BRIDGEPORT MUSIC, INC. V. DIMENSION FILMS: HAS UNLICENSED DIGITAL SAMPLING OF COPYRIGHTED SOUND RECORDINGS COME TO AN END?

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The practice of analog "sampling" arose in the 1970s as a result of technological advancement in the field of musical recording.[1] Sampling is the process of integrating a short clip of recorded sound, the sample, into a new sound recording.[2] In the 1980s, further technological advancements spawned the practice of digital sampling, a technology which gave sampling artists more flexibility in creating new works using samples. Today, sampling remains a common practice in the music industry, but until recently, it was unclear whether a license was required to sample a small portion of a protected work. Thus, while some artists sought licenses to sample from existing copyrighted works, others took their chances and went ahead with the sampling, merely waiting for an infringement suit to be filed.

In *Bridgeport Music, Inc. v. Dimension Films*,[3] the Sixth Circuit faced an issue head-on that previous courts tended to dodge, attempting to set forth clear guidelines regarding the copyright implications of digital sampling. The Sixth Circuit addressed the application of the de minimis exception to digital sampling of copyrighted sound recordings, and after a literal reading of the copyright statute and an examination of numerous policy arguments in favor of a bright-line rule, concluded that one may not "lift" or "sample" a portion of a sound recording without a license.[4]

Part I of this Note examines the emergence of copyright protection for sound recordings and compares the rights granted therein to those granted for musical compositions in light of the established legal principle of de minimis. Part II explores the effects of digital sampling in the music industry as well as existing case law on sampling. Part III presents the *Bridgeport* case and Part IV considers both the flaws in the court's statu-

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1. *See* Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 277 (1996).

2. *See, e.g.*, Sampling (music), WIKIPEDIA: THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Sampling_%28music%29 (last visited Jan. 25, 2006).

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

4. *Id.* at 800.

tory interpretation by failing to consider legislative history as well as the implications of its ruling on courts and litigants. This Note concludes with a summary of the arguments presented.

I. LEGAL BACKGROUND

The granting of federal copyright protection to sound recordings led, predictably, to a series of questions regarding the nature and scope of those rights. This Part will first discuss the evolution and scope of copyright protection for sound recordings, followed by an exploration of the differences in the protections afforded to musical compositions and sound recordings. It concludes with a summary of the long-established legal principle of de minimis, which is, at least on its face, very relevant to the sampling debate.

A. Copyright Protection for Sound Recordings

The Copyright Act of 1909 granted copyright protection only to specific categories of works, including musical compositions, books, periodicals, lectures, sermons, addresses, dramatic compositions, maps, works of art, models/designs, reproductions of a work of art, certain drawings, photographs, prints, and pictorial illustrations.[5] Although the 1909 Act was amended in 1912 to grant protection to motion pictures,[6] sound recordings remained excluded from federal statutory copyright protection until 1972.[7] The difference between musical compositions and sound recordings is material: a "musical composition" consists of a work's musical score and lyrics which produce a sound when played; a "sound recording" consists of the sounds when actually fixed in a phonorecord or other medium.[8]

Concerned with the rise in the prevalence of "record and tape 'piracy' (i.e., unauthorized duplication of sound recordings)," Congress undertook to extend copyright protection to sound recordings.[9] According to Congress, such infringement resulted in the loss of over $100 million annually.[10] On October 15, 1971, the 1909 Act was again amended to afford

5. *See* Copyright Act of 1909, ch. 320, § 5, 35 Stat. 1075, 1076-77 (1909).

6. *See* 1912 Amendment of 1909 Copyright Act, ch. 356, § 5, 37 Stat. 488 (1912).

7. *See* Sound Recording Copyright Act, Pub. L. No. 92-140, 85 Stat. 391 (1971) (incorporated as an amendment to the 1909 Act).

8. *See* 17 U.S.C. § 101 (2000) (defining sound recordings as "the fixation of a series of musical, spoken, or other sounds").

9. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 2.10[A] (2005).

10. *See id.* (citing H.R. REP. NO. 92-487 (1971)).

sound recordings federal statutory copyright protection.[11] This amendment took effect on February 15, 1972 and granted protection to sound recordings fixed on or after that date.[12] This protection was later incorporated into the Copyright Act of 1976 ("The Act"), and continues today.[13] The Act defines a sound recording as a work that results "from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[14]

B. Sound Recordings Versus Musical Compositions: Exclusive Rights and Compulsory Licenses

Although both musical compositions and sound recordings are now protected by federal copyright, the copyright in the former is distinct from that in the latter.[15] The rights vested in a sound recording copyright owner are limited to the right to reproduce, prepare derivative works, distribute copies and perform the work publicly by means of a digital audio transmission.[16] Ownership of the sound recording copyright varies depending on the employment relationship or agreed upon contract between the record label and performer.[17] Absent either of these circumstances, the copyright will initially vest in either the performer solely or the record label and performing artists jointly.[18]

Of particular importance, the right to reproduce a sound recording is "limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording."[19] Therefore, a copy is not infringing unless it physically copies the sounds in the recording, such as by copying a store bought compact disc or recording a song played on the radio. As a

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11. *See* Pub. L. No. 92-140, *supra* note 7.

12. *See* 1 NIMMER, *supra* note 9, § 2.10[A][1].

13. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810).

14. 17 U.S.C. § 101.

15. *See id.* § 106.

16. *Id.* § 114(a) (referencing the rights enumerated in § 106(1)-(3), (6)).

