Taking De Minimis out of the Mix: The Sixth Circuit Threatens to Pull the Plug on Digital Sampling in Bridgeport Music, Inc. v. Dimension Films

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TAKING DE MINIMIS OUT OF THE MIX:  
THE SIXTH CIRCUIT THREATENS TO PULL THE PLUG ON  
DIGITAL SAMPLING IN BRIDGEPORT MUSIC, INC.  
V. DIMENSION FILMS  

I. INTRODUCTION

Throughout the history of music, artists and composers have stolen ideas from their predecessors and contemporaries.1 Digital sampling represents the latest method through which artists take pieces of pre-existing works and incorporate them into new compositions.2 While digital sampling allows artists to push the boundaries of musical creativity, it likewise pushes at the conventions of copyright law, spawning a myriad of litigation.3 As parties within the music industry engage in a contentious internal battle, copyright law struggles to reconcile its fundamental purpose — to protect existing works without further stifling creativity.4

In Bridgeport Music, Inc. v. Dimension Films (Bridgeport I),5 the Sixth Circuit eliminated the de minimis6 standard regarding the digital sampling of sound recordings, creating a new, simple rule: “get a

1. See, e.g., Heim v. Universal Pictures Co., 154 F.2d 480, 488 (2d Cir. 1946) (acknowledging classical composer Handel directly copied other composers). From classical composers to contemporary rappers, musicians have long made use of prior artists’ works. See Kenneth M. Achenbach, Comment, Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works, 6 N.C. J. L. & TECH. 187, 188 (2004) (noting “[s]ampling has been used in hip-hop, dance, and other genres of music for well over a quarter of a century”). For a more detailed discussion of how digital sampling has historical predecessors, see infra notes 66-68 and accompanying text.


3. For a discussion of the numerous copyright infringement actions initiated in the Bridgeport cases alone, see infra note 15 and accompanying text.

4. See Copyright Law Revision: Hearings Before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. of the Judiciary on H.R. 223, 94th Cong. 475-79 (1975) (testimony of Donald D. Merry, President, Sicom Electronics Corp.) (describing incentives given by copyright protection). Copyrights can be thought of as a “dangling carrot,” by which Congress encourages individuals to create works beneficial to society in exchange for limited exclusive rights to that work. See id. at 475 (balancing creation of incentives with exclusivity).

5. 383 F.3d 390 (6th Cir. 2004), amended on reh’g, 410 F.3d 792 (6th Cir. 2005) (clarifying prior holding upon similar basis).

6. See Ringgold v. Black Ent'mt Television, Inc., 126 F.3d 70, 74-75 (2d Cir. 1997) (interpreting legal maxim de minimis non curat lex as “the law does not concern itself with trifles”).
license or do not sample.'

Although such a ruling will allow courts to apply a uniform and judicially manageable standard, the analytical foundation of the court's reasoning is statutorily questionable, and policy concerns suggest a different outcome may be more appropriate.

This Casenote examines the Sixth Circuit's reasoning in *Bridgeport* in light of the applicable copyright law, as well as policy concerns affecting the music industry. Section II provides a detailed discussion of the facts of the *Bridgeport* case. Section III describes copyright law pertinent to copyrights in both musical compositions and sound recordings, as well as the substantial similarity and *de minimis* standards used in determining copyright infringement. Additionally, Section III provides a brief history of digital sampling in music, and also discusses other attempts by courts to deal with copyright infringement regarding digital sampling. Section IV discusses the Sixth Circuit's reasoning in light of the relevant case law and statutes. Section V looks at the potential shortcomings of the *Bridgeport* holding by analyzing copyright statutes and market factors. Finally, Section VI 1) posits that *Bridgeport* will ultimately lead to a torrent of litigation, stifling creativity in the music industry, and 2) presents alternative solutions.

II. FACTS

In 1998, Dimension Films released the film *I Got the Hook Up.*

The film depicts the tale of two friends, who discover a truck full of cellular telephones, played by rap impresario "Master P" and Anthony "A.J." Johnson. Looking to get rich quick, the friends sell the cellular phones, which eventually malfunction, raising the

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8. For a more detailed critique of the Sixth Circuit's statutory and policy analysis, see infra notes 135-61 and accompanying text.


TAKING DE MINIMIS OUT OF THE MIX

The film's soundtrack included the song "100 Miles and Runnin'" ("100 Miles") by the seminal rap group Niggaz With Attitude ("N.W.A."). The song, a dark tale of running from the law, included a sample from "Get Off Your Ass and Jam" ("Get Off") by George Clinton, Jr. and the Funkadelics.

In 2001, Plaintiffs Bridgeport Music, Southfield, Westbound Records, and Nine Records brought suit against approximately 800 defendants, among them Dimension Films and No Limit Films. Plaintiffs Bridgeport and Southfield are music publishers who license and sell copyrights in musical compositions; the latter plaintiffs, Westbound and Nine Records, distribute and produce sound recordings.

The suit revolved around the sampled use of the song "Get Off." Bridgeport and Westbound claimed ownership of the copyrights in the musical composition and sound recording, respec-

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12. See id. (following plot of film).

13. See generally Stephen Thomas Erlewine, Allmusic N.W.A. Biography, http://www.allmusic.com (search "N.W.A.") (last visited Oct. 14, 2005) (providing biography of rap music group). Formed in Los Angeles in 1986, N.W.A. was perhaps one of the most controversial groups in the history of rap music. See id. ¶ 1 (acknowledging group's public image). Featuring violent lyrics which were politically charged, N.W.A. gained critical acclaim not only for its lyrical content but also its sophisticated musical production. See id. ¶ 3 (praising musical prowess of group); see also Jason Birchmeier, Allmusic 100 Miles and Runnin' Review, http://www.allmusic.com/cgi/amg.dll?p=amg&sql=10:osl67ub0h0jh-T1 (last visited Oct. 9, 2005) (critiquing musical work by rap artist N.W.A.). A follow up single to the group's critically acclaimed album Straight Outta Compton, "100 Miles" "remains one of the group's best moments...the song's thick, heavy production showcase[d] rather brilliantly the fact that [group member] Dr. Dre had furthered his production talents immensely." Birchmeier, supra.

14. See N.W.A., 100 Miles and Runnin', on 100 MILES AND RUNNIN' (Ruthless Records 1990) (reciting lyrics). 100 Miles provided a sinister narrative of a police pursuit, filled with expletives and violent imagery. See id. (describing lyrical content of song).

15. See Bridgeport I, 383 F.3d 390, 393 (6th Cir. 2004), amended on reh'g, 410 F.3d 792 (6th Cir. 2005) (describing initiation of suit against named defendants). Originally, the four plaintiffs in this case alleged nearly 500 counts of copyright infringement and other state intellectual property claims against nearly 800 defendants. See id. (detailing size of original action). Subsequently, the district court severed that complaint into 476 separate actions, depending on which original work was allegedly infringed. See id. (recounting procedural history of current action).

16. See id. (noting intellectual property interests of various plaintiffs in suit). For a more detailed discussion regarding the applicable copyright law and the distinction between musical composition and sound recording copyrights, see infra notes 50-65 and accompanying text.

17. See Bridgeport I, 383 F.3d at 393 (acknowledging plaintiffs' causes of action regarding song "Get Off").
Bridgeport asserted the defendants infringed its copyright in the musical composition. The district court eventually dismissed these claims, concluding Bridgeport entered into an oral synchronization license agreement with the musical composition copyright owners of “100 Miles.”

