8 of the Constitution.¹³⁰ Because Congress’s role in creating copyright law is so important—and because a large part of both the *Bridgeport* and *VMG Salsoul* opinions turn on the interpretation of § 114(b) of the 1976 Copyright Act, the statute that protects a copyright owner’s right to a sound recording¹³¹—it is important to first analyze whether or not Congress intended for a *de minimis* exception to apply within the realm of digital sampling.

When the Sixth Circuit ruled that a *de minimis* analysis could not be used in sound recording copyright cases,¹³² it did away with the idea of substantial similarity in the context of those types of cases, and in doing so created a rule “at odds with the balance of jurisprudence” that forms the rest of American copyright law.¹³³ Substantial similarity has long been an essential element in forming an actionable copyright claim; as the Supreme Court stated in *Newton*, “[E]ven where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.”¹³⁴ Other copyright law

128. See *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265 (1994) (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . .”).

129. *VMG Salsoul*, 824 F.3d at 886.

130. U.S. CONST. art. I, § 8, cl. 8.

131. See *VMG Salsoul*, 824 F.3d at 882–84; *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799–801 (6th Cir. 2005).

132. *Bridgeport*, 410 F.3d at 801–02.

133. 4 NIMMER & NIMMER § 13.03[A][2][b].

134. *Id.* (quoting *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2003)).

claims allow a *de minimis* exception to be used;¹³⁵ in fact, the *de minimis* doctrine is recognized as being especially important in copyright law because it “can be used to identify both insignificant technical violations and those that fall below the substantial similarity threshold.”¹³⁶

But as the Ninth Circuit pointed out, there are other provisions throughout the Copyright Act in which sound recordings *do* receive different treatment and are singled out accordingly; § 114(b), however, is not one of those sections.¹³⁷ The Ninth Circuit’s decision to take this fact as evidence that Congress did not intend to create a distinction between sound recordings and other types of copyrightable material when it comes to a *de minimis* exception is a logical one, especially considering the legislative history. In a portion of § 114’s legislative history, Congress explicitly noted that “infringement takes place whenever all or any *substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method.”¹³⁸ As *Nimmer on Copyright* points out, “had *Bridgeport Music* consulted § 114’s legislative history instead of dismissing that history as irrelevant,” the Sixth Circuit might have realized that its argument that Congress intended “to dispense with traditional notions of substantial similarity”—and therefore, the *de minimis* exception—seems off-base.¹³⁹ The Sixth Circuit reasoned that the legislative history is “of little help” because digital sampling was not being done in 1971 when § 114 of the Copyright Act was being written by Congress.¹⁴⁰ However, as discussed earlier in this Note, there were artists before and at the time the Copyright Act was created who were copying portions of sound recordings for their own use.¹⁴¹ Additionally, based on the “or any other method” language in the above-quoted

135. See, e.g., *Pruté v. Universal Music Grp., Inc.*, 699 F. Supp. 2d 15, 19 (D.D.C. 2010) (granting a motion for summary judgment for the defendant after analyzing a collection of lyrics from artists on defendant’s label and finding the words and ideas were not substantially similar to those of the plaintiff’s); *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 218 (2d Cir. 1998) (using a substantial similarity analysis to determine that several photographs appearing briefly in a movie was *de minimis*); *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997) (using a substantial similarity analysis to determine that a television station’s use of a copyrighted poster that was visible in that background of a scene was more than *de minimis*); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73, 84–85 (6th Cir. 1943) (recognizing a general *de minimis* analysis for copyright cases when it dismissed on *de minimis* grounds the plaintiff’s claim alleging copyright infringement against a defendant who used the same sketches plaintiff had used in its catalog).

136. Schietinger, *supra* note 31, at 231 (citing *Ringgold*, 126 F.3d at 74–75).

137. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 882 (9th Cir. 2016).

138. H.R. Rep. No. 94-1476, at 106 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674 (emphasis added).

139. *NIMMER & NIMMER*, *supra* note 133, § 13.03[A][2][b].