17. *See* 1 NIMMER, *supra* note 9, § 2.10[A][3]; *see also* COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 149 (2002) (explaining that "record labels typically require recording artists to sign contracts that state their contributions are works for hire . . . and assign the copyright in their sound recording to the record company.").

18. *See* 1 NIMMER, *supra* note 9, § 2.10[A][3].

19. 17 U.S.C. § 114(b).

corollary,

> [t]he exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.[20]

Thus, an independently made work that imitates the sounds of the original sound recording is not an infringement of the copyright in that sound recording. Additionally, a derivative work of a sound recording is created when the actual sounds in the original sound recording are "rearranged, remixed, or otherwise altered in sequence or quality."[21] If these requirements are not met, then a derivative work is not created.

In contrast, musical composition copyrights[22] grant all of the rights as sound recordings as well as the right to perform and display the work in public.[23] Furthermore, a musical composition copyright initially vests in the creator of the composition, although contractual agreements between the author and a publishing entity often transfer ownership to the latter.[24]

Another major difference between copyrighted musical compositions and sound recordings is the availability of a compulsory license (also known as a mechanical license) for the former but not the latter.[25] A compulsory license allows a person to pay a statutory fee and record a song without seeking permission from the copyright owner if certain conditions are met.[26] The provision of compulsory licenses for musical compositions was intended to protect against "a great music monopoly"—in other words, a situation in which owners of musical compositions are able to prevent re-recording of their songs by demanding exorbitant licensing fees or by merely forbidding the re-recording.[27] A copyrighted musical composition is subject to a compulsory license if (1) "phonorecords of [the] nondramatic musical work have been distributed to the public in the

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20. *Id.*

21. *Id.*

22. *See id.* § 102 (granting copyright protection to musical works, including any accompanying words).

23. *See id.* § 106(4)-(5).

24. *See* 1 NIMMER, *supra* note 9, § 30.02.

25. *Id.* § 8.04[A] (citing Staggers v. Real Authentic Sound, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) and explaining the principle that the application of a compulsory license solely to nondramatic musical works makes it inapplicable to sound recordings).

26. *Id.* § 8.04[A]-[D].

27. *See id.* § 8.04[A] (citing H.R. Rep. No. 60-2222, at 6 (1909)); *see also id.* App. 13.

United States under the authority of the copyright owner" and (2) the licensee's "primary purpose in making phonorecords is to distribute them to the public for private use."[28]

Where a musical work exists only in a sound recording,[29] or when a compulsory licensee wishes to duplicate the work in the exact form in which it is embodied, a sound recording, one must take further steps not to infringe the copyright in the sound recording. The requirements for use of a sound recording through a compulsory license are that (1) the sound recording be lawfully fixed[30] and (2) the copyright owner of the sound recording authorize the making of the phonorecord by the licensee.[31] If the sound recording was fixed before February 15, 1972, the person who fixed the original sound recording, with an express license from the copyright holder of the musical composition, must give permission for the licensee to make a sound recording pursuant to a compulsory license.[32] If one cannot obtain permission to use the sound recording, then one can only exercise his rights in the musical composition compulsory license by re-recording the work with his own musicians, singers, etc.[33] Once a compulsory license to re-record (not merely reproduce in the exact original form) is obtained, the licensee can only adapt the original work to the extent that it embodies a new "style or manner of interpretation";[34] the licensee may not alter the basic melody or fundamental character of the original work.[35] Obtaining a compulsory license in a musical composition serves as a limitation on the exclusiveness of the right of the original copyright holder to make and distribute phonorecords, since the licensee is also able to make and distribute phonorecords pursuant to the compulsory license.[36]

Royalty rates for use of the original work through the compulsory license are set by statute, and vary depending on when the original work

28. 17 U.S.C. § 115(a)(1). This includes distribution of works to dealers who then sell to private users. *See* 1 NIMMER, *supra* note 9, § 8.04[D].

29. For example, an artist sits down with his guitar and records himself playing onto a compact disc. The only embodiment of the musical composition is in the sound recording since the artist never wrote down the music and lyrics.

30. *See* 17 U.S.C. § 115(a)(1); *see also* 1 NIMMER, *supra* note 9, § 8.04[E][2] (explaining that a sound recording is not lawfully fixed if such fixation constitutes copyright infringement under federal law, or common law copyright infringement, unfair competition, or other violations of state law).

31. *See* 17 U.S.C. §115(a)(1).

32. *See id.*

33. *See* 1 NIMMER, *supra* note 9, § 8.04[A].

34. 17 U.S.C. § 115(a)(2).

35. *See id.*

36. *See id.* § 115.

was created.[37] This rate generally functions as a maximum that can be charged by the copyright owner via a more traditional copyright license, because a potential licensee can merely invoke the compulsory license without permission from the copyright owner; thus in practice, agreements are reached for licenses at a rate lower than that prescribed in The Act.[38] A contractual agreement benefits the copyright owner in that it allows for the owner to potentially control the duration of the use, the context of the use, and any other limitations that could be negotiated, whereas a compulsory license leaves the owner with no control over the re-recording.