Plaintiff Westbound claimed “100 Miles” digitally sampled the recorded version of “Get Off” without a license, infringing the sound recording copyright. According to testimony at trial, “Get Off” commenced with a three-note guitar solo. The three notes were not struck simultaneously, but played in rapid succession, a musical effect known as an “arpeggiated chord.” The plaintiffs’ expert, Randy Kling, testified that “a two-second sample from the guitar solo was copied, the pitch was lowered, and the copied piece was ‘looped’ and extended to 16 beats.” The sample appeared five times in the four-and-a-half minute song; the district court determined each looped sample lasted approximately seven to eight seconds. The repeated loop produced a “high-pitched, whirling

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18. See id. (noting plaintiffs’ interests in separate copyright claims over song “Get Off”).
19. See id. at 393-94 (stating Bridgeport’s copyright interest in underlying musical work). For a more complete analysis of the difference between musical composition and sound recording copyrights, see infra notes 50-65 and accompanying text.
20. See Bridgeport I, 383 F.3d at 393-94 (noting existence of oral synchronization license between Bridgeport and Ruthless Attack Muzick and Dollarz N Sense Music); see also Bridgeport II, 230 F. Supp. 2d 830, 839-38 (M.D. Tenn. 2002), rev’d, 383 F.3d 390 (6th Cir. 2005) (determining oral synchronization license existed). The district court found the oral agreements entered into were valid, and that the written license agreements, executed subsequently, served to memorialize the earlier agreement between the parties. See Bridgeport II, 230 F. Supp. 2d at 833-38. A synchronization license refers to a license often used in conjunction with movies, where a song is used as part of a background for a scene. See Donald S. Passman, All You Need to Know About the Music Industry 241 (4th ed. 2000) (defining synchronization license).
21. See Bridgeport I, 383 F.3d at 394 (specifying plaintiffs’ varying claims against various defendants).
22. See id. (noting song structure of “Get Off”).
23. See Bridgeport II, 230 F. Supp. 2d at 839 (describing notes allegedly infringed by defendants); see also Arpeggio, http://www.music.vt.edu/musicdictionary/texta/Arpeggio.html (last visited Oct. 9, 2005) (defining arpeggio and arpeggiated chord as, “[p]laying the notes of a chord consecutively (harp style). A broken chord in which the individual notes are sounded one after the other instead of simultaneously”).
24. For a discussion of looping as a sampling technique, see infra note 75 and accompanying text.
25. Bridgeport I, 383 F.3d at 394.
26. See id. (noting “this sample appears in the sound recording ‘100 Miles’ in five places; specifically, at 0:49, 1:52, 2:29, 3:20 and 3:46”); see also Birchmeier, supra note 15 (listing track information). The track “100 Miles” appeared on var-
sound that capture[d] the listener’s attention” and created dramatic anticipation for the rest of the song.27 No Limit did not dispute that “100 Miles” sampled “Get Off” or included the song on the film’s soundtrack.28

III. BACKGROUND

A) Protection Under Section 106 of the Copyright Act

Copyrights protect “original works of authorship fixed in any tangible medium of expression...”29 Section 106 of the Copyright Act30 provides that copyrightable subject matter includes at least eight different categories of creations, including musical works.31 Copyright holders receive the exclusive right to make copies, to prepare derivative works, to distribute copies, and to perform or display the copyrighted work publicly.32 In copyright infringement cases for digital sampling, it is usually necessary to prove the substantial similarity between the original and allegedly infringing work.33

28. See Bridgeport I, 383 F.3d at 393 (“There seems to be no dispute either that ‘Get Off’ was digitally sampled or that the recording ‘100 Miles’ was included on the soundtrack . . . .”).
30. See id. § 106.
31. See id. (creating exclusive rights in copyright).
32. See id. (listing grant of rights). The applicable portion of Section 106 provides the right:
1) to reproduce the copyrighted work in copies of phonorecords;
2) to prepare derivative works based on the copyrighted work;
3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4) in the case of literary, musical . . . and other audiovisual works, to perform the copyrighted work publicly;
   a. in the case of literary, musical . . . or other audiovisual work, to display the copyrighted work publicly; and
   b. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.
Id.
33. For a more detailed discussion of proving copyright infringement through similarity, see infra notes 34-40 and accompanying text.
i) Proving Infringement Via a Similarity of the Works

To successfully prove copyright infringement, a plaintiff must make a prima facie case showing that they own a valid copyright.\(^{34}\) Once the plaintiffs have established a valid copyright, they must also prove the defendant's use of the copyrighted material violates one of the exclusive rights bestowed upon the holder in Section 106.\(^{35}\) Success in copyright infringement suits is usually dependent upon the ability to prove that the defendant has copied a protected expression, and that the two works are substantially similar.\(^{36}\)

Proving unauthorized copying, however, is often difficult because the plaintiff needs to produce evidence of the actual copying.\(^{37}\) This evidence is usually proven circumstantially and depends upon a plaintiff's ability to demonstrate the defendant had access to the original work.\(^{38}\) Evidence of similarity is determined by distilling the elements that constitute the actual creative expression in both works, and determining whether the choices made by the defendant were the product of an independently creative process, or were essentially duplicative of the plaintiff's creative decision-making.\(^{39}\) While there are many defenses which can be raised to defend infringing uses of copyrighted material, two are pertinent to the digital sampling discussion. A defendant may 1) assert the use is small and trivial in the eyes of the law, or 2) the use of the material can be considered fair use.\(^{40}\)

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38. See generally Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (providing analysis for proving violation of exclusive right to reproduce copyrighted material). Although many other courts have adopted slightly varying standards, almost all are based in the standard set forth in Arnstein. See, e.g., Reyher, 533 F.2d at 90 (relying upon standard set in Arnstein).


40. For a discussion of the \textit{de minimis} use and fair use analyses, see infra notes 41-49 and accompanying text.
(1) De Minimis Use Analysis

The *de minimis* analysis requires that some significant level of copying must be present, and if "there are no similarities, no amount of evidence of access will suffice to prove copying." The de minimis analysis requires that there is substantial similarity in the copying, there is no infringement. The analysis additionally examines the amount of the copying taking place. Determining whether the allegedly infringing work is substantially similar considers whether the portion copied was at "such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying." Thus, even literal copying is permissible if the amount taken is insignificant enough to be considered *de minimis*. Nevertheless, should the court determine that the use is not *de minimis* and infringing, the defendant may still assert the fair use defense.

(2) The Fair Use Defense

As a matter of policy, courts acknowledge some types of infringement are valid and are a "fair use" of the copyrighted work.

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41. *Arnstein*, 154 F.2d at 468.
45. For a more detailed discussion of the fair use defense, see *infra* notes 46-49 and accompanying text. It is worth noting the defendants in *Bridgeport II* did not assert a fair use defense, as the district court judge did not find that infringement occurred. *See* Bridgeport Music, Inc. v. Dimension Films (*Bridgeport III*), 401 F.3d 647, 651 (6th Cir. 2004) (concluding fair use defense analysis unnecessary at trial). For a more detailed discussion of how the fair use defense is implicated in the Sixth Circuit's analysis, see *infra* notes 177-82 and accompanying text.
46. 17 U.S.C. § 107 (2005). The statute provides, in relevant part: Notwithstanding the provisions of [S]ections 106 and 106A [17 U.S.C. §§ 106 and 106A], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
There are several categories of uses of copyrighted material which are traditionally considered fair uses: scholarship, news reporting, and parody. In addition, courts consider four factors in deciding whether the use is fair: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work. The third factor, the amount and substantiality of the portion used, may affect the de minimis analysis — the smaller the amount used, the more likely courts are to find a fair use.

