

**CREATIVITY OR COPYRIGHT INFRINGEMENT?: EVALUATING  
THE DE MINIMIS EXCEPTION IN DIGITAL SAMPLING  
THROUGH VMG SALSOU, LLC AND BRIDGEPORT MUSIC,  
INC.**

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ABSTRACT

*In 2005, the United States Court of Appeals for the Sixth Circuit controversially held in Bridgeport Music, Inc. v. Dimension Films that the de minimis exception—the doctrine that a small use of a copyrighted work does not constitute copyright infringement—did not apply to copyrighted sound recordings. The decision was the only federal court of appeals decision to rule directly on this discrete issue until the United States Court of Appeals for the Ninth Circuit decided VMG Salsoul, LLC v. Ciccone in 2016. The Ninth Circuit held, in direct contravention to the Sixth Circuit, that the de minimis exception did apply to copyrighted sound recordings. This Note will analyze the Bridgeport and VMG Salsoul decisions, conclude that the VMG Salsoul decision is correct, and offer some potential solutions to the issue of digital sampling in today’s music industry.*

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## INTRODUCTION

“Music is one of the oldest forms of human expression,”<sup>1</sup> but music and musical tastes are continuously changing.<sup>2</sup> As music styles have changed, so have the technological means of creating it and presenting it to the public.<sup>3</sup> One modern trend is sampling and more particularly,

1. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

2. See Matthias Mauch et al., *The Evolution of Popular Music: USA 1960–2010*, at 1, 3, ROYAL SOC’Y OPEN SCI. (Apr. 9, 2015), <http://rsos.royalsocietypublishing.org/content/royopensci/2/5/150081.full.pdf>. The authors analyzed songs appearing on the U.S. Hot 100 between 1960 and 2010. *Id.* The authors concluded that some music genres “became rarer [over time], others became more common, [and] others cycled.” *Id.* at 3. Interestingly, the authors concluded that “the evolution of chart diversity is dominated by historically unique events: the rise and fall of particular ways of making music.” *Id.* at 5. To further this point, the authors stated that “a causal account of the evolution of music must ultimately contain an account of how musicians imitate, and modify, existing music when creating new songs . . . .” *Id.* at 9.

3. See *id.* at 5; Alex Ross, *The Record Effect: How Technology Has Transformed the Sound of Music*, NEW YORKER (June 6, 2005), <http://www.newyorker.com/magazine/2005/06/06/the-record-effect>. Ross discusses many different technological advances that changed music. *Id.* For example, Ross discusses how the phonograph “changed how people sang and played.” *Id.* People used the phonograph “not merely as a means for preserving and distributing music but as a way of making it.” *Id.* Other examples include magnetic tapes and the turntable, which allowed for error-free records and allowed DJ’s “to create . . . phonograph[ic] effects,” respectively. *Id.* Other less obvious technological advances,

digital sampling.<sup>4</sup> Digital sampling has been defined as “the use of computer technology to copy short segments from existing recordings, texts, or motion pictures for inclusion in transformative sound recordings of multimedia works.”<sup>5</sup> Sampling is responsible for hip-hop’s rise to popularity<sup>6</sup> and has even led to the creation of a new genre of music.<sup>7</sup>

The safest way to sample a song is to obtain a license from the copyright holder;<sup>8</sup> however, obtaining a license can be difficult.<sup>9</sup> This is because there are two different copyrightable aspects of music: 1) the musical composition and 2) the sound recording.<sup>10</sup> The problem for potential licensees is that the copyright holders for the musical composition and the sound recording are often different.<sup>11</sup> Thus, artists

such as designing concert halls to ensure the best acoustics, also “changed how people played and listened.” *Id.*

4. See JOSEPH GLENN SCHLOSS, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP 30 (2014). Schloss notes that sampling first became popular in 1986 and “allow[ed] a producer to build rhythm tracks from individual drum sounds . . .” *Id.* at 30, 35. This quickly transitioned into “sampl[ing] entire melodies,” thus increasing creativity in hip-hop and creating unique works of music in general. *Id.* at 35, 39.

5. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 380 (1996).

6. SCHLOSS, *supra* note 4, at 39. Schloss argues that “[t]he creative exploitation of these new techniques, along with parallel advances in emceeing, has led to the late 1980s being called the ‘golden era’ of hip-hop.” *Id.*; see also Daniel Esannason, Note, *Get a License or Don’t Sample: Using Examples from Popular Music to Raise New Questions About the Bridgeport v. Dimension Films Holding*, 29 HARV. J. L. & TECH. 551, 557 (2016) (“In the 1980s, hip-hop artists saw sampling as an art.” (citing KEMBLEW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 19 (2011))). One early, popular example of sampling was “U Can’t Touch This” by Stanley Burrell (known professionally as “MC Hammer”), which sampled Rick James’s “Super Freak.” W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling’s Effect on the Market for Copyrighted Works*, 67 OKLA. L. REV. 443, 455 (2015) (citing MC HAMMER, U CAN’T TOUCH THIS (Capitol Records 1990); RICK JAMES, SUPER FREAK (Gordy 1981)). MC Hammer obtained a license to sample the song and credited Rick James as a cowriter. See *id.* (citing JAMES FRANKEL, THE TEACHER’S GUIDE TO MUSIC, MEDIA, AND COPYRIGHT LAW 145–46 (2009)).

7. See Schuster, *supra* note 6, at 446. Schuster discusses the 2010 album “All Day” by Gregg Gillis (also known as Girl Talk). *Id.* The album “consists of approximately 400 interwoven samples of copyrighted works.” *Id.*

8. See Danica L. Mathes, *Music-Licensing Reform May Be on the Way*, LAW360 (Sept. 9, 2014, 10:45 AM), <http://www.law360.com/articles/573481/music-licensing-reform-may-be-on-the-way>.

9. *Id.*

10. *Id.*

11. *Id.* Mathes states that generally “either the songwriter or the songwriter’s music publisher (by assignment) owns the copyright in, and licenses rights in connection with, the musical composition.” *Id.* She goes on to say that “[e]ither the performer or the performer’s record label (by assignment) will own the copyright in, and license rights in connection with, the sound recording.” *Id.*

who wish to use small samples from copyrighted works will have to “obtain[] multiple licenses from multiple sources.”<sup>12</sup>

Some have argued that, in general, the current licensing schemes for copyrighted works are ineffective.<sup>13</sup> This can be due to a variety of reasons, including the inability to identify copyright holders, the refusal of copyright holders to negotiate for a license, and the practical difficulties of having to “obtain multiple clearances for a single work.”<sup>14</sup> Instead of obtaining licenses artists may either choose not to use the copyrighted work, which potentially stifles creativity, or may turn to piracy.<sup>15</sup>

Because of this piracy, it is unsurprising that “[a]n important issue in modern copyright jurisprudence is how to address digital sampling of a small portion of a copyrighted song for use as a building block in the creation of a new composition.”<sup>16</sup> Until recently, the most important digital sampling case was *Bridgeport Music, Inc. v. Dimension Films*.<sup>17</sup> In *Bridgeport*, the Sixth Circuit held that any unlicensed use of a copyrighted sound recording amounted to copyright infringement, regardless of the size of the sample taken.<sup>18</sup> This opinion has been staunchly criticized,<sup>19</sup> but it remained the only case decided by a federal court of appeals for over ten years.<sup>20</sup> However, a panel of the Ninth

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12. *Id.*

13. See, e.g., Yafit Lev-Aretz, *The Subtle Incentive Theory of Copyright Licensing*, 80 BROOK. L. REV. 1357, 1363 (2015).

14. *Id.* at 1359.

15. *Id.* at 1360–61.

16. Schuster, *supra* note 6, at 446. This issue can be especially important when commercially successful songs are actually sampled. See *id.* at 454. For example, the performer Robert Van Winkle (known professionally as “Vanilla Ice”) sampled Queen and David Bowie’s “Under Pressure” in “Ice, Ice Baby.” *Id.* (citing QUEEN & DAVID BOWIE, UNDER PRESSURE (EMI 1981); VANILLA ICE, ICE, ICE BABY (SBK Records 1989); John Schietinger, Note, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 213 (2005)). Vanilla Ice did not license the song and the copyright holders threatened suit, forcing Vanilla Ice to settle. Schuster, *supra* note 6, at 454–55 (citing Schietinger, *supra*, at 213).

17. 410 F.3d 792 (6th Cir. 2005); Ben Sisario, *‘Blurred Lines’ Lawyer Rocks Music Industry Again*, N.Y. TIMES (Mar. 15, 2015), <https://www.nytimes.com/2015/03/16/business/media/blurred-lines-lawyer-rocks-music-industry-again.html> (referring to *Bridgeport Music, Inc. v. Dimension Films* as a “landmark appeals court ruling,” and “one of the most important copyright cases in the music industry in years”).

18. *Bridgeport*, 410 F.3d at 801 (stating “[g]et a license or do not sample”).

19. See, e.g., 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b] (2016) [hereinafter NIMMER & NIMMER] (“Perhaps the [*Bridgeport*] court was led into error . . .”); Schuster, *supra* note 6, at 458 (“*Bridgeport Music* is not without detractors.” (citing WILLIAM PATRY, HOW TO FIX COPYRIGHT 92 (2012)); Esannason, *supra* note 6, at 559 (“The court’s decision [in *Bridgeport*] can be questioned in several respects.”).

20. See NIMMER & NIMMER, *supra* note 19.

Circuit recently held in *VMG Salsoul, LLC v. Ciccone*<sup>21</sup> that the de minimis exception—the idea that a small amount of copying is permitted—does apply to sound recordings,<sup>22</sup> in direct opposition to *Bridgeport*'s holding.<sup>23</sup>

This Note will argue that the Ninth Circuit's opinion in *VMG Salsoul* is the correct decision, even though *Bridgeport*'s rule would create ease of enforcement. Part I will discuss the general protections afforded to music under copyright law and more specifically the protections granted to sound recordings. This will begin in Section I(A) with a general background of the copyright law in the United States and the evolution of protection for music. Section I(B) will discuss the Sound Recording Act of 1971, its general structure, and what it protects for copyright holders of sound recordings. Section I(C) will discuss the general elements of copyright infringement, including a discussion of the de minimis exception and its applicability outside of copyright law.

