

## NOTES

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# REJECTING THE DE MINIMIS DEFENSE TO INFRINGEMENT OF SOUND RECORDING COPYRIGHTS

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### INTRODUCTION

“Get a license or do not sample.”<sup>1</sup> The Sixth Circuit’s terse ultimatum in the 2005 *Bridgeport Music, Inc. v. Dimension Films* decision rejected the common law de minimis<sup>2</sup> exception to copying as applied to sound recordings, and for eleven years, Bridgeport stood unchallenged by the courts of appeals, the Supreme Court, and Congress.<sup>3</sup> This changed in June 2016 with the Ninth Circuit’s decision in *VMG Salsoul, LLC v. Ciccone*.<sup>4</sup> Confronted with the question of whether the de minimis defense applies to the unauthorized copying of sound recordings, the court openly rejected the Sixth Circuit’s reasoning and held that the de minimis defense applies.<sup>5</sup> In doing so, the Ninth Circuit created a circuit split subjecting two centers of the American music industry, Nashville (Sixth Circuit) and Los Angeles (Ninth Circuit), to

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

2 *See, e.g., Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (“[D]e minimis non curat lex’ (sometimes rendered, ‘the law does not concern itself with trifles’).”).

3 During that time, however, several district courts and scholars criticized *Bridgeport’s* holding. *See infra* note 84. Neither the Supreme Court nor Congress have addressed *Bridgeport’s* rejection of the de minimis exception.

4 824 F.3d 871 (9th Cir. 2016).

5 *Id.* at 886.

inconsistent copyright protection regimes.<sup>6</sup> In the interest of consistency and predictability in the law, this split must be resolved.

Part I of this Note examines the history of sound recording copyrights, the role of digital sampling in the music industry, and the basic principles and functions of the *de minimis* defense. Part II carefully dissects the *Bridgeport* and *VMG* opinions. Part III then considers the merits of each opinion and concludes that *Bridgeport* reached the correct conclusion. This argument rests on the statutory scheme of Title 17 of the U.S. Code and the plain text of its applicable provisions, bolstered by their legislative history, giving life to a unique statutory creature that thrives in a manner inconsistent with traditional theories of copyright law. In essence, (1) sound recording copyrights protect only the form of the substance protected by underlying musical work copyrights; (2) the *de minimis* inquiry focuses solely on the substance of a given work; (3) therefore, the formal protection afforded by sound recording copyrights should be excluded from the *de minimis* inquiry.

## I. BACKGROUND

Resolving the circuit split demands an understanding of the intersection of sound recording copyrights, digital sampling in the music industry,<sup>7</sup> and the common law *de minimis* defense in the heavily statutory field of copyright law.<sup>8</sup> To this end, we will begin with an examination of each.

### A. Sound Recording Copyrights

“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated . . . .”<sup>9</sup> When a playwright scribbles his notes in his journal, when a painter brings his brush to the canvas, when a photographer emerges from the darkroom with picture in hand, their work

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6 See *id.* at 889–90 (Silverman, J., dissenting). The *VMG* court acknowledged and weighed the “particularly troublesome” consequences of its disagreement. See *id.* at 886 (majority opinion) (“‘Creating inconsistent rules among the circuits would lead to different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide.’ . . . But the goal of avoiding a circuit split cannot override our independent duty to determine congressional intent.” (quoting *Seven Arts Filmed Entm’t Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1256 (9th Cir. 2013))).

7 It is worth noting that while this Note specifically addresses sound recording infringement in the digital sampling context, sound recording copyrights are not limited to musical works. See *infra* Section I.A.

8 See generally 17 U.S.C. (2012); see also H.R. REP. NO. 60-2222, at 7 (1909) (“[C]opyright legislation . . . is not based upon any natural right . . . [but] such rights as [the rights holder] has are purely statutory rights.”); David E. Shipley, *Droit de Suite, Copyright’s First Sale Doctrine and Preemption of State Law*, 39 HASTINGS COMM. & ENT. L.J. 1, 11 (2017) (discussing Title 17’s preemption provision, § 301, as “reflect[ing] congressional intent to preempt and abolish . . . any rights under common law” equivalent to the rights codified in Title 17).

9 17 U.S.C. § 102(a).

is protected by the provisions of Title 17 of the U.S. Code. Each of these works—the notes, the painting, and the photograph—embody a single copyright carrying, where applicable, the exclusive rights expressed in § 106(1)–(6). These are the rights of reproduction,<sup>10</sup> adaptation,<sup>11</sup> distribution,<sup>12</sup> public performance,<sup>13</sup> and public display.<sup>14</sup> When a musician writes and records a song, however, she acquires two distinct yet related copyrights: one for the underlying musical work and one for the sound recording.<sup>15</sup> While the musical work copyright covers the substantive elements of the song, such as the lyrics, rhythm, tempo, and arrangement of notes,<sup>16</sup> the sound recording copyright covers the actual sounds embodied in the recording. As defined in § 101, “[s]ound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds.”<sup>17</sup> Simply put, the sound recording copyright extends to the actual sounds you hear when you press “play.”

Prior to 1971, musicians only retained a copyright in a song’s underlying musical work and thereby had no recourse for unauthorized duplication of their sound recordings by lawful users of that work. While sound recording technology has existed since at least 1860,<sup>18</sup> it was not until the introduction

10 *Id.* § 106(1) (granting the right “to reproduce the copyrighted work in copies or phonorecords”).

11 *Id.* § 106(2) (granting the right “to prepare derivative works based upon the copyrighted work”).

12 *Id.* § 106(3) (granting the right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership”).

13 *Id.* § 106(4) (for certain enumerated categories of works, granting the right “to perform the copyrighted work publicly”).

14 *Id.* § 106(5) (for certain enumerated categories of works, granting the right “to display the copyrighted work publicly”). Sound recordings are also granted a specific exclusive right “to perform . . . publicly by means of a digital audio transmission.” *Id.* § 106(6).

15 *See id.* § 102(a)(2), (a)(7) (enumerating both “musical works” and “sound recordings” as copyrightable subject matter); *see also* Jennifer Leigh Pridgeon, Note, *The Performance Rights Act and American Participation in International Copyright Protection*, 17 J. INTELL. PROP. L. 417, 420 (2010) (tracing bifurcation of rights to 1908 case *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1 (1908)).

16 Courts have examined a variety of compositional elements in determining the bounds of a musical work copyright. *See, e.g.*, *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (lyrics, rhythm, pitch, cadence, relationship between verse and chorus); *Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir. 1999) (phrasing, rhythms, “melodic contours,” lyrics, melodies, structures, chord progressions); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 543 (S.D.N.Y. 2000) (structure, melody, harmony, rhythm). Courts are quick to clarify that music is not a medium that lends itself to precise definitions and enumerated elements, and therefore, the relevant elements of a musical composition in a given case should not be taken as exhaustive. *See Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004) (“[N]o one magical combination of these factors . . . will automatically substantiate a musical infringement suit.”).

17 17 U.S.C. § 101.

18 *See* Danielle Ely, Comment, *We Can Work It Out: Why Full Federalization of Pre-1972 Sound Recordings Is Necessary to Clarify Ambiguous and Inconsistent State Copyright Laws*, 23 GEO. MASON L. REV. 737, 740 (2016).

of magnetic tape in the mid-twentieth century that it became commercially viable to market recording technology to a broad consumer base.<sup>19</sup> This accessibility allowed any individual to quickly and cheaply create high fidelity copies of songs, and thus led to a massive influx of pirated material on the market.<sup>20</sup> Because the copyright laws at the time only protected underlying musical works, duplication of recordings avoided infringing the copyright, provided that the copyist paid the nominal compulsory license fee for the musical work.<sup>21</sup> It did not take Congress long to notice the substantially damaging potential of record piracy.