C. De Minimis Use

A long established principle that has particular relevance in this area of copyright law is *de minimis non curat lex*—the law does not concern itself with trifles.[39] The de minimis principle is invoked when a violation of a law is so minimal that it does not rise to the level necessary to impose legal consequence.[40] The United States Supreme Court has declared that the de minimis rule "is part of the established background of legal principles against which *all* enactments are adopted, and which *all* enactments (absent contrary indication) are deemed to accept."[41]

At a general level, de minimis in the copyright context "can mean what it means in most [other] legal contexts: a technical violation of a right so trivial that the law will not impose legal consequences."[42] More specific to copyright law, the de minimis principle applies when "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."[43] One should note that the term "substantial similarity" is used in many different contexts. First, it is used "as the threshold to determine the degree of similarity that suffices, once access has been shown, as indirect proof of copying."[44] More relevant here, however, a substantial similarity analysis is undertaken "after the fact of copying has been established, as the threshold for determining [whether] the degree of

37. *See id.* § 115(c).

38. *See* 1 NIMMER, *supra* note 9, § 8.04[I] (citing Recording Indus. Ass'n v. Copyright Royalty Tribunal, 662 F.2d 1, 4 (D.C. Cir. 1981)).

39. BLACK'S LAW DICTIONARY 8 (8th ed. 2004).

40. *See* Ringgold v. Black Entm't Television Inc., 126 F.3d 70, 74 (2d Cir. 1997).

41. Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) (emphasis added).

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

43. *Id.*

44. *Id.*

similarity suffices to demonstrate actionable infringement."[45] A determination of substantial similarity requires an analysis of the quantitative amount used of a protected work—it seems only logical, then, that defendants be permitted to argue the amount used was de minimis and that no actionable infringement exists.[46] Finally, substantial similarity is relevant to the fair use defense.[47] One factor in evaluating the defense of fair use is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[48] Consequently, a defendant may argue that this factor weighs in favor of a fair use defense because the amount used is de minimis. Courts apply a fair use defense to discard liability in cases where the plaintiff has established a prima facie case of infringement, but the defendant's use is trivial.[49]

II. DIGITAL SAMPLING TAKES THE LEAD

Digital sampling allows artists to easily sample pre-recorded music, and leaves the courts to determine if such action constitutes copyright infringement. This Part presents a history of digital sampling and its perception as a threat to the music industry, and concludes with a survey of the caselaw involving digitally sampled works.

A. Digital Sampling Threatens Sound Recordings

Sampling is the process of integrating a short clip of recorded sound, the sample, into a new sound recording.[50] Digital sampling of sound recordings first occurred in the 1980s,[51] although other forms of sampling

45. *Id.*

46. *See id.* at 75.

47. Section 107 of the Copyright Act provides for a fair use defense utilizing a four factor test: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect upon the plaintiff's potential market. *See* 17 U.S.C. § 107 (2000). While these factors are suggestions for the court to consider, it can also consider other factors that "may prove to have a bearing upon the determination of fair use." 1 NIMMER, *supra* note 9, § 13.05[A]. A commercial use is said to cut against a finding of fair use and over time, factor two has been determined to be irrelevant. *See id.* § 13.05(A)(1)(c), (2)(a). Factor three requires both a quantitative and qualitative analysis. *See id.* § 13.05(A)(3) (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)). 17 U.S.C. § 107 provides illustrations of where a fair use defense may be applicable, but the statute text reads "such as" and is thus not an exhaustive list.

48. *Ringgold*, 126 F.3d at 75 (citing 17 U.S.C § 107(3)).

49. *See, e.g.*, Berlin v. E.C. Publ'g, Inc., 219 F. Supp. 911 (S.D.N.Y. 1963).

50. *See, e.g.*, Sampling (music), WIKIPEDIA: THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Sampling_%28music%29 (last visited Jan. 25, 2006).

51. *See generally* Szymanski, *supra* note 1, at 278.

existed prior to this time.[52] In the early days of sampling, artists would sample traditional instruments, such as pianos, drums, and wind instruments, or other ambient sounds to incorporate into their music.[53] With the advent of digital sampling, it was not long before artists strayed from sampling traditional or ambient sounds, a practice which was rarely if ever challenged as infringing, and began sampling copyrighted pre-recorded sound recordings by other artists.[54] The switch in sources of works for sampling presumably occurred because digital sampling, unlike analog sampling, allows artists to easily sample from commercially available digital media, such as compact discs, while gaining a greater ability to alter the speed, pitch, and other characteristics of a sample.[55]

This practice of digitally sampling sound recordings led to an increase in litigation in the 1990s, and remains a hotly contested issue today.[56] Owners of the sampled sound recordings often maintain that an "unauthorized use of a previously recorded song constitutes copyright infringement."[57] Despite this objection, digital sampling has many advantages for the artist who uses samples. If an artist wishes to sample a particular sound found in another song in his own recording, the savings in production costs can be significant, since it is usually more expensive to record in a studio with live musicians than to digitally sample from other media.[58] Whereas a single compact disc usually costs no more than twenty dollars, it may cost hundreds if not thousands of dollars to hire musicians and pay for studio time. A "sampler," the device most commonly used for sampling, records sound through a microphone or a direct source, such as a compact disc, and digitally stores the information to produce a perfect reproduction that can be manipulated and inserted into a new song.[59] Furthermore, a digital sampler released in 1975 for a price of $30,000 had

52. *Id.* at 277 (explaining that sampling was occurring during the 1960s).

53. *See, e.g.*, Danielle L. Gilmore & Kenneth L. Burry, *Healthy Sampling: Digital Music Sampling Creates High-Stakes Challenges to Existing Copyright Law for the Recording Industry*, 20 L.A. LAW. 40, 42, Apr. 1997.