B) Musical Works are Protected by Two Copyrights

A musical work has two copyrights: one in the underlying musical work and the other in the actual sound recording. The underlying compositions have long been protected by the provisions of Section 106; a more recent statutory history, however, established a copyright in the actual sound recording.

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id. 47. See id. ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment . . . scholarship, or research is not an infringement of copyright."). 48. See id. (specifying considerations in finding fair use). 49. See Andrew Watt, Comment, Parody and Post-Modernism: The Story of Negativeland, 25 COLUM. J.L. & ARTS 171, 179 (2002) (noting smaller appropriations of copyrighted work more likely deemed fair use). Watt proposes that a fair use finding for digital samples is likely to be lower, based upon a listener’s ability to recognize the original source of a small sample. See id. (asserting split-second James Brown scream as problematic in fair use analysis).


51. For a more detailed discussion of the history and provisions of the sound recording copyright, see infra notes 56-64 and accompanying text.
The copyright in the underlying musical work consists of the words and music that the author or authors used in creating the composition's notes, lyrics, and melodies. The sound recording copyright protects the actual tangible recorded performance of the musical composition, and the musical choices that were made in expressing those underlying words and music. For example, while John Lennon and Paul McCartney own the musical composition of "Yesterday," other artists may own their recorded versions of the song. In practice, however, the rights in both the musical composition and the sound recording are often conveyed to third parties, such as music publishers and record labels.


53. See id. at 1669-70 (describing sound recording copyright).

54. See id. (illustrating difference between sound recording and music composition copyrights). The distinction between the sound recording and musical composition copyrights can be hard to conceptualize, and John Lennon and Paul McCartney's "Yesterday" provides a good example:

[T]he Beatles's "Yesterday" is protected by the same musical composition copyright regardless of how many times it is recorded. The sound recording copyright... protects one particular recording of a musical work. Therefore, each different recording of "Yesterday" is protected by a different sound recording copyright.

55. See Abramson, supra note 52, at 1670 (noting both musical composition and sound recording copyrights commonly conveyed to third parties). Therefore, while Paul McCartney and John Lennon composed "Yesterday," it is their publishing company, Northern Songs, which administers the musical composition copyrights. See The Beatles' Companies, http://www.rockmine.music.co.uk/Beatles/BeatleCo.html (last visited Oct. 9, 2005) (describing Beatles' publishing company). The Beatles' situation is in some ways unique in that they retained a significant ownership in their publishing company, Northern Music. See id. (noting publishing company established by Beatles). Similarly, the copyright owners traditionally assign the rights in the sound recording to a third party, the record company. See M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 28 (8th ed. 2000) (providing record companies often become copyright holders of sound recordings). Today, for example, there are "major labels," a conglomerate of three to five companies which are considered to be the industry leaders. See PASSMAN, supra note 20, at 84-85 (describing existence of five "major label" companies). "Major labels" are named as such due to their extensively staffed departments, and most importantly, the large distribution channels that they utilize to make their records available to the public. See id. (indicating organizational structure of large record companies). There have been numerous consolidations of the major record companies, and today, four major labels remain: Universal Music Group, Sony BMG Music Entertainment, Warner Music Group, and EMI Group. See List
ii) The Establishment of the Sound Recording Copyright

Although musical compositions have always enjoyed copyright protection, prior to 1972, there were no separate copyrights in sound recordings.56 Before the enactment of Section 114, underground record pirates directly copied existing records, and then obtained a mechanical compulsory license from the publishers.57 The addition of the sound recording copyright created a statutory right to protect the embodied performance of the music.58

Section 114 of the Copyright Act created a separate right in the actual fixed version of the recording, but limited that right in comparison to the provisions of Section 106.59 Specifically, Section 114(a) limited sound recording copyright holders to the right to make copies, the right to create derivative works, and the right to distribute copies.60 Section 114(b), however, limited the applicable rights in Section 114(a) to directly recapturing the sounds already of Record Labels, http://en.wikipedia.org/wiki/List_of_record_labels (last visited Oct. 12, 2005) (listing major labels).

Continuing with the Beatles for illustrative purposes, the sound recording copyright to Help!, the album on which the song “Yesterday” first appeared, has changed hands, and is currently owned by Capitol Records, while the music composition copyright has remained with Northern Songs. See, e.g., William Ruhlmann, Help! (US) Overview, http://www.allmusic.com/cg/amg.dll?p=amg&sql=10:pxoibkk96akz (last visited Oct. 9, 2005) (providing information regarding Beatles’ record). Capitol Records retained the sound recording copyright owner of The Beatles’ album Help! since its original release in 1965. See id. (detailing sound recording owner of Beatles’s album).

56. See Passman, supra note 20, at 308-09 (describing history of sound recording copyright).

57. See id. (crediting underground record piracy as impetus for creation of sound recording copyright). The mechanical compulsory license enables anyone to record a non-dramatic musical work once the owner of the copyrighted owner distributes phonorecords of the work. See generally 17 U.S.C. § 115 (2005) (creating compulsory license). Congress originally created this mandatory license in response to the rise of the piano roll and phonorecord industry. See Theresa M. Bevilacqua, Note, Time to Say Good-Bye to Madonna’s American Pie: Why Mechanical Compulsory Licensing Should be Put to Rest, 19 Cardozo Arts & Ent. L.J. 285, 289 (2001) (recounting history of mechanical compulsory licenses). Currently, compulsory licenses are more commonly thought of as the device through which artists obtain a mandatory license to the musical composition copyright in order to create “cover” songs of other artists’ works. See id. at 286 (crediting mechanical compulsory license with bestowing right to cover another artist’s works).

58. See Passman, supra note 20, at 310 (describing sound recording copyright protection).


60. See id. (delineating provisions of sound recording copyrights). Section 114(a) provides that, “[t]he exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106 . . . ” Id.
held in the fixed form. Therefore, the rights under Section 114(b) did "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." The owner of a particular version of a record could only bring an infringement action if they could prove that at least some substantial segment of the original sound recording had been copied. Thus, Congress designed the Sound Recording Act to provide protection of the actual unique performance captured, not the underlying music. Because digital sampling typically copies and manipulates the actual sound recording, it is important to understand its history and use in modern music.

C) The Rich Tradition of Sampling the Musical Composition

The concept of taking another composer's musical composition and transposing it to a new piece of music is not a recent phenomenon. Classical composers and artists have traditionally used

61. See 17 U.S.C. § 114(b) (stipulating exclusive sound recording copyright for fixed version). The statute, in relevant part, provides:

The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 [17 U.S.C. § 106] is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 [17 U.S.C. § 106] is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 [17 U.S.C. § 106] do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

62. Id.


64. See id. ("Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.").

65. For a discussion of digital sampling and its usage of sound recordings, see infra notes 69-81 and accompanying text.

66. See Josh Norek, Comment, "You Can't Sing Without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System, 11 UCLA ENT. L. REV. 83, 95 (2004) ("Since the beginning of Western music, musicians have liberally referenced works by other musicians."). Norek notes that while hip-hop receives more scrutiny under copyright law, artists in the genres of rock and roll and classical music have long borrowed from other musical sources. See id. (asserting increased scrutiny for
motifs and melodies from other composers, or have directly lifted passages note-for-note into their own works. This practice is de rigeur for jazz artists performing improvised solos, also known as "quoting."  

i) The Innovation of Sampling the Sound Recording

Previously, musicians sampled by crudely re-recording sections of analog tapes. The sound quality was often poor, and the analog storage medium did not allow for much manipulation of the source sounds. Advances to digital technology enables sounds to be precisely and accurately sampled without degradation of sound quality as well as providing greater flexibility in terms of manipulating the source sounds, making sampling an extremely attractive option. Rap music particularly benefited from advances in sampling, as artists unable to afford backing musicians, could now

hip-hop music). Norek identifies several artists such as the Red Hot Chili Peppers, whose song "Punk Rock Classic" makes use of a guitar riff from Guns N’ Roses "Sweet Child O’ Mine." See id. at n.65 (identifying guitar riff utilized from other artist’s work).