In 1971, Congress officially recognized sound recordings as copyrightable subject matter with the passage of the Sound Recording Act (SRA).<sup>22</sup> With the stated purpose of creating a “limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording,”<sup>23</sup> the SRA gave owners of the copyright the right to “reproduce and distribute to the public by sale or other transfer of ownership . . . reproductions of the copyrighted work.”<sup>24</sup> The Act then further defined the reproduction right as “the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording” and provided specifically that “this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”<sup>25</sup> To illustrate, consider a cassette tape with a solo acoustic guitar track. Under the SRA, a copyist would infringe the sound recording copyright by directly recording the playback of the tape (imagine holding a microphone up to a speaker, for instance). The copyist would avoid infringement, however, if she were to make a recording of herself playing the guitar, even if her performance perfectly mimics the original cassette. So long as the *actual sounds* of the recording are not reproduced, there is no infringement.<sup>26</sup>

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19 See Steven L. Sparkman, *Tape Pirates: The New “Buck”-aneer*, 21 COPYRIGHT L. SYMP. 98, 104 (1971).

20 See *id.* at 104–05 (estimating between one-third and one-half of all tapes sold nationwide were pirated copies); see also *Hearing Before the Subcomm. on Courts, the Internet & Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 3 (2004) (statement of Marybeth Peters, Register of Copyrights) (noting that during the “era of tape piracy in the late 1960s . . . ‘pirates’ inundated the Copyright Office with notices of intention, many of which contained hundreds of song titles”).

21 See Sparkman, *supra* note 19, at 106; see also S. REP. NO. 92-72, at 4 (1971).

22 Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391. Congress originally planned to introduce sound recordings into the copyright laws through a general revision of Title 17, but the widespread pirate activity necessitated acting on this specific provision before waiting for the whole revision to pass. See S. REP. NO. 92-72, at 3–4.

23 85 Stat. at 391.

24 *Id.* § 1(a).

25 *Id.*

26 Bear in mind that the same categorical exception does not apply to the underlying musical work copyright. Thus, while a copyist may avoid infringement of the sound recording copyright, she very well may infringe the underlying musical work.

Five years after the SRA, Congress passed a complete overhaul of the copyright laws with the Copyright Act of 1976 (“1976 Act”).<sup>27</sup> While the Act did many things, of relevance to our discussion is its incorporation of the SRA into the new § 114 titled “Scope of exclusive rights in sound recordings.”<sup>28</sup> As its name implies, this section defines the boundaries of the exclusive rights in sound recordings granted by § 106. The 1976 Act structured Title 17 so that copyrightable subject matter is defined in § 102, the exclusive rights afforded to that subject matter are given generally in § 106, and then § 106 expressly limits those exclusive rights by the applicable provisions in (what are now) §§ 107–122.<sup>29</sup> Consistent with the definitions and boundaries in the SRA, sound recordings are defined in § 101,<sup>30</sup> recognized as copyrightable subject matter in § 102(a)(7), granted the broad suite of exclusive rights in § 106. Section 114 then pulls back on those exclusive rights to set clear limits.

Principally, § 114 limits the exclusive rights in sound recordings to reproduction, adaptation, distribution, and, after 1995, public performance via digital audio transmission.<sup>31</sup> While the adaptation right was a new expansion, the 1976 Act largely transplanted the language of the SRA in defining the scope of the reproduction right, primarily only making technical changes to its language to conform to the new statutory structure.<sup>32</sup> Importantly, the 1976 Act retained the independent fixation infringement exception, but with slightly altered language. Where the SRA provided that “the making or duplication of another sound recording that is an independent fixation of other sounds”<sup>33</sup> did not infringe the reproduction right, the 1976 Act phrased it as “the making or duplication of another sound recording that *consists entirely of* an independent fixation of other sounds.”<sup>34</sup> While § 114 has undergone significant revision since the passage of the 1976 Act, none of the section’s nine amendments have altered the independent fixation excep-

27 Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541.

28 *Id.* § 114.

29 See 17 U.S.C. §§ 102, 106, 107–22 (2012).

30 See *supra* note 17 and accompanying text.

31 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336. Note that the SRA only provided for the rights of reproduction and distribution, not adaptation. See *supra* note 24 and accompanying text.

32 For instance, where the SRA provided that the “exclusive right of the owner of a copyright in a sound recording *to reproduce it* is limited to the right to duplicate the sound recording *in a tangible form* that directly or indirectly recaptures the actual sounds fixed in the recording,” and excluded “sounds accompanying a motion picture,” from the definition of sound recordings. Act of Oct. 15, 1971, Pub. L. No. 92-140, § 1(a), (e), 85 Stat. 391, 391 (emphasis added). The 1976 Act replaced “to reproduce it” with “under clause (1) of section 106” and “in a tangible form” with “in the form of phonorecords, or of copies of motion pictures and other audiovisual works.” *Id.* § 114(b).

33 *Id.* § 1(a).

34 *Id.* § 114(b) (emphasis added). The 1976 Act applied this exception to both the reproduction and adaptation rights. *Id.*

tion of § 114(b).<sup>35</sup> Thus, the previous guitar player example still holds true: so long as the *actual sounds* of the recording are not recaptured, the copyist does not infringe the sound recording copyright.

Understanding the legal concept of the sound recording copyright, let us now briefly examine its most common factual application—digital sampling.

### B. Digital Sampling

Sampling, perhaps most prevalent in the rap and hip-hop genres, refers to the act of copying and transplanting segments of an existing recording into a new song.<sup>36</sup> The range and motivation of use covers everything from forming the new song entirely around a distinctive looped sample—as in Eminem’s loop of the bassline in Labi Siffre’s *I Got The . . .*<sup>37</sup> in *My Name Is*<sup>38</sup> or Kanye West’s loop of a vocal segment of Daft Punk’s *Harder, Better, Faster, Stronger*<sup>39</sup> in *Stronger*<sup>40</sup>—to adding embellishments with quick, isolated seg-

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35 See 109 Stat. 336 (adding digital transmission performance right to § 106(6) and setting distinct limits in § 114); Act of Nov. 13, 1997, Pub. L. No. 105-80, 111 Stat. 1529 (modifying licensing language in § 114(f)); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (modifying licensing scheme in § 114(d)); Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (modifying and adding settlement and royalty payment language in § 114(f) and (g)); Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (modifying § 114(f) to conform with other changes to Title 17 involving replacing copyright arbitration royalty panels with Copyright Royalty Judges); Copyright Royalty Judges Program Technical Corrections Act, Pub. L. No. 109-303, 120 Stat. 1478 (2006) (making conforming technical changes in § 114(f) reflecting other changes throughout Title 17 related to Copyright Royalty Judges); Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (modifying § 114(f) to provide for agreements for the reproduction and performance of sound recordings by webcasters); Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926 (further modifying § 114(f) settlement language); Copyright Cleanup, Clarification, and Corrections Act of 2010, Pub. L. No. 111-295, 124 Stat. 3180 (making grammatical and other conforming changes to § 114). In the forty-five years since passing the SRA, Congress has only modified the independent fixation exception once, and that was the 1976 Act’s *expansion* of the exception to both the reproduction and adaptation rights. It is also worth noting that four of these amendments were enacted *after* the *Bridgeport* decision.

36 See Stephen R. Wilson, Note, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 179 (2002). Sampling is distinct from “covering” a song in that sampling involves employing the actual audio (albeit often manipulated in speed or other effect) whereas the traditional cover song simply mimics or evokes the original composition. See *id.* at 181; see also REEL BIG FISH, *Take on Me*, on BASEKETBALL (Mojo 1998) (ska cover of 1980s synth-pop song *Take on Me*, A-HA, *Take on Me*, on HUNTING HIGH AND LOW (Warner Bros. 1984)).

37 LABI SIFFRE, *I Got the . . .*, on REMEMBER MY SONG (EMI 1975).

38 EMINEM, *My Name Is*, on THE SLIM SHADY LP (Interscope 1999).

39 DAFT PUNK, *Harder, Better, Faster, Stronger*, on DISCOVERY (Virgin 2001).

40 KANYE WEST, *Stronger*, on GRADUATION (Def Jam 2007).

ments—as in the approximately two-second military vocalization sound effect that opens Kanye West’s *Jesus Walks*.<sup>41</sup>

Artists can evoke older songs through sampling and thereby comment on the original or add their own personal touch, but of primary value is the substantially reduced investment in time, labor, and capital afforded by sampling.<sup>42</sup> For example, if a rapper wants to loop a particular, recognizable guitar riff as the main section of his song, he can either play and record the riff himself, hire a session musician to play the riff, or just rip the riff directly from the original recording. In the first two instances, substantial time will go into ensuring that the timing and tone of the riff match the original; that time will be spent in a studio, which must be paid for. If the rapper does not play guitar, he will have to pay the session musician for his time; he will likely need to pay a separate audio engineer to properly set up the microphones and other equipment; and a producer must be paid to mix the audio. Recording an original work is an expensive, time consuming, and labor-intensive process. The appeal of digital sampling is therefore easy to understand. Why incur all those costs when they can be avoided with a ninety-nine cent MP3 file and a basic understanding of how to split an audio file? Sampling makes sense, both artistically and financially. Let us now turn to how the law complicates it.