54. *See id.*

55. *See id.*

56. *See generally* Astride Howell, *Sample This! A Ninth Circuit Decision Seems to be in Harmony with the Sixth Circuit's Bright-Line Rule on what Constitutes Infringement in Digital Sampling*, 28 L.A. LAW. 24, 26, Sept. 2005 (explaining that litigation began in the 1990s).

57. Gilmore, *supra* note 53, at 42.

58. *See* Sandra L. Brown, *Sound Recording Advances Call for Change in Law*, N.Y. L.J., July 14, 1995, at 5 (noting that practice of using samples to achieve "desired sound" is "becoming increasingly popular" in order to save money).

59. Gilmore, *supra* note 53, at 42.

dropped in price to $1,500 by 1986.[60] Today, one can purchase a digital sampler on Amazon.com for less than $200.[61] Many see this trend as one that replaces live performances by musicians with cheaper versions of themselves—usually, their own compact discs.[62]

B. Digital Sampling: The Caselaw

The rise of the practice of digital sampling has led to many cases dealing with this issue. *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*[63] was one of the first cases to address digital sampling, and is famous for its opening sentence: "Thou shalt not steal."[64] In *Grand Upright*, defendants admitted to use of three words and the accompanying background music from plaintiffs' sound recording.[65] Although the main issue in the case was one of ownership of the sound recording, unrelated to sampling, the court assumed that a license was required to sample, stating that defendants "knew they were violating the plaintiff's rights" by not securing a proper license.[66] Despite the court's failure to fully address whether the sampling at issue was a de minimis use that did not constitute infringement, *Grand Upright* is credited for marking "the 'end of the days of casual sampling' and the beginning of widespread licensing of samples."[67]

In *United States v. Taxe*, defendants purchased eight-track stereo tape recordings from a retail outlet.[68] Defendants took samples from these recordings, altered them, included them in a new recorded work, and sold the new eight-track stereo tapes to the public.[69] The Ninth Circuit held that

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60. Jon Pareles, *Digital Technology Changing Music*, N.Y. TIMES, Oct. 16, 1986, at C23 (explaining that "the original Fairlight sampler, introduced in 1975, cost $30,000; the same level of sampling technology now costs about $1,500"); *see also* Fairlight CMI, WIKIPEDIA: THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Fairlight_CMI (last visited Feb. 22, 2006).

61. *See, e.g.*, Amazon.com, http://www.amazon.com/gp/search.html/ref=xs_ap_l_xglna/104-784795228247l9?index=mi&node=11965861&keywords=digital%20sampler (last visited Nov. 25, 2005).

62. *See, e.g.*, Pareles, *supra* note 60.

63. 780 F. Supp. 182 (S.D.N.Y. 1991).

64. *Id.* at 183.

65. *See id.*

66. *Id.* at 184-85.

67. Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1673 (1999) (quoting DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 296 (1997)).

68. 540 F.2d 961, 964 (9th Cir. 1976).

69. *Id.*

the trial judge's jury instruction was incorrect to the extent that it characterized all re-recordings as infringement, but that its subsequent inclusion of a substantial similarity consideration was correct.[70] The proper rule, according to the court, is that a sound recording copyright owner's right to reproduce "can be infringed by an unauthorized re-recording which, despite changes in the sounds duplicated, results in a work of 'substantial similarity.'"[71] Thus, while the *Taxe* court's analysis allowed for an exploration of substantial similarity, it too remained silent as to whether sampling was a de minimis use, and whether such use would constitute infringement.

More recently, in *Newton v. Diamond*,[72] the court addressed whether digital sampling requires a license for *both* the sound recording and the musical composition.[73] Since the defendants, Beastie Boys, had obtained a license for use of plaintiff's copyrighted sound recording,[74] the only question remaining was whether the Beastie Boys also needed a license for the musical composition to digitally sample.[75] Defendants sampled a six-second, three-note segment of Newton's composition "Choir" and included it in their recorded song "Pass the Mic."[76] The court concluded that it was not necessary to obtain a license for use of the musical composition embodied in the sound recording.[77] Since the digitally sampled portion was so minimal as to constitute a de minimis use of the musical composition, no actionable infringement existed.[78] While the case demonstrates that the de minimis principle applies to determining infringement of a copyright in a musical composition, it is not instructive in determining whether the same rule also applies to sound recordings. This precise issue was addressed by the Sixth Circuit in *Bridgeport*.[79]

III. *BRIDGEPORT MUSIC, INC. V. DIMENSION FILMS*

Despite previous cases involving both sampling and copyrighted sound recordings, *Bridgeport* was the first case to directly address the legal consequences of digital sampling of sound recordings. When the *Grand Up-*

70. *Id.* at 965.
71. *Id.* at n.2.
72. 388 F.3d 1189 (9th Cir. 2003).
73. *See id.* at 1190.
74. *Id.*
75. *Id.*
76. *See id.* at 1190-91.
77. *Id.* at 1190.
78. *Id.*
79. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).

right decision came down in 1991, there was an increase in the prevalence of licensing for samples of sound recordings, probably caused by fear of the possible legal repercussions of not seeking permission.[80] Nevertheless, as evidenced by *Bridgeport*, some artists continued to sample without licenses.[81]

A. Facts and Procedural History

Plaintiff, Westbound Records, Inc. ("Westbound"), filed suit against defendant, No Limit Films LLC ("No Limit"), for copyright infringement after No Limit digitally sampled a portion of a sound recording owned by Westbound, "Get Off Your Ass and Jam" ("Get Off") by George Clinton, Jr. and the Funkadelics.[82] Recording artist N.W.A. inserted this sample into its song "100 Miles and Runnin" ("100 Miles"), which was owned by No Limit and subsequently used in the soundtrack of a movie.[83] Specifically, 100 Miles included a two second guitar riff consisting of three notes played consecutively at a quick pace.[84] The recording artist lowered the pitch of the sample, looped the copied piece to extend to sixteen beats which lasted seven seconds, and repeated this seven second segment five times in the song.

