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Split Chords: Addressing the Federal Circuit Split in Music Sampling Copyright Infringement Cases

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Split Chords: Addressing the Federal Circuit Split in Music Sampling Copyright Infringement Cases

Abstract

This Note offers a comprehensive analysis of the current circuit split regarding how the de minimis doctrine applies to music sampling in copyright infringement cases. Since the Sixth Circuit's 2005 landmark decision in *Bridgeport Music Inc. v. Dimension Films*, critics, scholars and even judges have dissected the opinion and its bright line rule of "get a license or do not sample." In May 2016, the Ninth Circuit issued its opinion in *VMG Salsoul v. Ciccone*. The Ninth Circuit explicitly declined to follow *Bridgeport*, holding that analyzing a music sampling copyright infringement case requires a substantial similarity analysis, including applying a de minimis analysis.

The Ninth Circuit's decision created a circuit split and an unsettled area of intellectual property law. This Note seeks to promote critical analysis of this contested area of law by exploring the underpinnings of the substantial similarity and de minimis doctrines, as well as the holdings of each case and their arguments. The Note offers three proposals regarding how courts should handle the circuit split, and in doing so creates a distinctive way of looking at the music sampling issue to help the federal judiciary frame the problem in a more expansive way.

Keywords

music sampling, copyright infringement, circuit splits, sound recordings

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SPLIT CHORDS: ADDRESSING THE FEDERAL CIRCUIT
SPILT IN MUSIC SAMPLING COPYRIGHT
INFRINGEMENT CASES

Erik J. Badia

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INTRODUCTION

In 1990, hip-hop artist Vanilla Ice released his song “Ice Ice Baby” in the United States and it quickly became a hit, giving hip-hop its first number one song atop the Billboard “Hot 100” chart.¹ Before long, however, the song stirred up a controversy rivaling its popularity due to Vanilla Ice’s “sampling” of the bass line from Queen and David Bowie’s 1981 hit “Under Pressure.”² Vanilla Ice did not acquire a license or permission from the “Under Pressure” artists and did not give them any songwriting credits as required under copyright law.³ Shortly after the

¹ *Billboard Charts Archive, the Top 100 – 1990*, BILLBOARD, <http://www.billboard.com/archive/charts/1990/hot-100> (last visited Sept. 24, 2016); Steve Huey, *To The Extreme*, ALLMUSIC, <http://www.allmusic.com/album/to-the-extreme-mw0000316695> (last visited Sept. 24, 2016); Joe Lynch, *8 Songs Accused of Plagiarism that Hit No. 1 on the Billboard Hot 100*, BILLBOARD, <http://www.billboard.com/articles/news/list/6501950/songs-accused-plagiarism-no-1-hot-100-blurred-lines> (last visited Sept. 24, 2016); Mim Udovitch, *To The Extreme*, ENT. WKLY., <http://www.ew.com/article/1990/11/02/extreme> (last visited Sept. 24, 2016); Vanilla Ice’s real name is Rob Van Winkle. Kevin Stillman, ‘Word to Your Mother,’ IOWA ST. DAILY, http://www.iowastatedaily.com/news/article_766d27d2-dc56-5ff3-9040-47e44d46094f.html (last visited Sept. 24, 2016).

² See Eric Arnum, *Digital Flashback: Samplers Run Amok*, MTV, <http://www.mtv.com/news/620408/digital-flashback-samplers-run-amok> (last visited Sept. 24, 2016); *Famous Copyright Infringement Cases in Music*, WEINHAUS & POTASHNICK, <http://www.fairwagelawyers.com/most-famous-music-copyright-infringement.html> (last visited Sept. 24, 2016); Peter Relic, *The 25 Most Notorious Uncleared Samples in Rap History*, COMPLEX MAG., <http://www.complex.com/music/2013/04/the-25-most-notorious-uncleared-samples-in-rap-history/vanilla-ice-ice-ice-baby-sampling-david-bowie-and> (last visited Sept. 24, 2016); Matthew Yglesias, *Was Paul’s Boutique Illegal?*, SLATE MAG., http://www.slate.com/articles/business/moneybox/2012/05/adam_yauch_and_paul_s_boutique_how_dumb_court_decisions_have_made_it_nearly_impossible_for_artists_to_sample_the_way_the_beastie_boys_did.html (last visited Sept. 24, 2016).

³ See ROGER L. SADLER, *ELECTRONIC MEDIA LAW* 309 (Sage Publ’ns 2005); Alex Holz, *How You Can Clear Cover Songs, Samples, and Handle Public Domain Works*, AM. SOC’Y OF COMPOSERS, AUTHORS AND PUBLISHERS, <http://www.ascap.com/playback/2011/01/features/limelight.aspx> (last visited Sept. 24, 2016); Rich Stim, *When You Need Permission to Sample Others’ Music*, NOLO,

controversy erupted, Vanilla Ice told MTV in a 1990 interview that the bass lines from “Ice Ice Baby” and “Under Pressure” were actually different because he had added in a single extra beat.⁴ But within months, Queen and Bowie threatened to sue the young rapper for copyright infringement,⁵ and the matter eventually settled out-of-court.⁶ The “Ice Ice Baby” incident was one of the first major music sampling controversies, but over the next fifteen years, dozens of musicians faced similar lawsuits or threats of suit for copyright infringement.⁷

<http://www.nolo.com/legal-encyclopedia/permission-sampled-music-sample-clearance-30165.html> (last visited Sept. 24, 2016).

⁴ Luke Davis, *Throwback Thursday: Vanilla Ice Denying he Ripped Off “Under Pressure,”* SAMPLEFACE, <http://www.sampleface.co.uk/vanilla-ice-denying-he-ripped-off-under-pressure/> (last visited Sept. 24, 2016). (Van Winkle later said in an interview with a reporter from the Iowa State Daily that he was joking during the 1990 interview with MTV when he tried to distinguish the bass line of “Ice Ice Baby” from “Under Pressure.” Whether or not he was actually joking in the 1990 interview is debatable.)

⁵ SADLER, *supra* note 3, at 309; *Famous Copyright Infringement Cases in Music*, WEINHAUS & POTASHNICK, <http://www.fairwagelawyers.com/most-famous-music-copyright-infringement.html> (last visited Sept. 24, 2016); Jordan Runtagh, *Songs on Trial: 10 Landmark Music Copyright Cases*, ROLLING STONE, <http://www.rollingstone.com/music/lists/songs-on-trial-10-landmark-music-copyright-cases-20160608/vanilla-ice-vs-queen-and-david-bowie-1990-20160608> (last visited Sept. 24, 2016).

⁶ SADLER, *supra* note 3, at 309; *Famous Copyright Infringement Cases in Music*, WEINHAUS & POTASHNICK, *supra* note 5; Runtagh, *supra* note 5. (According to Van Winkle in an interview with an Iowa newspaper, the artist allegedly settled the case for \$4 million. Stillman, *supra* note 1.)

⁷ Justin Charity, 9 *Legal Battles Between Rappers and the Artists They Sampled*, COMPLEX MAG., <http://www.complex.com/music/2014/09/how-many-emcees-must-get-sued/gold-digger> (last visited Nov. 5, 2016). (There have been several prominent cases in the last two decades where popular musicians and groups have been sued regarding unauthorized music sampling, including Jay Z for his hit “Big Pimpin,” Kanye West for “Gold Digger,” and most recently, Justin Bieber and the DJ Skrillex, who were sued in 2016 for alleged sampling in their hit song “Sorry.”) *See* Steward v. West, No. 13-02449, 2014 U.S. Dist. LEXIS 186012, *25–27 (C.D. Cal. Aug. 14, 2014); Daniel Kreps, *Justin Bieber, Skrillex Sued Over ‘Sorry’ Hook*, ROLLING STONE, <http://www.rollingstone.com/music/news/justin-bieber-skrillex-sued-over-sorry-hook-20160527> (last visited Sept. 24, 2016); Ben Sisario, *Jay Z and Timbaland Win Copyright*

In 2005, the standard for copyright infringement in music sampling cases appeared to shift to a strict, bright line rule when the Sixth Circuit Court of Appeals rejected the use of a “substantial similarity” test in the landmark decision *Bridgeport Music Inc. v. Dimension Films* and held that *any* unauthorized sampling of a sound recording was grounds for copyright infringement.⁸ The decision cut against long-standing principles of copyright law which dictated that in infringement cases courts must perform a substantial similarity analysis, and by natural extension must consider the defense of *de minimis non curat lex*, or simply *de minimis*.⁹

Lawsuit Over ‘Big Pimpin’ Sample, THE NEW YORK TIMES, http://www.nytimes.com/2015/10/22/business/media/jay-z-and-timbaland-win-copyright-lawsuit-over-big-pimpin-sample.html?_r=0 (last visited Sept. 24, 2016). (Another notorious example that happened around the same time as “Ice Ice Baby” was MC Hammer’s “You Can’t Touch This,” which sampled the base line from Rick James’ song “Superfreak”; that case also settled out-of-court when Hammer (real name Stanley Burrell) agreed to give James a songwriting credit (which would also entitle him to royalties).) See Kenneth Partridge, *‘U Can’t Touch This’ at 25: Remembering MC Hammer’s Breakthrough Single*, BILLBOARD, <http://www.billboard.com/articles/columns/the-juice/6436624/u-cant-touch-this-25-anniversary-mc-hammer> (last visited Sept. 24, 2016); Randy Reiss, *Rick James Undergoes Physical Rehab*, MTV, <http://www.mtv.com/news/503519/rick-james-undergoes-physical-rehab/> (last visited Sept. 24, 2016); Pat Pemberton, *U Can’t Touch This*, ROLLING STONE, <http://www.rollingstone.com/music/news/u-can-t-touch-this-mc-hammer> (last visited Sept. 24, 2016).

⁸ See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–05 (6th Cir. 2005) (finding the *de minimis* defense did not apply to sound recordings under federal copyright law and any unauthorized copying of sampled music, no matter how small or insignificant, could constitute copyright infringement.)

⁹ Mike Suppappola, *Confusion in the Digital Age: Why the De Minimis Use Test Should be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L.J., 93, 98–99 (2006). (The author notes:

The principle that trivial copying does not constitute actionable infringement has long been a central tenet of copyright law. Indeed, Judge Learned Hand observed over 80 years ago that “[s]ome copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent.” “This principle reflects the legal maxim, *de minimis non curat lex*” “*De minimis* use means that a copying ‘has

Though the Sixth Circuit's *Bridgeport* standard stood unchallenged by its sister circuits for more than a decade, critics derided the opinion¹⁰ and some lower courts outright declined to follow it.¹¹ In June 2016, Madonna's (real name Madonna Louise Ciccone) hit song "Vogue" brought the

occurred to such a trivial extent as to fall below the quantitative [and qualitative] threshold of substantial similarity")

Id. The term *de minimis non curat lex*, or *de minimis* for short, is often translated as, "the law does not concern itself with trifles." BLACK'S LAW DICTIONARY (10th ed. 2014); See also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991). (holding that the selection, coordination, and arrangement of respondent's white pages constituted a "*de minimis* quantum of creativity" and thus did not satisfy the minimum constitutional standards for copyright protection); See Also *Newton v. Diamond*, 388 F.3d 1189, 1192–95 (9th Cir. 2004) (finding the Beastie Boys' use of a six-second, three-note flute segment of plaintiff's musical composition was *de minimis* and therefore not actionable as a matter of law).

¹⁰ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [A][2][b] (2015); Mark R. Carter, *Applying the Fragmented Literal Similarity Test to Musical-Work and Sound-Recording Infringement: Correcting the Bridgeport Music, Inc. v. Dimension Films Legacy*, 14 MINN. J.L. SCI. & TECH. 669, 681–84 (2013) (criticizing the *Bridgeport* holding and proposing the use of the Fragmented Literal Similarity Test as the standard for sound recording infringement cases); Julie Cromer, *Harry Potter and the Three-Second Crime: Are We Vanishing the De Minimis Doctrine from Copyright Law?*, 36 N. M. L. REV. 261, 283 (2006) (arguing that the "Sixth Circuit's blanket disregard for substantial similarity or a *de minimis* test is not only improper but reckless"); Michael Jude Galvin, *Bright Line at Any Cost: The Sixth Circuit Unjustifiably Weakens the Protection for Musical Composition Copyrights in Bridgeport Music v. Dimension Films*, 9 VAND. J. ENT. & TECH. L. 529, 539 (2007) (criticizing the *Bridgeport* holding and asserting that the Sixth Circuit "should have affirmed the decision of the district court and dismissed the plaintiff's infringement claim"); John Schietinger, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 210 (2005) (criticizing the *Bridgeport* holding as "problematic and potentially harmful").

¹¹ *Steward v. West*, No. 13-02449, 2014 U.S. Dist. LEXIS 186012 at *25–27 (C.D. Cal. Aug. 14, 2014) (noting that *Bridgeport* "has been criticized by courts and commentators alike" and declining to follow its holding); *Batiste v. Najm*, 28 F. Supp. 3d 595, 625 n.52 (E.D. La. 2014) (noting *Bridgeport's* holding and declining to follow); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338–41 (S.D. Fla. 2009) (explicitly declining to follow *Bridgeport's* holding, finding that *Bridgeport's* statutory interpretation was flawed and that the *Bridgeport* court's "policy prescriptions, however accurate they may be, do not present grounds for this Court to follow its direction"); *EMI Records Ltd. v. Premise Media Corp. L.P.*, 2008 N.Y. Misc. LEXIS 7485 (N.Y. Sup. Ct. Aug. 8, 2008) (explicitly declining to follow the statutory interpretation "relied upon by the court in *Bridgeport Music* to declare the bright line rule that a *de minimis* exception is not available").

Bridgeport opinion back into the public sphere.¹² In *VMG Salsoul v. Ciccone*, the Federal Court of Appeals for the Ninth Circuit addressed whether a 0.23 second piece of audio allegedly sampled from an earlier disco song and reused in Madonna's "Vogue" constituted infringement.¹³ The Court's opinion directly rejected the reasoning of *Bridgeport*, holding that a substantial similarity test must be used, and the *de minimis* defense does apply in music sampling cases.¹⁴ This created a circuit split and an inconsistent rule of law at the federal appellate level.¹⁵

This Note addresses the conflict in the Federal Circuit Courts regarding the interpretation of copyright law and whether substantial similarity, the *de minimis* defense, and the "fair use" defense should be available in music sampling cases. Part I of the note discusses the evolution of music sampling and copyright infringement cases which have defined the area. Part II addresses the recently created circuit split, analyzes the arguments made by each court and discusses the merits, potential ramifications and policy implications of each view. Part III will propose how the circuit split should be resolved and will provide another method

¹² *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016); see *Madona's 'Vogue' Didn't Infringe Disco Song*, 84 U.S.L.W. 1826 (2016).