### C. *Substantial Similarity and the De Minimis Copy*

In actions for infringement where the plaintiff alleges unauthorized copying, courts typically employ a two-step test to determine liability: (1) was there actual copying and (2) was the copying so “far as to constitute improper appropriation.”<sup>43</sup> The first prong looks to both direct evidence, such as a defendant’s admission, and indirect evidence, such as a defendant’s access to the original work and the degree of similarity between the alleged copy and the original.<sup>44</sup> If the plaintiff carries the burden for the first prong, the second prong then requires demonstrating what many courts call “substantial similarity” to the protectable elements of the original work.<sup>45</sup> In the

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41 KANYE WEST, *Jesus Walks*, on THE COLLEGE DROPOUT (Def Jam 2004) (sampling AUTHENTIC SOUND EFFECTS, *Manual of Arms*, on AUTHENTIC SOUND EFFECTS VOL. 3 (Elektra 1987)).

42 See Wilson, *supra* note 36, at 179 n.9.

43 See Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

44 *Id.* Note that the similarity analysis in the first prong is different than the substantial similarity analysis in the second prong. Substantial similarity as indirect evidence of actual copying centers on the objective similarities between the original and alleged copy—for instance, whether two musical works use the same notes and rhythm. See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000).

45 See, e.g., *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (holding that infringement requires “copying of constituent elements of the work that are original”); *Blehm v. Jacobs*, 702 F.3d 1193, 1199–1200 (10th Cir. 2012) (ruling that plaintiff must show “substantial similarity between legally [protectable] elements.” (alteration in original) (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 942 (10th Cir. 2002))); *Johnson v. Gordon*, 409 F.3d 12, 19 (1st Cir. 2005) (holding that substantial similarity must

context of musical works, substantial similarity turns on “whether defendant took . . . so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed.”<sup>46</sup> In essence, the substantial similarity standard queries whether the relevant audience would recognize the copied elements as deriving from the original work. Herein lies the de minimis inquiry.

The de minimis inquiry is the other side of the substantial similarity coin. Once a plaintiff demonstrates actual copying, the question becomes whether the defendant copied “to such a trivial extent as to fall below the quantitative threshold of substantial similarity.”<sup>47</sup> Thus, a defendant has a successful de minimis defense when, despite the plaintiff’s successful showing of actual copying, the plaintiff cannot carry the burden of demonstrating substantial similarity. The substantial similarity, and therefore de minimis, inquiry varies depending on the category of work, however.<sup>48</sup> The traditional de minimis analysis in the musical work context simply asks whether the plaintiff demonstrated substantial similarity with reference to the lay hearer.<sup>49</sup> If the lay audience would recognize the copied elements as deriving from the protectable elements of the original work, the de minimis exception does not apply and, absent another exception, the defendant will be held liable for infringement.

As a final note before our discussion of *Bridgeport* and *VMG*, the de minimis exception is a common-law rule.<sup>50</sup> The strict language of Title 17 does not invoke the de minimis test. As Congress has not expressly approved or denied the rule, the boundaries of de minimis are subject only to the decisions of the courts. It is with this historical backdrop that the *Bridgeport* and *VMG* courts announced their rules. Let us now examine their arguments.

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be shown between protected elements); *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004); *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997); *Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 631 (S.D.N.Y. 2008); cf. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (ruling that similarities must be in expression, not abstract idea). Different courts tend to use inconsistent or otherwise vague and confusing language, but, as the Seventh Circuit notes, they all hinge on showing that “the defendant had an actual opportunity to copy the original . . . and that the two works share enough unique features to give rise to a breach of the duty not to copy another’s work.” *Peters v. West*, 692 F.3d 629, 633–34 (7th Cir. 2012).

46 *Arnstein*, 154 F.2d at 473; accord *Newton*, 388 F.3d at 1193 (employing “average audience” standard). The *Arnstein* court explained its use of the lay listener in terms of protecting the artist’s “interest in the potential financial returns from his compositions which derive from the lay public’s approbation of his efforts.” *Arnstein*, 154 F.2d at 473.

47 *Ringgold*, 126 F.3d at 74.

48 For instance, in the context of visual works, it may be the case that the entire work was copied but the use was nonetheless not infringing. This was exactly the case in *Gottlieb*: the entirety of a copyrighted pinball machine design appeared in a movie, but the use was still de minimis. *Gottlieb*, 590 F. Supp. 2d at 631–32.

49 *Newton*, 388 F.3d at 1193 (“[A] use is de minimis only if the average audience would not recognize the appropriation.”).

50 See *supra* note 2 and accompanying text.

## II. THE CIRCUIT SPLIT

*Bridgeport* and *VMG* came to contrary conclusions in deciding whether the de minimis exception applies in the case of sound recordings. This Part will examine each case and lay out the rationale behind their holdings. Part III will then assess the merits of each case and propose a resolution consistent with *Bridgeport's* holding based on the operative text of the statute and the unique nature of sound recording copyrights.

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

The dispute in *Bridgeport Music, Inc. v. Dimension Films*<sup>51</sup> centered on the unauthorized sampling of plaintiffs *Bridgeport Music* and *Westbound Records'* song *Get Off Your Ass and Jam*<sup>52</sup> in the song *100 Miles and Runnin'*,<sup>53</sup> which in turn was featured in the movie *I Got the Hook Up*<sup>54</sup> and its accompanying soundtrack.<sup>55</sup> The lower court found only de minimis copying and therefore granted summary judgment against the plaintiffs.<sup>56</sup> The Sixth Circuit reversed the decision.<sup>57</sup>

The particular sample at issue was the introduction to *Get Off Your Ass and Jam*, a four-second unaccompanied guitar riff.<sup>58</sup> The riff was a rapidly repeated arpeggiated chord, that is, a series of notes played one by one that comprise a single chord.<sup>59</sup> As the district court characterized it, the rapid arpeggiation created a distinctive “high-pitched, whirling sound that captures the listener’s attention and creates anticipation of what is to follow.”<sup>60</sup> *100*

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

52 FUNKADELIC, *Get Off Your Ass and Jam*, on LET’S TAKE IT TO THE STAGE (Westbound 1975).

53 N.W.A., *100 Miles and Runnin'*, on 100 MILES AND RUNNIN’ (Ruthless Records 1990).

54 I GOT THE HOOK UP (Dimension Films 1998).

55 *Bridgeport*, 410 F.3d at 795.

56 *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002), *rev’d*, 410 F.3d 792.

57 *Bridgeport*, 410 F.3d at 795.

58 *See id.* at 796.

59 *See Bridgeport*, 230 F. Supp. 2d at 839. For instance, the G Major chord consists of the notes G, B, and D, so arpeggiating the G Major chord means playing G, B, and D in succession rather than simultaneously. *See, e.g.*, Kathy Dickson, *Eight Things You Need to Know About Arpeggios*, GUITAR WORLD (Apr. 19, 2016), <https://www.guitarworld.com/lessons/guitar-tricks-eight-things-you-need-know-about-arpeggios>.

