Circuit Split: An Efficient Rule to Govern the Sampling of Sound Recordings

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CIRCUIT SPLIT: AN EFFICIENT RULE TO GOVERN THE SAMPLING OF SOUND RECORDINGS

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On June 2, 2016, the Ninth Circuit Court of Appeals held that a horn hit lasting less than a quarter of a second, which had been physically copied from a copyrighted sound recording and subsequently modified, did not constitute actionable copyright infringement.[2] The Ninth Circuit opinion stands in direct opposition to the Sixth Circuit rule that any physical copying and use of a copyrighted sound recording constitutes actionable infringement, regardless of how small or whether the sample is modified. [3] No other circuit has addressed the issue of whether a *de minimis* copying constitutes infringement of a copyrighted sound recording.[4] In order to encourage the creative development of music in America and to protect individual property rights, an efficient and equitable rule for the sampling of sound recordings is necessary.

I. Introduction

"He who receives an idea from me, receives instruction himself without lessening

mine; as he who lights his taper at mine, receives light without darkening me." – Thomas Jefferson [5]

The purpose of federal copyright law is "[t]o promote the Progress of Science and useful Arts."[6] Intellectual property law is operating efficiently when it protects individual property rights and leaves room for creative growth. Musical creations that are truly original are exceedingly rare; a natural consequence of the reality that there exists a finite amount of musical notes and orders in which to organize them. Yet musicians continue to expand the public domain of music and create new works of art through a variety of methods, including "sampling."

Sampling is defined as "the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo." [7] Sampling may be advantageous to a musician for a number of reasons, including lowering production costs. For example, a burgeoning musician who wishes to utilize a drum break in their song may not be able to afford to hire a studio drummer to participate in a recording session, but may be able to copy a drum break that was previously recorded and copyrighted by someone else. This hypothetical also illuminates the argument for protecting the original musician from un-compensated sampling: the musician has invested time and money into the original production of the drum break, and allowing others to benefit financially from their investment would deter future investments in the creation of music. Although the veracity of this "tragedy of the commons" justification for the protection of sound recordings or intellectual property generally is worthy of debate, it is necessary for the purposes of this Note to assume that the protection of sound recordings is justified. But the question remains: how and to what extent should the recordings be protected?

While the horn hits at issue in *VMG Salsoul, LLC v. Ciccone* may have been quite small, they have resulted in substantial litigation and have illuminated an important legal issue that American courts are faced with today: should the physical copying and use of a copyrighted sound recording constitute infringement as a bright line *per se* rule, or, alternatively, should courts consider the *de minimis*, fair use, or substantial similarity defenses which have traditionally been applied in sound recording infringement cases? [8]

The Sixth Circuit has chosen to adopt a bright line rule that any and all copying and use of even small or relatively insignificant portions of a sound recording is copyright infringement. [9] This rule reflects a policy decision that prioritizes individual property

rights and independent creation, perhaps to the detriment of "collaboration and the custom of borrowing in the performance of music." [10] In its opinion, the Sixth Circuit Court reasoned that the "music industry, as well as the courts, are best served if something approximating a bright-line test can be established." [11] In order to reach its conclusion that any and all copying of a protected sound recording was copyright infringement regardless of the size or intensity of the duplication, the court's analysis was largely dependent on a "literal reading" approach to the interpretation of federal statutes governing copyright infringement. [12]

The Ninth Circuit, on the other hand, has opted to extend the *de minimis* requirement of copyright law to the sampling of sound recordings. A use of a sound recording is *de minimis* "only if the average audience would not recognize the appropriation." [13]According to the Ninth Circuit Court of Appeals, "[w]hen considering a claimed infringement of a copyrighted sound recording, what matters is how the musicians "played" the notes, that is, how their rendition distinguishes the recording from a generic rendition of the same composition." [14]

Section I of this Note provides an introduction to the issue of sampling as it pertains to copyright infringement. Section II of this Note sets forth the scope of the Note and further explains what sampling is and how the copyright protection of sound recordings differs from that of musical compositions. Section III of this Note explains the importance of developing a rule to efficiently govern the sampling of sound recordings, especially due to the increased prevalence of sampling in the modern music industry. Section IV of this Note explains the *de minimis* exception to copyright infringement. Section V of this Note provides an in-depth analysis of *Ciccone* and *Bridgeport Music* in order to evaluate the merits of the courts' respective opinions. Section VI of this Note provides an analysis of the proper statutory interpretation, considers public policy concerns, and recommends what action the Supreme Court should take to resolve this issue.. As noted *infra*, the Supreme Court may be unable to reach an appropriate solution and Congressional action may be necessary. Therefore, this Note will end by suggesting Congressional action that may result in an efficient rule for the sampling of sound recordings.