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

141. See *supra* Section I.B.

legislative history, it seems as though Congress did actually foresee the possibility of technology being advanced to the point of being able to easily copy small portions of sound recordings, and it “decided to retain the universally accepted notion of substantial similarity under those circumstances.”¹⁴² Therefore, the fact that the digital sampler was not created until the 1970s does not make the legislative history of § 114 irrelevant.

Additionally, prohibiting the use of a *de minimis* exception directly conflicts with the concept of fair use, another defense that is used throughout copyright law, including in the area of digital sampling and sound recordings.¹⁴³ The fair use defense allows for the reproduction of copyrighted works for certain specific “fair” uses (such as teaching, scholarship, or research) and is codified in § 107 of the Copyright Act.¹⁴⁴ In determining whether the unauthorized use of a copyrighted work falls within the doctrine of fair use, § 107 sets out four factors that should be considered, one of which is “the *amount* and *substantiality* of the portion used in relation to the copyrighted work as a whole.”¹⁴⁵ If a defendant who sampled from a copyrighted sound recording wanted to use the fair use defense against an allegation of copyright infringement, evidence would have to be presented as to the amount and substantiality of the sample in relation to the entire sound recording, and the court would have to consider this; in essence, the court would have to perform a *de minimis* analysis. It seems illogical to prohibit the use of the *de minimis* exception when it forms part of the fair use analysis, a defense that is already considered acceptable to use in cases involving sound recording copyrights.

The plaintiffs in *VMG Salsoul* argued that because Congress did not amend the copyright statute at any point in the eleven years between the *Bridgeport* and *VMG Salsoul* decisions to clarify whether or not a *de minimis* exception should apply to sound recording cases, the Sixth Circuit’s decision correctly matched Congress’s intent.¹⁴⁶ But as the Ninth Circuit pointed out, this argument is

142. NIMMER & NIMMER, *supra* note 133, at 13-62 n.114.17.

143. Schietinger, *supra* note 31, at 235. Even the Sixth Circuit acknowledges the fair use defense in the realm of sound recording copyright cases: the court concluded the *Bridgeport* decision by stating that “[s]ince the district judge found no infringement, there was no necessity to consider the affirmative defense of ‘fair use.’ On remand, the trial judge is free to consider this defense and we express no opinion on its applicability to these facts.” *Bridgeport*, 410 F.3d at 805. Therefore, in the *Bridgeport* opinion, the Sixth Circuit created a rule that a *de minimis* or substantial similarity analysis could not be used in sound recording cases, but also allowed a defendant the possibility to prevail if it can establish fair use, when one of the factors of that defense includes a substantial similarity analysis. NIMMER & NIMMER, *supra* note 133, § 13.03[A][2]; *see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 571–72 (1994) (ruling that the defendant could use a fair use defense in a case involving digital sampling).

144. 17 U.S.C § 107 (2012).

145. 17 U.S.C § 107(3) (emphasis added).

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

unconvincing.¹⁴⁷ First, the Supreme Court itself has held that a lack of congressional action concerning a court's interpretation of a statute "carries almost no weight," so Congress not speaking up at any point after the *Bridgeport* decision does not necessarily mean it agreed.¹⁴⁸ Additionally, so many other courts have declined to follow the *Bridgeport* rule that Congress's lack of response to a decision by one circuit seems to be of even less importance.¹⁴⁹

B. *The Idea of Judicial Efficiency*

It is also important to consider the two circuits' rulings in terms of judicial efficiency, because both the Sixth Circuit and the Ninth Circuit address it in their opinions and note its importance.¹⁵⁰ "Judicial efficiency" (or "judicial economy") refers to efficiency in the operation of the courts and the justice system as a whole, particularly "the efficient management of litigation so as to . . . avoid wasting the judiciary's time and resources."¹⁵¹ A bright-line rule is often considered to be more efficient for the courts, but this does not necessarily mean that the Sixth Circuit's prohibition of the *de minimis* exception is in the interest of judicial efficiency.