Part II will summarize both *Bridgeport* and *VMG Salsoul* and Part III will analyze the decisions. Section III.A. will discuss the appropriate interpretation of the relevant statutes and the relevant legislative history. Section III.B. will discuss the various policy rationales discussed in the decisions, including issues based on judicial economy, congressional acquiescence, and what type of “taking” sampling involves. The note will conclude in Part IV with some insight into the future of this issue.

## I. COPYRIGHT PROTECTIONS FOR MUSIC

### A. Copyright Law Generally

There is a longstanding history of copyright protection in the United States.<sup>24</sup> Before the United States became independent, copyright protection was administered by the individual colonies.<sup>25</sup> This led to differing levels of protection in each of the twelve colonies that provided copyright protection.<sup>26</sup> To address this issue,<sup>27</sup> the United States Constitution provides Congress the power “[t]o promote the Progress of

21. 824 F.3d 871 (9th Cir. 2016).

22. *Id.* at 874.

23. *Id.* at 886 (noting that the court was “tak[ing] the unusual step of creating a circuit split by disagreeing with the Sixth Circuit’s contrary holding in *Bridgeport*”).

24. See Esannason, *supra* note 6, at 552.

25. *Id.*

26. *Id.*

27. *Id.* (discussing how “[o]ne of the first challenges that the nation faced . . . was how to administer copyrights”).

Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>28</sup> Apparently, this clause was intended “to spur more innovation and creativity rather than to reward the labor of an author or inventor.”<sup>29</sup>

In 1790, Congress passed the first copyright statute to generally protect written works.<sup>30</sup> Although music was not explicitly protected,<sup>31</sup> at least one court held that music could be protected as a book.<sup>32</sup> Music was explicitly protected under the Copyright Act of 1831, which provided that “who shall be the author or authors of any book or books, map, chart, or *musical composition* . . . shall have the sole right and liberty of printing, reprinting, publishing, or vending.”<sup>33</sup> The Copyright Act of 1831, by its plain language, only protected musical compositions<sup>34</sup> (i.e., music and any accompanying words or lyrics).<sup>35</sup>

Congress amended the Copyright Statute in 1909<sup>36</sup> in response to judicial difficulty in dealing with technological advancements in the nineteenth and early twentieth centuries.<sup>37</sup> The amendment did not

28. U.S. CONST. art. I, § 8, cl. 8.

29. Esannason, *supra* note 6, at 552 (citing DAVID J. MOSER & CHERYL L. SLAY, MUSIC COPYRIGHT LAW 907 (2013)).

30. U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 16 (2015) [hereinafter COPYRIGHT AND THE MUSIC MARKETPLACE], <http://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (citing Copyright Act of 1790, ch. 15, 1 Stat. 124, 124 (1790) (repealed 1831)). See Copyright Act of 1790, preamble <https://www.copyright.gov/history/1790act.pdf> (“An Act for the encouragement of learning, by securing the copies of maps, Charts, And books, to the authors and proprietors of such copies, during the times therein mentioned.”).

31. See COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 30, at 16.

32. *Id.* at 16 n.10 (citing Clayton v. Stone, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) (No. 2872) (holding that “[a] book within a statute need not be a book in the common and ordinary acceptation of the word, viz., a volume made up of several sheets bound together; it may be printed only on one sheet, as the words of a song or the music accompanying it”)).

33. *Id.* at 16 n.11 (citing Copyright Act of 1831, ch. 16, 4 Stat. 436 (1831) (emphasis added)).

34. See *id.* at 17.

35. U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1 (2012) [hereinafter MUSICAL COMPOSITIONS AND SOUND RECORDINGS], <https://www.copyright.gov/circs/circ56a.pdf>.

36. U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 8 (2011) [hereinafter PRE-1972 SOUND RECORDINGS], <http://www.copyright.gov/docs/sound/pre-72-report.pdf>.

37. See Mark R. Carter, *Applying the Fragmented Literal Similarity Test to Musical-Work and Sound-Recording Infringement: Correcting the Bridgeport Music, Inc. v. Dimensions Films Legacy*, 14 MINN. J.L. SCI. & TECH. 669, 674 (2013) (discussing the rise of the phonograph and “mechanical music machines based on organs and pianos”). For example, the United States Supreme Court, in *White-Smith Music Pub’g Co. v. Apollo*

explicitly protect sound recordings (i.e., works that result from “the fixation of a series of musical, spoken, or other sounds”),<sup>38</sup> but did protect copyright holders of musical compositions whose works were reproduced in sound recordings.<sup>39</sup>

### B. Copyright Law—Sound Recordings

Sound recordings were officially protected in the Sound Recording Act of 1971.<sup>40</sup> The statute was enacted “for the purpose of protecting against unauthorized duplication and piracy of sound recordings . . . .”<sup>41</sup> “The law provided only a limited right with respect to sound recordings.”<sup>42</sup> The amendment gave similar copyright protection to sound recordings as it did to other works and gave “record producers a new tool with which to combat outright duplication.”<sup>43</sup>

The copyright law’s basic structure is as follows. Copyright protects “original works of authorship,” which include sound recordings.<sup>44</sup> Copyright holders of these works of authorship are then granted certain exclusive rights.<sup>45</sup> These exclusive rights include, but are not limited to, the following: 1) to produce copies or phonographs of the copyrighted work;<sup>46</sup> 2) to create derivative works;<sup>47</sup> and 3) to sell, rent, lease, or lend any copy or phonorecord to the public.<sup>48</sup> Sound recordings are granted an additional exclusive right, namely, a right of public performance.<sup>49</sup>

Co., held that a piano roll used for mechanical pianos was not a duplicate of a musical composition and thus not protected under the copyright statute. 209 U.S. 1, 18 (1908); see also Carter, *supra*, at 674 n.19; PRE-1972 SOUND RECORDINGS, *supra* note 36, at 8.

38. MUSICAL COMPOSITIONS AND SOUND RECORDINGS, *supra* note 35, at 1.

39. COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 30, at 26 n.72 (citing An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1075 (1909) (giving copyright holders the exclusive right “to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced”).

40. PRE-1972 SOUND RECORDINGS, *supra* note 36, at 10 (citing Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971)).

41. § 3, 85 Stat. at 392. The statute only protects sound recordings made on or after February 15, 1972. *Id.*; see also PRE-1972 SOUND RECORDINGS, *supra* note 36, at 12. However, any sound recordings made before that day could be protected under state law. Carter, *supra* note 37, at 675.

42. PRE-1972 SOUND RECORDINGS, *supra* note 36, at 12.

43. *Id.*

44. Copyright Act of 1976, 17 U.S.C. § 102(a)(7) (2012).

45. *Id.* § 106(1)–(6).

46. *Id.* § 106(1).

47. *Id.* § 106(2).

48. *Id.* § 106(3).

49. *Id.* § 106(6).

A separate section of the statute defines the scope of these exclusive rights as they apply to sound recordings.<sup>50</sup> The statute first restricts the exclusive rights of sound recording copyright holders to those specified in 17 U.S.C. § 106(1)–(3) and (6).<sup>51</sup> Namely, § 106 allows the copyright holder to reproduce the sound recordings, prepare derivative works, distribute copies by licensing, and to publicly perform them through digital audio transmission.<sup>52</sup> Of particular importance in the case of digital sampling is the limitation placed in § 114(b).<sup>53</sup> This subsection further restricts the exclusive rights of those specified in § 114(a), stating in relevant part:

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.<sup>54</sup>

At the very least, this provision exempts from protection “similar-sounding, but independently created, recordings from sound recording infringement.”<sup>55</sup> However, as will be discussed in more detail later, *Bridgeport* interpreted this provision to mean that “a sound recording owner has the exclusive right to ‘sample’ his own recording.”<sup>56</sup> This portion of the statute is key to the Sixth Circuit’s reasoning in *Bridgeport* and it is reasoning that has been met with criticism.<sup>57</sup>

### C. Copyright Infringement and the *De Minimis* Exception

In its most basic form, a plaintiff in a copyright infringement action must prove two elements: 1) that she owns the copyright and 2) copying by the defendant.<sup>58</sup> For ownership, “the copyright registration certificate constitutes *prima facie* evidence in favor of the plaintiff.”<sup>59</sup> The second element, copying, is conceptually broken down into two

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50. *Id.* § 114.

51. *Id.* § 114(a).

52. *Id.* § 106(1)–(3), (6).

53. *Id.* § 114(b).

54. *Id.*

55. Carter, *supra* note 37, at 689.

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

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

58. NIMMER & NIMMER, *supra* note 19, § 13.01.

59. *Id.* § 13.01[A].

parts, however few have done so.<sup>60</sup> First, the defendant must have used the plaintiff's copyrighted work in some fashion.<sup>61</sup> After this is shown as a factual matter, the plaintiff must demonstrate that there is actionable appropriation (i.e., "whether the defendant's work is substantially similar to plaintiff's work such that liability may attach").<sup>62</sup>

*De minimis non curax lex*—de minimis—means "[t]he law does not concern itself with trifles"<sup>63</sup> and thus, if copying is de minimis, then by definition it cannot be substantial. Scholarly literature has identified two types of substantial similarity: 1) comprehensive nonliteral similarity and 2) fragmented literal similarity.<sup>64</sup>

Comprehensive nonliteral similarity occurs where there is "a similarity not just as to a particular line or other minor segment, but where the fundamental essence or structure of one work is duplicated in another."<sup>65</sup> Where there is word for word copying, there is substantial similarity; however, when there is something akin to paraphrasing, there may or may not be substantial similarity.<sup>66</sup>

Fragmented literal similarity occurs "[w]here there is literal similarity (virtually, though not necessarily, completely word for word) between plaintiff's and defendant's works."<sup>67</sup> The key question, according to Nimmer, is "whether the similarity relates to matter that constitutes a substantial portion of *plaintiff's* work—not whether such material constitutes a substantial portion of defendant's work."<sup>68</sup> If this test is used, the question in digital sampling cases should thus be whether the sampled music constitutes a substantial portion of the original copyright holder's work.<sup>69</sup> If the answer is no, then the claim must fail.<sup>70</sup>

60. *Id.* § 13.01[B].