60 *Bridgeport*, 230 F. Supp. 2d at 839. While arpeggiation is a standard musical technique, the district court found the particular aural qualities and effects of the riff were sufficient to defeat summary judgment for lack of originality. *Id.* It is worth noting at this point that the Nimmer treatise, on which *VMG* placed great weight, criticizes *Bridgeport* for failing to perform an originality inquiry and thereby “adopting a categorical rule that all two-second snippets, if sampled, lead to liability.” 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b] n.114.21 (2017) [hereinafter NIMMER]. This is an uncharitable reading of *Bridgeport*. The procedural posture of the case was such that summary judgment for lack of originality was denied and not renewed on appeal. *Bridgeport*, 410 F.3d at 797. The court therefore had no occasion to inquire into originality. One is

*Miles and Runnin'* sampled a two-second segment from the solo, lowered its pitch, looped it for sixteen beats (approximately seven seconds), and inserted it at five different points throughout the song.<sup>61</sup> While the district court held that the differences were significant enough to support a finding that a lay audience would not have recognized the appropriation,<sup>62</sup> the Sixth Circuit's new test precluded that question from being asked.<sup>63</sup>

The Sixth Circuit's reasoning rests primarily on its construction of Title 17, specifically the interplay between §§ 106 and 114.<sup>64</sup> The core of the statutory analysis began with a consideration of the purpose and history of copyright law in the United States. Noting that the laws aim to both promote creativity and protect original works, the court found § 114(b)'s right to duplicate through direct or indirect recapturing of the sound recording's actual sounds to strike the appropriate balance.<sup>65</sup> Anyone may imitate—even perfectly—the sound recording and thereby benefit from its creative value, but the fixed sounds themselves—i.e., the artist's actual product—are protected by the copyright monopoly.<sup>66</sup> In further defining the bounds of that monopoly, the court took special notice of the 1976 Act's addition of the word "entirely" to § 114(b)'s independent fixation exception<sup>67</sup> and concluded that the exception grants the owner of a sound recording copyright "the exclusive right to 'sample' his own recording."<sup>68</sup> The plain text of the § 114(b) exception then effectively precludes a *de minimis* inquiry.<sup>69</sup>

Explaining the policy judgment behind this interpretation, the Sixth Circuit pointed to ease of enforcement, the ability of markets to control licensing fees, and the necessarily intentional nature of sampling.<sup>70</sup> First, as to ease of enforcement, the independent fixation exception sets a simple bright-line rule: "[g]et a license or do not sample."<sup>71</sup> Section 114 extends

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liable for copyright infringement under 17 U.S.C. § 501(a) (2012) only for violations of the rights enumerated in §§ 106–122 or § 602, rights which depend on the underlying work satisfying the subject matter requirements of § 102(a), one of which is originality. Nimmer raises valuable questions about the Sixth Circuit's decision, but to accuse it of setting a test that would impose liability without regard for the basic requirements of copyrightability goes too far, especially where the court demonstrated such a thorough assessment of the statutory language.

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

62 *See Bridgeport*, 230 F. Supp. 2d at 842.

63 *See Bridgeport*, 410 F.3d at 798–99.

64 *Id.* at 799.

65 *Id.* at 800.

66 *Id.*

67 *See supra* notes 33–34 and accompanying text.

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

69 The *Bridgeport* court declined to consider the legislative history of the SRA or the 1976 Act on the basis that "digital sampling wasn't being done in 1971." *Id.* at 805. I agree with the *VMG* court that the Sixth Circuit was wrong to ignore legislative history, *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 884 (9th Cir. 2016), and I fully treat the issue *infra* Section III.A.

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

71 *Id.*

the sound recording copyright to reproduction and adaptation under § 106 and then carves out a special exception for independent fixation; by its plain terms, § 114 shields simulation, but punishes unauthorized direct or indirect copying. Where the unpredictability of a jury's assessment of substantial similarity may deter artists and producers—as potential future litigants—from making creative uses of another's sound recording,<sup>72</sup> this bright-line rule would allow them to model their behavior based on the predictability of the rule.<sup>73</sup>

Second, this rule would lead to an efficient market for licenses. Because samplers may lawfully simulate a sound recording, parties can bargain for the actual value of the sample. A sampler will thus only seek a license that costs less than the cost of simulating the sound independently.<sup>74</sup> Rather than allow licensors to exercise undue control over the price of the license, market pressure would force them to set a price at or near the value the sampler assigns to the sound recording. This increases the overall utility of the license market by allowing licensors to continue realizing the economic potential of their creative works while also allowing samplers to incorporate the remaining creative value of those works into their own creations at a cost reflecting their assigned value to the recording.<sup>75</sup>

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72 See *id.* at 802 n.15 (“A cost-benefit analysis generally indicates that is [sic] is less expensive for a sampler to purchase a license before sampling . . . rather than take his chances in an expensive trial, the outcome of which . . . is nearly impossible to predict with any degree of certainty.” (second alteration in original) (quoting Wilson, *supra* note 36, at 188 n.97)).

73 As the court noted, a bright-line rule would not inhibit a sampler's future creative use of an artist's sound recording because the sampler is still free to imitate the recording if he does not want to seek a license or a license is refused. *Id.* at 801. The court also considered the beneficial impact of a bright-line rule on judicial economy. *Id.* at 802. Predictability of the rule not only benefits potential litigants *ex ante* by clearly delineating lawful and unlawful conduct, but also can make litigation more efficient by making the *ex post* analysis simpler. Rather than mire the trier of fact in the “gymnastics” of a substantial similarity analysis, the question becomes solely whether or not actual copying took place. *Id.* This has the additional benefit of preventing expert testimony on the objective prong of the substantial similarity analysis from unduly influencing the trier of fact during the subjective analysis phase. See, e.g., Jeremy Aregood, Note, *Blurring the Line: An Examination of Technological Fact-Finding in Music Copyright Law*, 16 J. MARSHALL REV. INTELL. PROP. L. 115, 123–25 (2016) (discussing the difficulty of separating forensic evidence of similarity for actual copying from the subjective impressions on the trier of fact central to the second prong of the substantial similarity analysis). The Sixth Circuit made clear, however, that judicial economy is only an ancillary consideration and not dispositive. *Bridgeport*, 410 F.3d at 802. On the other hand, the economic impacts on the music industry, particularly with regard to the market for licenses, did play a role in the court's decision. See *id.*

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

75 The *Bridgeport* court, in further supporting its announcement of a new rule, placed a degree of emphasis on the fact that many, if not most, samplers seek licenses “as a matter of course.” *Id.* at 804; see also *id.* at 804 n.19 (quoting A. Dean Johnson, Comment, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 163 (1993)) (discussing the development of sampling clearing-

Finally, this bright-line rule reflects a policy against permitting willful appropriation of another's creative pursuits. As the Sixth Circuit stated, "sampling is never accidental."<sup>76</sup> Sampling is a deliberate choice—a sampler cannot accidentally take a portion of a sound recording as a composer can subconsciously incorporate another musician's melody into his own. A sampler must seek out and choose a particular preexisting sound recording, determine which portion of that recording best fits the new work, and then directly reproduce that work by taking from the original recording. Samplers "know [they] are taking another's work product."<sup>77</sup> The court went so far as to claim that sampling amounts to a physical taking from the copyright holder—that the sampler takes "something of value,"<sup>78</sup> even when the sample is small.<sup>79</sup> As the court explained, the thing sampled is not just the underlying song, but the actual fixed sounds—samplers take from the fixed, physical medium.<sup>80</sup> That Congress expressly carved out an exception for independently fixed imitations further militates against permitting de minimis takings of the copyright holder's work. The independent fixation exception creates a particularized instance wherein unauthorized use of the work is lawful, but that lawfulness depends entirely on the use of the work being an independent fixation. The reproduction and adaptation rights reserved by statute to the copyright holder thus stand against any taking not in accordance with the accompanying statutory exception.<sup>81</sup>

*Bridgeport's* rejection of the de minimis defense was dictated by statute and reinforced by policy. Section 114 provides that a reproduction consisting entirely of independently fixed sounds is lawful; therefore, a reproduction *not* consisting entirely of independently fixed sounds does not fall within

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houses and the growing trend of publishers instituting licensing policies to more efficiently handle the high number of requests for licensed samples).

76 *Id.* at 801.

77 *Id.*

78 *See id.* at 802 & n.14 (quoting Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1667–68 (1999)) (noting that by appropriating another musician's work, sampling avoids the cost of hiring musicians but still reaps the benefit of a live musician's sound).

79 *See id.* at 801–02.

80 *See id.* at 802.