One of the benefits of a bright-line rule is that it can establish consistency in the rulings of cases within an area of law and provide clarity for what the law actually is. Surely that was one of the Sixth Circuit's interests in creating a bright-line prohibiting the *de minimis* exception in *Bridgeport*;¹⁵² however, that goal was not achieved. As previously mentioned, after the *Bridgeport* decision was made, it was immediately criticized by leading legal scholars, and nearly every district court not bound by the Sixth Circuit's opinion declined to follow it.¹⁵³ Any goal the Sixth Circuit had in creating more consistency, clarity, and efficiency among the courts by adopting a bright-line rule was clearly not met.

Another argument the Sixth Circuit made for prohibiting a *de minimis* analysis was that it would decrease litigation, an idea that stemmed from the fact that the *Bridgeport* case discussed in this Note was just one of nearly 500 claims of copyright infringement alleged by those same plaintiffs.¹⁵⁴ The court reasoned that a bright-line, "get a license or do not sample" rule would encourage artists to get licenses instead of getting involved in litigation, thus

147. *Id.*

148. *Id.* "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)).

149. *VMG Salsoul*, 824 F.3d at 887.

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

151. *Judicial Economy*, BLACK'S LAW DICTIONARY (10th ed. 2009).

152. *Bridgeport*, 410 F.3d at 802.

153. *VMG Salsoul*, 824 F.3d at 886.

154. PARKS, *supra* note 43, at 163; *supra* Part II.

decreasing the amount of cases being brought into court.¹⁵⁵ However, this seems to suggest that copyright litigation is already rampant, while in reality not every case of copyright infringement ends up going to court: some because they are settled by the parties, and many more because attorneys make the determination that the claim is not worth the time and money to litigate.¹⁵⁶ A bright-line rule could even potentially create *more* litigation: “[T]he open-ended nature of [the *Bridgeport*] ruling invites all kinds of frivolous lawsuits that will benefit neither artists nor fans.”¹⁵⁷ “Get a license or do not sample”¹⁵⁸ is a bright-line rule that guarantees a ruling in favor of the copyright owner in any sampling case that goes to trial, and therefore in a way encourages the owner to bring an infringement claim “anytime their music is sampled, no matter how insignificant.”¹⁵⁹ A bright-line rule may make the process of deciding an individual case more efficient, but if it also spurs an increase in the number of cases that are litigated, that is hardly a win for judicial efficiency.¹⁶⁰

C. *The Purpose of American Copyright Law*

As previously discussed, the fundamental goal of American copyright law as set out in the Constitution is to “promote the *Progress*” of art and the creation of new works.¹⁶¹ With that in mind, perhaps the most disheartening part of the *Bridgeport* opinion is that it clearly misunderstands the role digital sampling plays in the music industry and the importance and creativity of that manner of making music. The Sixth Circuit’s decision fails to recognize sampling as a legitimate form of art, one that “has the potential to be inventive and influential,”¹⁶² and one that pays homage to other artists and cultures.¹⁶³ Thus, forbidding *de minimis* sampling of sound recordings goes directly against the goal of American copyright law to promote progress and creativity.

While the rule set out in *Bridgeport* undoubtedly simplifies the law for the music industry—“get a license or do not sample” could hardly be any clearer—

155. *Bridgeport*, 410 F.3d at 801–02.

156. DEMERS, *supra* note 6, at 113. In the book, a former attorney for the Disney Corporation describes the process of assessing potential copyright claims, stating that in-house attorneys first determine whether there is an actionable claim, then make a “real-world determination” of whether or not the company will make any money, whether the public will even see the work at issue, and if the company even “really care[s].” *Id.* Based on that description, it almost seems as though attorneys for record labels and artists do their own *de minimis* analysis before even bringing a claim to court.