II. Scope of Argument

Before determining what rule should govern the unauthorized sampling of music, it is necessary to first understand exactly what "sampling" is. In general, "sampling involves the use of a small segment of an existing sound recording in a new sound recording."[15] When a musician writes down a song, including the lyrics and composition, the composition of that song immediately enjoys copyright protection. [16]

However, musical compositions and sound recordings are considered to be two separate and unique pieces of intellectual property under copyright law. [17] The distinction between the composition and the recording may not be intuitive at first, but it is essential to understand for the purposes of developing an efficient rule for the copyright protection of music. In 1991 the Supreme Court of the United States outlined the elements of a copyright infringement claim as: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."[18]

This Note is not concerned with the copyright protection of musical composition. The musical composition consists of the "music" (the unique arrangement of musical notes creating the sound) and any words that are associated with the song.[19] While the protection of a musical composition presents its own unique issues, it is sufficient for the purposes of this Note to recognize that this is a separate and distinct component of intellectual property law, and that the duplication of a musical composition is only actionable if it is legally significant.[20] Instead, this Note is concerned with sound recordings. The term "sound recording" refers to "a specific performance of a composition, as affixed in a recording medium . . ., that serves as the 'raw audio source used by the sampling musician.'"[21] In other words a sound recording is the actual physical (whether digital or otherwise) recording of the sounds that together comprise the musical work. The copyright of the musical composition and the copyright of the sound recording are two separate and distinct bundles of rights, and as such "the rights of a copyright in a sound recording do not extend to the song itself, and vice versa."[22] A single recording company usually owns the sound recording, not the musician who created the composition.[23]

To illustrate the difference between a musical composition and a sound recording, it may be helpful to analogize to the copyright protection enjoyed in by a novel. In this metaphor, musical composition copyright would protect the plot, setting, characters, and arrangement of words that comprise the novel. The sound recording copyright, on the other hand, would protect the physical book including the cover, bindings, and the pages themselves. Copyright law does not protect physical books in this manner, but does protect sound recordings.[24]

This Note is only concerned with the literal copying of a physical sound recording, or the copying of a portion of a music file. The individual who copies the sound recording will often modify it in some way, possibly by slowing it down, speeding it up, or even changing the order of notes. [25] It is critical to point this potential for modification out because sampling does not include simulation or imitation but instead is limited to "the actual use of the copyright owner's original work."[26] Thus, while in some jurisdictions a musician is prohibited from directly copying a single "horn hit" from a sound

recording, in every jurisdiction that same musician is free to pick up a horn and attempt to play the "horn hit" in the same way to produce the same sound. [27]

III. Importance

The practice of sampling is used throughout the music industry. [28] The practice is especially widespread in genres such as hip hop and rap.[29] Additionally, sampling is regularly used in marketing campaigns. [30]

In order to illustrate the degree to which the unauthorized sampling of sound recordings has permeated contemporary culture, it is helpful to consider the story of the "Amen Break." The "Amen Break" is a six second drum-beat, or break-beat, that has been sampled from a 1969 song titled "Amen, Brother." [31] While the original song was not particularly popular, the sample of the break-beat has seen an emergence in popularity since the late 80's with the rise of hip hop. [32] The song was used in several hip hop and rap songs during this period, including NWAs "Straight Outta Compton." [33] Around the same time that NWA released "Straight Outta Compton," a sub-genre of rave music called "Ragga Jungle" became popular in the United Kingdom.[34] Ragga Jungle centered its aesthetic almost entirely on sampling the Amen Break.[35] The Amen Break demonstrates the influence that music sampling can have on contemporary culture: A six second drum loop taken from the B-side of a 1969 funk and soul single has spawned hundreds of unique tracks, supported a number of clubs and the careers of dozens of Disc Jockeys, and has given rise to a subculture of the UK rave phenomenon in the late 1980s and early 1990s. [36] The band that created the single that the Amen Break was sampled from has never pursued any claim for copyright infringement. [37]

Judicial economy is another important concern to consider when formulating a rule to govern the sampling of sound recordings without permission. Sampling was rarely litigated until recently; instead most parties chose to settle when there was a dispute. [38] However, as the law around sampling continues to develop, the use of digital sampling becomes more widely used; and considering the statutory guidance that is now available, it is likely that sampling cases will increase exponentially.[39] The lack of an efficient rule governing the unauthorized sampling of sound recordings threatens to flood courts with litigation.

The strict liability standard set forth in *Bridgeport* may have a nation-wide effect on the creation of sound recordings because successful recordings are distributed across the United States.[40] The adoption of an efficient and uniform rule to govern the unauthorized sampling of sound recordings is important because money, the balance of personal property interests, the cultivation of creative development, collaboration, and

the public domain of music are all at issue.

IV. The *De Minimis* Rule

The rights associated with a copyright are generally not absolute. Over one hundred years ago, Judge Chatfield explained: "Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done *to an unfair extent*."[41] The term "*de minimis*" is derived from the legal maxim "*de minimis non curat lex*" which roughly translates to "the law does not concern itself with trifles."[42] In other words, the *de minimis* rule stands for the proposition that a court will not impose liability on an unauthorized appropriator of copyrighted property if the average audience would not recognize the appropriation.[43]

Although those who duplicate sound recordings may modify the recordings in a number of ways, such as changing the speed, distorting the sounds contained in the recording, or even changing the order or arrangement of sounds, it does not necessarily follow that the modification will prevent copyright infringement.[44] Thus, there is a large and unpredictable grey area in the law about what copying will be *de minimis*, and what copying will be substantially similar. Unless an appropriation is legally substantial, a court applying the *de minimis* rule will not find that copyright infringement has occurred. Generally, a claim for copyright infringement will fail unless the copying is substantially similar.[45]

V. The Split

A. The Sixth Circuit

In March of 2005 the United States Sixth Circuit Court of Appeals attempted to resolve the issue of what rule should govern the unauthorized sampling of sound recordings.[46] The seminal case in the Sixth Circuit is *Bridgeport Music, Inc. v. Dimension Films*. The dispute in *Bridgeport* arose out of the use of a sample from "Get Off Your Ass and Jam" in the song "100 Miles and Runnin,'" which was then used in the soundtrack of *I got the Hook Up*, a movie released by defendant No Limit Films in 1998.[47] Particularly of interest to this Note are the claims of Westbound Records against No Limit Films.