¹³ *VMG Salsoul, LLC*, 824 F.3d at 874.

¹⁴ *Id.* at 880-88.

¹⁵ *Id.* at 886; see *Madona's 'Vogue' Didn't Infringe Disco Song*, 84 U.S.L.W. 1826 (2016).

courts may use to analyze music sampling cases in order to give effect to the legislative interests of copyright law.

I. BACKGROUND

The origins of music sampling date back to the nineteenth century,¹⁶ but the type of sampling discussed in both *Bridgeport* and *VMG Salsoul*¹⁷ dates back only to the mid-twentieth century.¹⁸ Sampling did not become a popular technique in the music industry until the 1980's, when hip-hop and rap musicians began sampling segments of their own and others' work, like drums beats and bass lines, and reusing them in other songs.¹⁹ Almost immediately, this relatively new technique of music sampling began posing legal problems for artists who wanted to use it.²⁰

¹⁶ Hugh Davies, *A History of Sampling*, 1 J. ORGANISED SOUND 3, 10 (1996).

¹⁷ See *VMG Salsoul*, 824 F.3d at 874 and *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–05 (6th Cir. 2005) (the type of music sampling discussed in this note is narrowly focused on sampling where an artist or producer uses a piece of equipment (initially a “sampler” machine, but now more commonly software programs on computers) to copy a piece or segment of already-recorded music and insert it, either unedited or after it has been modified, into another musical work); see also SADLER, *supra* note 3, at 309, *Digital Music Sampling: Creativity or Criminality?*, NAT'L PUBLIC RADIO (Jan. 28, 2011, 1:00 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=133306353>, Jane McGrath, *How Music Sampling Works*, HOW STUFF WORKS (Sept. 24, 2016), <http://entertainment.howstuffworks.com/music-sampling1.htm> (since about the 1970's, sampling has generally referred to “the method by which special musical instruments or apparatus digitally ‘record’ external sounds’ for later playback. Playback usually consists of either simply pressing a button, or key, to recall a recorded sample or programming a music sequencer to trigger a sample automatically within a predetermined arrangement of samples”), Michael Allyn Pote, *Mashed-up in Between: The Delicate Balance of Artists' Interests Lost amidst the War on Copyright*, 88 N.C. L. REV. 639, 643–44 (2010).

¹⁸ See Davies, *supra* note 16, at 10.

¹⁹ Pote, *supra* note 17, at 645; see also JOSEPH G. SCHLOSS, *MUSIC CULTURE: MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP*, 35–40 (Wesleyan Univ. Press 2014).

²⁰ See, e.g., *Grand Upright Music, Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183–85 (S.D.N.Y. 1991) (holding that defendants, including rapper Marcel Theo Hall, also

These problems began to arise in part because the innovative new technology raised questions as to how copyright law protected these sampled pieces of music, and later because of the complex and often expensive nature of the licensing process which developed—what has now become known in the music industry as “sample clearing,” the process a musician uses to obtain a license to sample a portion of another artist’s work in their own song.²¹ The process of “sample clearing” essentially amounts to getting authorization from and providing compensation to the copyright holder of the original work.²² But because copyrights exist for both the underlying musical composition of the song, as well as the actual sound recording of the song,²³ this usually requires the sampling artist to get “clearance” from two, sometimes separate, entities: the copyright owner of

known as “Biz Markie,” intentionally violated plaintiff’s rights by using three words from plaintiff’s song and sampling a portion of the plaintiff’s master recording without permission on defendant’s album “I Need a Haircut”), Michaelangelo Matos, *How M/A/R/R/S ‘Pump Up The Volume’ Became Dance Music’s First Pop Hit*, ROLLING STONE (July 14, 2016), <http://www.rollingstone.com/music/features/how-m-a-r-r-s-pump-up-the-volume-became-dance-musics-first-pop-hit-20160714>, Relic, *supra* note 2, Jeremy Mersereau, *10 Artists Who Were Sued For Unauthorized Samples*, AUX TV (Nov. 10, 2015), <http://www.aux.tv/2015/11/10-artists-who-were-sued-for-unauthorized-samples/>. By the end of the 1980’s, several hip-hop, rap and dance music artists were already getting into legal trouble for unauthorized sampling in their music. See *Grand Upright Music, Ltd. v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991); Mersereau, *supra*; Relic, *supra* note 2.

²¹ Kembrew McLeod and Peter DiCola, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* 77–78 (Duke Univ. Press Books 2011).

²² See Holz, *supra* note 3, Stim, *supra* note 3; see also *Guide to Sample Clearance for Producers*, COMPLEX MAG. (June 27, 2013), <http://www.complex.com/music/2013/06/guide-to-sample-clearance-for-producers/>.

²³ See SADLER, *supra* note 3, at 309, Holz, *supra* note 3, Stim, *supra* note 3.

the song's musical composition *and* the copyright owner of the master tape of the sound recording.²⁴

The copyright holder will normally ask for either a flat fee, songwriting credit with royalties, or some other type of compensation for use of the sampled work.²⁵ If a copyrighted piece of recorded music is sampled and then used in another work without proper authorization, the owner of either copyright may bring an infringement lawsuit against the offending party.²⁶ While some sampling artists like the Beastie Boys have gotten into trouble for getting only one of the two licenses required for sampling,²⁷ others, like Vanilla Ice, did not attempt to get licenses for the samples they used at all.²⁸

²⁴ See Jimmy Ness, *The Queen of Sample Clearance: An Interview With Deborah Mannis-Gardner*, FORBES (Feb. 19, 2016, 8:00 AM), <http://www.forbes.com/sites/passionoftheweiss/2016/02/19/the-queen-of-sample-clearance-an-interview-with-deborah-mannis-gardner/#5390b6cc412f>, Stim, *supra* note 3, *Guide to Sample Clearance for Producers*, *supra* note 22 (thus, there is copyright protection for both the underlying musical composition—the notes to be played and their arrangement—and the actual recording of the composition when the musicians play the composition and “fix it in the medium” by recording it onto a tape or electronically onto a storage device).

²⁵ See SADLER, *supra* note 3, at 309; Holz, *supra* note 3; Stim, *supra* note 3. A songwriting credit is not just an acknowledgement of credit or thanks, it normally also entitles the credited artist to a portion of the fees or “royalties” for the song in the future. Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 80 (2006).

²⁶ See SADLER, *supra* note 3 at 309; Holz, *supra* note 3; Stim, *supra* note 3.

²⁷ See *Newton v. Diamond*, 388 F.3d 1189, 1191 (9th Cir. 2004) (noting that the Beastie Boys obtained a sampling license for the sound recording at issue but failed to obtain the proper license for the underlying musical composition).

²⁸ See *Famous Copyright Infringement Cases in Music* *supra* note 2; Relic, *supra* note 3.

The standards for federal copyright law are set out in the Copyright Act of 1976.²⁹ Under the body of case law interpreting the federal Copyright Act, in order for a plaintiff to prove infringement, she must establish three essential elements: (1) ownership of a valid copyright; (2), a copying; (3) “of constituent elements of the work that are original.”³⁰ Assuming the plaintiff can satisfy the first element by showing ownership, in order for the defendant’s use to constitute infringement the plaintiff must also demonstrate that her work was copied by the defendant, and under the third prong, long-standing copyright principles dictate that the plaintiff must also prove that the copied portion was original, and that the defendant copied a legally significant portion of it.³¹ In other words, if defendant Artist A is sued for copying the work of plaintiff Artist B, then Artist B must show:

²⁹ 17 U.S.C. §§ 101-810 (2016); NIMMER & NIMMER *supra* note 10 at § 1-OV.

³⁰ *Feist* 499 U.S. at 363 (1991) (holding that the selection, coordination, and arrangement of respondent’s white pages did not satisfy the minimum constitutional standards for copyright protection); *Newton* 388 F.3d at 1192–95 (finding the defendant’s use of a six-second, three-note flute segment of plaintiff’s musical composition was *de minimis* and did not satisfy the minimum constitutional standards for copyright protection and therefore not actionable as a matter of law); *Leigh v. Warner Bros.*, 212 F.3d 1210, 1214 (11th Cir. 2000) (“Even in the rare case of a plaintiff with direct evidence that a defendant attempted to appropriate his original expression, there is no infringement unless the defendant succeeded to a meaningful degree.”); *Sid & Marty Krofft TV Prods. v. McDonald’s Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977) (using “total concept and feel” variant of substantial similarity test to find defendants had infringed on plaintiff’s copyright); NIMMER & NIMMER *supra* note 10 at § 13.03 [A].

³¹ *See Newton* 388 F.3d at 1192–95 (using the substantial similarity test to determine the defendant’s use of a six-second, three-note flute segment of plaintiff’s musical composition was *de minimis* and did not satisfy the minimum constitutional standards for copyright protection and therefore not actionable as a matter of law); *Leigh*, 212 F.3d at 1215 (finding defendant’s film sequence not substantially similar to plaintiff’s work as a matter of law); *Sid & Marty Krofft TV Prods.*, 562 F.2d at 1167 (using “total concept and feel” variant of substantial similarity test to find defendants had infringed on plaintiff’s copyright); *see also* NIMMER & NIMMER *supra* note 10 at § 13.03 [A].

Artist A copied her work, that her work was original enough to warrant copyright protection, and that Artist A has taken and reused a legally significant portion of the work.³² Thus, even if the defendant admits she has copied the plaintiff's work, the plaintiff must still show that the work is eligible for copyright protection and that the defendant has copied a legally significant portion of it.³³

A core test for determining whether there has been a legally significant infringement is the substantial similarity test.³⁴ A long line of cases have recognized the concept of substantial similarity as being a basic tenant of copyright protection, dating all the way back to the 19th Century.³⁵

³² NIMMER & NIMMER *supra* note 10 at § 13.03 [A].

³³ *Id.* See also Galvin, *supra* note 10 at 531; Schietinger *supra* note 10 at 218–19.

³⁴ See NIMMER & NIMMER *supra* note 10 at § 13.03 [A] [1]–[4]; Galvin, *supra* note 10 at 531; Schietinger *supra* note 10 at 218–19. See also Jason E. Sloan, *An Overview of the Elements of a Copyright Infringement Cause of Action - Part II: Improper Appropriation*, AM. BAR ASS'N http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/part_2_elements_of_a_copyright.html (last visited Sept. 24, 2016).

³⁵ See *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841). Justice Joseph Story explained that while the entire work need not have been appropriated to trigger copyright infringement liability, a significant portion must have been copied, writing:

It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are *substantially to an injurious extent* appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto.

Id. (emphasis added). See also *Perris v. Hexamer*, 99 U.S. 674, 676–78 (1878) (“A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. It follows that to infringe this right *a substantial copy of the whole or of a material part* must be produced.”) (emphasis added); *Dymow v. Bolton*, 11 F.2d 690, 692(2d Cir. 1926) (“But an examination of that and other cases will show that the inquiry actually made was always to ascertain what had been appropriated, if anything, and then decide whether the appropriation was (1) of copyrightable matter, and (2) *was substantial.*”) (emphasis added).

Ultimately, the substantial similarity test seeks to determine whether there is a significant likeness between the alleged infringing work and the original copyrighted work, both quantitatively and qualitatively.³⁶ While there are different variations of the substantial similarity test,³⁷ one of the keys to the test used most often by courts is whether the allegedly infringing work is recognizable to an average audience member.³⁸ As the Ninth Circuit explains: “If the public does not recognize the appropriation, then the copier has not benefitted from the original artist's expressive content. Accordingly, there is no infringement.”³⁹

However, a threshold issue of the “substantial similarity” test is whether the infringement is actionable at all: if the portion of the work copied is legally insignificant, it will not sustain a cause of action for

³⁶ See NIMMER & NIMMER *supra* note 10 at § 13.03 [A]. As professor David Nimmer points out, there is a subtle, yet critical distinction between what is normally termed “probative similarity,” a factual offer that a work has been copied (i.e. did the defendant literally take portions of the original copyrighted work), and “substantial similarity,” which seeks to determine if the alleged infringement has copied a legally “significant” portion of the work. *Id.* Despite its obvious-sounding name, it is important to note the subtly and complexity of the various versions of the substantial similarity test, of which Nimmer writes, “The determination of the extent of similarity that will constitute a substantial, and hence infringing, similarity presents one of the most difficult questions in copyright law.” *Id.*

³⁷ See NIMMER & NIMMER *supra* note 10 at § 13.03 [A] [1]-[4]. See also Carter *supra* note 10 at 677; Sloan, *supra* note 34.

³⁸ See NIMMER & NIMMER *supra* note 10 at § 13.03 [E][1], § 13.03 [A]. This is the so-called “audience test.” NIMMER & NIMMER *supra* note 10 at § 13.03 [E][1]. Looking at this version of the substantial similarity test, the comparison is not made simply in terms of literal similarity between the two works, but also whether the alleged infringing work is so similar that an average listener might recognize it, or mistake it for the original copyrighted work. NIMMER & NIMMER *supra* note 10 at § 13.03 [A], § 13.03 [E][1]. See also Carter *supra* note 10 at 677.

³⁹ VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 881 (9th Cir. 2016).

infringement.⁴⁰ Courts normally apply the concept of *de minimis* to determine if the alleged infringement is actionable as a matter of law.⁴¹ If the legal standard of substantial similarity is not met, then the court may dismiss the case as *de minimis*, usually on a motion to dismiss, summary judgment or judgment as a matter of law, before it reaches a jury.⁴² As an example, one test applied by the Ninth Circuit in *Fisher v. Dees* holds that the use of a piece of music or other work is considered *de minimis*, or not “substantial” enough to be actionable, “only if it is so meager and

⁴⁰ See *Newton v. Diamond*, 388 F.3d 1189, 1192–93 (9th Cir. 2004) (dismissing plaintiff’s case on summary judgment because the defendant’s use of a six-second, three-note flute segment of plaintiff’s musical composition was *de minimis* and did not satisfy the minimum constitutional standards for copyright protection); *Ringgold v. Black Entertainment TV, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (noting that “*de minimis* can mean that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying”); *NIMMER & NIMMER supra* note 10 at § 13.03 [A][2][a].

⁴¹ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991) (holding that the selection, coordination, and arrangement of respondent’s white pages did not satisfy the minimum constitutional standards for copyright protection); *Newton*, 388 F.3d at 1192–95 (holding that the defendant’s use of a six-second, three-note flute segment of plaintiff’s musical composition was *de minimis* and did not satisfy the minimum constitutional standards for copyright protection and therefore not actionable as a matter of law); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1337–1338 (S.D. Fla. 2009) (finding that the defendant’s alleged use of a two-second piece of plaintiff’s work was not substantially similar and granting summary judgment to the defendant on that issue); *NIMMER & NIMMER supra* note 10 at § 13.03[A].