61. *Id.*

62. *Id.*

63. *De Minimis Non Curat Lex*, BLACK'S LAW DICTIONARY (10TH ed. 2014).

64. *See, e.g.*, NIMMER & NIMMER, *supra* note 19, § 13.03[A][1]–[2].

65. *Id.* § 13.03[A][1].

66. *Id.* Nimmer states that when paraphrasing occurs, "if the defendant's work copies not merely the idea, but 'the expression of the idea' contained in plaintiff's work, then the two works are substantially similar." *Id.* Courts have developed multiple tests for determining this. *Id.* § 13.03[A][1][a]–[e]. These tests include (1) the abstractions test, (2) the pattern test, (3) the total concept and feel test, and (4) the iterative test (used in software infringement). *Id.*

67. *Id.* § 13.03[A][2].

68. *Id.* § 13.03[A][2][a] (emphasis added).

69. *See id.* § 13.03[A][2].

70. *See id.*

## II. THE CASES

## A. Bridgeport Music, Inc. v. Dimension Films

## 1. Facts and Procedural Posture

A brief discussion of the relevant facts and the district court decision is warranted to help place both the Sixth Circuit's decision and the broader issue of small, direct sampling in context. Westbound Records ("Plaintiff") claimed No Limit Films and Priority Records ("Defendants") sampled Westbound's copyrighted sound recording to "Get Off Your Ass and Jam"<sup>71</sup> in "100 Miles and Runnin'."<sup>72</sup> Defendants allegedly sampled two seconds of a four second guitar "riff" in Plaintiff's sound recording.<sup>73</sup> To alter the sound recording to its needs, Defendants allegedly lowered the pitch, looped the sample, and extended it to sixteen beats.<sup>74</sup> This sample appeared at five places in the song and, according to the "district court's estimation," lasted for about seven seconds.<sup>75</sup> The district court granted Defendants' motion for summary judgment and concluded that "under [either] a qualitative/quantitative de minimis analysis or under the . . . 'fragmented literal similarity' test, the sampling . . . did not 'rise to the level of a legally cognizable appropriation.'"<sup>76</sup> Westbound appealed that decision.<sup>77</sup>

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71. FUNKADELIC, GET OFF YOUR ASS AND JAM (Westbound Records 1975). The court assumed, without any proof, that Westbound would be able to establish that it actually owned the copyright. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 796 (6th Cir. 2005).

72. *Bridgeport*, 410 F.3d at 795-96; N.W.A., 100 MILES AND RUNNIN' (Priority Records 1990). "100 Miles and Runnin'" was on the soundtrack for the movie *I Got the Hook Up*. *Bridgeport*, 410 F.3d at 795; I GOT THE HOOK UP (Dimension Films 1998).

73. *Bridgeport*, 410 F.3d at 796. The fact that the guitar "riff" lasted only four seconds is important because, according to Nimmer, the question in fragmented literal similarity cases is whether the sample taken "constitutes a substantial portion of plaintiff's work." See NIMMER & NIMMER, *supra* note 19, § 13.03[A][2].

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

75. *Id.* Specifically, it appeared at 0:49, 1:52, 2:29, 3:20, and 3:46. *Id.*

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

77. *Id.*

## 2. Analysis

### a. Statutory Interpretation

The Sixth Circuit, in reversing the district court's grant of summary judgment,<sup>78</sup> based their analysis "largely . . . with the applicable statute."<sup>79</sup> The court began its analysis with an uncontroverted assertion; namely, that § 114(b) allows anyone to imitate and recreate a sound recording so long as the person does not actually copy the sound recording.<sup>80</sup> The court then framed the issue as: "[i]f you cannot pirate the whole sound recording, can you 'lift' or 'sample' less than the whole."<sup>81</sup> In answering this question in the negative, the court principally relied on § 114(b).<sup>82</sup> Section 114(b) states that the exclusive rights granted to copyright holders of sound recordings in § 106(1)–(2) "do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."<sup>83</sup> The Sixth Circuit exclusively relied on the word "entirely"<sup>84</sup> and used this as justification for its conclusion that "a sound recording owner has the exclusive right to 'sample' his own recording."<sup>85</sup>

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78. *Id.* at 805.

79. *Id.* at 799.

80. *Id.* at 800.

81. *Id.*

82. *Id.*

83. *Id.* (emphasis added) (quoting 17 U.S.C. § 114(b) (2012)).

84. 17 U.S.C. § 114(b) (2012).

85. *Bridgeport*, 410 F.3d at 801. The court concluded that the addition of the word "entirely" to the statute in the Copyright Act of 1976 further bolstered its argument. *Id.* (citing Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391). The court ended its statutory analysis by stating that "[w]e find much to recommend this interpretation." *Id.* (citing Susan J. Latham, Newton v. Diamond: *Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 125 (2003)). However, the court did go on to cite, at length, one other book that seems to support this interpretation. *Id.* at 803 n.18 (quoting AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1486-87 (Aspen Law & Business 3d ed. 2002)). The citation of two supporting articles does not seem to constitute widespread support and it seems dubious for the Sixth Circuit to base its statutory analysis on a couple of law review articles. See Joshua Crum, *The Day the (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground*, 2008 B.Y.U. L. REV. 943, 960 (2008) ("[T]here are plenty of good arguments for why *Bridgeport* should not have come out the way it did—for instance, the almost complete reliance on law review articles as authority . . .").

b. *Policy Rationales*

The court next discussed four practical considerations to support its holding. These practical considerations were, 1) “ease of enforcement”; 2) market control of licensing prices; 3) the intent associated with copyrighting sound recordings; and 4) a physical taking argument.<sup>86</sup> The Sixth Circuit first reasoned that its decision would create “ease of enforcement.”<sup>87</sup> The court reiterated the essence of its holding by infamously stating, “[g]et a license or do not sample.”<sup>88</sup> The court was seemingly concerned with adopting a *de minimis* or substantial similarity analysis because it would require district court judges to go through “mental, musicological, and technological gymnastics.”<sup>89</sup> However, the court stressed, unconvincingly to some,<sup>90</sup> that “considerations of judicial economy are not what dr[ove] this opinion.”<sup>91</sup>

As a response to any criticism that the bright-line rule would stifle creativity, the court concluded that its rule would not “stifl[e] creativity in any *significant* way.”<sup>92</sup> According to the Sixth Circuit, because an artist could imitate or recreate any sound she desired and include that in her own work, there was not a risk of significant loss of creativity.<sup>93</sup>

The court next concluded that licensing would be practicable for artists.<sup>94</sup> The court reasoned that “the market w[ould] control the license price and keep it within bounds.”<sup>95</sup> This is because a copyright holder could only charge for the license at a price at or lower than the price it would take to reproduce or imitate the desired copyrighted work.<sup>96</sup>

86. *Bridgeport*, 410 F.3d at 801–02.

87. *Id.* at 801.

88. *Id.* The quoted language has been used in many law review articles to date. See, e.g., Kenneth M. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 199 (2004); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 153 (2009); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1565–66 (2005).

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

90. See, e.g., Carter, *supra* note 37, at 683 (citing *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 272 (6th Cir. 2009)) (noting that there were several hundred copyright infringement claims filed by Bridgeport Music and those complaints were split into 476 separate cases).

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

92. *Id.* at 801 (emphasis added). The court seems to admit that its rule will stifle creativity in some way. See *id.* Ironically, however, the court suggests that the creativity stifled will be *de minimis*. See *id.*; *infra* notes 233–35 and accompanying text.

93. See *Bridgeport*, 410 F.3d at 801.

94. *Id.*

95. *Id.*

96. *Id.*

The court also reasoned that the intent in infringing copyrighted sound recordings justified a bright-line rule.<sup>97</sup> The court stated that “sampling is never accidental” and compared this to musical compositions, which frequently involve an unintentional infringement.<sup>98</sup> For example, the court discussed how a composer may unintentionally infringe on a copyrighted musical composition where she has “a melody in [her] head, perhaps not even realizing that the reason [s]he hears this melody is that it is the work of another which [s]he had heard before.”<sup>99</sup> For sound recordings, by contrast, “you know you are taking another’s work product.”<sup>100</sup>

The court next concluded that sampling was “a physical taking rather than an intellectual one.”<sup>101</sup> The court reasoned that a sound recording copyright owner is not necessarily concerned with the song itself, but instead with all of the individual sounds that are in a song.<sup>102</sup> Therefore, according to the Sixth Circuit, even when a very small portion of that song is taken, the infringer is still “tak[ing] . . . something of value.”<sup>103</sup> Therefore, there is “a physical taking rather than an intellectual one.”<sup>104</sup>

The court concluded its opinion on this issue by discussing its approach to its holding and the appropriate forum for change of its rule.<sup>105</sup> The Sixth Circuit characterized its approach as “a ‘literal reading’ approach” and stated that “[t]he legislative history [was] of little help because digital sampling wasn’t being done in 1971.”<sup>106</sup> The court finally reasoned that Congress was the appropriate forum to clarify or change the law because Congress was more able to consider the “complex technical and business overtones” than a court.<sup>107</sup>

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97. *See id.* at 802.

98. *Id.* at 801.

99. *Id.*

100. *Id.* (citing *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (“Thou shalt not steal.”) (citation omitted) (internal quotation marks omitted)).

101. *Id.* at 802.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 802–05.

106. *Id.* at 805. This latter point about the legislative history is not universally held. *See infra* note 199.

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

B. VMG Salsoul, LLC v. Ciccone

1. Facts and Procedural Posture

VMG Salsoul, LLC (“Plaintiff”) brought this suit asserting that Madonna Ciccone (“Madonna”) and her producer Shep Pettibone (“Pettibone”) (collectively “Defendants”) infringed on its copyright to “Ooh I Love It (Love Break)”<sup>108</sup> by including a sample of it in their song “Vogue.”<sup>109</sup> Interestingly, Plaintiff claimed that Pettibone, who produced both “Love Break”<sup>110</sup> and “Vogue,”<sup>111</sup> sampled the former when creating the latter.<sup>112</sup> The alleged sample from “Love Break”<sup>113</sup> was a “horn hit” which appeared in two different forms: 1) a “single’ horn hit . . . [that] last[ed] for 0.23 seconds” and “consist[ed] of a quarter-note chord comprised of four notes” and 2) “a ‘double’ horn hit . . . [which] consist[ed] of an eighth-note chord of [the same notes from the single horn hit], followed immediately by a quarter-note chord of the same notes.”<sup>114</sup> The horn hits appeared a combined fifty times in “Love Break.”<sup>115</sup> The horn hits in “Vogue”<sup>116</sup> were essentially the same; however, they used different notes and were in a different key.<sup>117</sup> “The single horn hit occur[red] once, the double horn hit occur[red] three times, and a ‘breakdown’ version of the horn hit occur[red] once.”<sup>118</sup> The district court granted summary judgment to Defendants on two grounds: 1) the sound recording was not “original” and 2) even if it was “original,” any sampling was *de minimis*.<sup>119</sup>

108. THE SALSOU L ORCHESTRA, OOH I LOVE IT (LOVE BREAK) (Salsoul Records 1983).

109. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016); MADONNA, VOGUE (Sire Records 1990).