Westbound Records is a company in the business of recording and distributing sound recordings, and is the entity who possessed a copyright ownership interest in the sound recording which was sampled in "100 Miles and Runnin'." [48] The sample in controversy is a two second sample of a guitar solo that was "copied, the pitch was lowered, and the copied piece was 'looped' and extended to 16 beats."[49] Westbound

Records argued that the sound recording of the guitar solo from "Get Off Your Ass and Jam" had been literally copied and used in the song "100 Miles and Runnin'" which was in turn included in the Defendant's movie soundtrack *I Got the Hook Up*.[50] In response to Westbound Records' claims, No Limit Films presented two arguments: (1) That copyright law could not protect the sound recording that had been copied because it was not "original"; and (2) "that the sample was legally insubstantial and therefore does not amount to actionable copying under copyright law."[51]

While the District Court was not persuaded by No Limit Films' argument that the sound recording was not "original," the court concluded, based on a *de minimis* analysis or a "fragmented literal similarity" test, that no reasonable jury could find that the sampling rose "to the level of a legally cognizable appropriation."[52] It is particularly noteworthy that on appeal Westbound Records did not challenge whether or not a jury could find a legally cognizable appropriation, but instead argued that it is immaterial whether or not the appropriation was *de minimis* because no such inquiry "should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording."[53] In other words, Westbound Records did not argue that the District Court had been negligent in its application of the *de minimis* test, but rather that the test should never have been applied in the first place.

Although the Sixth Circuit Court of Appeals did ultimately agree with Westbound Records that the *de minimis* test should not have been applied, the court relied on an analysis that is separate and distinct from the arguments presented by the plaintiff.[54] The analysis of the court centered on a statutory interpretation of Sections 114 and 106 of Title 17 of the United States Code.[55] These statutes will be discussed in depth below, but for now it is sufficient to understand that together the statutes undoubtedly prohibit pirating or copying an entire sound recording.[56] The Sixth Circuit Court of Appeals noted in *Bridgeport Music* that it is clearly impermissible to pirate an entire sound recording, and then proceeded to address the issues of whether or not it is permissible to sample something less than the whole sound recording without violating the relevant statutes.[57]

In order to answer whether or not it is permissible to sample something less than an entire sound recording, the Sixth Circuit Court focused on the language of the governing statutes.[58] Specifically, the court focused on the inclusion of the word "entirely" in Section 114(b) of Title 17 the United States Code. [59]

The relevant portion of Section 114(b) places limitations on the rights the owner of a sound recording enjoys. According to the statute, the copyright owner of a sound recording does not have rights that "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."[60] This clause of the statutes allows for a musician to listen to the sound recording, and attempt to imitate or simulate the notes that are played on the sound recording so long as the musician does so using her own instruments and recording equipment. The court interpreted the inclusion of the word "entirely" to stand for the proposition that an imitating musician may not literally (physically) copy any portion, no matter how small or insignificant it is to the overall recording. Put differently, the court interpreted the aforementioned clause to stand for the proposition that "a sound recording owner has the exclusive right to 'sample' his own recording."[61] Thus, the Sixth Circuit adopted the rule that unauthorized sampling, regardless how small or seemingly insignificant, is copyright infringement as a matter of law.

There is a legitimate question as to why sound recordings should be afforded more copyright protection than musical compositions. The Sixth Circuit Court of Appeals offered two justifications for this distinction.[62] First, a literal reading of the governing statute mandates a *per se* rule for sound recordings, but does not do so for musical compositions.[63] Second, "even when a small part of a sound recording is sampled, the part taken is something of value."[64] In other words, sampling a sound recording constitutes a *physical* taking.[65]

The Sixth Circuit offered several justifications for the adoption of a new rule. First, the court explained that there is support for a *per se* rule in several law review and other published texts.[66] Second, the court argued that the new rule will not have a substantial effect on the practices of the music industry because many artists and companies have already adopted the policy of seeking licensing as a matter of course, many artists who sample without seeking licenses will continue to do so, and because pre-1972 sound recordings are not afforded federal copyright protections.[67] Third, the music industry has the ability to develop its own licensing guidelines if it chooses. Finally, the court identifies that "[t]he legislative history [of federal copyright protection statutes] is of little help because digital sampling wasn't being done in 1971" and therefore the best approach to this issue is a "literal reading" of the statue.[68]