No Limit moved for summary judgment on the grounds that the sample taken was unoriginal and thus unprotected, and even if it were protected, that the sample constituted a de minimis use, and therefore was not infringing.[85] Although the court determined that the sample was original and entitled to copyright protection, it granted summary judgment to No Limit, finding that under either a de minimis analysis or a "fragmented literal similarity" test,[86] No Limit's sampling did not "rise to the level of a legally cognizable appropriation."[87] Concluding that no reasonable juror would recognize the sample and its source, the court held that the alleged infringement was de minimis and not actionable.[88] Westbound appealed,

80. *See id.* at 803 n.16.
81. *See id.* at 796.
82. *Id.* at 795-96.
83. *Id.*
84. *Id.* at 796.
85. *Id.* at 796-97.
86. 1 NIMMER, *supra* note 9, § 13.03[A][2] (explaining that fragmented literal similarity means that a work was copied virtually word for word but the part that was copied is not the essence or fundamental substance of the original work).
87. *Bridgeport*, 410 F.3d at 797.
88. *Id.* at 798.

arguing that the district court erred in its interpretation of the applicable standard and in its finding that there was no genuine issue of fact.[89]

B. The Sixth Circuit's Opinion

The Sixth Circuit reversed the district court's ruling, finding that a de minimis analysis applies only to liability for copying musical compositions, not sound recordings.[90] The court concluded that a substantial similarity or de minimis inquiry is inappropriate when the defendant admits to digitally sampling a protected work.[91] The Sixth Circuit acknowledged that there was no precedent for it to follow, and thus grounded its analysis on a "literal reading" of the applicable statutes, supported by law review articles and other writings.[92] The court first closely examined the statutory definition of the exclusive rights of the owners of sound recording copyrights granted by § 106 and § 114(a).[93] It reasoned that since the owner of a sound recording copyright is granted the right to create derivative works, which encompasses rearranging, remixing, or otherwise altering the actual sounds,[94] to avoid infringement an artist who digitally samples a copyrighted sound recording is required to "[g]et a license or do not sample."[95] Thus, even a de minimis use will constitute a derivative work and infringe the rights of a copyright owner. The court went on to explain that insertion of the word "entirely" in § 114(b) meant that Congress intended that recording *any part* of another's sound recording would constitute infringement, and that only a sound recording copyright owner could sample his own work without a license.[96] In support of its conclusion, the court relied on literature stating that:

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89. *Id.* at 797.

90. *See id.* at 798.

91. *Id.* The court also agreed that "the only issue is whether the actual sound recording has been used without authorization." *Id.* at 798 n.6 (quoting Bradley C. Rosen, 22 CAUSES OF ACTION § 12 (2d ed. 2003)).

92. *Id.* at 805; *see id.* at 802-03.

93. *See supra* Sections I.A-B.

94. *Bridgeport*, 410 F.3d. at 800 (referencing 17 U.S.C. § 114(b)); *see supra* Sections I.A-B.

95. *Id.* at 801. The court found support for this conclusion in a law journal article that explained a license was required regardless of "how much a digital sampler alters the actual sounds or whether the ordinary lay observer can or cannot recognize the song." *See id.* at 801 n.10 (quoting Susan J. Latham, Newton v. Diamond*: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J 119, 125 (2003)).

96. *Id.* at 801; *see supra* Sections I.A-B.

> By 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. Thus, it would appear that *any* unauthorized use of a digital sample taken from another's copyrighted recording would be an infringement of the copyrighted recording.[97]

The court also addressed policy rationales in support of its holding—namely that a bright-line rule accomplishes ease of enforcement without stifling creativity.[98] First, the court declared that the market will control the price of licenses, and that this price should never exceed the cost of duplicating the sound in a studio.[99] Creativity, the court reasoned, is left to flourish because one can always imitate the sound of any sound recording on one's own, so long as they do not physically duplicate the original sound recording.[100] The court noted that their rule protects the value in sound recordings by preventing artists who sample from directly benefiting from another's recording without compensating the author of the original work.[101] The court also reasoned that its rule was economically efficient, as it is cheaper to obtain a sound recording license than to litigate disputed takings.[102] Lastly, the court pointed out that there is a benefit to judicial economy in employing a bright-line rule as opposed to a de minimis analysis since the former eliminates the need for an individual analysis of the multiple differences in each of future cases.[103] A bright-line test limits judicial inquiry to two questions: whether there was sampling and whether a license was obtained.[104]

Finally, it is important to note that the court explicitly entertained the idea that the fair use defense might still be considered by the district court on remand.[105]

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97. *Bridgeport*, 410 F.3d at 804 n.18 (quoting AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1486-87 (3d ed. 2002) (footnotes omitted)).

98. *Id.* at 801.

99. *Id.*

100. *Id.*

101. *See id.* at 802.

102. *Id.*

103. *See id.*

104. *See id.* at 804. The court is careful to acknowledge, however, that judicial economy is not what drove its decision. *See id.* at 802.

105. *Id.* For a discussion of the relevance of the applicability of the fair use defense, *see infra* Section IV.B.