⁴² See, e.g., *Lil’ Joe Wein Music, Inc. v. Jackson*, 245 Fed. Appx. 873, 880 (11th Cir. 2007) (dismissing plaintiff’s case on summary judgment in part because the alleged infringement was *de minimis* and “[n]o reasonable jury, properly instructed, could conclude that Lil’ Joe Wein’s and the Defendants’ compositions are substantially similar”); *Newton*, 388 F.3d at 1192–95 (dismissing plaintiff’s case on summary judgment because the defendant’s use of a six-second, three-note flute segment of plaintiff’s musical composition was *de minimis* and did not satisfy the minimum constitutional standards for copyright protection); *Steward*, 2014 U.S. Dist. LEXIS 186012, *25–27 (C.D. Cal. Aug. 14, 2014) (ruling in favor of defendant’s motion for judgment on the pleadings because defendant’s alleged infringement was *de minimis*); *Saregama India Ltd.*, 687 F. Supp. 2d at 1338–41 (finding that the defendant’s alleged use of a two-second piece of plaintiff’s work lacked substantial similarity, was *de minimis*, and granting summary judgment to the defendant on that issue).

fragmentary that the average audience would not recognize the appropriation.”⁴³ Thus, the concept of *de minimis* has historically been used as a defense by alleged infringers to argue that their copying is not legally significant enough to be actionable.⁴⁴

In addition to the principle of *de minimis*, another potential defense available to a musician being sued for copyright infringement is the doctrine of “fair use.”⁴⁵ Fair use is an affirmative defense which can only be used once substantial similarity between the original and alleged infringing work has been established.⁴⁶ Thus, fair use can be an alternative or fallback

⁴³ Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

⁴⁴ See, e.g., *Lil' Joe Wein Music*, 245 Fed. Appx. at 880 (dismissing plaintiff's case on summary judgment in part because the alleged infringement was *de minimis* and “[n]o reasonable jury, properly instructed, could conclude that Lil' Joe Wein's and the Defendants' compositions are substantially similar”); *Newton*, 388 F.3d at 1192–95 (dismissing plaintiff's case on summary judgment because the defendant's use of a six-second, three-note flute segment of plaintiff's musical composition was *de minimis* and did not satisfy the minimum constitutional standards for copyright protection); *Steward*, 2014 U.S. Dist. LEXIS 186012 at *25–27 (C.D. Cal. Aug. 14, 2014) (ruling in favor of defendant's motion for judgment on the pleadings because defendant's alleged infringement was *de minimis*); *Saregama India Ltd.*, 687 F. Supp. 2d at 1338–41 (finding that the defendant's alleged use of a two-second piece of plaintiff's work lacked substantial similarity, was *de minimis*, and granting summary judgment to the defendant on that issue).

⁴⁵ See NIMMER & NIMMER *supra* note 10; see also A. D. Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 138 (1993) (arguing that the fair use doctrine “should remain a viable defense to claims that sampling constitutes copyright infringement”); Michael B. Landau, *Are the Courts Singing a Different Tune When it Comes to Music? What Ever Happened to Fair Use in Music Sampling Cases?* 5 IP THEORY 1, 17–18 (2015) (arguing that the fair use doctrine should be used in music sampling cases and that the Compulsory License in Section 115 of the Copyright Act should be expanded to include music sampling under the fair use exception).

⁴⁶ Schietinger, *supra* note 10 at 220. “Fair Use” is an affirmative defense which recognizes a legally significant portion of the work has been copied, but that copying is excused under the doctrine of “Fair Use,” which is statutorily built into the Copyright Act. *Id.*

argument for a defendant if the *de minimis* defense fails.⁴⁷ The doctrine has a long and somewhat complicated history, but recent decisions and scholarship suggest that it could be applicable to music sampling cases.⁴⁸ Fair use in a copyright infringement action must be determined on a case-by-case basis using a four-factor test enumerated in § 107 of the Copyright Act of 1976.⁴⁹

How the copyright principles of substantial similarity, *de minimis* and fair use apply to music sampling has been the subject of debate in recent years.⁵⁰ In situations like Vanilla Ice's "Ice Ice Baby," where the

⁴⁷ Carter, *supra* note 10.

⁴⁸ See Landau, *supra* note 45, at 17–18 (arguing that the fair use doctrine should be used in music sampling cases and that the Compulsory License in Section 115 of the Copyright Act should be expanded to include music sampling under the fair use exception). See also *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (holding that under the fair use doctrine there is no requirement that new work must make a comment on the old work or author, only that the new work be sufficiently transformative); Johnson, *supra* note 45 (arguing that the fair use doctrine "should remain a viable defense to claims that sampling constitutes copyright infringement").

⁴⁹ 17 U.S.C. § 107 (2016). The four factors to be analyzed by the courts are: (1) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"; (2) "the nature of the copyrighted work"; (3) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and (4) "the effect of the use upon the potential market for or value of the copyrighted work."

⁵⁰ See, e.g., NIMMER & NIMMER *supra* note 10 at § 13.03 [A] [1]–[4]. Compare Carter, *supra* note 10, at 681–84 (criticizing the *Bridgeport* holding and proposing the use of the Fragmented Literal Similarity Test as the standard for sound recording infringement cases), and Cromer, *supra* note 10, at 283 (arguing that the "Sixth Circuit's blanket disregard for substantial similarity or a *de minimis* test is not only improper but reckless"), and Galvin, *supra* note 10, at 539 (criticizing the *Bridgeport* Holding and asserting that the Sixth Circuit "should have affirmed the decision of the district court and dismissed the plaintiffs infringement claim"), and Schietinger, *supra* note 10, at 210 (criticizing the *Bridgeport* holding as "problematic and potentially harmful"), with 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, 362 (2008) (arguing in favor of the *Bridgeport* decision and stating that prior to *Bridgeport*, "neither sampling musicians nor sampled musicians were

unauthorized sampling was substantial, and clearly recognizable to the listener, there can be little doubt that, without going through the proper legal channels, copyright infringement has occurred.⁵¹ However, cases began to arise in courts where musicians had sampled very small portions of songs, sometimes virtually unrecognizable, but were still being sued for copyright infringement.⁵² In several of these sampling cases defendants employed the *de minimis* defense to combat the allegations of infringement, and in cases where a song sampled only a small portion of another song, these defendants were successful.⁵³ In contrast, there is little case law on the

protected sufficiently by these laws and music industry practices”), and VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 889 (9th Cir. 2016) (Silverman, B., dissenting) (arguing that *Bridgeport’s* arguments are “well-reasoned and persuasive,” noting Congress’ silence after the decision and stating that “[o]nce the sound is fixed, it is tangible property belonging to the copyright holder, and no one else has the right to take even a little of it without permission”).

⁵¹ See NIMMER & NIMMER *supra* note 10 at § 13.03 [A]; Runtagh, *supra* note 5.

⁵² See, e.g., Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004) (defendant’s alleged infringement based on a six-second, three-note flute segment of plaintiff’s musical composition); Tuff ‘N’ Rumble Mgmt. v. Profile Records, Inc., 1997 U.S. Dist. LEXIS 4186 (S.D.N.Y. Apr. 2, 1997) (defendant’s alleged infringement based on sampling a portion of plaintiff’s drum track from a prior sound recording); Jarvis v. A & M Records, 827 F. Supp. 282, 291 (D.N.J. 1993) (defendant’s alleged infringement based on a sample of short vocal pieces and a keyboard riff of plaintiff’s prior sound recording); Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (defendant’s alleged infringement based on three words taken from plaintiff’s song and a portion of music taken from the plaintiff’s original sound recording).

⁵³ See, e.g., Newton, 388 F.3d at 1197–98 (granting summary judgment to defendant because alleged copying was *de minimis*); Jean v. Bug Music, Inc., No. 00 Civ. 4022, 2002 U.S. Dist. LEXIS 3176 (S.D.N.Y. Feb. 25, 2002) (granting summary judgment to defendants because even assuming plaintiff’s phrase was protected, alleged infringement was *de minimis*); Tuff ‘N’ Rumble Mgmt., 1997 U.S. Dist. LEXIS 4186 (S.D.N.Y. Apr. 2, 1997) (granting summary judgment to defendants because defendant’s alleged infringement was not substantially similar as a matter of law).

defense of fair use in music sampling cases, thus, it is unclear how willing courts would be to accept this defense in music sampling cases.⁵⁴

In 2005, however, *Bridgeport Music Inc. v. Dimension Films Inc.* appeared to create a sea change in the interpretation of copyright law in regards to the sampling of sound recordings.⁵⁵ In 2001, the music publishing house Bridgeport Music Inc., joined by several other related entities, filed a law suit the Middle District of Tennessee alleging nearly 500 counts of copyright infringement against close to 800 defendants.⁵⁶ The District Court severed the original complaint into 476 separate actions, which were whittled down to about a dozen over several years of proceedings and were then consolidated into the *Bridgeport* case.⁵⁷

At the heart of the *Bridgeport* claim was a two second, three-chord guitar solo from the Funkadelic song “Get Off Your Ass and Jam.”⁵⁸ The soundtrack for defendant Dimension’s movie “I Got the Hook Up” included the N.W.A.’s song “100 Miles and Runnin,” which sampled and looped the two second guitar piece from “Get Off Your Ass and Jam” several times.⁵⁹ The defendant did not deny that the piece of music was sampled,⁶⁰ but

⁵⁴ See, e.g., Landau, *supra* note 45, at 17–18.

⁵⁵ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 804–05 (6th Cir. 2005).

⁵⁶ *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 832 (M.D. Tenn. 2002); *Bridgeport*, 410 F.3d at 795.

⁵⁷ *Bridgeport*, 410 F.3d at 795.

⁵⁸ *Id.* at 796.

⁵⁹ *Id.*

⁶⁰ *Id.*

moved for summary judgment.⁶¹ The defendant argued the sample was legally insubstantial or *de minimis* and therefore did not amount to actionable copying, and in the alternative, even if the sampling was not *de minimis*, it was protected under the copyright doctrine of fair use.⁶²

The District Court dismissed the plaintiff's case on summary judgement, holding the sample at issue used by the defendant was *de minimis* and therefore not actionable.⁶³ The District Court used two different tests for substantial similarity and found that after listening to the sample and both songs, no reasonable juror "would recognize the source of the sample without being told of its source," and therefore the infringement was *de minimis*.⁶⁴

On appeal, the Court of Appeals for the Sixth Circuit issued an opinion⁶⁵ that reversed the lower court, and in an industry-altering decision held that *any* sampling of a recorded piece of music, regardless of how short

⁶¹ *Id.* at 796–97.

⁶² *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 838–40 (M.D. Tenn. 2002); *Bridgeport*, 410 F.3d at 805.

⁶³ *Bridgeport*, 230 F. Supp. 2d at 842–43.

⁶⁴ *Id.* (The District Court did a fairly detailed substantial similarity analysis, using both a quantitative/qualitative test as well as the "fragmented literal similarity" test on the sample in question.)

⁶⁵ *Bridgeport*, 410 F.3d at 795. (The Court issued an initial opinion on the consolidated cases on September 7, 2004. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004). In December 2004, the court denied defendant's the petition for rehearing *en banc*, but a panel rehearing was granted for the issues discussed in Part II of the opinion, which are the issues discussed in this Note. *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647 (6th Cir. 2004); *see infra* Part II. The court noted that "[a]fter additional briefing and argument on rehearing, we adhere to our conclusions and amend the opinion to further clarify our reasoning." *Bridgeport*, 410 F.3d at 795.

or unrecognizable it may be, could be actionable for copyright infringement.⁶⁶ Under the *Bridgeport* court's interpretation of the Copyright Act of 1976, the copyright owner of a sound recording had the exclusive right to duplicate and reuse the work,⁶⁷ and thus any sampling and reuse constituted infringement.⁶⁸ The Court also declined to address the defendant's alternative fair use argument.⁶⁹ The ruling appeared to effectively do away with the *de minimis* defense for copyright cases involving sampling,⁷⁰ with the Court instructing musicians flatly to "[g]et a license or do not sample."⁷¹

The *Bridgeport* case, however, was not well received in the United States by critics and scholars.⁷² Nevertheless, even with the *Bridgeport*

⁶⁶ *Id.* at 801–02.

⁶⁷ *Id.* at 801. The court noted, "[i]n other words, a sound recording owner has the exclusive right to 'sample' his own recording." *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 805. The Court stated that because the lower court ruled the infringement was *de minimis* and thus there was no infringement, it was not necessary to consider the affirmative defense of fair use. *Bridgeport*, 410 F.3d at 805.

⁷⁰ See NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b]; Carter, *supra* note 10, at 688; Schietinger, *supra* note 10, at 227–30.

⁷¹ *Bridgeport*, 410 F.3d at 801.

⁷² See NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b]; Carter, *supra* note 10, at 681–84 (criticizing the *Bridgeport* holding and proposing the use of the Fragmented Literal Similarity Test as the standard for sound recording infringement cases); Cromer, *supra* note 10, at 283 (arguing that the "Sixth Circuit's blanket disregard for substantial similarity or a *de minimis* test is not only improper but reckless"); Galvin, *supra* note 10, at 539 (criticizing the *Bridgeport* Holding and asserting that the Sixth Circuit "should have affirmed the decision of the district court and dismissed the plaintiffs infringement claim"); Schietinger, *supra* note 10, at 210 (criticizing the *Bridgeport* holding as "problematic and potentially harmful"). Moreover, even some courts, including District Courts in California, Florida, and Louisiana, declined to follow and instead used the traditional substantial similarity tests, including analyzing *de minimis* defenses. *Steward v. West*, No. 13-02449, 2014 U.S. Dist. LEXIS 186012, *25 n.8 (C.D. Cal. Aug. 14, 2014) (noting that *Bridgeport* "has been criticized by courts and commentators alike" and declining to follow its

court's opinion inviting Congress to address its landmark ruling,⁷³ the legislature has not yet taken any action and the Supreme Court has also not addressed the opinion in the more than ten years since the case was decided.⁷⁴ The *Bridgeport* holding remains good law in the Sixth Circuit—which notably includes the “Music City” of Nashville—and had not been directly challenged, until now.⁷⁵

The Ninth Circuit Court of Appeals decided to confront *Bridgeport* head-on in *VMG Salsoul v. Ciccone*.⁷⁶ In *Ciccone*, the artist Madonna was sued for the use of a “horn hit”⁷⁷ allegedly sampled from an earlier disco

holding); *Batiste v. Najm*, 28 F. Supp. 3d 595, 625 n.52 (E.D. La. 2014) (noting *Bridgeport*'s holding and declining to follow); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338–1341 (S.D. Fla. 2009) (explicitly declining to follow *Bridgeport*'s holding, finding that *Bridgeport*'s statutory interpretation was flawed and that the *Bridgeport* court's “policy prescriptions, however accurate they may be, do not present grounds for this Court to follow its direction”); *EMI Records Ltd. v. Premise Media Corp. L.P.*, 2008 N.Y. Misc. LEXIS 7485 (N.Y. Sup. Ct. Aug. 8, 2008) (explicitly declining to follow the statutory interpretation “relied upon by the court in *Bridgeport Music* to declare the bright line rule that a de minimis exception is not available”). Additionally, after the *Bridgeport* decision, David Nimmer dedicated a short section of his preeminent treatise *Nimmer on Copyright* to the decision, picking the *Bridgeport* court's argument apart. NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b].