68. See Sean Singer, Velocity of Celebration: Jazz and Semiotics, (Feb. 1997), http://www.allaboutjazz.com/articles/ae0297_01.htm (describing importance of quoting in jazz). Quoting is important to jazz music for its effect upon the listener, with musicians playing:

[A]nything from Thelonious Monk’s Well You Needn’t to Scott Joplin’s “The Entertainer” to a familiar line from the Broadway tune “Gonna Wash That Man Right Outta My Hair.” Thad Jones once quoted “Pop Goes The Weasel” in a solo on “April In Paris.” The tone color, phrasing, and energy can be detected by certain members of the audience who general [sic] shout, applaud, or laugh.

Id.

69. See Johnson, supra note 2, at 139 (describing early sampling). The practice of sampling using analog tapes can be traced back to the “musique concrète” style, developed by French artists, who would create musical collages by cutting and splicing pre-recorded tapes in their music. See id.

70. See id. (noting sound quality improvements via digital technology). During the 1960s, musicians used the Mellotron, an early incarnation of the synthesizer, which used tape loops to recreate sounds. See id. The Mellotron differs from digital sampling in that it stored the sounds as magnetic fluctuations on standard audio tape, as opposed to the series of numbers used in digital sampling. See id.

71. See id. (claiming sampling creates greater opportunities to manipulate sounds as well as save costs). With the technological advances in sampling:

The combination of a sampler and a multi-track tape recorder essentially grants musicians access to an entire orchestra, including brass and percussion, with only minimal investment. This technology makes large, expensive studio sessions unnecessary and places today’s most popular instrumental sounds at the musician’s fingertips.

Id. at 139-40 (footnote omitted).
simply sample backing tracks from pre-existing recordings. While some artists did in fact clear samples with the sound recording and music composition copyright holders, many more adopted a "catch me if you can" attitude, sampling freely in the hopes that potential litigants would either remain unaware their works were being used, or would not bring suit.

ii) **Digital Sampling Allows for a Wide Range of Uses**

In modern music, sampling takes an actual segment of a sound recording or musical composition from a pre-existing work. Musicians typically manipulate samples, with the length of the sample and the extent of the manipulation varying in each use. The ability of the listener, therefore, to recognize the sample may turn on several factors: the length and distinctiveness being among the most prevalent.

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72. See Abramson, *supra* note 52, at 1668 (claiming "[sampling] allows a producer of music to save money (by not hiring a musician) without sacrificing the sound and phrasing of a live musician in the song.").

73. See Bridgeport I, 383 F.3d 390, 401 (6th Cir. 2004), amended on reh'g, 410 F.3d 792 (6th Cir. 2005) (noting prevalent "live and let live" attitude regarding infringing sampling); see also Passman, *supra* note 20, at 306-07 ("... artists and [record] companies often had an attitude along the lines of 'If they catch me, I'll make a deal.'").

74. See Williams v. Broadus, No. 99 Civ. 10957 (MBM), 2001 U.S. Dist. LEXIS 12894, at *2 n.1 (S.D.N.Y. Aug. 27, 2001) (describing sampling method used by musicians). Sampling, as described in *Broadus*, is "lifting part of a song from a pre-existing master recording and feeding it through a digital sampler, or by hiring musicians who re-play or re-sing portions of the pre-existing composition." *Id.*

75. See Krasilovsky & Shemel, *supra* note 55, at 77 (describing sampling). For example, in *Bridgeport*, the three-note sample was manipulated by "looping." *See* Bridgeport I, 383 F.3d 390, 394 (6th Cir. 2004), amended on reh'g, 410 F.3d 792 (6th Cir. 2005) (describing sample). Looping is a sampling technique in which a segment of music, also known as a "riff," is converted into a digital data file, and then sequenced in a repetitive manner. *See* Achenbach, *supra* note 1, at 201-02 (defining looping as "using a particular 'riff' from the original song consisting of several notes. The riff is sampled by conversion to a digital data file, which is then sequenced in a repetitive manner to create a rhythm track").

76. See generally Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271 (1996) (asserting several factors present in manipulation of samples). Szymanski notes that some samples are recognizable because they use a known, familiar song in a new context, or because the sample itself has been used often by other artists. *See id.* at 279 (citing David Sanjek, "Don't Have to DJ No More": Sampling and the "Autonomous" Creator, 10 CARDOZO ARTS & ENT. L.J. 607, 613 (1992)) (postulating basis for listener's ability to recognize sample's source). For example, Run D.M.C.'s "Walk this Way" challenges listeners to consider Aerosmith's original music in an entirely new manner. *See id.* (providing example of transformative sampling). Szymanski further notes that although James Brown's "Funky Drummer" was only a minor hit when originally released, it is easily recognized today due to the widespread sampling of Clyde Stubblefield's drumming performance. *See id.* at n.32 (noting drumbeat
nizable samples. The first breakthrough hit of rap music was The Sugar Hill Gang’s “Rapper’s Delight,” which made a very obvious use of a sample from Chic’s “Good Times.” While the original source of a quantitatively long sample may be easier to identify, this is not always the case. A very short howl by James Brown may be immediately recognizable due to its qualitative distinctiveness. In contrast, other groups, such as Public Enemy, relied on production techniques which also included samples, but which were so short and distorted that the original source was unrecognizable to the listener. In cases where the sampling is relatively small, the courts have utilized the de minimis use analysis in determining if actionable infringement has taken place.

### iii) Judicial Interpretation of De Minimis Use in Sampling

The de minimis use analysis regarding sampling is a relatively new and unsettled area of law. In *Newton v. Diamond*, the Ninth Circuit Court of Appeals held the use of a three-note flute solo in the Beastie Boys’ “Pass the Mic” did not rise to the level of an infringing use, because the use of the composition, and not the actual performance, was de minimis. In *Newton*, the Ninth Circuit em-

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79. See PASSMAN, supra note 20, at 306 (describing use of samples in songs). The length of the samples is often inconsequential to whether the listener is able to easily recognize the artist or the original work. See id.
80. See id. (providing examples of recognizable samples). For example, James Brown’s music is some of the most frequently sampled in rap music, and much of the sampled pieces are easily recognizable to most of the listening public. See id. (asserting James Brown’s music is commonly sampled in rap music). In addition, there appears to be a larger “wholesale lifting” of music for rap songs today. See id. (noting Robbie Williams song “Millennium” utilizes “You Only Live Twice” as underlying musical backbone).
81. See Public Enemy: Bio, http://www.mtv.com/bands/az/public_enemy/bio.jhtml, (last visited Oct. 9, 2005) (distinguishing Public Enemy’s production style). Public Enemy influenced the development of rap music, both lyrically and sonically. See id. ¶1 (crediting Public Enemy as rap innovators). Their production team, the Bomb Squad, earned critical praise for splicing samples to a degree where they were unrecognizable to any listener, creating “dense soundscapes that relied on avant-garde cut-and-paste techniques, unrecognizable samples, piercing sirens, relentless beats, and deep funk.” Id.
82. See Bridgeport I, 383 F.3d 390, 400 (6th Cir. 2004), amended on reh’g, 410 F.3d 792 (6th Cir. 2005) (acknowledging scarcity of legal precedent in determining appropriate analysis).
83. 349 F.3d 591 (9th Cir. 2003), cert. denied, 125 S. Ct. 2905 (2005).
84. See id. at 598 (holding musical composition use de minimis and not actionable). *Newton* is factually distinguishable from *Bridgeport* because in *Newton* the de-
ployed two methodologies in assessing whether there was substantial similarity between a secondary work and the sampled piece of music. First, the court found that the "fragmented literal similarity" analysis required an additional inquiry as to the question of substantial similarity between the two works. Next, the court considered whether qualitatively or quantitatively, that substantially similar use fell below a de minimis level.