B. The Ninth Circuit

In June of 2016, the Ninth Circuit Court of Appeals attempted to resolve the issue of what rule should govern the unauthorized sampling of sound recordings.[69] The seminal case in the Ninth Circuit is *VMG Salsoul, LLC v. Ciccone*. The dispute in *VMG Salsoul* arose out of the artist Madonna's use of a 0.23 second "horn hit" in her hit song "Vogue."[70] Madonna physically copied the horn hit from an early 1980s instrumental

song titled “Ooh I Love It” without permission from the copyright owner.[71]

The defendant in *VMG Salsoul* presented identical defenses as the defendant in *Bridgeport Music*, asserting that the sound recording of the sampled music was not “original” for copyright law purposes, and that even if the court determined the sampled sound recording to be “original” for the purposes of copyright law, that the sampling was “*de minimis* or trivial” and thus exempt from copyright protection.[72] While the defendant disputes whether the physical copying of the song actually occurred, the court finds that when taking the facts in the light most favorable to the plaintiff a genuine issue of material fact occurred and thus the court must proceed to the next step of the analysis: assuming that the sampling did occur, does it constitute copyright infringement?[73] In order to answer this question, the court must determine both whether the *de minimis* exception to copyright infringement applies to sound recordings, and if so, whether or not the infringement in this case is *de minimis*.

In order to answer the question of whether or not the *de minimis* exception applies to sound recordings, the court begins by noting that courts in the Ninth Circuit have recognized “the response of the ordinary lay hearer” as an essential part of the copyright infringement test.[74] The court also explains that a copyright owner’s legally protected interest is the potential financial return for her creation.[75] Because any potential financial return linked to the copyright owner’s intellectual property is necessitated upon the approval or praise of the public or consumers, if the consumers are unable to recognize the appropriation then “the copier has not benefited from the original artist’s expressive content” and thus no infringement has occurred.[76] In other words, the court reasoned that harm to the creator of the sound recording is dependent upon public recognition of the origins of the recording.

Next, the court engages in an exercise of statutory interpretation to determine what Congress’ intent was in creating federal copyright protection. The court begins its analysis of the relevant statutes by highlighting that the text of 17 U.S.C. §106 “Exclusive rights in copyrighted works” does not suggest any differential treatment between any mediums of intellectual property, including sound recordings.[77] Therefore, if the *de minimis* exception applies to any one medium then there is no occasion to believe Congress intended not to extend the exception to the others.[78] Second, the court addresses 17 U.S.C. §114(b), the provision on which *Bridgeport Music* relied most heavily in formulating a *per se* copyright infringement rule for sound recordings. The *VMG Salsoul* court is highly critical of the *Bridgeport Music* court’s interpretation of the statute, explaining that “[w]e ordinarily would hesitate to read an *implicit expansion* of rights into Congress’ statement of an *express limitation* on rights.”[79] Unlike the court in *Bridgeport Music*, the Ninth Circuit court considered the §114(b)

legislative history in determining congressional intent.[80] Specifically, the legislative history states that copyright infringement occurs when all or "*any substantial portion* of the sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method."[81] Further, the *VMG Salsoul* court asserts that the 6th circuit rule relies upon a logical fallacy: inferring the inverse of a conditional from the conditional.[82] In other words, the Sixth Circuit is interpreting the statute as an extension of property rights whenever a sampling is not comprised of only independent fixations of other sounds. The Sixth Circuit asserts that this portion of the statute does not operate to create any property rights for the creator of the sound recording but instead ensures that musicians who sample through the use of only independent fixations of other sounds (i.e. their own instruments) will be protected from copyright infringement law suits. This alleged fallacy is discussed in greater depth *infra*.[83] Even under the Sixth Circuit's interpretation, there may remain a legally significant infringement claim based upon the appropriation of musical composition but that is outside the scope of this Note. The Ninth Circuit relies on statutory interpretation to determine that Congress intended for the *de minimis* exception to copyright infringement to be extended to sound recordings. [84]

Once the court determined that the *de minimis* exception to copyright infringement applied to sound recordings, the court began its analysis of whether the sampling in controversy was *de minimis*.[85] Notably, expert musicians who listened to the two tracks were unable to determine what portions of the recording had been copied.[86] Thus, the court held that because an average audience would be unable to recognize what portions of the original sound recording had been copied, the sampling was *de minimis* and did not constitute copyright infringement.[87] The Ninth Circuit is not alone in imposing *de minimis* requirements to sound recordings.[88]

VI. Analysis

A. Statutory Interpretation

Because both *VMG Salsoul* and *Bridgeport Music* based their decisions primarily on statutory interpretation, the United States Code is the best place to begin the search for a resolution to this circuit split. Title 17 of the United States Code is the federal statutory law governing copyright protection. [89]Section 102 of Title 17 announces what subject matter is afforded copyright protection under federal law; sound recordings are protected.[90] Next, section 106 of Title 17 sets forth the rights that are afforded to the owners of copyrighted works; subsection 6 pertains specifically to sound recordings and grants the exclusive right to "perform the copyrighted work publicly by means of a

digital audio transmission" to the creator of the sound recording.[91] Finally, sections 107 through 122 place limitations on the exclusive rights that are granted under section 106, with section 114 specifically placing limitations on the rights enjoyed by sound recording owners.[92]