157. Schietinger, *supra* note 31, at 245 (quoting Renee Graham, *An Anti-Sampling Court Ruling Limits the Options of Hip-Hop’s Best*, BOSTON GLOBE, Sept. 16, 2004, at D1).

158. *Bridgeport*, 410 F.3d at 801.

159. Schietinger, *supra* note 31, at 245–46.

160. *Id.* at 246.

161. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

162. Schietinger, *supra* note 31, at 234.

163. DEMERS, *supra* note 6, at 4.

it also “chills a lot of artistic expression.”¹⁶⁴ Under the Sixth Circuit’s rule, sampling even the smallest portions of a copyrighted sound recording could no longer be a “viable option” for some artists, as they would be forced to pay an expensive fee to license the sound recording.¹⁶⁵ The clearance of samples can be extremely time-consuming and expensive for both independent musicians and major label artists alike, adding tens of thousands of dollars to production costs and amounting to “a legal and administrative hassle.”¹⁶⁶ And for many artists, it is hardly a practical alternative to duplicate certain sounds in a studio instead of sampling them, as the Sixth Circuit suggested in *Bridgeport*.¹⁶⁷ Not all musicians can afford to purchase a variety of instruments or studio time, both of which can be extremely expensive.¹⁶⁸ Digital sampling is one technology that has allowed more people to create music for less money, but those same people would likely be precluded from making music under the *Bridgeport* rule.

Additionally, requiring all artists to seek permission through a license before sampling a portion of a sound recording gives copyright owners the ability to censor, “denying permission to anyone whose musical message they dislike.”¹⁶⁹ The possibility of censorship directly conflicts with the ideas of progress and creativity, ideas that provide the base of American copyright law.

Of course, it would be unwise to ignore that the Constitution also seeks to give some protection for copyright owners to further the above-mentioned goal, and copyright law today seeks to balance these two sometimes conflicting interests.¹⁷⁰ But in the realm of *de minimis* digital sampling, those two aims do not necessarily conflict.

One writer analogized prohibiting a *de minimis* sampling of sound recordings to “requiring a painter to obtain a license [to use] the canvas upon

164. Marjorie Heins, *Trashing the Copyright Balance*, FREE EXPRESSION POL’Y PROJECT (Sept. 21, 2004), <http://www.fepproject.org/commentaries/bridgeport.html> [<https://perma.cc/2QNZ-R8ZG>].

165. Schietinger, *supra* note 31, at 233–34.

166. Schietinger, *supra* note 31, at 238 (quoting 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, 93 (1993)). It was reported that the second album of De La Soul, a hip-hop group well-known for its use of sampling, was released in 1991 and “featured more than 50 samples and cost over \$100,000 in clearance and legal fees.” Baroni, *supra* at 92–93. Public Enemy, another hip-hop group hailed for its creative use of samples, says it now follows a flat-out “no samples” policy: “We don’t have the man power or the legal power or the money to deal with those issues.” DEMERS, *supra* note 6, at 119 (quoting Walter Leaphard).

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

168. Scheitinger, *supra* note 31, at 236 nn.234–37.

169. Heins, *supra* note 164. An example of this occurred when the owners of the copyright to the song “Oh Pretty Woman” by Ray Orbison denied a “raunchy rap group,” Two Live Crew, permission to record a much more vulgar version of the song. *Id.* These types of situations could be resolved through compulsory licensing—but that is another topic for another note.

170. *Bridgeport*, 410 F.3d at 800.

which he paints.”¹⁷¹ Like a painter’s canvas, a sample of a sound recording is just the “starting point” for a new creative work: “[A]lthough 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.”¹⁷² Following that logic, a *de minimis* exception for digital sampling cases would also not go against the second aim of copyright law—to protect the rights of copyright owners—because the analysis courts would perform would separate artists who use tiny portions of a copyrighted work and transform them into something new, unique, and completely unrecognizable from those artists who directly copy everything.¹⁷³ That second purpose of copyright law seeks to “deter wholesale plagiarism of prior works,”¹⁷⁴ and *de minimis* samples where the original work is far from recognizable can hardly be considered “wholesale plagiarism.”