110. THE SALSOU L ORCHESTRA, *supra* note 108.

111. MADONNA, *supra* note 109.

112. VMG Salsoul, 824 F.3d at 875. It seems that there would have been no cognizable claim in this case if Pettibone had just imitated or recreated the sounds, which theoretically should have been easy since he apparently produced the original track. See 17 U.S.C. § 114(b) (2012); VMG Salsoul, 824 F.3d at 875.

113. THE SALSOU L ORCHESTRA, *supra* note 108.

114. VMG Salsoul, 824 F.3d at 875.

115. See *id.* This would be an important fact in determining substantial similarity. See *supra* note 66 and accompanying text.

116. MADONNA, *supra* note 109.

117. VMG Salsoul, 824 F.3d at 875–76.

118. *Id.* at 876.

119. *Id.*

## 2. Analysis

The Ninth Circuit first had to determine the correct framework through which to analyze the case.<sup>120</sup> The court first determined that although contested, Plaintiff had set forth evidence of actual copying.<sup>121</sup> The Ninth Circuit then turned to its “leading authority on actual copying,” *Newton v. Diamond*.<sup>122</sup> In *Newton*, the Ninth Circuit held that for musical composition infringement cases where actual copying is alleged, the “[p]laintiff must show that the copying was greater than de minimis.”<sup>123</sup> However, this was a sound recording copyright infringement case and thus the court framed the issue as “whether the [de minimis] exception applies to claims of infringement of a copyrighted sound recording.”<sup>124</sup>

In discussing the de minimis exception generally, the court began its analysis by stating that a “firmly established” rule of copyright infringement is that there must be substantial copying.<sup>125</sup> The court similarly noted that it was not aware of any other courts not bound by *Bridgeport* that had actually followed its reasoning and rule that the de minimis exception does not apply to sound recordings.<sup>126</sup>

### a. Statutory Interpretation

Despite the above, the Ninth Circuit conducted an independent analysis of the copyright statute.<sup>127</sup> The court first stated that neither 17 U.S.C. § 102, which defines what is protected by copyright law,<sup>128</sup> nor 17 U.S.C. § 101, which defines sound recordings,<sup>129</sup> suggest that sound recordings should be treated differently from other protected works.<sup>130</sup>

The court then went on to discuss the interrelationship between § 106 and § 114(b),<sup>131</sup> which was at the heart of the *Bridgeport* decision.<sup>132</sup>

120. *See id.* at 877.

121. *See id.* There was testimony from Pettibone’s assistant that he overheard Pettibone direct an engineer to sample from “Love Break.” *Id.* Plaintiff also introduced expert musicological reports that determined that “Vogue” sampled from “Love Break.” *Id.*

122. *Id.* (citing *Newton v. Diamond*, 388 F.3d 1189, 1192–93 (9th Cir. 2004)).

123. *Id.*

124. *Id.* at 877–78.

125. *Id.* at 880 (citing *NIMMER & NIMMER*, *supra* note 19, § 13.03[A][2][a]).

126. *Id.* at 881.

127. *Id.*

128. *Id.* at 881–82 (citing 17 U.S.C. § 102 (2012)).

129. *Id.* at 882 (citing 17 U.S.C. § 101 (2012)).

130. *Id.* at 881–82.

131. *Id.* at 882–84.

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

The court focused on the sentence in § 114(b) which states that “[t]he exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds . . . .”<sup>133</sup> The court stated that this sentence “imposes an express *limitation* on the rights of a copyright holder” and that a straightforward reading suggests that someone who imitates the copyright recording has not infringed.<sup>134</sup>

The court thus concluded that the statutory text was clear; however, even if it was ambiguous, the court held that the legislative history supported its position.<sup>135</sup> Specifically a House Report, in talking about § 114(b), stated 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 . . . .”<sup>136</sup> The court concluded from this that Congress intended the de minimis exception to apply to sound recordings just like it applies to all other types of copyrighted works.<sup>137</sup>

The court also concluded that *Bridgeport*’s reasoning fails because it is based “on a logical fallacy.”<sup>138</sup> The Sixth Circuit concluded that since the “exclusive rights . . . *do not extend* to the making or duplication of another sound recording that *consists* entirely of an independent fixation of sounds, . . . that exclusive rights *do extend* to the making of another sound recording that *does not consist* of an entirely independent fixation of other sounds.”<sup>139</sup> However, “[a] statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances. In logical terms, it is a fallacy to infer the inverse of a conditional from the conditional.”<sup>140</sup>

#### b. Policy Rationales

The Ninth Circuit next discussed *Bridgeport*’s physical taking argument.<sup>141</sup> The court stated that the possibility of a physical taking was possible with other types of artistic works to which the de minimis

133. *VMG Salsoul*, 824 F.3d at 882–83 (quoting 17 U.S.C. § 114(b) (2012)).

134. *Id.* at 883.

135. *Id.*

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

137. *Id.* at 883–84.

138. *Id.* at 884 (quoting NIMMER & NIMMER, *supra* note 19, § 13.03[A][2][b]).

139. *Id.* (citation omitted) (quoting 17 U.S.C. § 114(b) (2012)).

140. *Id.* (citing JOSEPH G. BRENNAN, A HANDBOOK OF LOGIC 79–80 (2d ed. 1961)).

141. *Id.* at 885.

exception applies.<sup>142</sup> Secondly, even if sound recordings were different, this does not mean that Congress actually created a difference in the statute.<sup>143</sup> Finally, the physical taking distinction did not support the Sixth Circuit's holding because "[t]he Supreme Court has held . . . that the Copyright Act protects only the expressive aspects of a copyrighted work . . . ."<sup>144</sup>

The court also rejected a few other arguments. One of these was a Congressional acquiescence argument.<sup>145</sup> In essence, Plaintiff argued that the Sixth Circuit's interpretation of the law in *Bridgeport* must be correct because Congress did not act to amend or clarify the law after the decision.<sup>146</sup> The court, however, relying on Supreme Court precedent, ultimately rejected this argument, concluding that Congressional inaction "carries almost no weight."<sup>147</sup> The court also summarily rejected two of *Bridgeport's* policy rationales, the market control of license prices<sup>148</sup> and the intent associated with sampling.<sup>149</sup> These were rejected as befitting a legislature, not a court.<sup>150</sup>

The court thus held "that the 'de minimis' exception applies to action alleging infringement of a copyright to sound recordings."<sup>151</sup> In doing so, the Ninth Circuit acknowledged that it was directly creating a circuit split.<sup>152</sup> However, the court did note that, as a practical matter, a circuit split already existed because most courts have declined to follow *Bridgeport's* holding.<sup>153</sup> The court seemed to invite the Supreme Court

142. *Id.* The court specifically noted that computer programs can take a portion of a photograph and use it in another photograph, but the de minimis exception would apply to that situation as well. *Id.*

143. *Id.*

144. *Id.* (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)).

145. *Id.*

146. *Id.* at 886.

147. *Id.* (citing *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001)).

148. *See supra* notes 94–96 and accompanying text.

149. *See supra* notes 97–100 and accompanying text.

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

151. *Id.*

152. *Id.* at 886 ("[W]e take the unusual step of creating a circuit split by disagreeing with the Sixth Circuit's contrary holding in *Bridgeport*.").

153. *Id.* ("[A] deep split among the federal courts *already exists*. Since the Sixth Circuit decided *Bridgeport*, almost every district court not bound by that decision has declined to apply *Bridgeport's* rule.") (citing numerous cases). Judge Silverman dissented from the opinion and basically argued that *Bridgeport* was correctly decided. *Id.* at 888 (Silverman, J., dissenting). Judge Silverman argued, like the *Bridgeport* court, that: (1) digital sampling is theft and "[i]t is no defense to theft that the thief made off with only a 'de minimis' part of the victim's property"; (2) when read together, § 106 and § 114 grant a sound recording copyright holder the exclusive right to sample their own recordings, but where a work does not consist of entirely new sounds, there is copyright infringement; (3)

to weigh in on the issue because “the creation of a circuit split would be particularly troublesome in the realm of copyright.”<sup>154</sup> This is because “[c]reating inconsistent rules among the circuits would lead to different levels of protection in different areas of the country . . . .”<sup>155</sup>

### III. ANALYSIS

#### A. *Statutory Analysis*

##### 1. Sound Recording Act

The main disagreement between the *VMG* and *Bridgeport* decisions is the interpretation of 17 U.S.C. § 114<sup>156</sup> and as such, a brief discussion of statutory interpretation is necessary. A court’s main objective when interpreting a statute “is to determine congressional intent or purpose.”<sup>157</sup> The Supreme Court has stated the inquiry as follows: “[W]hen ‘the statute’s language is plain, ‘the sole function of the courts’—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”<sup>158</sup>

The Ninth Circuit’s interpretation of 17 U.S.C. § 114 more closely conforms to these tenets of statutory interpretation. The relevant portion of § 114 states:

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.<sup>159</sup>

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there was a physical taking and “[s]ampling is never accidental”; and (4) Congressional inaction since *Bridgeport* was instructive. *Id.* at 888–89.

154. *Id.* at 886 (majority opinion) (quoting *Seven Arts Filmed Entm’t Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1256 (9th Cir. 2013)).

155. *Id.* (quoting *Seven Arts Filmed Entm’t Ltd.*, 733 F.3d at 1256).