Essentially all of the debate over whether or not a *per se* infringement rule is statutorily mandated derives from differences of interpretation of section 114(b) which states 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. (emphasis added)[93]

The natural reading of this clause simply states that an individual is free to imitate or simulate a sound recording without incurring liability for copyright infringement. The *Bridgeport Music* court instead read this clause as an expansion of the copyright holder's rights.[94] This result was reached through the use of a logical fallacy. To illustrate the fallacy, consider the proposition enumerated in section 114(b): If entirely independent fixation of other sounds, then copyright protection does not extend. The *Bridgeport Music* court then formulated the following as what is in fact a false contrapositive of the above proposition: If not an entirely independent fixation of other sounds, then protection does extend.[95] The correct contrapositive of the proposition, however, is the following: If protection does extend, then it is not an entirely independent fixation of other sounds. The statute itself does not offer any guidance on whether liability is incurred when a fixation is not entirely independent, as *Bridgeport Music* suggests it does, because reliance on this reasoning would be committing the fallacy of inferring the inverse of a conditional from the conditional.[96]

Although *Bridgeport's* interpretation of the §114(b) may be one-of-a-kind, the statutory language itself is not unique. A comparable provision limiting the rights of copyright holders against libraries may be found at 17. U.S.C. §108(e).[97] §108(e) states:

> The rights of reproduction and distribution under this section apply to the *entire work, or to a substantial part of it,* made from the collection of a library or archives where the user makes his or her requests or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord or the copyrighted work cannot be obtained at a fair price… . (emphasis added).[98]

If a library copies a single sentence from the novel *Blood Meridian*, will Cormac McCarthy be successful in a copyright suit even though the library did not copy "the entire work, or . . . a substantial part of it?"[99] Under *Bridgeport's* interpretation, even if the library were to copy the word "he" from page 141 of *Blood Meridian*, the library would be liable for copyright infringement.[100] Under the Ninth Circuit's interpretation, copying the word "he" would not be infringement because no one reading the copy could identify the word as being derived from *Blood Meridian*.[101]

While the *Bridgeport Music* court dismisses the statute's legislative history because sampling was allegedly not in practice at the time of enactment, other forms of direct copying were available and therefore the legislative history should be considered. The legislative history of section 14(b) includes the following:

> Infringement takes place whenever all or *any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, *or any other method*, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. (emphasis added)[102]

This sentence from the legislative history is important for two reasons: (1) it enunciates that the drafters of section 14(b) did not intend an all or nothing application but instead intended the substantiality of literal copying to be considered; and (2) the drafters of section 14(b) recognized that literal copying was already possible and left room for the statute to apply to new technologies or other methods of copying that would come in the future[103]. Such an interpretation has found support in federal court.[104]

Thus, when considering the plain language of section 114(b) in conjunction with the overall statutory scheme of Title 17 and the accompanying legislative history, it is apparent that the *Bridgeport Music* court's statutory justification is misplaced. Accordingly, congressional intent in drafting federal copyright law was not to hold individuals who literally copy sound recordings liable for copyright infringement as a matter of law. Instead, it appears that congress intended the substantiality of the duplication and reuse to be a factor of consideration in a copyright infringement case.

B. Policy Concerns

The most logical statutory interpretation may lead to the application of the *de minimis* rule, as suggested by the Ninth Circuit Court of Appeals in *VMG Salsoul*, but this does not necessarily solve the public policy need for an efficient rule. The concern of judicial economy still exists, and those who sample will be less likely to settle out of court with plaintiffs if they know that they have the *de minimis* defense at their disposal. There

is also a need for the music industry to have a rule that will lead to consistent results in litigation, because it will allow artists to price the risk of having a judgment against them ex ante and thereby decide if it is less expensive to go the route of licensing.

Alternatively, it has been argued that the *de minimis* rule promotes judicial economy.[105] The argument is supported be the notion that plaintiff's are less likely to seek legal recourse if they are afraid that the court will absolve the defendant of liability pursuant to the *de minimis* defense.[106] Likewise, the argument may be made that a *per se* rule actually creates more litigation because plaintiffs will sue much more often knowing that the defendant does not have access to the defense of the *de minimis* rule.[107]

Whatever rule is adopted should not stifle creativity. The *per se* rule formulated by the Sixth Circuit appears to stifle creativity on its face, although the court in *Bridgeport Music* offered several arguments as to why this would not be the result. First, a bright line rule such as this one promotes ease of enforcement.[108] Second, the free market will necessarily ensure that license prices are efficient.[109] Finally, unlike the infringement of musical composition copyright, infringement through the sampling of a sound recording is never accidental.[110]

There are also concerns of the *de minimis* rule's effects on creativity. Allowing for nearly unchecked copying could act as a deterrent for the creation of truly new works of music. Some have argued, however, that no artwork can truly be "original" because all artists rely so heavily on the inspirations and influences they receive from other artists.[111]

C. Resolution – U.S. Supreme Court

The United States Supreme Court should resolve this circuit split by adopting the Ninth Circuit's interpretation of this issue. The correct interpretation of the relevant statutory scheme does not create a *per se* copyright infringement rule for the physical sampling of sound recordings, as the Sixth Circuit suggests. Instead, the statutes leave room for the application of the common law doctrine of the *de minimis* rule.