81 While the *Bridgeport* court foreclosed application of the de minimis defense, it expressly left open the question of whether a fair use defense may apply. *Id.* at 805. Especially considering that 17 U.S.C. § 107 (2012) codifies the fair use defense and is one of the clawback provisions noted in § 106, it would seem consistent with *Bridgeport* to allow fair use defenses. *Bridgeport* denied the injection of an uncodified common law defense; its analysis does not evince an intent to abrogate other statutory provisions. *Cf. Barré v. Carter*, 272 F. Supp. 3d 906, 930 (E.D. La. 2017) (noting both that *Bridgeport* left the applicability of a fair use defense open and that nothing in § 107 suggests it does not extend to digital sampling). Further, while § 107 does account for the "amount and substantiality of the portion used in relation to the copyrighted work as a whole," this is only one factor that must be balanced against the others. 17 U.S.C. § 107. Thus, closing the door on the de minimis inquiry with respect to substantial similarity infringement does not close the door on fair use because of its de minimis-type factor.

the exception and infringes the copyright. This bright-line rule carries the additional benefits of easy enforcement and predictability of the law, encouraging an efficient market for licenses, and addressing the necessarily intentional taking inherent in digital sampling.

This decision has drawn considerable criticism among scholars.<sup>82</sup> Much of this centers on the negative policy effects of the bright-line rule and its potential impact on future creativity.<sup>83</sup> Several publications, prescient of *VMG*, also take particular issue with the court's choice to ignore legislative history, often pointing to a House Report suggesting that § 114 contemplates a substantial similarity test.<sup>84</sup> As Section III.A covers, however, courts and scholars have been underinclusive in their consideration of the legislative history—a more thorough examination reveals that *Bridgeport's* holding actually better comports with congressional intent.

Despite the widespread scholarship against *Bridgeport*, the decision went unchallenged by the other courts of appeals for eleven years.<sup>85</sup> Then, in 2016, the Ninth Circuit gave new life to the de minimis defense in *VMG*.

### B. *VMG Salsoul, LLC v. Ciccone*

The *VMG* court rejected *Bridgeport's* holding and renewed the de minimis defense to infringement of sound recording copyrights.<sup>86</sup> There, the plaintiff argued that Madonna and her producer, Shep Pettibone, sampled without authorization a “horn hit” section from the song *Ooh, I Love It (Love Break)*<sup>87</sup> (“*Love Break*”), used it in two commercial versions of

82 See, e.g., John Schietinger, Note, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 230–34 (2005) (arguing that rejecting the de minimis defense is inconsistent with the defense's broad applicability in copyright law and nothing in the caselaw or the statute precludes the defense); M. Leah Somoano, Note, *Bridgeport Music, Inc. v. Dimension Films: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?*, 21 BERKELEY TECH. L.J. 289, 302–06 (2006) (arguing that *Bridgeport* “is contrary to legislative history and unjustifiably departs from the well-established doctrine of de minimis”). But see Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford “Sound” Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355 (2008) (defending the *Bridgeport* decision).

83 See, e.g., Christopher Weldon, Note, *The De Minimis Requirement as a Safety Valve: Copyright, Creativity, and the Sampling of Sound Recordings*, 92 N.Y.U. L. REV. 1261, 1273–78 (2017) (noting that *Bridgeport's* bright-line rule has led to greater risk aversion among record labels and created a “clearance culture at times border[ing] on the absurd”).

84 See, e.g., Daniel Esannason, Note, *Get a License or Don't Sample: Using Examples from Popular Music to Raise New Questions About the Bridgeport v. Dimension Films Holding*, 29 HARV. J.L. & TECH. 551, 559–60 (2016); Somoano, *supra* note 82, at 304–05; see also *infra* notes 112–13 and accompanying text.

85 Note that several district courts have declined to follow the bright-line *Bridgeport* rule. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir. 2016) (collecting cases).

86 *Id.* at 874.

87 THE SALSOU L ORCHESTRA, *Ooh, I Love It (Love Break)*, on OOH, I LOVE IT (LOVE BREAK) (Salsoul Records 1983). *VMG's* predecessor hired Pettibone in the early 1980s to

Madonna's hit song *Vogue*,<sup>88</sup> and thereby infringed both the musical work and sound recording copyrights held by VMG.<sup>89</sup> The district court declined to follow *Bridgeport* and held instead that infringement of sound recording copyrights warrants a substantial similarity and de minimis analysis.<sup>90</sup> The Ninth Circuit affirmed the district court's grant of summary judgment in the defendant's favor.<sup>91</sup>

The sample at issue was a single 0.23-second horn hit chord from *Love Break*.<sup>92</sup> *Love Break* uses the horn hit throughout the song as both a single quarter-note hit and a quick succession of an eighth-note hit followed by a quarter-note hit.<sup>93</sup> *Vogue* also uses the single- and double-hit setup, but Pettibone's sample transposed the chord up a half step—that is, the sample appears in *Vogue* at a slightly higher pitch than the original.<sup>94</sup> The radio edit version of *Vogue* uses the single hit once and the double hit three times, whereas the longer compilation version uses the single hit once and the double hit five times.<sup>95</sup> The Ninth Circuit held that because Pettibone sampled less than a second of the original recording, the sample appeared very few times in *Vogue*, and the sample altered the original sound, a reasonable juror would not recognize the *Vogue* horn hits as being sampled from *Love Break*, and the use was therefore de minimis.<sup>96</sup>

The Ninth Circuit's rejection of *Bridgeport* rests on its contrary interpretation of Title 17's applicable provisions, in turn based on the statutory scheme, the plain language of the statute, and the legislative history of the

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remix several compositions, *Love Break* being one such result. VMG Salsoul, LLC v. Ciccone, No. CV 12-05967, 2013 WL 8600435, at \*1 (C.D. Cal. Nov. 18, 2013). The parties disputed the proper ownership of the copyrights to the song, and while VMG asserted ownership through a work for hire agreement, *see id.*; 17 U.S.C. § 101 (2012) (defining "work made for hire"), the district court declined to rule on the issue because its finding that the sampled portion lacked originality made ownership irrelevant. VMG, 2013 WL 8600435, at \*6–7; *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (ruling that copyright infringement requires showing both ownership of the copyright and unauthorized copying of original elements of the work).

88 MADONNA, *Vogue*, on I'M BREATHLESS (Warner Bros. 1990).

89 VMG, 824 F.3d at 875.

90 VMG, 2013 WL 8600435, at \*9–10. The district court granted summary judgment to the defendants on two alternative grounds: either the composition and sound recording of the horn hit lacked originality, or, even if the plaintiff demonstrated originality, the sample was a de minimis use. *Id.* at \*6, \*12.

91 VMG, 824 F.3d at 874.

92 *Id.* at 875.

93 *Id.* *Love Break* uses the single hit twenty-seven times and the double hit twenty-three times. *Id.*

94 *Id.* at 875–76, 875 n.3. The sample also modified the original waveform of the horn hit by altering its dynamic qualities to make it "punchier" and by overlaying other sounds and effects. *Id.* at 879.

95 *Id.* at 876.

96 *Id.* at 880. Of note, one of VMG's experts, a "highly qualified and trained musician," was unable at first to accurately discern which parts of *Love Break* were sampled and incorporated into *Vogue*. *Id.* As the court remarked, "[a]n average audience would not do a better job." *Id.*

applicable provisions.<sup>97</sup> First, the court looked to the placement of sound recordings in § 102's recognition of copyrightable subject matter.<sup>98</sup> Section 102 simply places sound recordings as one of eight enumerated copyrightable categories, and therefore does not afford special treatment or suggest sound recordings should be subject to different levels of protection than the other enumerated categories.<sup>99</sup> The court came to a similar conclusion regarding § 101's "neutrally worded" definition of sound recordings<sup>100</sup>—the definition is silent on the de minimis exception and does not suggest Congress intended to preclude its application.<sup>101</sup> Further, the court claimed, § 106 fails to evince an intention by Congress to alter the common law's effect on sound recordings or to otherwise treat them differently than other categories of copyrightable works.<sup>102</sup> While § 106(6) does grant an additional exclusive right specifically to sound recording copyrights, that right concerns public performances and thus does not impact any rights associated with copying.<sup>103</sup> Therefore, nothing in the basic provisions setting out the rights enjoyed by copyright holders supports treating sound recording copyrights any differently than any other category. Sound recordings *are* treated distinctly in § 114, however, but the court does not consider that section to defeat the de minimis exception. The role of that section in Title 17 is to impose limits on the rights enumerated in § 106, and eliminating the de minimis defense would expand those rights.<sup>104</sup> The structure of the copyright laws thus militates against eliminating the de minimis exception.