⁷³ *Bridgeport*, 410 F.3d at 805 (noting that the Court took a “literal reading” approach to their interpretation of the federal statute and that “[i]f this is not what Congress intended or is not what they would intend now, it is easy enough for the record industry, as they have done in the past, to go back to Congress for a clarification or change in the law”).

⁷⁴ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 889 (9th Cir. 2016) (Silverman, B., dissenting) (noting Congress' inaction in the more than ten years since the *Bridgeport* decision).

⁷⁵ See *VMG Salsoul*, 824 F.3d at 886; 84 USLW 1826, Issue No. 46, June 9, 2016.

⁷⁶ *VMG Salsoul*, 824 F.3d at 874.

⁷⁷ *VMG Salsoul*, 824 F.3d at 875. (The “horn hit” discussed in the case was alternately identified by the courts as a “horn stab,” or “horn part,” but was described as “a single chord that is played eleven times in Defendants' work, *Vogue*.”); *VMG Salsoul, LLC v. Ciccone*, No. CV 12-05967, 2013 U.S. Dist. LEXIS 184127 (C.D. Cal. Nov. 18, 2013).

track and reused in her wildly successful song “Vogue.”⁷⁸ The plaintiff alleged that the producer of “Vogue” sampled a .23 second horn part from the song “Love Break” and inserted it into “Vogue.”⁷⁹

The District Court found the sampled portion lacked sufficient originality to be eligible for copyright protection, and that even if it was copyrightable, the sampling was *de minimis*.⁸⁰ On appeal, the Ninth Circuit explicitly declined to follow *Bridgeport* and affirmed, holding that a substantial similarity analysis must be done and that the traditional *de minimis* defense is available in infringement cases involving samples of copyrighted sound recordings, just like in other copyright infringement cases.⁸¹ In doing so, the Ninth Circuit created a circuit split which now subjects copyright infringement actions to different standards of legal analysis.⁸²

II. ANALYSIS

This section will discuss and analyze the arguments presented both by the *Bridgeport* and *VMG Salsoul* opinions by weighing the reasoning of

⁷⁸ *VMG Salsoul*, 824 F.3d at 875.

⁷⁹ *Id.* at 875–77. (The producer in question, Shep Pettibone, produced both the songs “Love Break” and “Vogue” and plaintiff offered the testimony of Pettibone’s assistant who claimed that he witnessed Pettibone direct an engineer to insert the sample from “Love Break” into “Vogue.” The defendant denied this allegation, however, and disputed both the fact that there was actual copying and, in the alternative, even if the portion used was copied from “Love Break” it was *de minimis*.)

⁸⁰ *Id.* at 876.

⁸¹ *Id.* at 880–88; 84 USLW 1826, Issue No. 46, June 9, 2016.

⁸² See 84 USLW 1826, Issue No. 46, June 9, 2016; Bill Donahue, *9th Circ. Throws Down The Gauntlet On Music Sampling*, LAW360, <http://www.law360.com/articles/803236> (last visited Oct. 8, 2016).

those two opinions against the background of established copyright law and congressional intent.

A. *The Bridgeport Argument: “Get A License Or Do Not Sample”*

The controversial portion of the *Bridgeport* Court’s decision focused narrowly on the issue of whether an admitted sampling⁸³ of a sound recording required the use of a substantial similarity analysis by the courts to determine whether or not the use constituted infringement.⁸⁴ The heart of the final⁸⁵ *Bridgeport* decision is the Court’s statutory interpretation of two sections of the federal government’s Copyright Act of 1976: § 106 and § 114.⁸⁶

⁸³ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 796 (6th Cir. 2005). (The Court points out that, “[b]ecause defendant does not deny it, we assume that the sound track of Hook Up used portions of ‘100 Miles’ that included the allegedly infringing sample from ‘Get Off.’”)

⁸⁴ *Id.* at 798.

⁸⁵ *See supra* note 65.

⁸⁶ *Bridgeport*, 410 F.3d at 799–802. (Section 106, entitled “Exclusive rights in copyrighted works” is the portion of the Copyright Act which explains the types of exclusive rights the owner of a copyright is entitled to under the Act, which are:

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (2016).

Section 114, in contrast, is entitled “Scope of exclusive rights in sound recordings” and sets forth the limitations on a copyright owner’s exclusive rights. 17 U.S.C. § 114 (2016).

1. *Statutory Interpretation*

The *Bridgeport* Court focused much of their analysis on §114 of the Copyright Act of 1976, particularly the language of §114(b) and how it relates to § 106.⁸⁷ The *Bridgeport* Court’s key argument centered on the fact that the Copyright Act of 1976 added the word “entirely” into the preceding clause from similar language found in the earlier Sound Recording Act of 1971.⁸⁸ The Court argued that this change in the statutory text demonstrated Congress’ intent that the owner of a sound recording copyright “has the exclusive right to ‘sample’ his own recording.”⁸⁹

The Court argued that because the word “entirely” had been added to the predecessor statute, it demonstrated a change in Congress’ intent: if the new piece of music is *entirely* free from copying (sampling) there is no copyright protection, therefore if the new piece of music has *any* copying (sampling) then copyright protection automatically extends to it, regardless of how much was copied.⁹⁰ The *Bridgeport* Court noted that they had

⁸⁷ *Bridgeport*, 410 F.3d at 799–800; *see also* 17 U.S.C. § 114 (2016); NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b].

⁸⁸ *Bridgeport*, 410 F.3d at 800.

⁸⁹ *Id.* at 801.

⁹⁰ *Id.* (The Court noted that they employed a “literal reading approach” to their statutory interpretation. *Id.* at 805. The *Bridgeport* Court cites two main sources for its statutory interpretation rationale: the copyright treatise *Kohn on Music Licensing*, an extensive portion of which was cited by the court in a footnote to argue that they had not simply pulled their statutory interpretation “out of thin air,” as well as a law review article by Susan J. Latham, at the time an LL.M. student in Intellectual Property at the Benjamin N. Cardozo School of Law. *Id.* at 803, n.18; Susan Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling - A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 124–27 (2003). The quoted section of

consulted the legislative history of the act, which appears to conflict with their interpretation,⁹¹ but the Court disregarded it by arguing that “the legislative history is of little help because digital sampling wasn’t being done in 1971.”⁹² Inextricably tied to the *Bridgeport* Court’s rationale for their statutory interpretation is their argument that sound recordings are distinguishable from other types of copyright infringement and thus require

Al and Bob Kohn’s work states that “[b]y using the words ‘*entirely* of an independent fixation’ in referring to sound recordings which may imitate or simulate the sounds of another, Congress may have intended that a recording containing *any* sounds of another recording would constitute infringement.” *Bridgeport*, 410 F.3d at 803 n.18. The cited portion of Latham’s Law Review Note, discussing §114(b) of the copyright act reads:

The import of this language is that it does not matter how much a digital sampler alters the actual sounds or whether the ordinary lay observer can or cannot recognize the song or the artist’s performance of it. Since the exclusive right encompasses rearranging, remixing, or otherwise altering the actual sounds, the statute by its own terms precludes the use of a substantial similarity test. Thus, the defenses available to a defendant are significantly limited.

Latham, *supra* at 125.

⁹¹ See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883–84 (9th Cir. 2016) (finding that the legislative history of the Copyright Act of 1976 for § 114 indicates that Congress intended that liability for infringement attach “whenever all or any substantial portion” of the sound recording is reproduced and used without authorization); see also NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b] (arguing that the legislative history of § 114 “debunks the [*Bridgeport*] court’s imputation that Congress, when adopting Section 114, intended to dispense with traditional notions of substantial similarity”). For context, the full passage of the legislative history for § 114 reads:

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. Thus, 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. 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.

H.R. REP. NO. 94-1476, at 5721 (1976).

⁹² *Bridgeport*, 410 F.3d at 805.

different treatment under the Copyright Act.⁹³ Based on the Court's interpretation of the Copyright Act, *Bridgeport* created a bright line rule, holding that the sampling and subsequent re-use of a sound recording in another medium, no matter what size, constituted a *per se* infringement.⁹⁴ The court thus held the substantial similarity test, and accordingly *de minimis*, did not apply in the context of music sampling.⁹⁵

2. “Sweat of the Brow” and Other Policy Rationales

In addition to their statutory interpretation, the *Bridgeport* Court also introduced several policy arguments as to why they believed their new bright line rule was both desirable and proper.⁹⁶ One of the Court's rationales was what amounts to a “sweat of the brow” argument—the artist who is being sampled should not have the fruit of his labor taken without compensation.⁹⁷ The Court said that fragments of songs taken in sampling cases are valuable,⁹⁸ and argued that artists would not sample otherwise, because it either saves the artist time, adds something to the new recording,

⁹³ *Id.* at 802. The court explained: “[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. It is a physical taking rather than an intellectual one.” *Id.*

⁹⁴ *Id.* at 801.

⁹⁵ *Id.* at 801–02.

⁹⁶ *Id.* at 802–05.

⁹⁷ See discussion *infra* Part II. B. 2.

⁹⁸ *Bridgeport*, 410 F.3d at 802. The Court argued that even small samples are valuable to the sampling artist either because it saved the artist the time and money of having to recreate that piece of music for the new work, or because the sampled piece of music has a particular “sound” that is recognizable and thus valuable to the new recording. *Id.*

or both.⁹⁹ The Court also said their holding would create “ease of enforcement,” telling artists flatly: “Get a license or do not sample.”¹⁰⁰ The Court argued that without this bright line rule, fact finders would be subject to “mental, musicological, and technological gymnastics” in trying to apply a *de minimis* or substantial similarity analysis.¹⁰¹

B. The Ninth Circuit’s Response To Bridgeport

In *VMG Salsoul*, the Ninth Circuit Court of Appeals upheld the District Court’s summary judgement ruling for the defendant because even if proved, the alleged infringement was *de minimis*.¹⁰² The Ninth Circuit said it declined to follow *Bridgeport* because it disagreed with *Bridgeport*’s statutory interpretation of the Copyright Act and that, regardless of the policy arguments advanced by the *Bridgeport* Court, they were bound to follow Congress’ intent.¹⁰³

1. Addressing Bridgeport’s Statutory Interpretation

The *VMG Salsoul* Court notes as a basic premise that 17 U.S.C. § 114(b), which *Bridgeport* read to expand the sound recording copyright

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 801. The Court points out that artists are free to imitate those portions of songs they would like to replicate, but copying and reusing a sample is forbidden under their interpretation of the Copyright Act. *Id.* at 802. In another policy argument, the court also contends that the music industry will be able to create workable guidelines for sample licensing, that the majority of musicians apparently already go through this sample licensing process and that for defendants it would “appear to be cheaper to license than to litigate.” *Id.* at 802–04.

¹⁰¹ *Id.* at 802.

¹⁰² *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016).

¹⁰³ *See VMG Salsoul*, 824 F.3d at 884–87.

holder's rights, actually seeks to define the *limits* of copyright protection, and therefore the *Bridgeport* Court's use of that statute to expand a copyright holder's power was questionable.¹⁰⁴ The Court points out that the legislative history of the Act supports this proposition because it shows that § 106 of the Copyright Act, which explains the nature of a copyright holder's exclusive rights, is subject to the limitations of §§ 107–118, including § 114, and “must be read in conjunction with those provisions.”¹⁰⁵

The Ninth Circuit then directly confronted the key behind *Bridgeport*'s reasoning: the inference the *Bridgeport* Court read into their statutory interpretation of § 114(b).¹⁰⁶ The *VMG* Court held that the

¹⁰⁴ *Id.* at 883. The Ninth Circuit explains that “[w]e ordinarily would hesitate to read an *implicit expansion* of rights into Congress’ statement of an *express limitation* on rights.” *Id.*

¹⁰⁵ *Id.* The Court also points out that 17 U.S.C. § 102, which generally defines the areas protected by copyright law and 17 U.S.C. § 106, which explains the exclusive rights the owner of a copyright retains, treats sound recordings no differently than any other type of protected work. *Id.* at 881–83.

¹⁰⁶ *Id.* at 883–85. As previously noted, one of the basic premises *Bridgeport* relies on is that because Congress added the word “entirely” into the wording of § 114(b), it demonstrated Congress’ intent that the owners of a copyright of a sound recording have an exclusive right to the use and recreation of their own work. *See* discussion *supra* Part II. A. Throughout much of the opinion relating to *Bridgeport*, the Ninth Circuit impliedly follows parts of the critique by Professor David Nimmer of the *Bridgeport* decision in *Nimmer on Copyright*. Compare NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b] with *VMG Salsoul*, 824 F.3d at 880–88. In the section addressing the *Bridgeport* decision, Nimmer succinctly summarizes the *Bridgeport* court’s logical syllogism regarding § 114(b): “That sentence immunizes the maker of a sound-alike recording; if no sounds are recaptured, the newcomer is categorically exempt from liability to the owner of the sound recording. From that proposition, the panel summarily reasons that if some sounds are recaptured, the newcomer’s liability is complete.” NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b].

reasoning in *Bridgeport* is based on a “logical fallacy.”¹⁰⁷ The Court’s argument was: based on the premise that adding the word “entirely” into the statutory text of § 114(b) means that Congress intended no liability should attach when *none* of a sound recording was used in another piece of music, it does not logically follow for the *Bridgeport* Court to infer that liability should then *automatically* attach when *any* of the sound recording is used in another piece of music.¹⁰⁸

The Court pointed out that, “[a] statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances,”¹⁰⁹ and demonstrated this by giving an example following the logic behind the *Bridgeport* Court’s statutory interpretation.¹¹⁰ The Ninth Circuit supported their challenge to *Bridgeport*’s statutory interpretation with the legislative history of § 114 that *Bridgeport*

¹⁰⁷ *VMG Salsoul*, 824 F.3d at 884. This language again comes from *Nimmer*. NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b].