Finally, prohibiting a *de minimis* exception is simply “profoundly wrong as a matter of copyright principles.”¹⁷⁵ As stated by a judge in one of the earliest copyright cases over 150 years ago, “Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”¹⁷⁶ The *de minimis* exception is one way in which copyright law “acknowledges the importance of creative copying.”¹⁷⁷

D. *The Impact on the Music Industry*

Although the Ninth Circuit chose not to perform a policy analysis in *VMG Salsoul*,¹⁷⁸ it remains important to discuss as the Sixth Circuit did make several policy arguments in *Bridgeport*,¹⁷⁹ and the rule does indeed have effects on the music community. A bright-line rule forbidding a *de minimis* exception in sound recording copyright cases has been shown to have a negative impact on the music community, and in turn, on society in general.¹⁸⁰

The *Bridgeport* decision has directly impacted the music industry in terms of the way artists and labels treated works containing sampled sound recordings.¹⁸¹ It has changed the advice copyright attorneys give their clients:

171. Schietinger, *supra* note 31, at 234 (quoting Nate Lindell, *Are Courts Really Copyright-Competent?*, (Oct. 7, 2004).

172. *Id.*

173. *Id.*

174. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 842 (M.D. Tenn. 2002).

175. Heins, *supra* note 164.

176. *Id.* (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845)).

177. Heins, *supra* note 164.

178. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 887 (9th Cir. 2016). The court said that the Sixth Circuit’s policy arguments were “for a legislature, not a court” and spoke “to what Congress *could decide*” as opposed to what it actually decided, and therefore it did not address those issues. *Id.*

179. *Supra* Part II.

180. Howell, *supra* note 26, at 28; Schietinger, *supra* note 31, at 246.

181. *MCLEOD & DICOLA*, *supra* note 32, at 141–44.

instead of saying that *de minimis* samplings are fine without being cleared, the opinion has become that “even if you can’t hear a sample of the sound recording, you still have to clear it.”¹⁸² And instead of a bright-line rule clearing up confusion within the music industry, as *Bridgeport* believed it would,¹⁸³ many artists have been left with even more questions.¹⁸⁴ Some artists also see the rule as an unfair change, since it directly contradicts how many previously understood copyright law.¹⁸⁵

Perhaps even worse—especially when considered within the context of the general purpose of copyright law—is the effect the Sixth Circuit’s decision has had on creativity within the music industry. Upon release of the *Bridgeport* opinion, reactions by those within the industry ranged from somber to full-on civil disobedience,¹⁸⁶ and overall, many described the decision as “extraordinarily chilling.”¹⁸⁷ Some experts also have seen “ripple effects” of the decision on other genres of music, such as jazz and blues, that don’t directly involve sampling but rather less-direct forms of “musical borrowing.”¹⁸⁸ Even though the *Bridgeport* ruling only affected sound recordings, some within the music industry have become more cautious and seek to clear uses of small portions of musical compositions as well “just to be safe.”¹⁸⁹ This suggests that there are amounts of time and money being wasted, and perhaps even artists who are dissuaded from borrowing at all because of the fear of a lawsuit. Overall, many view the law as a “threat” and as “impos[ing] more blockades,”¹⁹⁰ and as yet another control “blocking society’s access to cultural resources.”¹⁹¹ “[N]ot all good music today is created in entertainment industry studios,”¹⁹² and with the *Bridgeport* decision making sampling so much more expensive, many fear that the bright-line rule it created prohibiting the *de minimis* exception could

182. *Id.* at 142 (quoting Whitney Broussard).

183. *Supra* notes 81–82 and corresponding text.