The court characterized Newton's infringement claim as one requiring a fragmented literal similarity because the Beastie Boys copied an exact or nearly exact piece of the plaintiff's work, without copying the overall structure of the prior work. The Ninth Circuit held that cases classified as fragmented literal similarity presumed the copying resulted in a significant actual similarity between the works. Therefore, the court determined it necessary to further analyze whether the similar pieces were trivial or substantial in that similarity.

The substantiality of the similarity between the two works "is measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole." The court noted that the sampled portion was not qualitatively significant to the plaintiff's work, as the three-note sequence

fendants obtained the license for the sound recording of "Choir," a song written and performed by avant-garde jazz flutist James Newton. See id. at 592 (recounting facts of case). The Beastie Boys licensed the right to "Choir" from ECM, the sound recording copyright owner, but the composition copyright remained with Newton. See id. at 592-93 (providing details regarding copyright ownership). Newton sued on the basis that the musical composition copyright had been violated. See id. (stating basis of plaintiff's claim).


86. See id. (noting judicial reliance upon Nimmer's "fragmented literal similarity" analysis (referencing NIMMER ON COPYRIGHT § 13.03[A][2] at 13-45, n.92.2)).

87. See id. (identifying quantitative/qualitative appropriation analysis).

88. See Newton, 349 F.3d at 596 (applying fragmented literal similarity analysis).

89. See id. (explaining presumption of high similarity).

90. See id. (breaking down trivial and substantial elements analysis).

91. Id. (citing Worth v. Selchow & Righter Co., 827 F.2d 569, 570 n.1 (9th Cir. 1987)). The correct analysis is to determine whether the substantial portion was appropriated from the plaintiff's work. See id. (citing Worth, 827 F.2d at 570 n.1) (detailing correct standard application); see also Jarvis v. A&M Records, 827 F. Supp. 282, 291 (D.N.J. 1993) (defining "constituent elements of the work that are original") (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)).
only appeared once in the song for a mere six seconds. Further, the court held that qualitatively, the musical interval in the three-note sequence appeared in a variety of forms throughout the composition. The court concluded the value of Newton’s contribution was in the performance, and therefore, the actual similarity between the compositions was \textit{de minimis} as there was no substantial similarity. The \textit{Newton} case revolved around the \textit{de minimis} standard as applied to musical composition copyright infringement, and not in actions based upon sound recording copyright infringement. The analytical tools of the \textit{Newton} case, however, formed the basis of the district court’s holding in \textit{Bridgeport I}.

IV. NARRATIVE ANALYSIS

A) The District Court Decision

At trial, defendant No Limit Films ("No Limit") moved for summary judgment on the basis that the digitally sampled chord from the unlicensed sound recording did not meet the requisite level of originality, and therefore, was not copyrightable. No Limit argued further that even if a valid copyright did exist, that the use of the sample from "Get Off" was \textit{de minimis}, and therefore, not actionable. The district court found that the originality of the sampled music could be analyzed by the way in which the notes were used and their effect upon the listener, rather than the originality of the actual notes. The court found that a reasonable jury

92. See Newton, 349 F.3d at 597 (determining sequence comprised only two percent of original work). The three-note sequence lasted for approximately six seconds out of the four and a half minute licensed sound recording. See id. (calculating quantitative significance of sequence).

93. See id. (concluding Newton failed to establish sampled section’s particular significance in original composition).

94. See id. at 598 (concluding composition use was \textit{de minimis}). The court particularly noted that on the facts of the case, a listener would be unable to recognize Newton’s contribution as a composer, separate from his talent as a performer. See id.

95. See Bridgeport I, 383 F.3d 390, 396 (6th Cir. 2004), amended on reh’g, 410 F.3d 792 (6th Cir. 2005) (concluding sound recording requires different analysis than that for musical composition).


97. See Bridgeport I, 383 F.3d at 394 (asserting “the sample was legally insubstantial and therefore does not amount to actionable copying under copyright law”).

98. See Bridgeport II, 230 F. Supp. 2d at 839 (describing originality requirement analysis for copyrightable element).
could conclude that the chord appeared in an original way and was "therefore entitled to copyright protection." 99

Turning to the question of *de minimis* use, the district court determined that based upon either a qualitative/quantitative *de minimis* analysis, or the fragmented literal similarity test, the use of the sample in question did not rise to the level of an infringing use. 100 The district court found that under each method of analysis, the *de minimis* standard was a "derivation of the substantial similarity element," and that therefore, the key question was whether the average listener would be able to discern the original source of the sampled recording. 101 After listening to both "Get Off" and "100 Miles," the court found that no reasonable juror, even one familiar with George Clinton's music, could have known the original source without having been told. 102

Additionally, the court found that the small amount of actual copying, as well as the actual difference between the songs, supported a finding of no copyright infringement. 103 Balancing the need of artists to use existing music to create new works, and noting that the purpose of copyright law was to "deter wholesale plagiarism of prior works[,]" the court granted No Limit's motion to dismiss Westbound's sound recording infringement claim. 104 Westbound appealed to the Sixth Circuit, challenging the district court's usage

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99. *Id.*

100. See *Bridgeport I*, 383 F.3d at 395 (concluding use was *de minimis* and not actionable).

101. *Bridgeport II*, 230 F. Supp. 2d at 841 (deriving *de minimis* analysis from substantial similarity analysis).

102. See *Bridgeport I*, 383 F.3d at 395 (finding reasonable user could not recognize sample "Get Off" unless informed).

103. See id. ("This finding, coupled with findings concerning the quantitatively small amount of copying involved and the lack of qualitative similarity between the works, led the district court to conclude that Westbound could not prevail on its claims for copyright infringement of the sound recording."); see also *Bridgeport II*, 230 F. Supp. 2d at 841-42 (detailing district court analysis). The district court determined that each looped segment lasted seven or eight seconds, and that only 40 seconds out of the total four and a half minute length of "Get Off" used the sample. See *Bridgeport II*, 230 F. Supp. 2d at 841 (determining total use of sample in relation to length of song). In addition, the court found that the actual mood of "Get Off" was "celebratory, and meant to instill a positive feeling in the listener, whereas '100 Miles' was a dark and brooding piece, in which the 'Get Off' sample created additional "tension and apprehension at the sound of pursuing law enforcement." *Id.* at 841-42.