IV. ANALYSIS

The *Bridgeport* court's analysis of The Act as it pertains to sound recordings is contrary to legislative history and unjustifiably departs from the well-established doctrine of de minimis. Nonetheless, defendants may still be able to sample without a license by utilizing the fair use doctrine.

A. Statutory Interpretation Gone Awry

In *Bridgeport*, the court departed from de minimis and substantial similarity principles, the use of which is well-established in the analysis of musical compositions and copyright infringement,[106] holding that these principles are not applicable where there has been direct copying of a sound recording.[107] This divergence is questionable in light of prior cases and the legislative history of § 114. The following Section will evaluate the court's analysis in relation to established rules of statutory interpretation, and provide an alternative interpretation of The Act in light of evident Congressional intent.

When interpreting a statute to determine its proper application, courts must generally start with the plain meaning of the text.[108] If the "terms of a statute [are] unambiguous, judicial inquiry is complete"[109] and the "sole function of the court is to enforce it according to its terms."[110] The *Bridgeport* court used a literal approach to interpret Section 114(b) of The Act, which states that:

> [t]he exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.[111]

Based on this interpretation, the court concludes that Congress intended that any unauthorized sampling is infringement.[112]

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106. *See, e.g.*, *Copyright Law—Sound Recording Act—Sixth Circuit Rejects De Minimis Defense to the Infringement of a Sound Recording Copyright*, 118 HARV. L. REV. 1355 (2005).

107. *See Bridgeport*, 410 F.3d at 798.

108. *See, e.g.*, Mansell v. Mansell, 490 U.S. 581, 588 (1989).

109. Taylor v. Freeland & Kronz, 938 F.2d 420, 424 (3d Cir. 1991) (quoting Demarest v. Manspeaker, 498 U.S. 184, 190 (1991)), *aff'd*, 503 U.S. 638 (1992).

110. Caminetti v. United States, 242 U.S. 470, 485 (1917).

111. 17 U.S.C. § 114(b) (emphasis added).

112. *Bridgeport*, 410 F.3d at 804 n.18 (quoting AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1486-87 (3d ed. 2002) (footnotes omitted)).

The court's reliance on the word "entirely" is flawed. The sentence containing this word, when read in context, describes a limitation on the rights of a copyright owner insofar as it explains that a sound recording copyright owner has *no recourse* against a new work that *is* an entirely independent fixation despite imitating the sounds of the original sound recording. The statute does not state that a sound recording copyright owner *does* have undeniable recourse against a new work that is *not* an entirely independent fixation, as the court concludes. The text itself is silent as to the rights of a copyright owner of a sound recording when it comes to works that are *not* entirely independently fixed, including where the work makes de minimis uses, as the use in *Bridgeport* arguably is. Digital sampling by nature requires the taking of some portion of a previously recorded work, which means the new work is not entirely independently fixed. However, the quantity of the original work used in the new work is what lays the foundation for a de minimis argument. The language of the statute does not demonstrate a congressional intent to confer a benefit on sound recording copyright owners by making the de minimis doctrine, which normally would apply to activities which would constitute infringement but for the minimal use, unavailable to defendants in sampling cases.

The *Bridgeport* court also employed a literal interpretation of the statute in its treatment of derivative works. It found that a sound recording copyright owner has the exclusive right to prepare derivative works and accordingly, "[a] recording that embodies samples taken from the sound recording of another is by definition a 'rearranged, remixed, or otherwise altered in sequence or quality.'"[113] The court reasoned that a new work which digitally samples from a protected sound recording, even if de minimis, is considered a derivative work and therefore infringes on the sound recording copyright owner's right to prepare derivative works.[114] This finding departs from current judicial practice in copyright law, which accepts the well established de minimis principle in light of the derivative work right.[115] The court fails to explain why the de minimis principle is available when determining infringement of a musical composition copyright regardless of the derivative work right granted therein, yet is not

113. *Id.*

114. *Bridgeport*, 410 F.3d at 800-01.

115. *See, e.g.*, *Newton*, 388 F.3d 1189, 1196-97 (9th Cir. 2004) (finding that a three note use of the musical composition was a de minimis use and did not constitute infringement).

available to derivative works of sound recordings.[116] In essence, by excluding the use of de minimis doctrine, and by characterizing the alleged infringing work in sound recording sampling cases as a derivative work, the *Bridgeport* court grants to sound recording copyright owners a stronger right to prepare derivative works than it does to musical composition copyright owners. The court does not provide any justification for these disparate levels of protection, stating only that a digital sample fits the definition of a derivative work for a sound recording, "a rearranged, remixed, or otherwise altered in sequence or quality."[117] Furthermore, the court did not analyze whether the sample in this case was "rearranged, remixed, or otherwise altered in sequence or quality," leaving future courts in the dark as to the contours of this standard. Given the absence of any details in the statute, the exemption of sound recordings from a de minimis analysis based on an argument that it infringes the derivative work right is unjustified.

Absent a finding of ambiguity, the court can still consult legislative history if a literal reading produces a result at "odds with the intentions of its drafters."[118] The Supreme Court has stated, "that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill."[119] The *Bridgeport* court determined that "[t]he legislative history [was] of little help because digital sampling wasn't being done in 1971."[120] The court is incorrect—the legislative history is relevant and reveals that the court's conclusions regarding de minimis and derivative works are contrary to congressional intent.