156. *Id.* at 881 (stating that “[w]e begin our analysis with the statutory text”); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799 (6th Cir. 2005) (noting that “[o]ur analysis begins and largely ends with the applicable statute”).

157. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990).

158. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)); *see also* Eskridge, *supra* note 157, at 626 (“[S]tatutory text is important as the best evidence of legislative intent or purpose.”).

159. 17 U.S.C. § 114(b) (2012).

The plain meaning of these words is that if there is a sound recording that was entirely independently made, then the exclusive rights in 17 U.S.C. § 106(1)–(2) do not protect the original copyright holder, regardless of whether the new sound recording sounds almost exactly the same as the other sound recording.<sup>160</sup> The statute, unlike what the Sixth Circuit held,<sup>161</sup> says nothing about what happens in a situation where a derivative work does not “consist[] entirely of an independent fixation of other sounds . . . .”<sup>162</sup>

Courts often interpret statutes by looking at the overall statutory structure.<sup>163</sup> In this vein, “an interpretation should be disfavored if it would make the disputed provision fit awkwardly with another provision or produce internal redundancy or confusion. An interpretation that would make sense of the statute as a whole should be adopted.”<sup>164</sup> With this framework in mind, the plain language of 17 U.S.C. § 114(b) clearly demonstrates that the statute limits, and does not expand, the exclusive rights granted to sound recording copyright holders. Section 114(b) almost exclusively speaks in limiting language.<sup>165</sup> For example, the most relevant section of the statute, the third sentence, states “[the] exclusive rights . . . *do not extend* . . . .”<sup>166</sup> The first, second, and fourth sentences<sup>167</sup> of the section only strengthen this interpretation.

160. See *VMG Salsoul*, 824 F.3d at 883. This provision, for example, would protect a tribute band who mimics another band’s songs, even potentially to the point where the songs are indistinguishable, so long as there was no actual copying of the song. See § 114(b).

161. *Bridgeport*, 410 F.3d at 800 (concluding, based on its reading of 17 U.S.C. § 114(b), that “a sound recording owner has the exclusive right to ‘sample’ his own recording”).

162. See 17 U.S.C. § 114(b).

163. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 425 (1989).

164. *Id.* There are flaws with interpreting statutes in this way. For example, this interpretative method “assum[es] that statutes are . . . internally consistent and coherent” and it may only provide little help because it might reveal more ambiguities or silences. *Id.*

165. See 17 U.S.C. § 114(b).

166. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 884 (9th Cir. 2016) (quoting 17 U.S.C. § 114(b) (emphasis added)).

167. *Id.* at 882 n.10 (quoting 17 U.S.C. § 114(b) (“The exclusive right . . . under clause (1) of section 106 is *limited* to the 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. The exclusive right . . . under clause (2) of section 106 is *limited* to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. . . . The exclusive rights . . . under clauses (1), (2), and (3) of section 106 *do not apply* to sound recordings included in educational television and radio programs . . . distributed or transmitted by or through public broadcasting entities . . . .”) (emphasis added)).

As found by the Ninth Circuit, the Sixth Circuit's conclusion is illogical.<sup>168</sup> Section 114(b) is phrased as a conditional statement, although it is not in typical "if-then" format.<sup>169</sup> If rewritten to fit the traditional "if-then" format of a conditional, the statute would read: if a "sound recording . . . consists entirely of an independent fixation of . . . sounds,"<sup>170</sup> then there are no exclusive rights under 17 U.S.C. § 106(1)–(2).<sup>171</sup> What the Sixth Circuit concludes from this statement is actually its inverse,<sup>172</sup> namely, that if the sound recording does not consist entirely of an independent fixation of sounds, then the sound recording copyright holder has exclusive rights under 17 U.S.C. § 106(1)–(2).<sup>173</sup> However, as the Ninth Circuit states, "it is a [logical] fallacy to infer the inverse of a conditional from the conditional."<sup>174</sup> This can be illustrated by the following truth table:<sup>175</sup>

168. *VMG Salsoul*, 824 F.3d at 884 ("Close examination of *Bridgeport's* interpretative method further exposes its illogic.").

169. See MARILYN A. REBA & DOUGLAS R. SHIER, *PUZZLES, PARADOXES, AND PROBLEM SOLVING: AN INTRODUCTION TO MATHEMATICAL THINKING* 214 (2014) ("In our everyday speech, we use conditional statements (those involving *if-then* constructs) in a variety of forms."); NICHOLAS RESCHER, *CONDITIONALS* 2 (2007) (generally defining conditionals as "statement-connective statements that are explicitly or implicitly of 'if-then' form, for ordinarily the consequent of the conditional spells out what follows (in one of the many senses of this term) from the acceptance or supposition of the antecedent").

170. 17 U.S.C. § 114(b) (2012).

171. See *id.*

172. See REBA & SHIER, *supra* note 169, at 215 ("Two conditional statements are inverses of each other if one statement negates both the antecedent and the consequent of the other . . ."). Thus, the inverse is produced by flipping the "if" portion of the conditional and the "then" portion and negating both. See *id.*

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

174. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 884 (9th Cir. 2016); see also Phillip M. Kannan, *Symbolic Logic in Judicial Interpretation*, 27 U. MEM. L. REV. 85, 108 (1996) ("p→q does not imply ~p→~q").

175. This table was largely reproduced from REBA & SHIER, *supra* note 169, at 216; however, some columns have been removed. A similar example can be seen in Kannan, *supra* note 174, at 103. In the table, the "p" is called the antecedent and the "q" is called the consequent. RESCHER, *supra* note 169, at 2. While a conditional and its inverse are not logically equivalent, other mutations of the conditional are equivalent. See REBA & SHIER, *supra* note 169, at 215–16. For example, the inverse of a conditional and the converse of the conditional (i.e., a statement that flips the antecedent and the consequent) are logically equivalent. *Id.* Further, a conditional and its contrapositive (i.e., a statement that flips that antecedent and consequent and negates both) are logically equivalent. *Id.* at 214–16.

	p	q	Original Conditional ( $p \rightarrow q$ )	Inverse ( $\sim p \rightarrow \sim q$ )
1	True	True	True	True
2	True	False	False	True
3	False	True	True	False
4	False	False	True	True

~ indicates a logical negation  
 $\rightarrow$  indicates a logical conditional

For there to be logical equivalence, the results of this table for the “Original Conditional” column and the “Inverse” column would have to be identical;<sup>176</sup> as can be seen, that is not the case. “However, if for given statements p and q only the cases in which both are true or both are false can arise, then for those particular statements” there is equivalence.<sup>177</sup> Row 2 can actually be discounted because it cannot happen with the given conditional. In essence, there is no way that there could be a completely independent fixation of sounds and still retain exclusive rights.<sup>178</sup> However, row three is logically possible. Namely, if there is not an entirely independent fixation there may not be exclusive rights if, for example, fair use applies.<sup>179</sup> Therefore, even for the given conditional, the conditional and its inverse are not logically equivalent.<sup>180</sup>

As is evident from the above analysis, nothing in 17 U.S.C. § 114(b) indicates that Congress intended the de minimis exception to not apply to sound recordings. In fact, the Sixth Circuit’s interpretation to the contrary both distorts the plain meaning of the statute and is logically suspect. Therefore, the Ninth Circuit’s opinion is more convincing on this critical point.

176. See REBA & SHIER, *supra* note 169, at 214–26; Kannan, *supra* note 174, at 91.

177. Kannan, *supra* note 174, at 100.

178. See 17 U.S.C. § 114(b) (2012).

179. See 17 U.S.C. § 107 (2012) (“Notwithstanding the provisions of section 106 . . . the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

180. See sources cited *supra* note 175.

## 2. Legislative History

Although the Sixth Circuit declined to consult legislative history in its analysis,<sup>181</sup> legislative history can still be used even if a statute is held to be unambiguous.<sup>182</sup> As the Supreme Court has stated:

When [the plain] meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one “plainly at variance with the policy of the legislation as a whole” this Court has followed that purpose, rather than the literal words.<sup>183</sup>

181. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005) (“We have taken a ‘literal reading’ approach. The legislative history is of little help because digital sampling wasn’t being done in 1971.”). Tracy Reilly recounts how at least one author attempted to refute this statement by arguing that “the first electronic samplers were introduced in the 1950s” and that the first digital sampler was available in 1975. Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court’s Attempt to Afford “Sound” Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 365–66 n.58 (2008). Reilly provides evidence from multiple authors that disagree with this position, concluding that this statement from the Sixth Circuit was correct. *See id.* at 366 n.58. Reilly argues that technology at the time was vastly different from digital sampling because they “[did] not merely replace a type of digital sound, as do Mellotrons and synthesizers; it replace[d] a particular instrument as played by a particular player in a particular setting, engineered by a particular engineer under the direction of a particular producer.” *Id.* (quoting E. Scott Johnson, Note, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 2 J.L. & TECH. 273, 274–75 (1987)).

182. M. Leah Somoano, *Bridgeport Music, Inc. v. Dimension Films: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?*, 21 BERKELEY TECH L.J. 289, 304 (2006).

183. *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940). This author is cognizant of, and also receptive to the argument by some, particularly Justice Antonin Scalia, that consulting legislative history can be misleading. *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). Justice Scalia’s lament in his concurring opinion in *Conroy* demonstrates this position well:

The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: “The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself . . . .” But not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.

*Id.* (Scalia, J., concurring) (citation omitted). Kenneth Dortzbach identifies three general critiques of legislative history: (1) illegitimacy, (2) indeterminacy, and (3) easy manipulation. Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80

Thus, the Ninth Circuit was correct to look at the relevant legislative history.<sup>184</sup>

The relevant legislative history only seeks to confirm and bolster the interpretation of the statute based on its plain meaning. The first relevant piece of legislative history demonstrates that the third sentence of § 114(b) only means that a copyright holder does not have derivative copyright protection when there is an independent creation of sounds, even if very well done.<sup>185</sup> A House Report on the statute states:

Subsection (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated . . . . Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.<sup>186</sup>

The same House Report makes it clear that Congress had “the *expressed intention* not to give exclusive rights against initiative or simulated performances and recordings . . .”<sup>187</sup> and thus “[u]nder section 114, the exclusive right of [the] owner of copyright in a sound recording to prepare derivative works based on the copyrighted sound recording is recognized.”<sup>188</sup> These passages also belie the Sixth Circuit’s reliance on the addition of the word “entirely” in the Copyright Act of 1976.<sup>189</sup>

MARQ. L. REV. 161, 162–63 (1996). Dortzbach notes that legislative history can be seen as illegitimate because it is neither “signed into law by an executive” nor “voted on by a legislature.” *Id.* at 162. Legislative history can be indeterminate because there are many different legislators with different views and a judge could pick and choose which statements supports her position, while ignoring contrary statements. *Id.* at 162–63. Finally, legislative history can easily be manipulated “in its creation and in its interpretation.” *Id.* at 163. This is because the history is written by staffers who could be influenced by lobbyists. *Id.* However, where, as here, the legislative history conforms to the plain meaning of the statute, the author believes there is a weaker argument that consultation with the legislative history is improper.

184. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883 (9th Cir. 2016)

185. See *id.*

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

187. H.R. REP. NO. 94-1476, at 106 (emphasis added).

188. *Id.*

189. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005) (“The significance of [§ 114] is amplified by the fact that the Copyright Act of 1976 added the word ‘entirely’ to this language.”).

Adding the word “entirely” just clarified that a sound recording copyright holder’s exclusive derivative rights under § 106(2) only cease when a new sound recording is entirely independent, which mirrors the plain meaning of the statute.<sup>190</sup>

Further, the legislative history also substantiates the argument that the overall structure of the copyright statute is to grant broad copyright protections under § 106 and then limit those rights under § 114. A House Report states that § 106 grants “exclusive rights in broad terms . . . and then . . . provide[s] various limitations . . . in the 12 sections that follow.”<sup>191</sup> Therefore, § 106 “is made ‘subject to sections 107 through 118,’ and must be read in conjunction . . .”<sup>192</sup> This again confirms the statutory analysis that § 114(b) is a limitation on the rights granted in § 106<sup>193</sup> and thus belies the Sixth Circuit’s analysis that resulted in an expansion of the rights under these sections.<sup>194</sup>

Similarly, the legislative history confirms that sound recordings are to be treated similarly to other types of copyrightable works.<sup>195</sup> In its brief to the Sixth Circuit, the Brennan Center for Justice at NYU School of Law and the Electronic Frontier Foundation (“The Brennan Center”) pointed to both a House Report and a Senate Report to support this position.<sup>196</sup> The House Report stated that the copyright protections granted to sound recordings did “*not grant any broader rights than are accorded to other copyright proprietors* under the existing Title 17.”<sup>197</sup> The Brennan Center also cited a Senate Report that expressed similar sentiments: “The purpose of the new [statutory language] is to extend to the owners of copyrighted music used in the making of recordings the *same* remedies available for other copyright infringements . . .”<sup>198</sup> This

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190. See 17 U.S.C. § 114(b) (2012).

191. H.R. REP. NO. 94-1476, at 61.

192. *Id.*

193. See *supra* notes 160–67 and accompanying text.

194. See *Bridgeport*, 410 F.3d at 800–01.

195. Brief of Amici Curiae Brennan Center for Justice at NYU School of Law and the Electronic Frontier Foundation in Support of Appellee at 7, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (No. 02-6521) [hereinafter Brennan Center Brief]; John S. Pelletier, Note, *Sampling the Circuits: The Case for a New Comprehensive Scheme for Determining Copyright Infringement as a Result of Music Sampling*, 89 WASH. U. L. REV. 1161, 1187 (2012).

196. Brennan Center Brief, *supra* note 195, at 7.

197. *Id.* at 7 (quoting H.R. REP. NO. 92-487, at 1575 (1971) (emphasis added)); see also Pelletier, *supra* note 195, at 1187 (quoting S. REP. NO. 92-72, at 6 (1971)) (“In approving the creation of a limited copyright in sound recordings it is the intention of the committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17.”).

198. Brennan Center Brief, *supra* note 195, at 7 (quoting S.R. REP. NO. 92-72, at 3 (1971) (emphasis added)).

legislative history confirms that § 114(b) does not expand the copyright protections granted to sound recordings because sound recording copyright holders actually have fewer protections than musical composition copyright holders.<sup>199</sup> With this legislative history in mind, the Sixth Circuit's opinion that expanded the rights afforded to sound recording copyright holders in relation to other types of copyrightable work simply cannot be correct.

The legislative history also suggests that the de minimis exception should be used for sound recordings. The Ninth Circuit latches onto one sentence in a House Report as almost definitive proof that the de minimis exception applies.<sup>200</sup> The House Report states that copyright "infringement takes place whenever all or any substantial portion of the actual sounds [that go to make up a copyrighted sound recording] are reproduced."<sup>201</sup> This passage does suggest that infringement only occurs when something more than de minimis copying occurs.<sup>202</sup> However, an argument could be made that this is just an isolated statement in the legislative history that might not actually indicate congressional intent.<sup>203</sup> Although this argument has some merit,<sup>204</sup> where this statement is just a small part of a vast amount of evidence suggesting that the de minimis exception applies to sound recordings, just as it applies to all other types of copyrightable works, then this argument is certainly weakened if not altogether rejected. Therefore, the Ninth Circuit's opinion is correct in terms of the legislative history in addition to its interpretation of the statutory text.

### B. Congressional Acquiescence

Plaintiff in *VMG Salsoul* argued, unsuccessfully, that *Bridgeport's* holding that the de minimis exception did not apply to copyrighted sound recordings must have been a proper interpretation of congressional intent because Congress has not acted to correct the decision in its aftermath.<sup>205</sup> The Ninth Circuit rejected this argument

199. Pelletier, *supra* note 195, at 1187.

200. *VMG Salsoul, LLC, v. Ciccone*, 824 F.3d 871, 883–84 (9th Cir. 2016) ("That passage strongly supports the natural reading of § 114(b) . . .").

201. *Id.* at 884 (quoting H.R. REP. NO. 94-1476, at 106 (1976)).

202. *See id.*

203. *See, e.g., Dortzbach, supra* note 183, at 162–63.

204. *See* sources cited *supra* note 183.

205. *VMG Salsoul*, 824 F.3d at 886. The Sixth Circuit called on Congress to amend the statute if the court's interpretation was at odds with Congressional intent. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005) ("If this is not what Congress intended or is not what they would intend now, it is easy enough for the record

because “congressional inaction in the face of a judicial statutory interpretation . . . carries almost no weight.”<sup>206</sup>

The United States Supreme Court has occasionally approved of congressional acquiescence arguments.<sup>207</sup> William Eskridge, Jr. describes two types of congressional inaction that could be relevant to the *de minimis* issue here: 1) what he calls “congressional acquiescence”—“Congress’ failure to overturn a judicial or administrative interpretation is evidence that Congress has acquiesced in that interpretation of the statute” and 2) “reenactment cases”—“where the acquiescence argument is buttressed by reenactment of the interpreted statute without material change.”<sup>208</sup>

However, as Eskridge, Jr. notes, the Supreme Court is almost as likely to reject both of the above arguments as it is to accept them.<sup>209</sup> The Supreme Court generally employs one of three types of reasons to reject a congressional acquiescence or reenactment argument.<sup>210</sup> The first of these is where there is insufficient evidence to demonstrate that Congress was actually aware of the judicial decision.<sup>211</sup> Importantly, this can also include the “lack of a clear line of interpretation by . . . the courts.”<sup>212</sup> The second reason is that even though Congress has not directly acted to correct the decision, it has acted in a way that suggests that it does not agree with the decision.<sup>213</sup> The final reason is that “subsequent legislative inactivity cannot ratify a clearly erroneous prior interpretation.”<sup>214</sup>

In this same vein, the Ninth Circuit cited a more recent case dealing with congressional acquiescence.<sup>215</sup> The Ninth Circuit quoted *Alexander v. Sandoval*<sup>216</sup> for the proposition that “[i]t is impossible to assert with any degree of assurance that congressional failure to act

industry, as they have done in the past, to go back to Congress for a clarification or change in the law.”)

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

207. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 67 (1988) [hereinafter *Interpreting Legislative Inaction*] (stating that “[t]he Court has grappled with [congressional acquiescence] arguments since the nineteenth century, oftentimes finding inaction arguments persuasive but other times finding them unappealing”) (citation omitted).

208. *Id.* at 70–71.

209. See *id.* at 75, 79.

210. *Id.* at 75–81.

211. *Id.* at 75.

212. *Id.* at 76.

213. See *id.*

214. *Id.*

215. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001)).

216. *Alexander*, 532 U.S. at 292.

represents affirmative congressional approval of the Court's statutory interpretation."<sup>217</sup> However, the Ninth Circuit actually omitted a prefatory clause that would actually strengthen its argument.<sup>218</sup> The Court stated that "when . . . Congress has not comprehensibly revised a statutory scheme but has made only isolated amendments," that congressional inaction should be given almost no weight.<sup>219</sup>

Therefore, although there is Supreme Court precedent to support a congressional acquiescence argument,<sup>220</sup> this argument is not very strong for a variety of reasons. First, as the Ninth Circuit points out, many districts courts that have considered the issue after *Bridgeport* have declined to follow its rule.<sup>221</sup> This would give the Court an opportunity to reject this argument under the first reason discussed by Eskridge, Jr., namely a lack of consensus among the courts to the proper interpretation.<sup>222</sup> Second, the copyright laws have not been comprehensively revised since 1976.<sup>223</sup> Therefore, under *Alexander*, the congressional inaction should be given little to no weight.<sup>224</sup> Finally, as discussed in the previous section, the Sixth Circuit's statutory interpretation goes against the plain meaning of the statute and clear legislative history.<sup>225</sup> Therefore, the Court could reject a congressional acquiescence argument because it "cannot ratify a clearly erroneous prior interpretation."<sup>226</sup>

### C. Policy Considerations

The Sixth Circuit also considered a number of policy considerations as further support for its statutory analysis.<sup>227</sup> The Ninth Circuit criticized this analysis as one for the legislature, not the judiciary;<sup>228</sup> however, discussion of a couple of these policy considerations can be

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217. *VMG Salsoul*, 824 F.3d at 886 (quoting *Alexander*, 532 U.S. at 292).

218. *See Alexander*, 532 U.S. at 292.