While Congress has not created a special category of *per se* copyright infringement for sound recordings, the U.S. Supreme Court could deem the *de minimis* defense to not apply to sound recordings on public policy grounds. Unfortunately, neither the Ninth Circuit nor the Sixth Circuit has clearly established an efficient rule. It is unclear what effect a *per se* rule would have on the music industry if applied nation-wide. The U.S. Congress is in a much better position to investigate and analyze the needs of the music industry than is the U.S. Supreme Court and therefore the Court should avoid engaging in judicial activism in the resolution of this problem. Instead the Court should adopt the Ninth Circuit's interpretation and treat sound recordings as it treats other categories of

intellectual property. In its opinion, the Court should emphasize that there is a need for Congressional action to resolve the need for an efficient rule regarding the sampling of sound recordings.

D. Resolution – Congressional Action

Neither the approach adopted by the Ninth Circuit in *VMG Salsoul* nor that adopted by the Sixth Circuit in *Bridgeport Music* adequately addresses the need for an efficient rule to govern music sampling. *Bridgeport Music's* bright-line rule approach, however, is a step in the right direction. In order to reach a satisfactory solution to the problem at hand, it is necessary to maintain the spirit of the *Bridgeport Music* decision while reaching a more practical outcome. The *de minimis* defense is not the appropriate measuring stick for the sampling of sound recordings because "[w]herever [the line] is drawn [to mark where *de minimis*] will seem arbitrary"[112] and will result in an overwhelming grey area in which musicians and recording companies would be forced to operate. Instead, this Note proposes that the United States Congress should enact compulsory licensing for all sound recordings.

The Sixth Circuit may have been inhibited by its enumerated powers, but the Congress is both well equipped and Constitutionally mandated to solve this problem. The Sixth Circuit created a bright line rule: "Get a license or do not sample."[113] With Congress' help, this bright line rule can provide an equitable solution for all parties involved.

The United States Congress should enact compulsory licensing for all sound recordings. Congress has already created a compulsory licensing system for some activities, such as the performance and distribution of "cover songs."[114] 17 U.S.C. § 115 "authorizes any person who complies with its provisions to obtain a license to make and distribute phonorecords of a nondramatic musical work if: (1) the work has 'been distributed to the public in the United States under the authority of the copyright owner; and (2) the person's 'primary purpose in making phonorecords is to distribute them to the public for private use.'"[115] Put simply, a compulsory system would allow anyone who wants to sample a song to do so by paying a set fee, which is regulated by the federal government, and by giving notice in compliance with the regulations. The system of compulsory licensing should allow any artist to sample any other artist's music, for a set fee.[116] The fee would be set by a regulatory body and would be based on the fair market value of sound recordings. The fee should depend on a number of factors, including the length of the sample and its importance to the source material. The system should feature a notice requirement by which all owners of sound recordings would be served with notice of (and compensated for) the sampling of their recordings.[117]

Limitations on the use of sound recordings should include maximum limits of duration, and limits on how many samples may be taken from a single artist, album, or recording.[118] However there should be no limitation on the manipulation of the sample, in order to foster creativity.[119] There should also be a variety of alternative payment methods to allow musicians who are lacking capital to participate legally. For example a young musician may agree to a congressionally approved royalty contract to share proceeds from the use of the sample.

The compulsory licensing system would ensure that the courts are not flooded with litigation because non-licensed sampling would become copyright infringement as a matter of law. The system would foster the creative growth of the music community. And the compulsory licensing system would drastically cut down on transactional costs, creating a more efficient music industry.[120] The way music is made is evolving alongside technology; federal copyright laws must adapt accordingly. Unfortunately, there appears to be little support for the creation of a compulsory licensing system in Congress and in fact it is plausible that Congress may repeal the existing compulsory licensing system under Section 115.[121] Among other concerns, Congress has communicated concerns that while compulsory licensing for an entire musical score to be recreated by the licensee requires substantial time and resources to be expended by the licensee, allowing a similar system for the use of physical sound recordings would allow the licensee to profit off of the resources and time of the licensor.[122] Essentially Congress has voiced its concern that implementing a compulsory licensing system for sound recordings would result in a "tragedy of the commons" scenario.

VII. Conclusion

In conclusion, there is a very important divide in the law governing the sampling of sound recordings. The American music industry is already highly dependent on the sampling of sound recordings, and it appears that the dependence will continue to increase in the years to come. American law is not currently equipped to efficiently deal with the copyright protections of sound recordings.

The Ninth and Sixth Circuit Courts of Appeals have attempted to reach an efficient solution to the issue of sound recordings. The Sixth Circuit's *per se* rule provides a bright line rule, but may stifle creativity and is based upon a faulty interpretation of the relevant statutory scheme. The Ninth Circuit's application of the *de minimis* rule is consistent with the relevant statutory scheme and copyright common law in general, but may not be an efficient solution to the larger problem. The United State Supreme Court should address this circuit split and adopt the Ninth Circuit's interpretation of the rule. However, it does not appear that a solution to this problem can be completely derived

from judicial action. Congress, on the other hand, is capable of creating an efficient solution to the sampling conundrum.