The committee reports from prior to passage of the Copyright Act of 1976 illuminate Congress's intentions regarding the rights and limitations conferred on a sound recording copyright owner. These reports suggest Congress did not intend for sound recording copyright owners to be exempt from a de minimis analysis or afforded more protection than musical composition copyright owners. The House report reveals that Congress envisioned a test of substantial similarity to determine if a sound recording is infringed. The record clearly states that sound recording "infringement

116. *See* Harvard Law Review, *supra* note 106, at 1359 (explaining that Section 114 of Title 17 should not be interpreted to grant a sound recording copyright holder a stronger or additional right).

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

118. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

119. Eldred v. Ashcroft, 537 U.S. 186, 210 n.16 (2003) (quoting from prior Supreme Court opinions).

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

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 . . . or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work."[121] The Senate Report equally supports this proposition regarding the reproduction right in copyrighted works and reads, "[a]s under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part."[122] Thus, it is known that Congress considered infringement actionable when a substantial part of the original is copied. The report is silent when it comes to determining if a de minimis use is actionable infringement for sound recordings; two inferences can be made from this silence. First, Congress's intent that substantial similarity results in infringement inherently assumes that the opposite is equally true: if there is not substantial similarity, then there is not infringement. Second, Congress may have assumed that given the relatively broad acceptance of the de minimis principle, there was no need to explicitly confirm its applicability. Hence, by not explicitly eliminating its application to sound recordings, it can be implied that de minimis was expected to apply to sound recordings as it does in other legal areas. Read against the background of existing law at the time Congress granted sound recordings copyright protection, it is odd that the *Bridgeport* court concluded that a de minimis analysis is unavailable for sound recordings merely because digital sampling did not exist at the time.

The legislative history of the Copyright Act of 1976 illuminates a similar problem with regard to the *Bridgeport* court's conclusions about derivative works. The House Report does not explicitly state whether a de minimis use can be characterized as a derivative work. Perhaps Congress did not explicitly state that a de minimis use should not be characterized as a derivative work because it assumed that the derivative work right for sound recordings would be applied in the same manner as that for musical compositions, where a de minimis use is not considered a derivative work and does not infringe the right of the copyright owner to create derivative works.

In its entirety, it appears that the *Bridgeport* court's reasoning is subject to justifiable counterarguments. The court's focus on the word "entirely" in the statute failed to account for the context in which the word appeared. Furthermore, the legislative history of The Act suggests that the

121. H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721 (emphasis added).

122. S. REP. NO. 94-473, at 58 (1975).

legal principle of de minimis is equally applicable to sound recordings as it is to musical compositions regardless of a derivative work right.

B. The Impact of a Fair Use Defense

Although the court's ruling cuts against clearly established judicial principles regarding de minimis use and the derivative work right, the impact of its holding remains to be seen. The following Section explores the likely impact of the court's holding on both courts and potential litigants.

The *Bridgeport* court eliminated the application of the de minimis use exception at the stage where it is determined whether works are sufficiently similar to constitute actionable copying. The court appeared to have been compelled by "a rare opportunity to follow a 'bright line' rule . . . [that] would promote a faster resolution of [sampling] disputes,"[123] and follows a much simpler approach by asking whether a license was obtained to sample; if not, then actionable infringement exists. Although the court offers a judicial economy argument to promote its bright-line rule, its retention of the fair use defense in copyright sound recording cases[124] arguably both mitigates the potential practical impact of the court's decision, and undercuts its arguments for judicial economy.

By eliminating the ability to argue de minimis at the substantial similarity stage but allowing a fair use defense, the *Bridgeport* court has paradoxically created more work for courts, as a fair use defense requires more analysis than does the defense of de minimis for actionable infringement. At the substantial similarity stage, the finding that a defendant's use was de minimis would end the inquiry. Under fair use, a finding of de minimis use would only be one factor to be weighed against three others.[125] However, caseloads may be reduced somewhat to the extent that potential litigants may be unsure about their ability to make a fair use defense. In this scenario, samplers may prefer to get a license before digitally sampling and avoid litigation altogether.

The *Bridgeport* ruling may also have significant effects on litigants, with correlating effects on judicial caseloads. Litigants may be reluctant to enter into litigation regarding the complex, uncertain, and fact-intensive inquiry under the four-factor fair use analysis.[126] A fair use defense re-

123. *Bridgeport*, 410 F.3d at 804 n.18 (quoting AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1486-87 (3d ed. 2002) (footnotes omitted)).

124. *Id.* at 805 (noting that on remand the trial judge is free to consider a fair use defense).

125. *See Ringgold*, 126 F.3d at 76 (explaining that it makes more sense to reject a claim because the use is quantitatively insubstantial then undergo a fair use analysis).

126. See *supra* note 47 and accompanying text for a description of fair use analysis.

quires an analysis of four factors. In most cases, the first factor, purpose and character of the use, will likely weigh against the defendant, since most digital sampling is incorporated into commercially produced and released works.[127] The second factor, nature of the copyrighted work, would likely be moot.[128] The third factor, amount and the substantiality of the portion used, should almost always weigh in favor of the defendant, since sampling typically involves only a minimal taking from the original work. Furthermore, given the quantitative amount artists sample from protected works, it would be difficult to ever conclude that such a minimal taking also constituted the "heart of the original work," a finding which would weigh against the defendant.[129] The fourth factor, effect on the market for the original work, depends largely on the genres of the two works involved in the case.[130] Where the two works are from different genres, this factor should weigh in favor of the defendant, as the new work will probably not impact the market for the original if the audiences for each genre do not overlap.[131] Overall, although there is good reason to believe that a defendant can successfully tilt the balance of fair use in his favor, the effort and expense that would likely go into litigating the fair use issue is great, especially in light of the difficulty of winning a summary judgment motion on fair use.[132]

Overall, courts will have to exert more effort in undergoing the analysis of a fair use defense rather than extinguishing the case on the basis of the de minimis principle. Similarly, litigants will have an uphill, although not unconquerable, battle in winning a sampling case on the basis of fair use.