219. *Id.*

220. *See sources cited supra* notes 207–09 and accompanying text.

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

222. *See Interpreting Legislative Inaction*, *supra* note 207, at 75.

223. *See Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RESEARCH LIBRARIES, <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.WIVA4lz5ZPY> (last visited Mar. 29, 2018).

224. *See Alexander*, 532 U.S. at 292.

225. *See supra* Section II.

226. *Interpreting Legislative Inaction*, *supra* note 207, at 76.

227. *See discussion supra* Section II.A.2.b.

228. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 887 (9th Cir. 2016) ("Plaintiff advances several reasons why *Bridgeport's* rule is superior as a matter of policy . . . . Those arguments are for a legislature, not for a court. They speak to what Congress *could* decide; they do not inform what Congress *actually* decided.").

helpful from a normative perspective, as is conceded by the Ninth Circuit.<sup>229</sup>

### 1. Judicial Economy v. Creativity

The Sixth Circuit's creation of a bright-line rule would certainly lead to judicial efficiency;<sup>230</sup> however, the question is at what cost? Does a rule promoting judicial economy come at a cost of stifling creativity? This is an important and contested<sup>231</sup> question because copyright strives to promote creativity.<sup>232</sup>

As an initial matter, it is important to note that the Sixth Circuit in *Bridgeport* seems to concede that its rule will stifle creativity in some way.<sup>233</sup> The court states that “[w]e do not see this [rule] as stifling creativity in any *significant* way.”<sup>234</sup> Implicit in this is a recognition (ironically) that some creativity will be suppressed because of its rule.<sup>235</sup> The Ninth Circuit, while not discussing this issue at length,<sup>236</sup> expressed a similar sentiment when it stated that “it is possible that a bright-line rule against sampling would unduly stifle creativity in certain segments of the music industry because the licensing costs would be too expensive for the amateur musician.”<sup>237</sup>

As a corollary to this, from a law and economics perspective, it appears that *Bridgeport's* bright-line rule would likely stifle creativity.<sup>238</sup> Ryan Grelecki concludes this would be the case for a few reasons.<sup>239</sup> For example, the bright-line rule creates an issue where the

229. *See id.*

230. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005) (“This case also illustrates 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.”); Ryan C. Grelecki, Comment, *Can Law and Economics Bring the Funk . . . or Efficiency?: A Law and Economics Analysis of Digital Sampling*, 33 FLA. ST. U. L. REV. 297, 317 (2005) (“The establishment of a bright-line rule in digital sampling copyright allows for greater judicial efficiency. When a particular element is present, there is a particular result . . . . It creates a hard-and-fast rule that allows judges to ignore creative considerations, resulting in speedier and more predictable litigation.”).

231. Compare Grelecki, *supra* note 230, at 317 (arguing that “the bright line rule . . . stifles the creativity of another artist”), with Reilly, *supra* note 181, at 391–92 (arguing that *Bridgeport's* bright-line rule will not stifle creativity because music producers are still free to imitate a copyrighted sound recording).

232. Grelecki, *supra* note 230, at 317.

233. *See Bridgeport*, 410 F.3d at 801.

234. *Id.* (emphasis added).

235. *See id.*

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

237. *Id.* at 887 n.11.

238. *See Grelecki, supra* note 230, at 318–19.

239. *Id.*

holder of a sound recording copyright can demand the price for a license.<sup>240</sup> Grelecki concedes that the sampler would theoretically only pay an amount less than or equal to the cost of imitating the sound recording on her own;<sup>241</sup> but even this is inefficient because compromise is unlikely as the copyright holder has the much greater bargaining power and this would lead to increased transaction costs.<sup>242</sup>

There are issues from a law and economics perspective with using a standard such as the *de minimis* exception.<sup>243</sup> Use of the *de minimis* exception necessarily results in lesser judicial efficiency, slows down the litigation process, and results in uncertainty for the relevant parties.<sup>244</sup> This is because the *de minimis* exception is a factual standard, one a jury is more likely to decide, rather than a judge as a matter of law.<sup>245</sup> Furthermore, a *de minimis* standard could actually stifle creativity because it may discourage new artists from developing copyrightable works.<sup>246</sup> This might occur because artists could realize that even though they have copyright protection, an artist could take a small portion of their original work, with no legal recourse available to them and with no prospect of obtaining any monetary value from what was taken from them.<sup>247</sup>

Although this may be the case, Grelecki argues that using the *de minimis* exception is more efficient, in part because it would result in more settlements.<sup>248</sup> Similarly, it is more efficient because it does not require a sampling artist to contact and negotiate with every artist, and more likely the production company, to use a small piece of the copyrighted work.<sup>249</sup>

As shown above, both a bright-line rule and a *de minimis* exception stifle creativity to an extent.<sup>250</sup> However, the *de minimis* exception seems less likely to stifle creativity than a bright-line rule.<sup>251</sup> This is because artists are probably much more familiar with licensing, due to the compulsory licensing system imposed on them for musical

240. *Id.* at 319.

241. *Id.* This essentially acknowledges Reilly's argument. *See* Reilly, *supra* note 181, at 401.

242. *See* Grelecki, *supra* note 230, at 319.

243. *Id.* at 322.

244. *Id.*

245. *See id.*

246. *Id.* at 323.

247. *Id.*

248. *Id.* at 322.

249. *See id.* at 323.

250. *See supra* notes 233–49 and accompanying text.

251. *See* Grelecki, *supra* note 230, at 328.

compositions,<sup>252</sup> and may see licenses as a necessary “cost of doing business,” thus resulting in more sound recording licenses as a matter of course.<sup>253</sup> Further, it seems unlikely that a new artist would completely give away all potential monetary gain simply because they could not extract what would likely be just a small portion of that total potential gain due to unlicensed sampling.<sup>254</sup>

## 2. Physical v. Intellectual Taking

The Sixth Circuit’s conclusion that digital sampling constitutes a physical taking rather than an intellectual one<sup>255</sup> is incorrect for a few reasons. The Sixth Circuit states that “[f]or the sound recording copyright holder, it is not the ‘song’ but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium.”<sup>256</sup>

The first issue with this analysis is that it uses “a common law concept of misappropriation [in] an area that has been pre-empted by [a] congressional statute.”<sup>257</sup> Up until the moment of publication, an author of a work holds a natural-law property right in the “fruits of h[er] labor.”<sup>258</sup> However, once the work is published, it falls under the copyright regime which seeks to “regulate[] the use of the copyright, [rather than] the use of the work.”<sup>259</sup> If copyright law permits the use of the copyright, then the author’s claim to the “fruits of h[er] labor” is incorrect.<sup>260</sup>

The second issue with this analysis is that it “misconstrues the nature of [digital] sampling.”<sup>261</sup> The Sixth Circuit stated that when digital sampling occurs, the sounds are taken from the song itself.<sup>262</sup> However, digital sampling actually just copies the sounds in the copyrighted sound recording and “leaves the original . . . intact.”<sup>263</sup> In

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252. *See id.* at 303.

253. *See id.*

254. *See id.* at 325.

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

256. *Id.*

257. Amanda Webber, Note, *Digital Sampling and the Legal Implications of Its Use After Bridgeport*, 22 ST. JOHN’S J. LEGAL COMMENT. 373, 404 (2007) (citing Jason S. Rooks, *Constitutionality of Judicially-Imposed Compulsory Licenses in Copyright Infringement Cases*, 3 J. INTELL. PROP. L. 255, 259 (1995)).

258. Rooks, *supra* note 257, at 260.

259. *Id.* at 262.

260. *Id.* at 260.

261. Webber, *supra* note 257, at 404.

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

263. *See* Jennifer R. R. Mueller, Note, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 IND. L.J. 435, 449–50 (2006); *see also* Steven

this respect a digital sample is akin to photocopying a book, which “creates a copy without destroying the original.”<sup>264</sup> Therefore, “[c]ategorizing digital sampling as a physical taking does not create a meaningful basis upon which sound recordings deserve greater copyright protection.”<sup>265</sup>

The final issue with the Sixth Circuit’s analysis is that even with the assumption that digital “sampling [i]s a ‘physical taking,’” it does not follow that the *de minimis* exception does not apply.<sup>266</sup> For example, the *de minimis* exception applies “even when actual, physical artwork is used in a movie, television show, or play.”<sup>267</sup>

#### IV. FUTURE OF THIS ISSUE

The importance of the Ninth Circuit’s decision is that it explicitly created a circuit split within the United States Federal Courts of Appeals.<sup>268</sup> This circuit split has generated at least two identifiable issues: 1) copyrighted sound recordings are now granted “differ[ing] levels of protection in different parts of the country”<sup>269</sup> and 2) copyrighted sound recordings are “given more protection than other types of” copyrighted works.<sup>270</sup>

The circuit split, however, will not be resolved in *VMG Salsoul* because the time has long passed for Plaintiff to appeal for a Ninth Circuit en banc review<sup>271</sup> or to file a writ of certiorari to the United

D. Kim, *Taking De Minimis out of the Mix: The Sixth Circuit Threatens to Pull the Plug on Digital Sampling in Bridgeport Music, Inc. v. Dimension Films*, 13 VILL. SPORTS & ENT. L.J. 103, 125 (2006) (citing Brennan Center Brief, *supra* note 195, at 10).

264. Kim, *supra* note 263, at 125 (citing Brennan Center Brief, *supra* note 195, at 10).

265. *Id.*

266. *Copyright Law—Sound Recording Act—Sixth Circuit Rejects De Minimis Defense to the Infringement of a Sound Recording Copyright.—Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004), 118 HARV. L. REV. 1355, 1360 (2005).

267. *Id.* (citing *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70 (2d Cir. 1997)).

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

269. *Id.* More protection is now granted to sound recording copyright holders in jurisdictions covered by the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee). Sound recording copyright holders in the Ninth Circuit (California, Arizona, Nevada, Oregon, Washington, Idaho, Montana, Alaska, Hawaii, Guam, and the Northern Mariana Islands) have lesser protections.

270. Mueller, *supra* note 263, at 436 (noting that “*Bridgeport’s* holding would mean that one type of subject matter, sound recordings in particular, would be treated differently and in fact given more protection than other types of subject matter, including literary works, films, and musical compositions”).