The court's conception of losing the de minimis defense as expanding the rights of the copyright holder also dictates its plain reading of § 114. Much like the *Bridgeport* court, VMG argued that the independent fixation exception in § 114(b) effectively supplants the de minimis exception and grants a sound recording copyright holder the exclusive right to sample his own work.<sup>105</sup> Denying this interpretation, the VMG court placed great

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97 The court's statutory interpretation is primarily cast in the shadow of its conviction that "[t]he rule that infringement occurs only when a substantial portion is copied is firmly established in the law." *Id.* The court found the Nimmer treatise's trace of the rule to the mid-1800s particularly persuasive in this regard and traced its own express recognition of the rule to at least 1977. *See id.* at 880–81 (first citing NIMMER, *supra* note 60, § 13.03[A][2][a], at 13-56 to 13-57, 13-57 n.102; and then citing *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977)). Quoting *Krofft*, the court derived the rule from the fact that the copyright holder's "legally protected interest [is] the potential financial return from his compositions which derive from the lay public's approbation of his efforts." *Id.* at 881 (alteration in original) (quoting *Krofft*, 562 F.2d at 1165). With the presumption that the de minimis exception ubiquitously applies across all of copyright law, the court then turned to its statutory analysis.

98 VMG, 824 F.3d at 881–82.

99 *Id.*

100 *Id.* at 882.

101 *Id.*

102 *See id.*

103 *Id.*

104 *See id.* at 883.

105 *See id.* at 882–83.

emphasis on the phrasing of the exception—“[t]he exclusive rights of the owner of a copyright in a sound recording . . . *do not extend* to the making or duplication of another sound recording [with certain qualities].”<sup>106</sup> The court rightly interpreted this to mean that any mimicking of a sound recording, even if perfect, does not infringe the copyright so long as there is no actual copying.<sup>107</sup> But the Ninth Circuit did not consider this to address the question presented, that is, whether Congress intended to preclude the de minimis defense where the sample sounds markedly dissimilar to the original.<sup>108</sup> Rather, the independent fixation exception is an express limitation on the boundaries of the copyright, and as such, does not carry an implicit expansion of rights, particularly against the backdrop of the “consistent application of the de minimis exception across centuries of jurisprudence.”<sup>109</sup> The court, with reliance on the Nimmer treatise, goes so far as to state that *Bridgeport* therefore “rests on a logical fallacy”<sup>110</sup>; it cannot be inferred that because the exclusive right does not extend to a particular circumstance, it therefore does extend to all others.<sup>111</sup> The plain language of § 114 and its logical consequences thus do not support *Bridgeport’s* holding.

The court lastly turned to the pertinent legislative history to support its position that not only should courts not treat sound recordings any differently from the other categories, but Congress affirmatively intended to retain the de minimis defense.<sup>112</sup> The court specifically looked to a House Report explaining that, while § 114(b) limits statutory protection to the particular sounds of the recording and thus allows for independently fixed imitations, “infringement takes place whenever all *or any substantial portion* of the actual sounds . . . are reproduced.”<sup>113</sup> By this language, Congress intended to retain the same infringement standard in sound recordings as with any other category. Rather than carve out an exception that also precludes the traditional common law defense, Congress “clearly understood that the de minimis exception applies to copyrighted sound recordings.”<sup>114</sup> Congressional intent thus confirmed the Ninth Circuit’s interpretation of the statute.

*VMG’s* recognition of the de minimis defense, much like *Bridgeport’s* rejection, hinged on an interpretation of Title 17. Its reading of the statutory scheme evinced an intent to treat sound recordings exactly as other copyrightable works and to impose limitations through § 114. The plain text of § 114 limits protection to only the actual sounds embodied in the recording; only by logical fallacy could one conclude that this limitation expanded the

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106 *Id.* at 883 (second alteration in original) (quoting 17 U.S.C. § 114(b) (2012)). The court also noted that all of the other sentences in § 114(b) use the same “do not extend” or “do not apply” language to limit the scope of the sound recording copyright. *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.* at 884 (quoting NIMMER, *supra* note 60, § 13.03[A][2][b], at 13-61).

111 *Id.*

112 *Id.* at 883.

113 *Id.* (alteration in original) (quoting H.R. REP. NO. 94-1476, at 106 (1976)).

114 *Id.* at 884.

rights to preclude the de minimis defense, and the legislative history of the 1976 Act confirmed Congress's intent to require a showing of more than de minimis copying. *VMG* took the right analytical approach, but it erred in its reasoning. Part III will largely argue within this framework, but will argue in favor of *Bridgeport's* holding.

### III. THE DE MINIMIS DEFENSE SHOULD NOT APPLY TO INFRINGEMENT OF SOUND RECORDING COPYRIGHTS

*Bridgeport* reached the right conclusion, but should have gone further in its analysis—likewise, *VMG* considered many of the right factors but drew a conclusion contrary to what those factors demonstrated. This Part will argue in favor of rejecting the de minimis defense to infringement of sound recording copyrights based on two elements: (1) the legislative history of the Sound Recording Act and the 1976 Act evinces a policy inconsistent with traditional principles of copyright law and thus demands a unique approach to sound recording copyrights, and (2) the plain text of § 114, read in light of the legislative history, precludes the de minimis defense.

#### A. *Legislative History Rebutts the Traditional Policies Behind the De Minimis Defense*

The *VMG* court properly looked to legislative history to inform its interpretation of § 114. *VMG's* underinclusive analysis, however, failed to uncover the myriad passages throughout the history of the SRA and the 1976 Act that emphasize the need to adequately compensate and reward artists and producers for their work, protect the integrity of the sound recording itself, and deter others from freeriding on the labor that goes into creating a sound recording.

Congress, as explained in Section I.A, was principally motivated by the widespread record piracy in the years leading up to the SRA. Emphasizing the exigency of the issue, the House Report estimated “that the annual volume of [record] piracy [was] in excess of \$100 million.”<sup>115</sup> In contrast, the annual value of legitimate record sales was estimated at \$300 million.<sup>116</sup> The rampant piracy imparted substantial economic harm on legitimate record manufacturers, but of “equal importance” to Congress was the denial of royalties to performing artists and musicians.<sup>117</sup> Prominent in the SRA's legislative history is this type of focus on the extraeconomic impact of piracy and infringement on the integrity of artists, musicians, engineers, producers, and other players responsible for the creation of the copyrighted work.<sup>118</sup> Con-

115 H.R. REP. NO. 92-487, at 2 (1971).

116 *Id.*

117 *Id.*

118 See, e.g., *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. 481 (1967) (statement of Thurman Arnold, Special Counsel, Record Indus. Ass'n of Am.) (noting, during hearings on a previous iteration of the bill the SRA derived from, the House committee's emphasis on the

gress was concerned not just with the fact that pirates were preventing those responsible for a sound recording from adequate financial compensation, but with the fact that pirates were in essence stealing their “efforts” and “talent.”<sup>119</sup> The integrity of the sound recording itself, and the labor and skill it represents, drove the legislature to protect those creative works.

The independent fixation exception reflects this motivation by focusing protection on the form of the recording’s content rather than its substance. Allowing perfect imitation of sound recordings demonstrates that § 114(b) only intends to punish unauthorized uses of the sounds *as fixed by the original creator*.<sup>120</sup> The substance of those sounds does not matter—if the substance mattered, Congress would not have allowed for perfect imitation. What matters is the original (and any subsequently authorized) embodiment of the sounds—that is, the actual product of the artist’s labor. For this reason, the traditional policy concerns behind copyright law, and particularly behind the *de minimis* defense, carry little if any weight with sound recording copyrights.