104. *Bridgeport II*, 230 F. Supp. 2d at 842-43 (dismissing Westbound's sound recording infringement claim). The court concluded that because musical borrowing was an essential element of creating new works, that "[i]f even an aficionado of George Clinton's music might not readily ascertain that his music has been borrowed, the purposes of copyright law would not be served by punishing the borrower for his creative use." *Id.*
of the *de minimis* copyright infringement analysis in determining that its claims were not actionable.\(^{105}\)

**B) Reversal by the Sixth Circuit**

In a unanimous decision, the United States Court of Appeals for the Sixth Circuit reversed the district court’s decision, disagreeing with the lower court’s analysis.\(^{106}\) The Sixth Circuit accepted Westbound’s claim that neither a substantial similarity nor a *de minimis* analysis were appropriate because No Limit Films did not dispute that it digitally sampled the sound recording of “Get Off.”\(^{107}\) Indeed, the court concluded that use of the substantial similarity analysis for musical composition infringement was not proper when dealing with sound recording infringement, and that the creation of a new rule was necessary.\(^{108}\) The court based its conclusion upon the statutory language of the Copyright Act, and its interpretation of the sound recording copyright holders as absolute.\(^{109}\) Further, policy concerns demanded something approach-

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105. *See* *Bridgeport I*, 383 F.3d at 393 (describing grounds for Westbound’s appeal). Bridgeport Music also appealed the district court’s decision, not on the basis of the summary judgment regarding its oral synchronization license, but in its attempt to “amend the complaint to assert new claims of infringement based on a different song included in the sound track of *Hook Up*.” *Id.*

106. *See* *id.* (disagreeing with district court analysis). In granting summary judgment, the court reviewed the case *de novo*. *See* *id.* (citing *Smith v. Ameritech*, 12 F.3d 857, 863 (6th Cir. 1997)) (providing standard of review). “In deciding a motion for summary judgment, the court must view the evidence and [all] reasonable inferences in the light most favorable to the nonmoving party.” *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (articulating basis for granting summary judgment). If there are no genuine issues of material fact, the moving party is entitled to summary judgment as a matter of law. *See* *Fed. R. Civ. P.* 56(c) (articulating basis of summary judgment standard).

107. *See* *Bridgeport I*, 383 F.3d at 395 (articulating plaintiff Westbound’s claim on appeal).

108. *See* *id.* at 396 n.4 (acknowledging “dearth of legal authority” dealing with sound recording copyright infringement). The court concluded that if a musical composition copyright had been at issue, its analysis would have followed the district court’s analysis, but because a sound recording was at issue, its analysis differed. *See* *id.* at 396 (claiming district court analysis proper for music composition copyright infringement). In addition, the court noted that it would have agreed with the district court’s analysis regarding the originality of the arpeggiated chord sampled from “Get Off” had the musical composition been at issue. *See* *id.* (concurring with originality analysis). In the case of sound recordings, however, the actual fixation of the sounds in the master recording satisfied the originality requirement. *See* *id.* (holding actual fixation of sounds constituted original expression).

109. *See* *id.* (specifying statutory language of Copyright Act formed basis of reasoning).
ing a bright-line, benefiting other courts and creating a more efficient marketplace for copyright clearances.110

i) The Sixth Circuit's Statutory Analysis

The court asserted that their “analysis begins and largely ends” with Section 114 of the Copyright Act.111 Based upon the history of the statute, the creation of a separate right for the protection of sound recordings demonstrated the intentional creation of distinct and different rights from musical compositions.112 Further, citing the actual statutory language of Section 114, the court asserted that the sound recording copyright holders enjoyed an absolute right to their musical work.113

Looking at the history of the Copyright Act, the court acknowledged that the overall purpose of copyright law centered upon giving protection to a creator’s work without stifling further creativity.114 The musical composition copyright regime reinforced this determination, as artists could protect their own content from being copied, but could not exclusively control their works or “fence them off from the world at large.”115 The court interpreted the creation of the sound recording copyright as giving an exclusive right for the copyright holder, as other artists could imitate the creative content of the musical work via a compulsory license, but could not duplicate the original work.116 Therefore, if one could not copy the sound recording for an entire work, the court concluded that it could not copy something less than the whole, without infringing the sound recording copyright.117

Based on this history, the court attempted to adopt a literal interpretation of the statutory language.118 The court determined that Section 114 specified the exclusive rights in Section 106 for the

110. See id. ("The music industry, as well as the courts, are best served if something approximating a bright-line test can be established.").
111. Id.
112. See Bridgeport I, 383 F.3d at 397 (examining statutory history of Section 114).
113. See id. (stating court's analysis).
114. See id. at 398 (recognizing policy balancing promoting creativity with protecting works).
116. See id. ("It must be remembered that if an artist wants to incorporate a "riff" from another work in his or her recording, he is free to duplicate the sound of that "riff" in the studio.").
117. See Bridgeport I, 383 F.3d at 398 (concluding only copyright owner has right to sample own work without license).
118. See id. at 401 ("[T]here is no Rosetta stone for the interpretation of the copyright statute. We have taken a 'literal reading' approach.").
owner of the sound recording: the right to make copies, the right to prepare derivative works, the right to distribute copies, and to perform the work via digital audio transmission. Further, because the original 1971 Sound Recording Amendment was enacted to protect against the technological advances, which at that time enabled record pirating, Section 114(b) gave the sound recording copyright holder an exclusive right to duplicate the sound recording. Analyzing Section 114(b), the court held the exclusive right of the sound recording copyright holder to prepare derivative works under Section 106 applied in situations where artists manipulated the actual sounds fixed in the recording. While an artist could feel free to duplicate the notes and sounds in the recording, to directly lift the sample without a license constituted a per se infringing use.

ii) The Sixth Circuit's Policy Analysis

The court found that policy determinations also supported establishing a bright-line rule. First, the court found that a "license or do not sample" standard would create easy enforcement and help promote a self-regulating market for sampling clearance licenses. Although this rule would allow for greater judicial economy in deciding sampling cases, the court disputed that this was their primary rationale in rejecting the de minimis use analysis, deeming sampling as not only an intellectual taking, but as an actual physical misappropriation.

Concluding that an artist's decision to sample is always intentional, the court determined that sampling the sound recording without a license was per se an infringing use. By establishing a bright-line rule for sound recording infringement, the court contended there would be easier enforcement of copyright law and that the rule would not stifle creativity. Under this ruling, artists wishing to use the section of an existing recording could simply

119. See id. at 397 (determining Section 114(a) provided basis for rights of sound recording copyright holder).
120. See id. at 398 (noting policy behind creation of sound recording copyright).
121. See id. (interpreting sound recording copyright).
122. See Bridgeport I, 383 F.3d at 398 (concluding artist cannot sample another's work without license).
123. Id. at 398-99 (elucidating need for bright-line rule).
124. See id. at 399 (analogizing digital sampling as physical taking).
125. See id. (determining sampling always intentional).
126. See id. at 396 ("We do not see this as stifling creativity in any significant way.").
recreate the desired piece of music in the studio. In instances where the artist did not want to recreate the music for either creative or financial reasons, obtaining a license would be necessary. By adopting this rule, the court posited that the digital sample licensing market would benefit significantly as internal market controls would establish more uniform licensing fees, and set limits upon such fees. Theorizing that the sound recording owner could not exact a license fee greater than the actual cost of recreating the sounds, the court's holding would assist in setting boundaries upon the fees exacted by the sound recording owners.

Aside from the statutory analysis and the market interests involved, the court also determined that theoretically, taking three notes of a sound recording no matter how small, took something of value from the copyright owner. An inquiry into how much or the intent behind the sampling is irrelevant. For the owner of the sound recording copyright, the value of the copyright was not in the notes, but in the sounds which were fixed in the recording. Therefore, the taking was not intellectual, but rather a physical taking. To adopt a de minimis or substantial similarity standard for digital sampling would require "mental, musicological, and technological gymnastics," the kind of which the court believed would result in an inefficient music economy.