271. See NINTH CIRCUIT APPELLATE LAWYER REPRESENTATIVES, THE APPELLATE LAWYER REPRESENTATIVES’ GUIDE TO PRACTICE IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 116 (2017) [hereinafter NCALR] (“In general, the due date for a petition for . . . rehearing en banc is 14 days from the date of decision.”) (citing FED. R.

States Supreme Court.<sup>272</sup> This is despite the fact that it appears that Plaintiff would have had a decent chance at obtaining either type of review. For example, the Ninth Circuit will consider a petition for a rehearing en banc “[w]hen the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.”<sup>273</sup> Application of this standard to *VMG Salsoul* would suggest that en banc review would have been appropriate. The Ninth Circuit decision clearly created a circuit split with the Sixth Circuit<sup>274</sup> and this case deals with federal copyright law, an area which Ninth Circuit precedent has recognized as an area where uniformity is necessary.<sup>275</sup> A counter to this, however, is that statistically, en banc review is not very likely; although the percentage is slightly better in the Ninth Circuit than it is in other circuits.<sup>276</sup>

Plaintiff also could have filed a writ of certiorari with the U.S. Supreme Court: “A case could be a good candidate [for Supreme Court review] if it creates or exacerbates a circuit split on an issue of law of substantial importance . . . .”<sup>277</sup> However, a grant of certiorari is

APP. P. 35); *see also* FED. R. APP. P. 35(c) (“A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.”); FED. R. APP. P. 40(a)(1) (“Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment.”). As the Ninth Circuit panel decision was rendered on June 2, 2016, the time for a petition for rehearing en banc has clearly passed. *See VMG Salsoul*, 824 F.3d at 871.

272. *See* NCALR, *supra* note 271, at 117 (“A petition for certiorari is due 90 days from the date of the decision or 90 days from the order denying a petition for rehearing/rehearing en banc (whichever is later).”) This time has also passed. *See VMG Salsoul*, 824 F.3d at 871.

273. Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *FORDHAM L. REV.* 2001, 2021 (2014) (quoting 9TH CIR. R. 35-1). This local rule does not differ in this regard to Federal Rule of Appellate Procedure 35 which allows for en banc review where “the proceeding involves one or more questions of exceptional importance . . . ; for example, . . . a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.” FED. R. APP. P. 35(b)(1)(B).

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

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

276. Sadinsky, *supra* note 273, at 2021. Between 2001 and 2009, the Ninth Circuit granted en banc review in 0.14 percent of all of its cases. *Id.* at 2015 n.128 (citing Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 *MO. L. REV.* 733, 738 (2011)). This puts the Ninth Circuit with the fifth highest percentage, behind the Federal Circuit, the Eighth Circuit, the Tenth Circuit, and the D.C. Circuit. *Id.*

277. NCALR, *supra* note 271, at 123 (citing EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 239 (10th ed. 2013)); *see also* SUP. CT. R. 10(a) (stating that one reason that the Supreme Court may grant certiorari is where “a United States court of appeals

permissive<sup>278</sup> and the Court has sometimes refused to grant certiorari when only two courts of appeals have ruled on an issue.<sup>279</sup> Similarly, the underlying issue has to be deemed important and “[i]f the dispute is minor or technical, the conflict alone may be insufficient.”<sup>280</sup> Here, there would have been a decent chance that the United States Supreme Court would have taken up the case, although this would not have been definite. A circuit split exists between two courts of appeals on an issue of federal law,<sup>281</sup> which could, by itself, be grounds for a grant of certiorari.<sup>282</sup> However, there are countervailing factors. One of these is that only two courts of appeals have directly discussed the issue of the de minimis exception and sound recordings.<sup>283</sup> Thus, the Supreme Court could have decided to let the issue percolate further before deciding to weigh in on the issue.<sup>284</sup> Similarly, the odds of the United States Supreme Court granting certiorari are very small, particularly when the writ is from a Ninth Circuit decision.<sup>285</sup>

The question then becomes how this circuit split will be resolved. One avenue would be another United States Court of Appeals decision that would further the circuit split. This would increase the likelihood that the United State Supreme Court would eventually grant a writ of certiorari, if filed.<sup>286</sup> But how likely is this result? It is telling that only two United States Courts of Appeals have confronted this specific issue in ten years.<sup>287</sup> Therefore, a decision by the United States Supreme

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has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”).

278. STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 238 (10th ed. 2013) (citing SUP. CT. R. 10) (“Rule 10 . . . warns at the outset that, since review on writ of certiorari is a matter of judicial discretion rather than of right, certiorari will be granted ‘only for compelling reasons.’”).

279. *Id.* at 247.

280. *Id.*

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

282. *See supra* note 277 and accompanying text.

283. *See VMG Salsoul*, 824 F.3d at 886; *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

284. *See supra* note 278 and accompanying text.

285. Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001–2015*, 61 VILL. L. REV. 795, 814 & n.76 (2016) (noting that the certiorari grant rate from the Ninth Circuit was 3.2%).

286. *See SHAPIRO ET AL.*, *supra* note 278, at 247 (“[T]here is already in place . . . a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question.” (quoting William J. Brennan, Jr., *Some Thoughts on the Supreme Court’s Workload*, 66 JUDICATURE 230, 233 (1983))).

287. *VMG Salsoul*, 824 F.3d at 871 (decision rendered June 2016); *Bridgeport*, 410 F.3d at 792 (decision rendered June 2005).

Court deciding the circuit split seems unlikely to occur in the near future.<sup>288</sup>

Another avenue for deciding the circuit split is legislative clarification of the law. Congress has a few ways it could address the issue. One would be to simply codify *VMG Salsoul's* holding that the de minimis exception applies to sound recordings. This could be done by adding a simple sentence to § 114(b) which would state:

Nothing in this subsection shall be read to imply that the exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 extend to the making of another sound recording that is not entirely independent. Such exclusive rights will only extend when the other sound recording consists of a substantial portion of the copyrighted sound recording.

Another potential Congressional change would, in essence, codify *Bridgeport's* rule. This could similarly be done by adding to § 114(b) a clause which states:

The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 extends to the making of another sound recording that is not entirely independent. Use of a copyrighted sound recording, regardless of the amount of the work taken, is per se copyright infringement.

The most common proposal is some form of a compulsory licensing system for sound recordings.<sup>289</sup> This type of system would allow for artists to sample any song in exchange for a set fee, determined by Congress, to the copyright holder.<sup>290</sup> This sounds simple in theory, but

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288. See SHAPIRO ET AL., *supra* note 278, at 247.

289. Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law*, 21 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 843, 865–66 (2011) (noting that “[t]he most commonly proposed suggestion is for Congress to create a compulsory licensing framework that encompasses a liability-based (instead of property-based) rule”); see also, e.g., Crum, *supra* note 85, at 964–69; David Fagundes, *Efficient Copyright Infringement*, 98 *IOWA L. REV.* 1791, 1840–43 (2013); Drew B. Hollander, “*Why Can’t We Be Friends?*” *How Congress Can Work with the Private Sector to Solve the “Digital Sampling Conundrum”*, 18 *VA. J.L. & TECH.* 229, 252–53 (2013).

290. Crum, *supra* note 85, at 964.

there are differing conceptions of this basic idea.<sup>291</sup> Furthermore, The Department of Commerce's Internet Policy Task Force recently declined to even propose a compulsory licensing scheme for "remixes," which included music.<sup>292</sup>

Another proposal would be a type of voluntary licensing whereby "users pay for the use of content, but instead of obtaining a license from each right owner, they buy one from collection societies."<sup>293</sup> This approach was actually recommended by the Department of Commerce.<sup>294</sup> However, as can be seen, there are numerous different proposals for a licensing scheme and any new proposal would require substantial review and debate from Congress before implementation because there are numerous differing interests at issue.<sup>295</sup>

Congressional action on this issue seems unlikely.<sup>296</sup> This is partly because, historically, Congress has been reluctant to pass copyright reform.<sup>297</sup> Furthermore, the fact that there is such a vast amount of scholarly work on the issue of digital sampling and potential legislative regimes to alleviate the problem, yet no corresponding legislative action, suggests that Congress has not even begun to consider legislative action on this issue.<sup>298</sup>

## V. CONCLUSION

Music is an important part of many people's lives. The Sixth Circuit in *Bridgeport* interpreted a statute that potentially reduced musical

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291. See, e.g., Hollander, *supra* note 289, at 267–72. This proposal includes both compulsory licensing and a "Copyright Management System." *Id.* This specific system would require a sampling artist to sample songs from an app and once completed, upload the new song to the app which would then determine a "fee and royalty assessment." *Id.* at 273–77.

292. INTERNET POLICY TASK FORCE, DEP'T OF COMMERCE, WHITE PAPER ON REMIXES, FIRST SALE AND STATUTORY DAMAGES: COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 4 (2016), [https://www.ntia.doc.gov/files/ntia/publications/white\\_paper\\_remixes-first\\_sale-statutory\\_damages\\_jan\\_2016.pdf](https://www.ntia.doc.gov/files/ntia/publications/white_paper_remixes-first_sale-statutory_damages_jan_2016.pdf).

293. Lev-Aretz, *supra* note 13, at 1382.

294. INTERNET POLICY TASK FORCE, *supra* note 292, at 29–33.

295. See Evans, *supra* note 289, at 869 ("Congress must revisit this issue to clarify and reconcile the varied approaches to this critical topic and to ensure that it fashions a rule that protects copyright holders, preserves traditional defenses to copyright infringement and encourages innovative uses of technology to create new works from existing creative artifacts.").

296. See *id.* at 868.

297. *Id.*

298. *Id.*

creativity and the creation of new genres of music.<sup>299</sup> The Ninth Circuit, however, properly interpreted 17 U.S.C. § 114(b) and held that the de minimis exception applies to copyrighted sound recordings.<sup>300</sup> This has created a circuit split, which has set this issue up for continued academic debate. However, more must be done to resolve this conflict. Either there must be more litigation on this issue, with parties willing to pursue the issue to its final conclusion (i.e., the United States Supreme Court), or there must be congressional action. The music industry as a whole can only benefit from a definitive rule either way.

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299. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–04 (6th Cir. 2005).

300. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 882–86 (9th Cir. 2016).

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