Congress should pass a statute creating a compulsory licensing system, similar to the system already in existence under Section 115, but applicable to the sampling of sound recordings. Such a system would allow for the continuing artistic development of the musical industry, would protect the property interests of copyright holders of sound recordings, and would promote judicial economy through the creation of a bright line rule. Though the problem may be complex, the solution is simpler: If you want to sample get a license. In order for this axiom to be applicable in the real world, Congress must ensure that licenses are reasonably available to those seeking them. This is accomplished through compulsory licensing.

[1] University of Kentucky College of Law, J.D. Expected May 2018.

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

[3] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800–02 (6th Cir. 2005).

[4] Lesley Grossberg, *A Circuit Split at Last: Ninth Circuit Recognizes De Minimis Exception to Copyright Infringement of Sound Recordings*, Baker Hostetler: Copyright, Content, and Platforms (June 21, 2016), https://www.copyrightcontentplatforms.com/2016/06/a-circuit-split-at-last-ninth-circuit-recognizes-de-minimis-exception-to-copyright-infringement-of-sound-recordings/; *but see id.* ("almost every district court not bound by that decision has declined to apply *Bridgeport's* rule.") (quoting *Ciccone*, 824 F.3d at 886).

[5] Thomas Jefferson, *Thomas Jefferson to Isaac McPherson*, The Founders' Constitution (Aug. 13, 1813), http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html

[6] U.S. Const. art. I, § 8, cl. 8.

[7] *Ciccone*, 824 F.3d at 875 (citing Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004)).

[8] *See, e.g.*, *id.* at 874.

[9] 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, 847 (2011).

[10] *Id.*

[11] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 799 (6th Cir. 2005).

[12] *Id.* at 805.

[13] *Ciccone*, 824 F.3d at 878 (quoting Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004)).

[14] *Id.* at 879.

[15] *See* 1 Lawrence A. Waks & Brad L. Whitlock, Texas Practice Guide Business Transactions § 4:274 (June 2017).

[16] *See* Gregory T. Victoroff, *Music Sampling: Legal Overview, Practical Guidelines*, 26 Beverly Hills B. Ass'n J. 134, 134 (1992).

[17] *Id.*

[18] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

[19] *See* Astride Howell, *SAMPLE THIS! A Ninth Circuit Decision to be in Harmony with the Sixth Circuit's Bright-Line Rule on What Constitutes Infringement in Digital Sampling*, L.A. L., Sept. 2005, at 24, 24; *see also* U.S. Copyright Office, Circular 56A, 1 (2017) https://www.copyright.gov/circs/circ73.pdf ("[there are two separate components of a musical work: the musical composition and the sound recording.] A musical composition consists of music, including any accompanying words. . . . A musical composition can be in the form of a notated copy (for example, sheet music); a phonorecord (for example, cassette tape, L.P., or CD); or a DPD. A sound recording, on the other hand, results from the fixation of a series of musical, spoken, or other sounds.")

[20] *See* Newton v. Diamond, 388 F.3d 1189, 1192–93 (9th Cir. 2004).

[21] Thomas P. Wolf, *Toward a "New School" Licensing Regime for Digital Sampling: Disclosure, Coding, and Click-Through*, 2011 Stan. Tech. L. Rev. N1, N6-N7.

[22] Conway v. Licata, 104 F. Supp. 3d. 104, 120 (D. Mass. 2015) (quoting Newton v. Diamond, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002).

[23] *See* James A. Johnson, *Thou Shalt Not Steal: A Primer on Music Licensing*, N.Y. St. B. Ass'n J., June 2008, at 23, 23; *see also* U.S. Copyright Office, Circular 73, 2 (2017), https://www.copyright.gov/circs/circ73.pdf ("The author of a musical composition is generally the composer and any lyricist. . . . The author of a sound recording is generally the performer(s) who captures and processes the performance to make the final

recording.")

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

[25] *See* Robert M. Vrana, *The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music*, 68 Wash. & Lee L. Rev. 811, at n. 64 (2011).

[26] *See* 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, 366 (2008).

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

[28] *See* Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 Am. Bus. L. J. 515, 516 (2006).

[29] *Id.* at n. 5, 516–17.

[30] *See, e.g.*, Butler v. Target Corp., 323 F. Supp. 2d. 1052, 1054 (C.D. Cal. 2004).

[31] Nate Harrison, *Can I Get an Amen?*, YouTube (March 4, 2015), https://www.youtube.com/watch?v=B27ehDHTCmc.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *See* Ponte, *supra* note 28, at 518.

[39] *Id.* at 518–19.

[40] Robert J. Bernstein & Robert W. Clarida, *Circuit Split Creates Uncertainty in Sampling of Sound Recordings; Copyright Law*, N.Y. L. J. Online (June 15, 2016).

[41] *See* W. Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861–62 (E.D.N.Y. 1909) (emphasis added).

[42] *See* Ringold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d. Cir. 1997).

[43] *See* Fisher v. Dees, 794 F.2d 432, 434–35 n. 2 (9th Cir. 1986) ("a taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation.").

[44] *See* United States v. Taxe, 540 F.2d 961, 964 (9th Cir. 1976).