¹⁰⁸ *VMG Salsoul*, 824 F.3d at 884–85.

¹⁰⁹ *Id.* at 884.

¹¹⁰ *Id.* at 885. The example used by the Ninth Circuit in *VMG Salsoul* does an excellent job of succinctly demonstrating the logical flaw in *Bridgeport*’s reasoning: For example, take as a given the proposition that “if it has rained, then the grass is not dry.” It does not necessarily follow that “if it has not rained, then the grass is dry.” Someone may have watered the lawn, for instance. We cannot infer the second if-then statement from the first. The first if-then statement does not tell us anything about the condition of the grass if it has not rained. Accordingly, even though it is true that, “if the recording consists entirely of independent sounds, then the copyright does not extend to it,” that statement does not necessarily mean that “if the recording does not consist entirely of independent sounds, then the copyright does extend to it.”

Id.

dismissed,¹¹¹ which conflicts with the *Bridgeport* Court's reading of the Copyright Act.¹¹²

2. "Sweat of the Brow" and Policy Arguments

The *VMG Salsoul* Court also took exception to two other arguments advanced by *Bridgeport*. First, the argument that even small portions of music recordings sampled are valuable and thus the original artist's efforts should be protected,¹¹³ essentially making a "sweat of the brow" argument,¹¹⁴ and second, that because the sounds sampled are "fixed in the medium," (they are already recorded onto a tape, or saved electronically) and the sample directly replicates that sound, "[i]t is a physical taking rather than an intellectual one."¹¹⁵

¹¹¹ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005). In that legislative history, Congress notes 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." H.R. REP. NO. 94-1476, at 5721 (1976). This is at odds with the *Bridgeport* Court's interpretation of the Copyright Act. *VMG Salsoul*, 824 F.3d at 883.

¹¹² *Id.*

¹¹³ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005). The court notes that "even when a small part of a sound recording is sampled, the part taken is something of value . . . [w]hen those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one." *Id.*

¹¹⁴ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (explaining that some courts had misconstrued the Copyright Act and used the "sweat of the brow" argument to uphold copyright infringement cases dealing with compilations of facts with no original expression, noting, "these courts developed a new theory to justify the protection of factual compilations. Known alternatively as 'sweat of the brow' or 'industrious collection,' the underlying notion was that copyright was a reward for the hard work that went into compiling facts.").

¹¹⁵ *Bridgeport*, 410 F.3d at 802.

The Ninth Circuit dismissed *Bridgeport's* “sweat of the brow” argument relying on *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*¹¹⁶ The Ninth Circuit argued that in *Feist*, the Supreme Court held “unequivocally that the Copyright Act protects only the expressive aspects of a copyrighted work and *not* the ‘fruit of the [author’s] labor.’”¹¹⁷ Addressing the second argument, the Ninth Circuit held that a “physical taking,” as opposed to an intellectual one, can happen across the copyright law spectrum, and gave the example of copying a photograph¹¹⁸ to note that the *de minimis* principle applies in all of those comparable situations.¹¹⁹ The Court stated, “we can think of no principled reason to differentiate one kind of ‘physical taking’ from another.”¹²⁰

¹¹⁶ See *Feist*, 499 U.S. at 349 (holding that the “sweat of the brow” doctrine used extensively by lower courts was improper because it defied basic copyright principles).

¹¹⁷ *VMG Salsoul*, 824 F.3d at 885. See also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991). The Supreme Court, talking about striking down the “sweat of the brow” argument courts had used for years to uphold copyright infringement actions, said:

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not “some unforeseen byproduct of a statutory scheme.” It is, rather, “the essence of copyright,” and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but “to promote the Progress of Science and useful Arts.”

Id. (citations omitted).

¹¹⁸ *VMG Salsoul*, 824 F.3d at 885. The Court’s argument is that in the same way a music sample makes an “exact” replica of the original sound recording, someone reprinting or photocopying a photograph is an “exact” replica of the original photograph, thus the distinction is arbitrary. *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

Lastly, the Ninth Circuit addressed *Bridgeport*'s policy reasoning for establishing the bright line rule of "get a license or do not sample"¹²¹ by arguing that regardless of the policy arguments advanced by a judge, the Federal Circuit Courts are tasked with interpreting and following the desire of the legislature through the statutes and laws they enact.¹²²

C. Addressing Bridgeport, VMG Salsoul, And The Resulting Circuit Split

The Ninth Circuit's opinion in *VMG Salsoul* created a Federal circuit split which now subjects litigants to different rules of law depending on where they file their lawsuit.¹²³ Unless and until the Supreme Court or Congress decides to address the issue, other courts tasked with deciding similar lawsuits will be faced with an undecided area of law.¹²⁴ In order to address this issue, a weighing of the arguments behind *Bridgeport* and *VMG Salsoul* is helpful.

¹²¹ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).

¹²² *VMG Salsoul*, 824 F.3d at 887. The Ninth Circuit points out that *Bridgeport*'s policy arguments "are for a legislature, not a court. They speak to what Congress *could* decide; they do not inform what Congress *actually* decided." *Id.* The Ninth Circuit also disregarded the argument made by Judge Silverman in the opinion's dissent that because Congress has not intervened, *Bridgeport* has "correctly divined congressional intent," adding:

[t]he Supreme Court has held that congressional inaction in the face of a judicial statutory interpretation, even with respect to the Supreme Court's own decisions affecting the entire nation, carries almost no weight . . . Here, Congress' inaction with respect to a decision by one circuit court has even less import, especially considering that many other courts have declined to apply *Bridgeport*'s rule.

Id.

¹²³ 84 U.S.L.W. 1826 (2016).

¹²⁴ *Id.*

Prior to *Bridgeport*, there was not a large body of copyright case law which dealt specifically with music sampling, but courts applied a substantial similarity and *de minimis* analysis to copyright cases, including sampling cases, almost universally.¹²⁵ In fact, courts have recognized the concept of substantial similarity as being a basic tenant of copyright protection dating back to 1841 in the case of *Folsom v. Marsh*.¹²⁶ In *VMG Salsoul*, the Ninth Circuit decided to continue applying those long-standing principles of substantial similarity and *de minimis* to music sampling cases

¹²⁵ *VMG Salsoul*, 824 F.3d at 881 (finding that “courts consistently have applied the rule in *all* cases alleging copyright infringement”). This included the Sixth Circuit as well, prior to the Circuit Court of Appeals decision in *Bridgeport*. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 839–40 (M.D. Tenn. 2002). In fact, the lower District Court in *Bridgeport* explicitly said in their initial ruling that the Circuit recognized the concept as applying to copyright infringement cases, and cited to a case from 1943 which held so, writing:

The Sixth Circuit has recognized that the principle of *de minimis non curat lex* (“the law cares not for trifles”) can be applied as a defense to copyright infringement if it can be shown that a substantial amount of the copyrighted work was not taken.

Id. See also Galvin, *supra* note 10 at 532–33; Carter *supra* note 10 at 677; Schietinger *supra* note 10 at 218–19. *But see* *Grand Upright Music, Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183–85 (S.D.N.Y. 1991) (finding that defendants intentionally violated plaintiff’s copyrights by using three words from plaintiff’s song and sampling a portion of the plaintiff’s master recording without permission on defendant’s album and finding for the plaintiff without doing any kind of substantial similarity analysis). The court in *Grand Upright Music* started out the opinion ominously quoting “Thou shall not steal,” the Seventh Commandment from Exodus in the Bible. *Id.* at 183. The court was so vexed that the defendant had intentionally appropriated the material that they referred the case to the United States Attorney to look into criminal charges. *Id.* at 185. *Grand Upright Music*, however was one of the earliest reported sampling cases and is the minority of infringement cases which haven’t applied some type of substantial similarity analysis. See Galvin *supra* note 10 at 532–33; Carter *supra* note 10 at 677; Schietinger *supra* note 10 at 218–19.

¹²⁶ See *supra* note 35 and accompanying text.

and declined to follow *Bridgeport*, which rejected those principles in the context of music sampling.¹²⁷

Thus, in comparing the two holdings the essential question becomes whether *Bridgeport*'s bright line rule passes muster and should overturn the decades-old copyright case law principles to which *VMG Salsoul* adheres. It follows that the *Bridgeport* opinion must demonstrate a compelling argument as to why courts should do so. The Sixth Circuit attempted to do this by arguing: (1) Congress specifically intended for sound recordings to be protected to a greater extent than all other copyrightable works in the Copyright Act; and (2) music sampling is distinguishable in a meaningful way from all other types of copyright infringement cases.

1. *Statutory Interpretation of the Copyright Act*

Comparing the statutory interpretation of the Copyright Act of 1976 in the context of music sampling by both the *Bridgeport* and *VMG Salsoul* Courts, the stronger argument is advanced by the Ninth Circuit. The Court's position in *VMG Salsoul* is that Congress did *not* intend for § 114 of the Copyright Act to treat sound recordings any differently, as the *Bridgeport* court holds, and that based on the legislative history, Congress intended that

¹²⁷ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 803 (6th Cir. 2005) (finding the *de minimis* defense did not apply to sound recordings under federal copyright law and any unauthorized copying of sampled music, no matter how small or insignificant, could constitute copyright infringement).

a substantial similarity and *de minimis* analysis should be conducted for music sampling cases.¹²⁸

First, looking at the *Bridgeport* Court's logic reasoning, the Ninth Circuit is correct: it does not follow that because Congress intended for no liability for infringement to attach when *none* of a sound recording was used in another piece of music that liability should *automatically* attach when *any* of the sound recording is used in another piece of music. As pointed out by the Ninth Circuit and David Nimmer in *Nimmer on Copyright*, there is an unsupported inferential leap made in that reasoning.¹²⁹

In terms of formal logic, the syllogism proposed by the Sixth Circuit in *Bridgeport* is called "the fallacy of affirming the consequent."¹³⁰ The

¹²⁸ See *VMG Salsoul*, 824 F.3d at 886.

¹²⁹ See discussion *supra* Part II. 2. A; see also *VMG Salsoul*, 824 F.3d at 884–85; NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b]; Galvin, *supra* note 10, at 537–38; Schietinger, *supra* note 10, at 239–44. As Professor Nimmer points out in discussing the flaws in *Bridgeport's* statutory interpretation of § 114(b):

That sentence immunizes the maker of a sound-alike recording; if no sounds are recaptured, the newcomer is categorically exempt from liability to the owner of the sound recording. From that proposition, the panel summarily reasons that if some sounds are recaptured, the newcomer's liability is complete. But it is submitted that that conclusion rests on a logical fallacy. By validating entire sound-alike recordings, the quoted sentence contains no implication that partial sound duplications are to be treated any differently from what is required by the traditional standards of copyright law—which, for decades prior to adoption of the 1976 Act and unceasingly in the decades since, has included the requirement of substantial similarity.

NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b].

¹³⁰ Stephen M. Rice, *Conspicuous Logic: Using the Logical Fallacy of Affirming the Consequent as a Litigation Tool*, 14 BARRY L. REV., 1, 10–12 (2010). The author explains with an example how this type of logical fallacy works:

The Fallacy of Affirming the Consequent takes a similar, but logically different, form from that of a well-formed hypothetical syllogism. For example: 1. If assent to enter into a contract is made

basic tenant of this logical flaw is that when there is a conditional “if-then” statement (i.e. If A then necessarily B), it is a fallacy to infer the inverse of the conditional based solely on the conditional (i.e. If B then necessarily A), because the initial statement only provides that a limited premise is true, it does not provide any information about the inverse of that condition.¹³¹

Thus, given the premise of the statement in § 114(b):¹³² *If a sound recording is a complete copy of another sound recording, then exclusive rights do not extend to it, it cannot be properly deduced: If exclusive rights do extend to the sound recording, then the sound recording is not copied at all* (i.e. it is free from copying).

One cannot properly take the “if-then” conditional statement in §114(b), and assume the inverse is *necessarily* true.¹³³ To do so would be

because of an improper threat that leaves the victim no reasonable alternative, then the contract is voidable by the victim.

2. The contract is voidable by the victim. 3. Therefore, the assent to enter into the contract was made because of an improper threat. Understanding the nature of this logically invalid argument and why it is logically invalid (and legally incorrect) requires an understanding of the rules governing validity of hypothetical syllogisms. A hypothetical syllogism must meet two basic logical rules in order to have a deductively valid form. If the form of the syllogism is invalid, then the syllogism cannot be relied upon to ensure the truth of the conclusion. Where a syllogism violates one of these rules of logical form, the syllogism is invalid, and the argument is said to be fallacious.

Id.

¹³¹ *Id.*

¹³² See discussion *supra* Part II A. 1.

¹³³ *Id.* This concept is clearly demonstrated by the Ninth Circuit’s example in *VMG Salsoul*. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 885 (9th Cir. 2016). The court’s example shows the logical reasoning problem with *Bridgeport*’s interpretation:

For example, take as a given the proposition that “if it has rained, then the grass is not dry.” It does not necessarily follow that “if it has not rained, then the grass is dry.” Someone may have watered the lawn, for

affirming the consequent. That is not to say that is *impossible* for the consequent (*Bridgeport's* premise) to be true, only that one cannot simply infer it from the conditional statement in § 114 *alone*. In the case of the premise in § 114, to prove the consequent is true would require some type of outside support to show that Congress actually intended that sound recordings are afforded absolute protection against copying and re-use, as opposed to all other mediums which are subject to a substantial similarity analysis.¹³⁴

Additional support to bolster the *Bridgeport* Court's interpretation of Congressional intent would normally be found in the legislative history or through other anecdotal evidence of Congressional intent, but the legislative history for the Copyright Act that *Bridgeport* dismissed actually demonstrates the opposite of what *Bridgeport* concludes.¹³⁵ As the Ninth Circuit points out, Congress notes in the legislative history of § 114 of the Copyright Act 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."¹³⁶

instance. We cannot infer the second if-then statement from the first. The first if-then statement does not tell us anything about the condition of the grass if it has not rained.

Id.

¹³⁴ See discussion *supra* Part II. 2. A; see also *VMG Salsoul*, 824 F.3d at 884–85;

NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b].

¹³⁵ See discussion *supra* Part II. 2. A.

¹³⁶ H.R. REP. NO. 94-1476, at 5721 (1976) (emphasis added).