C. The Future of Licensing for Digital Samples

The *Bridgeport* case effectively compels mandatory licensing for digital samples of sound recordings protected by copyright. Such a system has met with both criticism and praise from observers.

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127. *See* 1 NIMMER, *supra* note 9, § 13.05[A][1][c].

128. *See id.* § 13.05[A][2][a].

129. *See id.* § 13.05[A][3].

130. *See id.* § 13.05[A][4] (explaining that the assessment is of the effect on the market for the copyrighted work).

131. If both works are from the same genre, however, the fourth factor may present more of an obstacle to a sampler. One argument available to a defendant in such a case is that the new work would not replace the original work because fans of a particular genre of music may still purchase the works of both artists.

132. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (explaining that fair use is a mixed question of law and fact). Rarely is there ever no genuine issue of material fact with regard to the four factors of a fair use defense.

In the genre of rap music, for example, a single album may include multiple samples ranging from instruments to spoken phrases. Some argue that obtaining licenses for each sample would be time consuming and increase production costs by tens of thousands of dollars,[133] while others go as far as to say that the *Bridgeport* decision will result in the death of the art form of hip-hop.[134] Requiring a license to digitally sample may also stifle creativity by impeding the entrance of artists into the field who cannot afford to obtain the license, but could afford to purchase a sampler and sample the sound recording.[135]

Comprehensive licensing systems exist in other contexts and have succeeded without any major hindrances or clear evidence of impaired creativity.[136] Many major record labels have also established clearance departments to facilitate the implementation of licensing.[137] A mandatory licensing system also allows for musicians and record companies who have already invested in the production of the sound recording, with both their time and money, to be compensated by those who want to digitally sample the work. Furthermore, a licensing scheme would not necessarily stifle creativity, as the market would regulate the price of obtaining this license since the license would have to be cheaper than the cost of imitating the sound by re-recording it in a studio or the cost of defending a suit under a fair use theory.

One problem, however, that still exists with a mandatory sound recording licensing scheme is that the price of the license is not the only means by which creativity may be stifled. Non-economic reasons may also provide obstacles to obtaining licenses. For example, suppose the rap artist Eminem sought a license to sample from best-selling gospel singer Mahalia Jackson, but Jackson refused to grant such permission based on conflicting moral and political views. A compulsory license for sound re-

133. *See, e.g.*, Sheila Rule, *Record Companies are Challenging 'Sampling' in Rap*, N.Y. TIMES, Apr. 21, 1992, at C13.

134. *See, e.g.*, Gary Young, *6th Circuit Clamps Down on 'Sampling'*, NAT'L L.J. (Sept. 30, 2004) (quoting Lawrence E. Feldman of Feldman & Associates, who represent hip-hop musician Jazzy Jeff), *available at* http://www.law.com (registration required).

135. *See generally* Howell, *supra* note 56.

136. *See* U.S. COPYRIGHT CIRCULAR 73: COMPULSURY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS 1 (2003), *available at* http://www.copyright.gov/circs/circ73.pdf; *see also* 17 U.S.C. § 115 (providing for a compulsory license system for phonorecords).

137. *See, e.g.*, Young, *supra* note 134 (quoting Richard S. Busch of Nashville, Tennessee's King & Ballow law firm, which represented plaintiff Westbound Records, Inc. in *Bridgeport*).

cordings, as exists for musical compositions, would help avoid this type of situation.

In support of a mandatory licensing system, many "clearinghouses" for sampling have developed to ease the process of obtaining a license.[138] Clearinghouses usually work for the artist and are responsible for negotiating the license fee for sampling.[139] These clearinghouses would also be very familiar with the work of many artists. Therefore, they could advise artists seeking samples by indicating which works could likely be sampled and which works could not.[140] A good clearinghouse would also be able to ascertain the proper owner in the sound recording and therefore obtain a valid clearance on the sample.

On the whole, licensing, as long as rates are reasonable, seems to be a fair way to compensate artists who have already invested in creating a sound recording, while allowing others to make use of that work for a small price.

V. CONCLUSION

While many have criticized the *Bridgeport* court for departing from the basic principle of law of de minimis and carving out an exception to its use for digital sampling of sound recordings, the *Bridgeport* decision still allows defendants to argue fair use and potentially defeat an infringement claim on that ground. Had the court chosen to follow other areas of law, including copyright law for musical compositions, it could have applied the de minimis use exception to sound recordings. Instead, the court used a literal reading of the copyright statute to support a ruling that questionably contravenes congressional intent. In the end, mandatory licensing may represent a fair balance between promoting the goals of copyright law and protecting the work of others. Despite the criticism the *Bridgeport* court has received, it remains to be seen if its ruling will actually impact the way digital sampling occurs—after all, requiring licenses by law does not necessarily mean that artists will cease sampling without a license.

138. *See* Gilmore, *supra* note 53, at 68.

139. *Id.*

140. *See id.* (explaining that for example, Deborah Mannis-Gardner, of DMG, Inc., knows that Led Zeppelin samples "are not for sale at any price").