The economic incentive theory that pervades copyright law jurisprudence<sup>121</sup> struggles to coexist with § 114’s allowance of perfect imitations<sup>122</sup> and cannot account for Congress’s focus on the integrity of the artist’s work. The independent fixation exception severely limits the economic value of sound recordings and thus the prospect of gaining a sound recording copyright does not provide a substantial incentive to create new works. While § 114 focuses on the form of the artist’s work, the substance of that work is what carries economic value. To the copyright holder, consumers are buying

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“creativity and value of the contribution of performers and record producers to sound recordings” (quoting H.R. REP. NO. 89-2237, at 94 (1966)) (internal quotation marks omitted); S. REP. NO. 92-72, at 6 (1971) (rejecting a compulsory license scheme for sound recordings and emphasizing that the recording is the product of “the efforts of the record company and the artists,” and that copyists, thus, may either find a license or “mak[e] the same investment in production and talent as . . . the authorized record companies”).

119 See S. REP. NO. 92-72, at 6.

120 See *supra* notes 106–07 and accompanying text.

121 Congress’s power to enact the copyright laws derives from the Progress Clause of Article I of the Constitution: “Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. Courts tend to interpret this clause as intending to provide an economic incentive for “authors and inventors” to “advance public welfare through [their] talents . . . in ‘Science and useful Arts.’” See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)); see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

122 This is not to say that preventing economic harm was absent from the legislative history. For instance, Congress did not intend for the SRA to impose liability for unauthorized home recordings provided they were “for private use and with no purpose of reproducing or otherwise capitalizing commercially on [them].” H.R. REP. NO. 92-487, at 7 (1971).

sound recordings; but to the consumer, they are buying *songs*. The value to the consumer, the thing the consumer consumes, is the substance of the work. In other words, it is the underlying musical work copyright—as that copyright actually protects the song—that provides the primary economic value to the artist, not the sound recording copyright. The sound recording copyright acts as an additional protection to that underlying work, but as such still does not independently carry a substantial creation incentive. The creation incentive associated with sound recordings derives from the copyright on the underlying musical work.

The de minimis defense derives from the same economic incentive theory and therefore should not apply to sound recordings. As the *VMG* court explained, the defense is designed to protect the artist's financial interest in the "lay public's approbation of his efforts."<sup>123</sup> Thus, the public's recognition of the work determines liability. But the form/substance distinction between sound recordings and musical works means this cannot properly map onto unauthorized reproductions or adaptations of sound recordings. When a copyist directly recaptures the sounds fixed in the recording and uses them in his own work, the object of the "lay public's approbation" is the substance of the underlying musical work. Yes, the lay public *hears* the recording, insofar as that is where the sound derives from, but what the lay public *listens* to is the song and the sounds that embody the musical work. The de minimis inquiry is therefore not fit for the form protected by the sound recording copyright because its object is the substance protected by the underlying musical work copyright.

An examination of the compulsory license scheme for musical works further supports this conceptual divide between the two types of protection. The current compulsory license provisions in § 115 provide a "cover" license whereby anyone may "make and distribute phonorecords of" a musical work previously distributed to the public.<sup>124</sup> The modern § 115 in turn derives from § 1(e) of the Copyright Act of 1909 ("1909 Act"),<sup>125</sup> Congress's first enactment of a statutory license. Because the 1909 Act did not recognize sound recordings as copyrightable subject matter, § 1(e) is silent on that matter, instead providing substantially the same protections as § 115—anyone could mechanically reproduce a previously publicly distributed musical composition upon payment of a statutory royalty.<sup>126</sup> Instead of silence, however, § 115 expressly excludes sound recordings from the compulsory scheme.<sup>127</sup>

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123 *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 881 (9th Cir. 2016) (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977) (internal quotation marks omitted)).

124 17 U.S.C. § 115(a)(1) (2012). This often takes the form of one recording artist recording another artist's song in his own style. See JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 413–14 (4th ed. 2015); see also *supra* note 36.

125 Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1075–76.

126 *Id.* at 1076.

127 17 U.S.C. § 115(a)(1).

The legislative history suggests a Lockean labor theory rationale rather than the expected economic incentive argument. Congress first squarely rejected the compulsory license for sound recordings when developing the SRA. Presented with the argument that a sound recording statutory license would be “an appropriate adjunct” to the musical work license, the Senate Report declined to equate the two: the mechanical license for musical works affords “the right to make use of raw material—in this instance a copyrighted song. The record label, the performing artist, musicians, and arrangers develop this song into the finished product—the recorded song.”<sup>128</sup> Using my proposed parlance, the mechanical license runs only to the substance, the “raw material,” that is then shaped and embodied in the form resultant of the parties’ labor. That finished product, that form, is not just a marketable commodity made for consumers, but rather represents the “efforts of the record company and the artists” and therefore should not be made available to copyists without their consent.<sup>129</sup> The Senate Report even went so far as to make a prototypical “get a license or do not sample” statement: “Any unauthorized manufacturer who wishes to produce a record containing the same songs may do so by paying the mechanical royalty and making the same investment in production and talent as is being done by the authorized record companies.”<sup>130</sup> All of these statements focus explicitly on “talent” and “effort.” The Senate Report’s rejection of the compulsory license for sound recordings nowhere mentions any economic argument.

The accompanying House Report<sup>131</sup> echoes the same sentiments. After first incorporating the rationale of the Senate Report, the House Report proceeds to incorporate the reports of the Librarian of Congress and the Departments of State, Justice, and Commerce to further support the SRA.<sup>132</sup> Of the four statements, only the Department of Commerce spoke directly to the compulsory license issue. While noting that allowing the license would not “eliminate the undesirable effects” of piracy,<sup>133</sup> the main force of the statement’s support of Congress’s decision centered on the fact that “[s]ound recordings are finished products embodying the efforts of performers and recording companies.”<sup>134</sup> Forcing sound recording copyright holders to

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128 S. REP. NO. 92-72, at 6 (1971).

129 *Id.* (“The committee sees *no justification* for the granting of a compulsory license to copy the finished product, which has been developed and promoted through the efforts of the record company and the artists.” (emphasis added)).

130 *Id.*

131 H.R. REP. NO. 92-487 (1971).

132 *Id.* at 9–16.

133 *Id.* at 15. Though the statement does not elaborate on this point, presumably the license would not prevent the piracy concerns because unless the statutory royalty was prohibitively high, the royalty would just be a negligible cost to pirates. Recall that piracy was at a market volume of nearly \$100 million, *see supra* text accompanying note 115, so the two-cent statutory royalty for musical works posed only a nominal barrier. The same would, in theory, hold true for a sound recording royalty.

134 H.R. REP. NO. 92-487, at 15.

comply with the compulsory license would therefore be “inequitable.”<sup>135</sup> Congress’s stance with the SRA was thus clear: there was no problem with statutorily inhibiting a musical work copyright holder’s right to exclude others, but sound recording copyrights were to be licensed exclusively at the will of the copyright holder.

The House Report’s comments on § 115 in the 1976 Act’s history comports with this reading as well. While the statute on its face contemplates that sound recordings are excluded from the license and require authorization from the actual copyright holder, the House Report strengthens this by clarifying that sound recording copyright holders are not “in any way require[d] . . . to grant a license to duplicate the original sound recording.”<sup>136</sup> Therefore, under the 1976 Act as under the SRA, Congress seems to have intended that musical work copyrights be subject to third-party control in certain situations while sound recording copyrights were to be controlled exclusively by the rights holder. To push the implication further, Congress here marked a clear instance where musical work and sound recording copyrights were subject to dramatically different levels of protection. It is with this full legislative history that we should now read the language of § 114.

*B. The Plain Text of the Statute, in Light of the Legislative History, Is Incompatible with the De Minimis Defense*

As evidenced by the contrary interpretations of the *Bridgeport* and *VMG* courts, the plain language of § 114 alone is not dispositive here. Rather, the proper reading of the statute must be done in light of the full weight of the legislative history. Taking this into account, § 114 supplants the common law *de minimis* defense by providing an exclusive statutory defense: independent fixation. Both *Bridgeport* and *VMG* correctly construed the exception as allowing for perfect mimicry of the sound recording, provided that the copyist independently fixes the sounds. While *VMG* accurately characterized this as a limitation, it erred in concluding that reading it as a rejection of the *de minimis* defense would expand the rights of the copyright holder beyond the bounds of Title 17. This conclusion fails because it ignores the function of § 114, and particularly § 114(b), within Title 17.