The only reasonable reading of this statement is that Congress intended for infringement liability to attach when an alleged infringer copies and reuses “all or any substantial portion” of the work without authorization. Therefore, this would logically require courts to do some form of substantial similarity analysis when dealing with copyright infringement cases to determine when a “substantial portion” of the work has been copied and reused.¹³⁷ Furthermore, because courts have applied *de minimis* to copyright infringement cases under the substantial similarity test,¹³⁸ it would also logically require courts to determine whether the alleged infringement is *de minimis*. In addition, while the language in the Copyright Act did change from the earlier Sound Recording Act of 1971, the legislative history which *Bridgeport* dismissed as being irrelevant was written at the same time that Congress changed the statutory language, which further suggests that Congress did intend that sound recordings be subject to a substantial similarity analysis.¹³⁹ Thus, as the Ninth Circuit concluded in *VMG Salsoul*, the legislative history tends to rebut the *Bridgeport* Court’s inference that § 114 of the Copyright Act treats sound

¹³⁷ See discussion *supra* Part I. This would be faithful to the body of copyright law dating back to the 1800’s which requires such analysis. *Id.*

¹³⁸ See discussion *supra* Part I.

¹³⁹ H.R. REP. NO. 94-1476 (1976).

recordings differently and therefore they are not subject to substantial similarity and *de minimis* tests, as *Bridgeport* suggests.¹⁴⁰

In addition to the legislative history, another issue with *Bridgeport*'s statutory interpretation of § 114 is that it lacks solid support from secondary sources. Although the Court states that they did not pull their "interpretation out of thin air,"¹⁴¹ the material they cite for support is unconvincing. First, the court cites to a section of the treatise *Kohn on Music Licensing*, which proposes the same interpretation of § 114 that the *Bridgeport* Court reached.¹⁴² The problem is not the source itself, but what the source says. The quoted section of *Kohn* is not definitive in its reasoning, as it states, "Congress *may* have intended that a recording containing *any* sounds of another recording would constitute infringement."¹⁴³ The treatise merely posits that this *may* have been Congress' intent, and aside from this tentative interpretation, the treatise provides no other support for the proposition or how the authors reached that conclusion.¹⁴⁴

The other source the *Bridgeport* Court cites for support of its statutory interpretation is a student-written law review note which provides little analytical reasoning aside from making the same logical inference

¹⁴⁰ See *VMG Salsoul*, 824 F.3d at 886.

¹⁴¹ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 803 (6th Cir. 2005).

¹⁴² *Id.* at 803 n.18.

¹⁴³ AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING*, 1486-87 (Aspen Law & Business 3d ed. 2002) (emphasis added).

¹⁴⁴ *Id.*

regarding § 114(b) of the Copyright Act that *Bridgeport* relies on.¹⁴⁵ The Note, written by Susan J. Latham, only cites for support of this interpretation a lecture by law professor Justin Hughes.¹⁴⁶ This is not to imply that the student Note or Professor Hughes are not valid sources. The problem, however, is that like with *Kohn*, there is no explanation available to determine the logic or thought process of the statutory interpretation they advocate, nor on what they based their own understanding of the Copyright Act.¹⁴⁷ Moreover, Latham herself acknowledges in a footnote that despite this interpretation of § 114, *de minimis* may still be a valid defense, writing, “[t]here may be the possibility of a *de minimis* use defense, depending on how strictly the court interprets the ‘actual sounds’ language in the statute.”¹⁴⁸

This lack of secondary support, combined with the fact that the Court’s interpretation rests on an inference which is not based in sound logical reasoning and not maintained by the legislative history, demonstrates that the Sixth Circuit’s arguments in *Bridgeport* are not convincing. In contrast, the Ninth Circuit’s statutory interpretation of the Copyright Act in *VMG Salsoul* is grounded in logical arguments, bolstered by legislative history and adheres to the long-standing principles of

¹⁴⁵ *Bridgeport*, 410 F.3d at 801 n.10; Latham, *supra* note 90, at 125.

¹⁴⁶ Latham, *supra* note 90, at 125 n.33. Latham states in the footnote that her notes from the lecture are “on file with the author.” *Id.*

¹⁴⁷ Latham, *supra* note 90, at 125 n.33.

¹⁴⁸ Latham, *supra* note 90, at 125 n.35; *see also* Carter, *supra* note 10, at 686–87.

copyright law. Thus, the Ninth Circuit's statutory interpretation is the more persuasive argument.

2. *Distinguishing Sound Recordings from other Copyright Protected Mediums*

A key piece of reasoning behind the *Bridgeport* decision was the Court's dismissal of the legislative history of the Copyright Act.¹⁴⁹ The Court said it did so because copyright infringement via music sampling of sound recordings was not being done, or at least was not a problem, in the early 1970's when the Copyright Act was written.¹⁵⁰ This argument might be persuasive *if* sampling music from a sound recording was demonstrably different from other forms of copyright infringement. If sampling a sound recording *is* somehow legally distinguishable from copying and reusing work from other mediums, then dismissing the legislative intent—which was written at a time when Congress could not have realistically foreseen the type of widespread music sampling which began in the 1980's—is at least a reasonable proposition.¹⁵¹

The problem, however, is that there is no meaningful distinction between taking a small portion of a sound recording and reusing it in

¹⁴⁹ *Bridgeport*, 410 F.3d at 805.

¹⁵⁰ *Id.*

¹⁵¹ In theory, this would be a meaningful distinction, because if Congress could not have foreseen such events when drafting the Copyright Act of 1976 it follows that it would not be helpful to refer to the legislative history as it will merely explain the thought process behind the Act at a time when Congress was unaware and unprepared to deal with the type of sampling at issue.

another work, and taking a small portion of a photo, a video, or a drawing and reusing that in another work.¹⁵² In other words, the distinction the *Bridgeport* court attempts to make is an arbitrary one.¹⁵³ This is the Ninth Circuit’s argument in *VMG Salsoul*—that other copyright infringement cases deal with “physical takings,” but are still subject to a substantial similarity analysis, thus the Sixth Circuit’s reasoning is flawed.¹⁵⁴

The *Bridgeport* Court argued that music sampling is a “physical taking rather than an intellectual one.”¹⁵⁵ However, a video recording

¹⁵² See, e.g., NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b]. As Professor Nimmer points out:

Whether the conduct at issue is sound duplication or sound imitation, the defendant who would create a new work must fix materials into a tangible medium of expression; a distinction based on “physical copying” versus something else thus seems to be built on air. It is therefore difficult to subscribe to the court’s conclusion that sampling represents “a physical taking rather than an intellectual one.”

Id. See also Galvin, *supra* note 10, at 537–38; Schietinger, *supra* note 10, at 239–44.

¹⁵³ See NIMMER & NIMMER *supra* note 10 at § 13.03 [A][2][b] (arguing *Bridgeport*’s premise that sampling involves a physical, rather than intellectual taking based on the fact that sounds are “fixed in the medium” appears to be “built on air”). Outside of the *Bridgeport* decision, this distinction is not found in any other case law and is supported by very little. See, e.g., Galvin, *supra* note 10, at 537–38 (“If digital sampling is considered a physical taking from the sound recording, then why is it not also one from the musical composition (which the sound recording contains)? Both copyrights require that the work be fixed in a tangible medium; a musical score on paper is certainly no less tangible than a compact disc. At best, the court’s distinction between taking from a sound recording and taking from the musical composition is unconvincing.”); Schietinger, *supra* note 10, at 239–44 (“The Sixth Circuit improperly describes sampling as a physical rather than intellectual taking”); *but see* Reilly, *supra* note 50, at 362 (arguing in favor of the *Bridgeport* decision and stating that prior to *Bridgeport*, “neither sampling musicians nor sampled musicians were protected sufficiently by these laws and music industry practices”), and *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 889 (9th Cir. 2016) (Silverman, B., dissenting) (arguing that *Bridgeport*’s arguments are “well-reasoned and persuasive,” noting Congress’ silence after the decision and stating that “[o]nce the sound is fixed, it is tangible property belonging to the copyright holder, and no one else has the right to take even a little of it without permission”).

¹⁵⁴ See *VMG Salsoul*, 824 F.3d at 885.

¹⁵⁵ *Bridgeport*, 410 F.3d at 802.

contains sounds and images which are also “fixed in the medium”¹⁵⁶ when the recording is made, just as the sounds of the musical instruments are in a sound recording. Likewise, as the Ninth Circuit asserts, the images in a photograph are “fixed in the medium” when the photograph is captured, printed and reused.¹⁵⁷ Therefore, whether it is a photograph, a piece of recorded music, or a video clip which is copied and reused by the alleged infringer, there is no sound logical argument as to why any of these mediums should be treated differently.¹⁵⁸ Moreover, as the Ninth Circuit points out, there is no distinction drawn between these mediums in the Copyright Act itself.¹⁵⁹

It appears the *Bridgeport* court incorrectly focused on the fact that the copying done in sampling is exact, rather than focusing on what is more important in the context of the case: is the portion copied significant enough to constitute substantial similarity to the original work?¹⁶⁰ Thus, the fact that copyright infringement was not taking place through music sampling in the

¹⁵⁶ *Id.*

¹⁵⁷ *VMG Salsoul*, 824 F.3d at 885.

¹⁵⁸ As an example, imagine one were to take an exact copy of Lewis Hine’s iconic photograph “Sitting Atop a Skyscraper,” and then use a tiny, unrecognizable portion of it in a collage or another work of art. Even if that person freely admitted they had physically copied the piece from Hine’s photograph, unless the portion of the work they took from the photograph is recognizable to the average person, it is very likely that the copying would be considered *de minimis* and thus, not actionable, if one follows the holdings of the courts aside from *Bridgeport*. See *supra* note 153. How this example of reusing a small unrecognizable portion of a photograph in another work is different from taking a tiny, unrecognizable portion of a song and reusing it in another song is hard to follow.

¹⁵⁹ See *supra* note 105.

¹⁶⁰ NIMMER & NIMMER *supra* note 10 at § 13.03 [E][1].

1970's is irrelevant; copyright infringement was taking place in various other forums of copyright law at the time, including various other types of "physical takings" from other mediums, and the same principles of substantial similarity applied in those matters.¹⁶¹ Therefore, the Ninth Circuit's reasoning that there is no meaningful distinction between sampling and other forms of copyright infringement is logically sound, and the better argument.

3. *Policy Arguments*

While *Bridgeport's* policy arguments¹⁶² seem well-reasoned, as the Ninth Circuit argues in *VMG Salsoul*, courts are directed to interpret Congress' intent to the best of their abilities.¹⁶³ On its face, ease of

¹⁶¹ See, e.g., *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 216 (2d Cir. 1998) (finding the defendant's use of exact reproductions of plaintiff's photographs in the movie "Seven" was *de minimis* because the plaintiff's photographs "as used in the movie are not displayed with sufficient detail for the average lay observer to identify even the subject matter of the photographs, much less the style used in creating them"); *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 267–68 (5th Cir. 1988) (finding the 30 character sequence copied by defendant out of 50 pages of software source coding "constituted a quantitatively minor amount" and was thus *de minimis*); *Toulmin v. Rike-Kumler Co.*, 137 U.S.P.Q. 533, 534–35 (S.D. Ohio 1962) (finding defendant's copying of one sentence and half of another from plaintiff's historical book and subsequent reuse in his novel to be *de minimis* because the defendant's use of such a small portion of plaintiff's book "represents neither a substantial nor material part of the latter," and "was insignificant in value and extent of the copyrighted material").

¹⁶² See discussion *supra* Part II. 1. C.

¹⁶³ See *VMG Salsoul*, 824 F.3d at 887. See also John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005). The author notes:

For much of our history, the Supreme Court has unflinchingly proclaimed that legislative "intent" is the touchstone of federal statutory interpretation. The rationale is familiar: In a constitutional system predicated upon legislative supremacy (within constitutional boundaries), judges—as Congress's faithful agents—must try to ascertain as accurately as possible what Congress meant by the words it used.

Id.

enforcement sounds like a useful judicial improvement, but it is not necessarily an improvement at all if the method used to accomplish this goal does not comport with copyright case law and congressional intent. If Congress truly intended that sound recordings be treated the same as all other mediums in regards to copyright protection as the legislative history suggests,¹⁶⁴ then policy arguments made by judges should not override the legislature's intent, as the Supreme Court established in *SEC v. Joiner*.¹⁶⁵ When dealing with a case involving interpreting federal statutes such as the Copyright Act, the Federal Circuit Courts are not to ignore legislative intent and insert their own policy arguments, they are to interpret the desire of the legislature and decide the case according to that rationale.¹⁶⁶ Thus, the Federal courts should aim for fidelity in interpreting Congressional intent, and because the Ninth Circuit's argument is consistent with Congress' intent, it is more persuasive.¹⁶⁷

¹⁶⁴ See discussion *supra* Part II. 1. C.

¹⁶⁵ *SEC v. Joiner*, 320 U.S. 344, 350-51 (1943). The Supreme Court noted that the federal courts are to decipher to the best of their ability the legislature's intent when attempting to interpret federal statutes:

However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

Id.

¹⁶⁶ See Manning, *supra* note 163, at 419 n.1. See also *Joiner*, 320 U.S. at 350-51; *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 887 (9th Cir. 2016). The Ninth Circuit points out that *Bridgeport's* policy arguments "are for a legislature, not a court. They speak to what Congress *could* decide; they do not inform what Congress *actually* decided." *Id.*

¹⁶⁷ See note 178 *infra*.

4. *Comparing the Holdings and Their Effects*

Because the Sixth Circuit's arguments discussed above are unconvincing and the Ninth Circuit's contrary arguments are logical, grounded in established copyright case law and comport with the legislative intent available for the Copyright Act, the Ninth Circuit's holding in *VMG Salsoul* is superior. The effect of *Bridgeport*'s bright line rule on music sampling litigants since 2005 is unclear, in part because there are so few sampling cases which have made it to trial.¹⁶⁸ However, the implication of holding that *any* sampling is *per se* copyright infringement is fairly clear: it gives the music publishing companies the upper hand in negotiating sampling licenses and discourages artists from sampling other musical works without getting a license.¹⁶⁹

In contrast, the Ninth Circuit's holding, which requires courts ruling on music sampling infringement cases to do a substantial similarity and *de minimis* analysis, at least in theory, should help to readjust the balance

¹⁶⁸ Suppappola, *supra* note 9, at 125.