184. MCLEOD & DiCOLA, *supra* note 32, at 142.

185. *Id.* Some record labels have taken advantage of the retroactive nature of the Sixth Circuit’s rule and continued to bring lawsuits, targeting artists who sampled copyrighted sound recordings at a time when the practice was considered legal. *Id.* at 142–43.

186. *Id.* at 143. Digital activist group Downhill Battle created an online demonstration in the wake of the Sixth Circuit’s decision that encouraged the public to create songs made solely from the “Get Off Your Ass and Jam” sample from the *Bridgeport* case, which they then made available online. *Id.*

187. *Id.*

188. *Id.* at 143–44.

189. MCLEOD & DiCOLA, *supra* note 32, at 144.

190. *Id.* at 143.

191. DEMERS, *supra* note 6, at 4.

192. Schietinger, *supra* note 31, at 247 (quoting Heins, *supra* note 164).

completely silence independent artists and in the long-run “lead to mediocrity in the music.”¹⁹³

Allowing the *de minimis* exception naturally has a more positive impact on the music community because it allows for increased creativity by artists, even those who are not represented by a major label. And although a *de minimis* exception promotes creativity among those artists who do sample, this does not necessarily mean the rule would be harmful to those who do not. As previously stated, a *de minimis* analysis actually deters against the “wholesale plagiarism of prior works,” striking a balance between protecting the rights and interests of the copyright owner while also not “depriving other artists of the building blocks of future works.”¹⁹⁴

V. CONCLUSION

A circuit split is never the preferred outcome, but the Ninth Circuit made the right decision to split from the Sixth Circuit and allow a *de minimis* exception for sampled sound recordings. Of course, it is to the benefit of both the legal community and the music industry that the circuit split eventually be resolved.¹⁹⁵ And when it is resolved, the law should follow the decision set out in *VMG Salsoul* and a *de minimis* analysis should become the standard when analyzing copyright infringement claims concerning sound recordings.

Allowing a *de minimis* exception for sound recording copyright infringement claims best matches Congress’s intent in creating the Copyright Act of 1976, as shown by the legislative history and in the context of other copyright doctrines. It also does not go against the idea of judicial efficiency, while a bright-line, “get a license or do not sample” rule does little to promote that goal. Prohibiting a *de minimis* exception also directly conflicts with the purpose of American copyright law, while allowing one promotes it. Finally, the existence of the *de minimis* exception actually has a positive impact on the music community, while prohibiting one has created a negative result.

Decisions like *Bridgeport* unfortunately promote the idea that copyright law is a “constraint on creativity,” that it is “categorically harmful.”¹⁹⁶ But the framers of the Constitution specifically empowered Congress to create copyright law to “promote the *Progress*” of the arts and to foster creativity and the creation

193. *Id.* (citing Renee Graham, *An Anti-Sampling Court Ruling Limits the Options of Hip-Hop’s Best*, BOSTON GLOBE, Sept. 16, 2004, at D1) (quoting journalist Davey D. Cook).

194. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 842 (M.D. Tenn. 2002).

195. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016). One writer referred to the Ninth Circuit’s decision as “sending up a signal flare to the Supreme Court!” Eric Goldman, *De Minimis Music Sampling Isn’t Infringement—Salsoul v. Madonna*, TECH. & MARKETING L. BLOG (June 3, 2016), <http://blog.ericgoldman.org/archives/2016/06/de-minimis-music-sampling-isnt-infringement-salsoul-v-madonna.htm> [<https://perma.cc/S8WH-G2HK>].

196. DEMERS, *supra* note 6, at 113; MCLEOD & DiCOLA, *supra* note 32, at 11–14.

of new works,¹⁹⁷ ideas which seem to be the opposite of a “constraint.” Sampling sound recordings has become an integral part of the process of creating new musical works today, and resolving the circuit split to allow the use of the *de minimis* exception in those types of cases would help reposition the public’s opinion of copyright law to the balance the framers intended: as something that protects the interests and rights of creators, but also fosters progress and creativity in our nation.

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197. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

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