[45] *See generally* Leigh v. Warner Bros., Inc., 212 F.3d 1210 (11th Cir. 2000); Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821 (11th Cir. 1982); Jarvis v. A&M Records, 827 F. Supp. 282 (D.N.J. 1993); Williams v. Broadus, 2001 WL 984714 (S.D.N.Y. Aug. 27, 2001); Tuff 'N' Rumble, Inc. v. Profile Records, Inc., 1997 WL 158364 (S.D.N.Y. Apr. 2, 1997); (This list is far from exhaustive, but is illustrative of the popularity of the *de minimis* or substantial similarity rule outside of the Sixth Circuit).

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

[47] *Id.* at 794–96.

[48] *Id.* at 795.

[49] *Id.* at 796.

[50] *Id.*

[51] *Id.* at 796–97.

[52] *Id.* at 797.

[53] *Id.* at 798.

[54] *Id.* at 799

[55] *Id.*

[56] *Id.* at 799–801.

[57] *Id.* at 800.

[58] *Id.* at 800–01.

[59] *Id.* at 800.

[60] *Id.* at 800.

[61] *Id.* at 800–01.

[62] *Id.* at 801–02.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 802.

[66] *Id.* at 803.

[67] *Id.* at 804.

[68] *Id.* at 805.

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

[70] *Id.* at 874.

[71] *Id.* at 875.

[72] *Id.* at 876.

[73] *Id.* at 877.

[74] *Id.* at 881 (quoting Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977)).

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

[76] *Id.*

[77] *Id.* at 882.

[78] *Id.*

[79] *Id.* at 883.

[80] *Id.* at 883–84.

[81] *Id.* at 883.

[82] *Id.* at 884.

[83] *See infra* Section (VI)(A).

[84] VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 882 (9th Cir. 2016).

[85] *Id.* at 880.

[86] *Id.*

[87] *Id.*

[88] *See, e.g.*, Saregama India Ltd. v. Mosely, 687 F.Supp.2d 1325, 1338 (S.D. Fla. 2009).

[89] *See* 17 U.S.C. § 101–1301 (2004).

[90] 17 U.S.C. § 102(a)(7) (1990).

[91] 17 U.S.C. § 106(6) (2002).

[92] *See generally* 17 U.S.C. § 107–122 (1992); 17 U.S.C. § 114 (2010).

[93] 17 U.S.C. § 114(b) (2010).

[94] 4 Nimmer on Copyright §13.03[A][2][b] (2017).

[95] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800–01 (6th Cir. 2005).

[96] *See* Joseph G. Brennan, A Handbook of Logic 79–81 (2nd ed. 1961).

[97] 17 U.S.C. § 108(e) (2012).

[98] *Id.*

[99] 4 Nimmer on Copyright § 13.03 n. 114.14 (quoting 17 U.S.C. § 108(e)); Of course, this hypothetical assumes that the library is unable to obtain a copy of the novel for a fair price.

[100] *See* supra Section (V)(A) (Under *Bridgeport*, it would be of no consequence that no one reading the word “he” in the copy would be able to identify it as being derived from page 141 of *Blood Meridian*.)

[101] *See supra* Section (V)(B).

[102] H.R. Rep. No. 94-1476, at 106 (1976).

[103] *See* id.

[104] Saregama India Ltd. v. Mosely, 687 F. Supp.2d 1325, 1341 (S.D. Fla. 2009) ("There is no indication, however, that [Section 114(b)] relates to works which are not similar-sounding or that Congress otherwise sought to abandon the substantial similarity inquiry. Section 114(b)'s legislative history supports this view").

[105] Jennifer R.R. Mueller, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 Ind. L.J. 435, 454 (Winter 2006) (citing On Davis v. The Gap, Inc., 246 F.3d 152, 173 (2d Cir. 2001)).

[106] *See id.*

[107] *Id.* at 456–57.

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

[109] *Id.*

[110] *Id.*

[111] *See* David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recoding*, 19 Fordham Intell. Prop. Media & Ent. L.J. 75, 86 (Autumn 2008).

[112] Nichols v. Universal Pictures Co., 45 F.2d 119, 122 (2d. Cir. 1930).

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

[114] *See* 17 U.S.C. § 115 (2010).

[115] Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 526 (9th Cir. 2008) (quoting 17 U.S.C. § 115(a)(1) (2010)).

[116] *See* Michael L. Baroni, *A Pirate's Palatte: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. Miami Ent. & Sports L. Rev. 65, 94 (1993).

[117] *Id.* at 96; *See also* Circular 73 at 2 ("Section 115 does not cover sound recordings. Rather, it covers the reproduction and distribution of musical compositions.")

[118] Baroni, *supra* note 117 at 95.

[119] *Id.*

[120] *See* Richard A. Epstein & F. Scott Kieff, *Questioning the Frequency and Wisdom of Compulsory Licensing for Pharmaceutical Patents*, 78 U. Chi. L. Rev. 71, 85–86, (2011) ("[Compulsory licensing] thus functions as a transaction cost–saving device that permits the rapid dissemination of copyrighted material. . . . This approach has resulted in transaction costs for the scientists that are lower than those of purchasing a can of soda from a vending machine.")

[121] *See* Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 Am. Bus. L.J. 515, 549 (2006).

[122] *Id.* at 550.

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