Recall the basic statutory scheme: § 102 defines copyrightable subject matter; § 106 defines the broad set of exclusive rights afforded to those categories *subject to the provisions in §§ 107–122*; § 114 limits § 106 by defining the “scope of exclusive rights in sound recordings”;<sup>137</sup> § 114(a) limits sound recordings to the rights of reproduction, adaptation, distribution, and public performance via digital audio transmission; and § 114(b) limits the reproduction and adaptation rights to the actual sounds fixed in the recording, expressly excluding from this protection independently fixed imitations. The function of § 114 is to draw the only boundaries around the § 106 rights

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<sup>135</sup> *Id.*

<sup>136</sup> H.R. REP. NO. 94-1476, at 108–09 (1976).

<sup>137</sup> 17 U.S.C. § 114 (2012).

afforded to sound recordings—a purely statutory creature not recognized until 1971<sup>138</sup>—and those boundaries cover only the actual sounds fixed in the recording. Section 114, the only section tasked with drawing those boundaries, makes an express recognition of only one defense to infringement of the reproduction and adaptation rights.

The *VMG* court declined to “read an *implicit expansion* of rights into Congress’ statement of an *express limitation* on rights,”<sup>139</sup> but there is no implicit expansion of rights here; § 114 adopted nearly whole cloth the SRA, which itself *created* the rights afforded to sound recording copyrights. The 1976 Act could not expand the rights of a centuries-old common-law doctrine because it was merely incorporating the five-year-old statutory creature that originated with the SRA in the first place.<sup>140</sup> The centuries-old pronouncement that does carry force, however, is the Supreme Court’s 1834 decision in *Wheaton v. Peters*:

[Copyright], as has been shown, does not exist at common law—it originated, if at all, under the acts of congress. No one can deny that when the legislature are [sic] about to vest an exclusive right in an author or an inventor, they have the *power to prescribe the conditions on which such right shall be enjoyed*; and that *no one can avail himself of such right who does not substantially comply with the requisitions of the law*.<sup>141</sup>

This thing, the sound recording copyright, created purely by legislation and not by the courts, is given one defense, and that therefore is the singular defense.<sup>142</sup> Just as sound recording copyright holders are given exclusive control in the compulsory license context, they should retain exclusive control in the § 114 context. If the alleged copy does not consist entirely of independently fixed sounds as required by the statute, it necessarily falls within the ambit of the exclusive rights retained by the copyright holder.

The *VMG* court treated sound recordings like any other copyrightable subject matter but in doing so failed to appreciate the unique properties of sound recordings created by § 114. Sound recordings cannot be analogized to photographs or sculptures or drawings or books because those other categories do not carry the same unique exception to infringement. No provision in Title 17 provides that a copyist may, without authorization, lawfully

138 See *supra* note 22 and accompanying text.

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

140 See *supra* note 22 and accompanying text.

141 *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663–64 (1834) (emphasis added). Explaining that copyright “is a creature of statute,” the Ninth Circuit also relied on this passage in *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 883–84 (9th Cir. 2005) (en banc). See also H.R. REP. NO. 60-2222, at 9 (1909) (citing this passage with approval when explaining the 1909 Act’s creation of a compulsory license scheme for musical works, stating that “Congress could not legislate a man’s existing rights out of existence . . . but in this case Congress is creating a new property right”).

142 Fair use would still be a viable defense. Section 106 subjects all copyrightable subject matter to the various limitations in §§ 107–122, so both § 107 and § 114 impact sound recording copyrights. Nothing in § 107 suggests it does not extend to sound recordings, and nothing in § 114 suggests other express statutory limitations would not apply.

copy a painting if he paints the copy himself, or copy a book if he writes it himself, or copy a sculpture if he sculpts it himself. No other provision of Title 17 allows a copyist to lawfully copy *the entirety of the copyrighted work* so long as he does not take directly from the original work.<sup>143</sup> The language of the statute and the weight of its history demand differential treatment of sound recordings. While *VMG* cites to the House Report language indicating an intent to require a substantial similarity analysis, that one line neither comports with the ultimate legislative effect of the statute nor overcomes the pervasive emphasis on the integrity of the copyright holder's work.<sup>144</sup> The operation of § 114(b) precludes the de minimis defense.

To summarize, the de minimis defense should not be available for the infringement of sound recording copyrights because the plain text of § 114 precludes it, and the purpose and policy behind the statute make traditional copyright policy irrelevant in the case of sound recordings. First, the legislative history of the SRA and the 1976 Act strongly suggests that § 114 really protects the integrity of the form of the sound recording rather than the substance embodied by that form. Because the traditional economic underpinnings of copyright law and the de minimis defense look to the substance of the embodied work rather than its form, they cannot capture the unique statutory nature of sound recordings. Second, the statute defines the exclusive boundaries of sound recording copyrights and provides independent fixation as the one singular defense to infringement. By specifically providing only one defense in the section dedicated to defining the scope of the copyright, the statute requires reproductions and adaptations not within the ambit of the defense to infringe the residuum of the exclusive right retained by the copyright holder. The de minimis defense should therefore not apply.

#### CONCLUSION

Sound recording copyrights are unique creatures of statute. The *Bridgport* court properly recognized this and declined to afford samplers the common law de minimis defense. Relying on the words deliberately chosen by Congress to define the scope of the exclusive rights afforded to sound

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143 For this reason, I take particular issue with *VMG's* characterization of eliminating the de minimis defense as expanding the copyright holder's rights. The independent fixation exception all but obliterates the worth of those rights. A copyist may reproduce a trivial amount of a painting and successfully assert the de minimis defense, but he cannot take advantage of the defense beyond that trivial reproduction; in the sound recording context, however, not only can a sampler reproduce a trivial amount of a recording, but he can reproduce 100% of the recording and sell it as his own, provided he independently fixes the sounds (and, of course, clears the use of the underlying musical work). There is no expansion of rights when a perfect simulation of the work is lawful.

144 Additionally, the "all or any substantial portion" language cited by *VMG* did not appear until much later in the history. See H.R. REP. NO. 90-83, at 65 (1967) ("Thus, infringement takes place whenever the actual sounds that go to make up a copyrighted sound recording are reproduced . . ."); H.R. REP. NO. 89-2237, at 94 (1966) (same).

recordings and weighing the attendant policy concerns, the court established a bright-line rule: “get a license or do not sample.”<sup>145</sup> Looking also to the statute but considering further the legislative history behind those words, the *VMG* court held to the contrary and divided two centers of the American music industry into conflicting protection regimes. The split must be resolved, and absent congressional action, it should be resolved in favor of *Bridgeport*.

This is not a clear case. *VMG*'s insistence on treating sound recordings just as every other copyrightable subject matter relies on the fundamental theories that drive the American copyright system and even finds compelling support in the statute's legislative history. But the court's application of those principles was inconsistent with the unique statutory nature of sound recordings, and its underinclusive analysis of the legislative history painted only a tinted portion of the copyright's greater portrait.<sup>146</sup> This is not to say that *Bridgeport*'s analysis was pristine—it was not. *VMG* rightly criticized *Bridgeport* not only for ignoring the legislative history, but also for dedicating too much of its analysis to the reasons its rule is just rather than the reasons its rule is required.<sup>147</sup> But the justness of the bright-line rule is beyond the scope of this Note. Rather, this Note set out to show only that *Bridgeport* reached the right conclusion. The words of the statute, the nature of the protection, and the effect of the protection demand a rejection of the de minimis defense to infringement of sound recording copyrights. Section 114 dictates this result.

Here, the bright line is the right line: “get a license or do not sample.”<sup>148</sup>

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

146 *VMG*, for instance, criticized *Bridgeport*'s physical/intellectual taking distinction as advancing a “sweat of the brow” argument, but this fails to account for the numerous references in the legislative history to the importance of the artist's efforts and talents. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 885 (9th Cir. 2016) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359 (1991)).

147 *Id.*

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