V. CRITICAL ANALYSIS

A) Bridgeport's Elimination of the De Minimis Standard Results in Problems Greater than its Potential Benefit

While the Sixth Circuit's elimination of the de minimis exception for sound recording copyrights increases judicial economy and ease of enforcement, the court's ruling is problematic in its statu-

127. See Bridgeport I, 383 F.3d at 399 (noting artists' ability to recreate sounds).
128. See id. (determining bright-line ruling will result in more uniform digital sample licensing market).
129. See id. at 398-99 (suggesting "copyright holder[s] cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording.").
130. See id. at 399 ("[E]ven when a small part of a sound recording is sampled, the part taken is something of value.").
131. See id. ("No further proof of that is necessary than the fact that the producer of the record or the artist on the record intentionally sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both.").
132. See Bridgeport I, 383 F.3d at 399 ("[I]t is not the 'song' but the sounds that are fixed in the medium of choice.").
133. See id. (characterizing different theoretical basis for reasoning).
134. Id. (justifying non-application of de minimis analysis).
tory interpretation as well as its policy justifications. By taking Section 114 as the guiding statute, the court misinterprets the statutory analysis indicating that the creation of the sound recording copyright still required an evaluation of the substantial similarity of the original and allegedly infringing works. In addition, the court miscalculates both its policy analysis likening sampling to a physical taking, as well as its assumption that eliminating a de minimis use analysis will help to establish a self-regulating license market.

i) A Critique of the Sixth Circuit's Statutory Analysis

First, the court engages in an improper analysis of the actual statutory language as well as ignoring the legislative history of Section 114. The court interpreted Section 114's provision regarding the right to create derivative works as prohibiting sampling of the sound recording by anyone other than the copyright owner. It appears, however, Section 114 actually stipulates that the sound recording copyright owner is “limited” in sampling the actual fixed copy of the work. Therefore, Section 114 does not operate as an additional or stronger right; it must be read as a limitation upon the more general provisions of Section 106, which includes the substantial similarity analysis in proving infringement.

Furthermore, the legislative history of Section 114 also indicates that Congress envisioned the substantial similarity analysis should be included in analyzing sound recording copyright infringement. While the court determined that the de minimis use analysis was applicable to music composition copyrights, it asserted

135. For a critique of the Sixth Circuit's statutory and policy analysis, see infra notes 138-61 and accompanying text.
136. For a critique of the Sixth Circuit's statutory analysis, see infra notes 138-45 and accompanying text.
137. For a critique of the Sixth Circuit's policy analysis, see infra notes 146-61 and accompanying text.
138. See Recent Case: Copyright Law - Sound Recording Act - Sixth Circuit Rejects De Minimis to the Infringement of a Sound Recording Copyright. - Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390 (6th Cir. 2004), 118 HARv. L. Rev. 1355, 1359 (2005) [hereinafter Recent Case] (“Although the court in Bridgeport Music relied heavily on the copyright statute to justify its holding, nothing in the statute’s history or language requires that a substantial-similarity inquiry not apply to a sound recording copyright.”).
139. See id. (proposing court’s reading of statutory language was incorrect).
140. See id. (critiquing court’s analysis of Section 114).
141. See id. (concluding Section 114 does not create additional or stronger right).
142. See id. at 1359-60 (averring court did not consider history of Section 114).
sound recordings required a separate analysis. The court reasoned that because digital sampling was not at issue in 1971, it was difficult to discern the legislative intent in creating the sound recording copyright. Although Congress may not have anticipated the emergence of digital sampling, it did believe that the copying of "any substantial portion of the actual sounds" constituted infringement.

ii) A Critique of the Sixth Circuit's Policy Analysis

By likening the taking of a digital sample to an actual physical taking, the court misconstrued the nature of sampling. An amicus brief argued that "digital sampling is the creation of a copy, not the seizure of the original sound." Thus, digital sampling leaves the original sound recording intact, much like photocopying a book creates a copy without destroying the original. Categorizing digital sampling as a physical taking does not create a meaningful basis upon which sound recordings deserve greater copyright protection. Therefore, because digital samples cannot be reasonably construed as physical takings, the Sixth Circuit's conclusion categorizing them as such does not follow.

Secondly, the court assumes that potential samplers have similar motivations in attaching value to samples, and incorrectly assumes some market equilibrium will follow. The court proposes that because an artist has the option to recreate the sounds in the studio and obtain a mechanical compulsory license, it will prevent copyright holders from exacting a license fee greater than the cost

143. See Bridgeport I, 383 F.3d 390, 396 (6th Cir. 2004), amended on reh’g, 410 F.3d 792 (6th Cir. 2005) (concluding infringement analysis of musical composition copyright varies from analysis for sound recording infringement).
144. See id. at 401-02 ("The legislative history is of little help because digital sampling wasn’t being done in 1971.").
145. Recent Case, supra note 138, at 1359-60 (citing H.R. REP. No. 94-1476, at 107 (1976)) (italics omitted).
146. See Bridgeport I, 383 F.3d at 399 (proposing sampling “is a physical taking rather than an intellectual one”).
148. See id. (analogizing digital sampling to photocopies of books).
149. See id. (proposing “[a] distinction between physical and intellectual taking . . . is not meaningful and does not distinguish copying of sound recordings from many other types of copying”).
150. See Bridgeport I, 383 F.3d at 401 (concluding recording industry and recording artists possess ability to create meaningful guidelines for licensing).
of simply re-recording the desired music. The court overlooks what the sampler wishes to obtain — the original and unique expression of the notes. In some cases, the musical composition may be of secondary interest, as the actual composition is manipulated. What is of value to the sampler is the unique nature of the original recorded sounds and the creative choices that were made in the actual fixation of the composition. In *Newton*, the court deemed that it was the actual embodied performance of the music that contained the value, not simply the configuration of a particular combination of notes.

Finally, the assumption that the Sixth Circuit's holding will facilitate the creation of a sample license market ignores the reality of the current market failure. In some instances, because both parties recognize it is a particular version of the song that an artist wishes to sample in creating a secondary work, the copyright owner will be able to exact a fee much higher than the cost of recreating the sounds in the studio. Further, the possibility remains that

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151. See id. at 398-99 (asserting license holders' inability to obtain excessive fees).
152. See Recent Case, *supra* note 138, at 1362 (recognizing "sampling the sounds creates an expression the musician may not otherwise be able to articulate").

In some cases, you use a sample because its [sic] a really unique sound you want and it would be impossible to get otherwise, like [John] Bonham's kick drum [from the Led Zeppelin album "Houses of the Holy"] .... [You] could probably, with a lot of setup and experimentation, get the sound you are after. But it is so much faster to use a sample." Szymanski, *supra* note 76, at 272 (alterations in original) (citing Dupler, *supra*, at 74).
155. See Newton, 349 F.3d at 595 (noting importance of original performance). Although *Newton* is distinguishable because the Beastie Boys did obtain a sound recording license, it is still significant because the court found that the actual expression performed in the flute solo could not be captured even through transposing the music composition. See id. at 595-96 (placing additional value upon performance).
156. See Achenbach, *supra* note 1, at 199 (critiquing Sixth Circuit's failure to acknowledge unequal bargaining power).
157. See id. at 200 ("The consideration of cost is particularly important when making a decision that could dramatically increase such costs."). In addition to noting that the price for the actual license could become extremely high, Achen-
some copyright holders will never allow for their sound recordings to be sampled. In accordance with current music industry standards, artists, who do wish to obtain licenses for digital samples, must clear both the musical composition and sound recording copyright. Although the rights to a musical composition can be acquired via the mechanical compulsory license, the copyright for the entire musical composition sets the statutorily defined fee, and samplers generally rejected it as an impracticable solution. As a result, because most songs contain more than one sample, the compulsory license scheme is prohibitively expensive for many artists.