¹⁶⁹ See Schietinger *supra* note 10 at 234; see also Thomas P. Wolf, *Toward a "New School" Licensing Regime for Digital Sampling: Disclosure, Coding, and Click-Through*, 2011 STAN. TECH. L. REV. 1, 9 (2011) ("*Bridgeport*, if generalized into a nationally applicable standard for sampling, will dramatically increase the transaction costs associated with sampling, forcing artists to acquire both musical composition and sound recording licenses for all their samples, regardless of whether or not such samples would have previously been held to constitute non-infringing uses."); Steven 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 JEFFREY S. MOORAD SPORTS L.J. 103, 130–31 (2006) (Noting that "[s]hould the Supreme Court similarly deny certiorari in *Bridgeport*, musicians will face both costly and complex licenses for samples, or potentially face equally costly litigation—which will, in effect, pull the plug on digital sampling.").

between artist creativity and artist protection by creating room for artists to use small samples of other works without mandating artists engage in the complex and expensive sample clearing process.¹⁷⁰ How the use of a *de minimis* analysis might impact the filing of sampling infringement lawsuits is also unclear, because while it may encourage artists to take more risks in sampling without obtaining a license, which could increase litigation, it could also discourage music publishing companies from bringing infringement cases when the alleged copying is of a small portion of the work if courts find sampling uses to be *de minimis*.

However, with *VMG Salsoul* and *Bridgeport* coming to opposite conclusions in their holdings, one thing is clear: the resulting circuit split will subject litigants to diametrically opposed rules of law in the Ninth and Sixth Circuits.¹⁷¹ From the litigant's perspective, this clearly incentivizes forum shopping,¹⁷² something Congress and the courts have sought to reduce as much as possible.¹⁷³

¹⁷⁰ See Kembrew McLeod & Peter DiCola, *Non-Infringing Uses in Digital Sampling: The Role of Fair Use and the De Minimis Threshold in Sample Clearance Reform*, 17 DEAKIN L. REV. 322, 323–24 (2013) (arguing that “the *de minimis* threshold allows musicians a certain freedom to borrow small building blocks,” and that “[t]he absence of the *de minimis* rule for sound recordings has broad consequences However implemented, a *de minimis* threshold should apply to the infringement of sound recordings to provide leeway in copyright law’s balancing act between those who sample and those who have been sampled.”).

¹⁷¹ 84 U.S.L.W. 1826 (2016); Lesley Grossberg, *A Circuit Split at Last: Ninth Circuit Recognizes De Minimis Exception to Copyright Infringement of Sound Recordings*, BAKERHOSTETLER (last visited Nov. 3, 2016).

¹⁷² Grossberg, *supra* note 171. If a copyright license holder wants to sue an alleged infringer over the use of a sample of the copyright protected song, it would clearly be in their best interest to file suit in the Sixth Circuit, as the Sixth Circuit is bound to follow

5. *Unresolved Issues*

Both the *VMG Salsoul* and *Bridgeport* opinions still leave several issues unresolved. First, an underlying “slippery slope” problem remains in arguably all substantial similarity and *de minimis* determinations made by courts.¹⁷⁴ These determinations can be particularly challenging in the context of music sampling.¹⁷⁵ In addition, while there is debate on whether the real driving factor behind the *Bridgeport* opinion’s bright line rule was

Bridgeport’s bright-line “get a license or do not sample” rule. *Id.* Therefore any sampling, if proved, is *per se* infringement; thus all the plaintiff has to do is show that her work was actually copied and she wins the case, like in *Bridgeport*. *Bridgeport*, 410 F.3d at 801–05. Conversely, the defendant in such a suit would have the incentive to do whatever it can to avoid the Sixth Circuit and attempt to get the suit heard in the Ninth Circuit or in another federal circuit where the lower district courts have declined to follow *Bridgeport*, like the Second or Eleventh Circuits, which have employed a substantial similarity analysis. *See* *Batiste v. Najm*, 28 F. Supp. 3d 595, 625 n.52 (E.D. La. 2014) (using substantial similarity test); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338–41 (S.D. Fla. 2009) (applying substantial similarity test). This would require the plaintiff prove not only copying, but copying of a legally substantial portion of her work. *See* discussion *supra* Part I.

¹⁷³ *See* Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 336–37 (2005) (noting that “[n]o less an authority than a United States Supreme Court Justice has denounced forum shopping as ‘evil.’ Congressional efforts to limit forum shopping have portrayed the practice as abusive, devious, and unethical.”).

¹⁷⁴ *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 840 (M.D. Tenn. 2002). The District Court in the *Bridgeport* case pointed out that “[t]he Court’s role in making a *de minimis* analysis is a tricky one. It must balance the interests protected by the copyright laws against the stifling effect that overly rigid enforcement of these laws may have on the artistic development of new works.” *See also* NIMMER & NIMMER *supra* note 10 at § 13.03 [A]. Professor Nimmer points out that “[t]he determination of the extent of similarity that will constitute a substantial, and hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations.” *Id.*

¹⁷⁵ Suppappola, *supra* note 9 at 100–01. For example: where exactly is the legal threshold of *de minimis* when it comes to music sampling? Is it an arbitrary length—i.e. the cutoff for *de minimis* use is two seconds? Is it based on whether the “average listener” would recognize it? If so, how exactly does a judge or a panel of justices make a definitive ruling, as a matter of law, that an “average listener” would not recognize the sampled piece in the song? *See infra* Part III.

judicial economy,¹⁷⁶ clogging the courts remains a potential issue.¹⁷⁷ If courts are to apply a substantial similarity in every sampling case, it is not hard to see why having to do so for hundreds of cases would be draining on court resources.¹⁷⁸ Yet another issue in this circuit split is that neither *Bridgeport* nor the Ninth Circuit addressed the argument of fair use in their opinions.¹⁷⁹ There appears to be little to no case law regarding whether fair

¹⁷⁶ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005). The *Bridgeport* Court stresses that they did *not* create a bright line rule simply for the sake of judicial efficiency, writing, “[w]e would want to emphasize, however, that considerations of judicial economy are not what drives this opinion.” *Id.* But see Carter, *supra* note 10, at 681–84 (noting that “[t]he appeals court unconvincingly stressed judicial economy failed to dictate its rule,” and that “judicial economy seems to have driven *Bridgeport*’s bright-line rule”).

¹⁷⁷ The *Bridgeport* court was presented with nearly 500 instances of unlicensed sampling by the music clearinghouse Bridgeport Music Incorporated and related music publishing companies. *Bridgeport*, 410 F.3d at 795. Unlike in *Newton v. Diamond*, another seminal copyright sampling case, where the Ninth Circuit dealt with a single instance of sampling in one song, the *Bridgeport* case presented the Court with several hundred infringement claims by one clearinghouse against dozens of alleged infringers. *Newton v. Diamond*, 388 F.3d 1189, 1190 (9th Cir. 2004); *Bridgeport*, 410 F.3d at 795. It should be noted for purposes of distinguishing, that *Newton* dealt with an alleged infringement of a sample in regards to a musical composition, *not* a sound recording, which are distinguishable under copyright law, as discussed in Part I, *supra*. *Id.* For a discussion of the differences between the two, see generally Landau, *supra* note 45.

¹⁷⁸ *Bridgeport*, 410 F.3d at 802. The court points out that “[w]hen one considers that he has hundreds of other cases all involving different samples from different songs, the value of a principled bright-line rule becomes apparent.” *Id.* This is an important piece of context because it may go a long way towards explaining the underlying reasoning behind the court’s decision to create a “bright line” rule. In the next sentence, however, the court attempts to distance itself from the idea that they created the bright line rule simply for economy, noting, “[w]e would want to emphasize, however, that considerations of judicial economy are not what drives this opinion. If any consideration of economy is involved it is that of the music industry.” *Id.* See also Carter, *supra* note 10, at 681–84 (noting that “[t]he appeals court unconvincingly stressed judicial economy failed to dictate its rule,” and that “judicial economy seems to have driven *Bridgeport*’s bright-line rule”).

¹⁷⁹ While the *VMG Salsoul* Court was not faced with that issue because they found the alleged infringement to be *de minimis*, the *Bridgeport* Court declined to address that argument, though the defendant raised it. *Bridgeport*, 410 F.3d at 805. See also *supra* note 69.

use might apply as a valid defense to music sampling cases,¹⁸⁰ and this is particularly troublesome because the body of copyright infringement case law on music sampling itself is not very robust.¹⁸¹

III. PROPOSAL

In order to provide helpful dialogue in the face of the current circuit split, this section proposes three suggestions for courts faced with deciding similar cases. First, courts should follow the Ninth Circuit's reasoning and continue to perform substantial similarity analyses for music sampling cases. Second, this section proposes courts use a modified version of the "audience test" to determine a minimum threshold for substantial similarity in sampling cases in order to address the issue of judicial economy in the face of potentially increased music sampling litigation. Lastly, this section proposes that courts should also be receptive to analyzing fair use defenses by defendants in music sampling cases.

A. Sampling Cases Should Require A Substantial Similarity Analysis

Looking through the lens of copyright law, the Ninth Circuit's holding in *VMG Salsoul* is the proper analysis for courts when dealing with a music sampling case.¹⁸² The Ninth Circuit's arguments are generally well grounded in logic and decades of copyright law, and do not suffer from the

¹⁸⁰ Suppappola, *supra* note 9, at 125.

¹⁸¹ *Id.* at 95. Since 2006 when Suppappola's article was written, only a handful of additional cases on music sampling have been published. *See supra* note 11.

¹⁸² *See discussion supra* Part II. C.

types of flaws in reasoning that *Bridgeport* does.¹⁸³ Applying a substantial similarity and *de minimis* analysis to music sampling copyright infringement cases as the Ninth Circuit did in *VMG Salsoul* comports with long-standing copyright law principles, Congress' legislative intent, and the long line of cases which have followed those principles.¹⁸⁴ Thus, when faced with a copyright infringement lawsuit involving music sampling, courts should continue to apply a substantial similarity analysis, including analyzing potential *de minimis* defenses.¹⁸⁵

Addressing one of the unresolved issues raised above, while judicial economy is still a problem, as pointed out by copyright scholars, this is not an issue that can be easily solved and generally requires a case-by-case determination.¹⁸⁶ *Bridgeport's* rationale behind its bright line test for judicial economy disregards the fact that most copyright infringement actions are subject to a substantial similarity test and courts have so far managed to handle the load.¹⁸⁷ Regardless, when faced with such a situation, as

¹⁸³ See discussion *supra* Part II. C.

¹⁸⁴ See discussion *supra* Part II. C 1–4.

¹⁸⁵ See discussion *supra* Part I; Part II. C.

¹⁸⁶ See *NIMMER & NIMMER supra* note 10 at § 13.03 [A].

¹⁸⁷ See, e.g. *Newton v. Diamond*, 388 F.3d 1189, 1192–95 (9th Cir. 2004) (using the substantial similarity test to determine the defendant's use of a six-second, three-note flute segment of plaintiff's musical composition was *de minimis* and did not satisfy the minimum constitutional standards for copyright protection and therefore not actionable as a matter of law); *Leigh v. Warner Bros.*, 212 F.3d 1210, 1215 (11th Cir. 2000) (finding defendant's film sequence not substantially similar to plaintiff's work as a matter of law); *Sid & Marty Krofft TV Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977) (using "total concept and feel" variant of substantial similarity test to find defendants had infringed on plaintiff's copyright); *Steward v. West*, No. 13-02449, 2014 U.S. Dist. LEXIS 186012, *25–27 (C.D. Cal. Aug. 14, 2014) (applying substantial similarity test); *Batiste v.*

inconvenient as it may be, judicial efficiency should not trump legislative intent.¹⁸⁸

B. An “Audience Test” To Determine A Minimum Threshold For Substantial Similarity

The modified “audience test” proposed in this section seeks to deal with those unresolved issues of judicial economy. In terms of what type of substantial similarity test courts should apply, critics, scholars and courts have proposed several variations, though many courts, including the Ninth Circuit, use the so-called “audience test.”¹⁸⁹ Some copyright scholars criticize the test as not being faithful to the core tenants of the Copyright Act because it allegedly disregards all but the outward expression of the material.¹⁹⁰ However, while the audience test is not perfect, it has been used

Najm, 28 F. Supp. 3d 595, 625 n.52 (E.D. La. 2014) (using substantial similarity test); *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338–41 (S.D. Fla. 2009) (applying substantial similarity test); *EMI Records Ltd. v. Premise Media Corp. L.P.*, 2008 N.Y. Misc. LEXIS 7485 (N.Y. Sup. Ct. Aug. 8, 2008) (using substantial similarity test); *see also* NIMMER & NIMMER *supra* note 10 at § 13.03 [A]. Granted, the *Bridgeport* court was faced with nearly 500 separate infringement claims, but in the end, those were whittled down to less than fifteen through pre-trial proceedings. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 795 (6th Cir. 2005).

¹⁸⁸ *See* discussion *supra* Part II. C.

¹⁸⁹ *See* NIMMER & NIMMER *supra* note 10 at § 13.03 [E][1]. (“For over a century, the courts in general have purported to apply what is called the ordinary observer or audience test.”).

¹⁹⁰ *See id.* at § 13.03 [A]. Nimmer argues “that the ‘spontaneous and immediate’ reactions of the ordinary observer are relevant evidence in determining the existence of copying. There is, however, reason to dispute the doctrine insofar as it makes the visceral reactions of the trier the ultimate test of copying (assuming access).” Nimmer goes on to point out that “[t]he Copyright Act is intended to protect writers from the theft of the fruits of their labor, not to protect against the general public’s ‘spontaneous and immediate’ impression that the fruits have been stolen.” The holding of the Supreme Court in *Feist* appears to offer evidence to the contrary, however:

The primary objective of copyright is *not to reward the labor of authors*, but “to promote the Progress of Science and useful Arts.” To this end,

effectively by courts, and it could be adapted further in the context of music sampling cases to help courts determine when a minimal level of substantial similarity has been established.

The purpose of the modified audience test proposed in this section is to address the judicial efficiency issue the *Bridgeport* court sought to resolve with its bright line rule, while still allowing courts to comport with the tenants of copyright law and the legislative intent behind the Copyright Act. The test is designed specifically for pre-trial use in sampling cases and courts may choose to use a more in-depth substantial similarity test for the actual trial. But because pre-trial motions for summary judgment and their equivalents play such a large role in the gatekeeping function of courts,¹⁹¹ and given the potential for large-scale sampling litigation as seen in *Bridgeport*,¹⁹² a separate, efficient test for summary judgment would aid in

copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, *applies to all works of authorship.*

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) (emphasis added) (citations omitted). Thus on a basic level, the audience test, at least in the context of music sampling, appears to comport with the general principles behind the Copyright Act as determined by the Supreme Court in *Feist*. It should also be noted that *Bridgeport* dealt with an undisputed sampling of plaintiff's work. *Bridgeport*, 410 F.3d at 796. If the sampling is disputed, however, the issue of whether the sampling artist has actually sampled the work would require additional evidence to prove there was a copying of the original work.

¹⁹¹ D. Theodore Rave, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV., 875, 877–78 (2006) (“The adoption of Rule 56 expanded the availability of the motion to both parties in all types of actions, but its purpose remained the same. The architects of the rule saw summary judgment as a way to reduce ‘law’s delay’ and help clear crowded court dockets.”).

¹⁹² See *supra* note 56.

sorting cases which are viable from those which are not, while adhering to the goals of copyright law.

The modified audience test proposed in this section would be used pre-trial to determine whether an allegedly sampled portion of a song is legally significant enough to sustain a cause of action for copyright infringement. The proposed test seeks to create an analysis which is not as technically daunting as a test like fragmented literal similarity,¹⁹³ but one that remains true to the goals of copyright protection as enumerated in arguably the most helpful analysis the Supreme Court has given to date on the boundaries of copyright protection, *Feist Publications, Inc. v. Rural Telephone Service Co.*¹⁹⁴

In *Feist*, the Supreme Court considered whether defendant's copying of telephone numbers and other facts from a competitor's phone book constituted copyright infringement.¹⁹⁵ The Court explicitly rejected the "sweat of the brow" argument many lower courts had been using for decades to find infringement.¹⁹⁶ The Supreme Court explained that the Copyright Act "assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed

¹⁹³ See generally NIMMER & NIMMER *supra* note 10 at § 13.03 [A][1]–[2].

¹⁹⁴ Cromer, *supra* note 10, at 283 ("Absent a directive from Congress, courts have forged their own tests for copyright infringement, but again, without much guidance from obvious sources. The clearest directive enunciated by the Supreme Court was when in *Feist Publications, Inc. v. Rural Telephone & Telegraph Co.*").

¹⁹⁵ *Feist*, 499 U.S. at 342–44.

¹⁹⁶ *Id.* at 352–57.

by a work,” which the Court called the “idea/expression dichotomy.”¹⁹⁷ The Court noted that bare facts cannot be considered original expression, and thus the reuse of an unoriginal expression will not be entitled to copyright protection.¹⁹⁸ The Court held that in order for a work to be protected by the Copyright Act, originality is a key element and the work must contain a “modicum of creativity” to transform something like bare facts into original expression.¹⁹⁹

Therefore, working off the premises from *Feist*, in the context of music sampling it follows that the sampled portion in question must contain a “modicum of creativity” in order to be an original expression that is protected from copyright infringement.²⁰⁰ Thus, the 0.23 second “horn hit” at issue in *VMG Salsoul*, being in essence a four-note, single-chord horn

¹⁹⁷ *Id.* at 349–50. Indeed, underlying the core of copyright law are two competing interests which must be balanced: protecting the copyright holder from plagiarism of his or her work, and allowing sufficient room for new artists to build upon prior works towards the goal of advancing the progress of science and art. Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 L. & CONTEMP. PROBS. 3, 4–5 (1992); *see also* Pote, *supra* note 17 at 642. The District Court in *Bridgeport* also recognized this balancing act, writing in their opinion:

The Court recognizes that the fact of blatant copying is not challenged by the defendant for the purposes of this motion, and that the purposes of the copyright laws is to deter wholesale plagiarism of prior works. However, a balance must be struck between protecting an artist's interests, and depriving other artists of the building blocks of future works. Since the advent of Western music, musicians have freely borrowed themes and ideas from other musicians.

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

¹⁹⁸ *Feist*, 499 U.S. at 350–51.

¹⁹⁹ *Id.* at 362–63.

²⁰⁰ *Id.*

part, likely does not meet this minimum creativity requirement.²⁰¹ If it did, virtually every individual horn note played could be entitled to copyright protection, which would be an absurd result. Thus, the key question becomes: how do courts determine when a sampled piece of music meets the “modicum of creativity” requirement? The test proposed below seeks to address this question.

The basic premise of the proposed test is: *assuming there is evidence of sampling, does the allegedly copied music sample constitute a copying of constituent elements of the sampled work that are original, such that an average listener would be able to recognize it as being a part of the original work?*

In applying the test, the crucial question becomes: is the sample taken a sequence of music that an average listener would be able to recognize as a pattern from the original song? If so, then the copied work has met the threshold of being “original,” and is subject to copyright protection because there is a minimal amount of substantial similarity, at least enough to stave off a finding of being *de minimis*. If it is not, then the portion copied does not meet the minimum standards for copyright

²⁰¹ Jennifer R. R. Mueller, *All Mixed Up: Bridgeport Music v. Dimension Films and de minimis Digital Sampling*, 81 IND. L. J., 435, 440–41 (2006) (“courts recognize that there are a ‘limited number of notes and chords available to composers,’ and therefore ‘common themes frequently reappear in various compositions, especially in popular music.’ Such common themes do not meet the minimum threshold for originality, in the same way that a very simple sentence in English would not. Notes, like words, must be put together in an original way that requires a modicum of creativity.”).

protection and thus the sampling is *de minimis* and the action should be dismissed.²⁰²

Though this may seem a bit tautological, the proposed test seeks to more clearly define the audience test and create a more discernable line in a very subjective area of the law. Ultimately, the substantial similarity analysis essentially comes down to an exercise in line drawing,²⁰³ and this proposed test seeks to simply help determine where the baseline should be drawn by using an already-established form of the substantial similarity test.²⁰⁴

Take, for example, music created by a guitar: if an artist plays one note, is that an original expression that should be protected by copyright law? Almost certainly not. What about one chord? Again, probably not. But when an artist strings together a series of notes or chords, there is a point when the combination of notes and their arrangement becomes unique. Part of what defines that sequence of music as being unique is the ability of a listener to recognize the sequence or pattern of its tune. If a listener hears

²⁰² Courts could accomplish this in more than one way, however, the most obvious choice would be to do a “side-by-side” comparison of the songs at issue. The court could listen to the allegedly infringing sample, then to the original work and decide whether the sample has replicated a portion of the original work which an average listener would be able to recognize. By doing this kind of direct comparison, the court need not be familiar with the original work to determine if the sample replicates a recognizable portion of it, they merely need to be able to recognize the copied portion in the new work.

²⁰³ NIMMER & NIMMER *supra* note 10 at § 13.03 [A].

²⁰⁴ See NIMMER & NIMMER *supra* note 10 at § 13.03 [E][1]. (“For over a century, the courts in general have purported to apply what is called the ordinary observer or audience test.”).

only a chord or two, they may recognize it as the sounds of a guitar, but they likely would not recognize it as a part of a particular song. However, when enough notes or chords are played in a particular sequence, or in such a way as to make the sound unique, they become recognizable as something more than just guitar sounds, they become a unique tune which the listener can identify and which the listener would be able to recognize from the original work. It is at this point that copyright protection should be applied.

Consider analogizing the situation to *Feist*: the individual guitar notes or chords are like the facts (phone numbers) and their arrangement in a sequence is a compilation of those facts (the arrangement of the phonebook). This proposed test suggests that once the listener is able to identify the series of notes or chords as a unique compilation recognizable to the original work, it then satisfies the “modicum of creativity” requirement as set forth in *Feist*.²⁰⁵ As with the various audience tests currently employed by courts, this modified test could be used across the

²⁰⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362–63 363 (1991).

spectrum of music and musical instruments, including vocals,²⁰⁶ and

“looped” samples.²⁰⁷

Thus, this proposed audience test, tailored for pre-trial determinations of whether allegedly sampled portions of songs are legally significant enough to bring a cause of action for copyright infringement, would comport with the guidelines of *Feist* and allow for the protection of the original author’s unique *expression* as identified by an average listener. This adheres to the core principle enumerated in *Feist*, that the author’s expression, and *not* the fruit of the author’s labor—for example simply playing a wholly unoriginal note or chord—should be protected.²⁰⁸

²⁰⁶ As another example, a woman singing the two words “I love” might not be original enough to satisfy this test, but if a person were to sample Joan Jett’s vocal of those two words from the famous song “I Love Rock N’ Roll,” the average listener would likely identify the sample as being from Jett’s song, and thus substantial similarity would be established. In this scenario it is the singer’s unique expression (Jett’s voice and her tone)—not the words themselves—which the listener recognizes, and which is afforded copyright protection, consistent with *Feist*. *Feist*, 499 U.S. at 349–50.

²⁰⁷ Many of the cases involving digital music sampling deal with short pieces of sampled music which are then “looped” or repeated over and over in the new song; in two of the more widely cited sampling cases, *Bridgeport* and *Newton v. Diamond*, the samples at issue were both looped and modified. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 796 (6th Cir. 2005); *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004). In theory, “looping” a small sample would probably not meet the *de minimis* threshold of the test proposed in this note, unless the looped sample is recognizable to the average listener. While this may seem to some like a “loophole,” the core of the test is whether the appropriation is recognizable to the average listener, which comports with the copyright principles set forth in *Feist* by the Supreme Court. See discussion *supra* Part III, 2. For an in-depth discussion of looping and *de minimis* (pre-*Bridgeport*), see Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. OF HIGH TECH. L. 179 (2002); see also 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 (2011).

²⁰⁸ *Feist*, 499 U.S. at 362–63.

C. Fair Use

Finally, courts should be open to analyzing defendants' claims of fair use in sampling cases. It is unfortunate that neither *Bridgeport* nor *VMG Salsoul* addressed fair use,²⁰⁹ because it could be another viable defense for artists who sample. In general, analysis of the fair use doctrine as applied to music sampling is lacking,²¹⁰ thus, judicial decisions directly on that point would be extremely useful. Recent cases like *Lennon v. Premise Media Corp.*²¹¹ and *Bill Graham Archives v. Dorling Kindersley Ltd.*²¹² have held that if the copied portion of a work is sufficiently "transformative" in nature and does not appropriate a substantial portion of the original work, then the taking is not copyright infringement under the fair use exception even when the new use is commercial in nature.²¹³ Additionally, the Second Circuit

²⁰⁹ See discussion *supra* Part II, 3.

²¹⁰ See generally Landau, *supra* note 45; see also Suppappola, *supra* note 9 at 100–01. There are few cases which deal with "fair use" and music sampling. Landau, *supra* note 45. Perhaps the closest case is *Campbell v. Acuff-Rose Music, Inc.*, where the music group 2 Live Crew parodied the lyrics of Roy Orbison's ballad "Pretty Woman" and were sued for copyright infringement by the copyright owner; the action went all the way to the Supreme Court. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571–72 (1994). The Supreme Court reversed the lower court's ruling that because the use of the lyrics was for commercial gain it did not constitute fair use. *Id.* at 572. The Court held that while a parody's commercial character tends to weigh against a finding of fair use, it is only one of the four statutory elements which should be weighed in a fair use analysis. See *id.* at 594. The Court noted that the four factors laid out in the Copyright Act of 1976 are to be explored and weighed together in light of copyright's purpose of promoting science and the arts. *Id.* at 574–78.

²¹¹ *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 324 (S.D.N.Y. 2008)

²¹² *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324, 333 (S.D.N.Y. 2005)

²¹³ See e.g. *Lennon*, 556 F. Supp. 2d at 324 (S.D.N.Y. 2008) (finding the use of plaintiff's music in defendant's work transformative because it was being used to criticize the plaintiff's song, even though the new work was partially commercial in nature); *Bill Graham Archives*, 386 F. Supp. 2d at 333 (S.D.N.Y. 2005) (finding the defendant's use of

Court of Appeals has held that “[t]he ultimate test of fair use . . . is whether the copyright law’s goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.”²¹⁴ Moreover, in a 2013 decision, the Second Circuit held that there is no requirement that the new work comment on the original work or its author, only that the new use of the original work be *sufficiently transformative*, opening the door for a broader interpretation and application of fair use as an affirmative defense.²¹⁵

In many sampling cases, the portion of the work used is edited and sometimes “looped,” and then inserted into another song to create a *new* musical composition.²¹⁶ It is hard to predict how courts might rule,

Grateful Dead posters in his coffee table book to be fair use despite the commercial nature of his venture because they were sufficiently transformative and were part of a biography work on the band).

²¹⁴ Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc., 150 F.3d 132, 141 (2d Cir. 1998).

²¹⁵ Cariou v. Prince, 714 F.3d 694, 705 (2d Cir. 2013) (“The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute. Instead, as the Supreme Court as well as decisions from our court have emphasized, to qualify as a fair use, a new work generally must alter the original with ‘new expression, meaning, or message.’”).

²¹⁶ See discussion *supra* note 207. For a more in-depth discussion on whether music created by or with samples from other songs is in essence its own form of creativity and expression which should be protected, see Evans, *supra* note 207 at 846 (arguing that sampling and looping are the creative processes which “are the hallmark of the type of creativity and innovation born out of the hip hop music tradition,” but that current copyright law “fails to acknowledge the historical role, informal norms and value of borrowing, cumulative creation and citation in music”); see also Pote *supra* note 17 at 642 (arguing that copyright law “must balance the interests of current artists and the interests of future artists, and that mashup remixers seem to qualify as future artists under the Copyright Act”). But see Emily Harper *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, 39 HOFSTRA L. REV. 405, 406 (2010)

particularly because there has been little guidance from Congress or the courts,²¹⁷ but a valid argument could be made that the repurposing of a sampled piece of music in a new song is “sufficiently transformative” to fall under the fair use exception, even if the use is commercial in nature.²¹⁸ Thus, fair use might be a valuable affirmative defense for sampling musicians, especially if the sampling artist edited or modified the sampled work.

CONCLUSION

The issues addressed in this Note are complex, and music-sampling cases will continue to pose a challenge for courts in the future. An analysis of the two opinions shows there are several key flaws in the *Bridgeport* case and that the historical approach taken by the Ninth Circuit in *VMG Salsoul* is the preferable method. It is challenging to create a meaningful, objective standard or bright line rule for how courts should deal with substantial

(arguing that “mashups constitute copyright infringement, and that mashup artists are not entitled to the affirmative defense of fair use”).

²¹⁷ See *supra* note 181.

²¹⁸ See, e.g., Johnson, *supra* note 45 at 138 (arguing that the fair use doctrine “should remain a viable defense to claims that sampling constitutes copyright infringement”); Landau, *supra* note 45 at 17–18 (arguing that the fair use doctrine should be used in music sampling cases and that the Compulsory License in Section 115 of the Copyright Act should be expanded to include music sampling under the fair use exception); *but see* Harper *supra* note 216 at 406 (arguing that “mashups constitute copyright infringement, and that mashup artists are not entitled to the affirmative defense of fair use”).

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similarity. The modified audience test proposed in this Note seeks to offer courts an efficient way of scrutinizing actionable cases from *de minimis* cases via a straight-forward test which allows a case-by-case analysis of substantial similarity following the guidelines of *Feist*.