VI. IMPACT

Noting the Bridgeport case raised complex issues for copyright law, the Sixth Circuit unanimously affirmed its decision after rehearing the case en banc. Digital technology, however, still holds a permanent and important role in the creative efforts of musicians

bach claims that the bargaining process for both the musical composition and sound recording copyrights also places a potentially deterring financial burden upon the sampler. See id. at 199-200 (predicting outcome of holding).

158. See generally Bill Werde, Defiant Downloads Rise From Underground, N.Y. Times, Feb. 25, 2004, at E4 (recounting details of The Grey Album). In 2004, Brian Burton, a young Los Angeles based disc jockey (DJ) known as Danger Mouse, released The Grey Album, which took rapper Jay-Z’s a cappella version of The Black Album and mixed it with tracks from the Beatles’ White Album. See id. (providing underlying facts of album’s release); see also Achenbach, supra note 1, at 188-89 (articulating details regarding creation of record). Originally releasing only promotional copies, the record quickly gained critical acclaim for its ingenious usage of both records into a new recording. See Achenbach, supra note 1, at 187 (praising ingenuity of record).

Because Burton did not attempt to obtain a license to the Beatles’ work, EMI, the owner of the musical composition to the White Album, sent Burton a cease-and-desist letter once they learned of the album’s distribution. See id. at 189 (detailing EMI’s response). Some artists like the Beatles do not allow their work to be sampled under any circumstances. See Werde, supra, at E4 (acknowledging Beatles refusal of copyright license requests). In addition, it is possible that if Burton did attempt to clear the licenses for all of the copyrights, the fees would be prohibitively high. See id. (“[I]f Mr. Burton had been able to get permission . . . from both the Beatles and Jay-Z, he would probably have had to give away more than 100 percent of his publishing rights.”).

159. See Norek, supra note 66, at 90-91 (describing current digital sample clearance procedures).

160. See Szymanski, supra note 76, at 291 n.61 (elucidating impracticability of compulsory musical composition license for samples).

161. See id. (concluding compulsory licensing scheme unattractive option for samplers).

162. See generally Bridgeport Music, Inc. v. Dimension Films (Bridgeport IV), 410 F.3d 792, 795 (6th Cir. 2005) (reaffirming prior holding). Aware of these issues and others raised in the amicus briefs filed by various parties, the Sixth Circuit recently granted a motion for a rehearing en banc to reconsider its ruling on
in modern music.\textsuperscript{163} As one commentator notes, the tension digital sampling places upon copyright law is rapidly approaching a critical mass, where musicians, the recording industry, and courts struggle to determine an appropriate copyright regime that can effectively deal with digital sampling.\textsuperscript{164} \textit{Bridgeport} is important because it addresses an important area of digital sampling — the issue of \textit{de minimis} use in regards to sound recording copyright infringement.\textsuperscript{165} In eliminating the \textit{de minimis} use standard for sound recording infringement, the Sixth Circuit opens the floodgates for litigation.\textsuperscript{166} As a result, numerous commentators that have traditionally been on opposing sides — those representing the interests of musicians as well as those representing the interests of copyright holders — claim that the \textit{de minimis} use standard should not be eliminated, albeit for different reasons.\textsuperscript{167}

\textbf{i) The Sixth Circuit Opens the Floodgates for Litigation}

It is clear that the \textit{Bridgeport} holding sets a clear and manageable standard for courts to follow.\textsuperscript{168} Although the court claims its intent in creating the rule was not simply for judicial economy, with nearly 500 cases filed by \textit{Bridgeport}, setting a bright-line standard is attractive to potential plaintiffs as well as courts.\textsuperscript{169} While this rule may rest upon a debatable statutory analysis, other courts may find the rule attractive, as it could be perceived as creating greater ease for copyright enforcement.\textsuperscript{170} Plaintiffs can rely on summary judg-

\textsuperscript{163}See \textit{Szymanski}, \textit{supra} note 76, at 330 (asserting "digital technology may greatly enrich the creative process by generating countless new, transformative works").

\textsuperscript{164}See \textit{Achenbach}, \textit{supra} note 1, at 190 (noting struggle between parties in determining appropriate copyright law).

\textsuperscript{165}For a discussion of the \textit{de minimis} use analysis in regards to digital sampling, see \textit{supra} notes 81-94 and accompanying text.

\textsuperscript{166}For a discussion regarding the immense litigation that may occur as a result of the Sixth Circuit's holding, see \textit{infra} notes 167-72 and accompanying text.

\textsuperscript{167}For a discussion of how parties on traditionally differing sides of copyright law equally oppose the \textit{Bridgeport} holding, see \textit{infra} notes 168-71 and accompanying text.

\textsuperscript{168}See \textit{Bridgeport I}, 383 F.3d 390, 398 (6th Cir. 2004), \textit{amended on reh'g}, 410 F.3d 792 (6th Cir. 2005) (noting rule's ease of enforcement).

\textsuperscript{169}See \textit{id.} at 399-400 (claiming judicial economy did not motivate decision).

\textsuperscript{170}For a critique of the statutory justifications for the Sixth Circuit's holding, see \textit{supra} notes 138-45 and accompanying text.
ment to obtain judgments against those who sample even minute portions of sound recordings.\footnote{171. See Fed. R. Civ. P. 56(c) (articulating summary judgment standard). Applying the Bridgeport rule and eliminating the \textit{de minimis} use analysis, a copyright holder would only need to factually demonstrate a musician sampled the sound recording without a license, in order to obtain summary judgment on the issue of infringement.}

Although the Sixth Circuit claimed one’s views concerning digital sampling depends upon “where one stands,” this easily enforceable rule has brought together parties on traditionally opposing sides of the copyright regime.\footnote{172. See Bridgeport I, 383 F.3d 390, 401 (6th Cir. 2004), amended on reh’g, 410 F.3d 792 (6th Cir. 2005) (noting differing views on sampling). The Sixth Circuit notes: As is so often the case, where one stands depends on where one sits. For example, the sound recording copyright holders favor this interpretation as do the studio musicians and their labor organization. On the other hand, many of the hip hop artists may view this rule as stifling creativity. \textit{Id.}} Parties who have traditionally represented the interests of the copyright holders have defended the \textit{de minimis} standard.\footnote{173. See, e.g., Gary Young, \textit{Court Clamps Down on ‘Sampling’; Warnings of Disaster over 6th Circuit Ruling on Copying Records}, NAT’L L.J., Sept. 27, 2004, at 10 (noting parties traditionally opposed to sampling defending \textit{de minimis} standard).} The Recording Industry Association of America ("RIAA") claims the problem created by the Sixth Circuit’s ruling creates retroactive liability for those who properly relied upon the previous rules.\footnote{174. See id. (proposing holding will cause “a torrent of lawsuits”). The RIAA is the trade group which represents the record labels in the music industry. See Recording Industry Association of America — About Us, http://www.riaa.com/about/default.asp (last visited Oct. 12, 2005) (announcing mission statement of RIAA). The RIAA generally represents the interest of copyright holders such as the record labels and is the party who brought suits against illegal file sharers. See Copyright Infringement Lawsuits Brought Against 753 Additional Illegal File Sharers, Feb. 28, 2005, http://www.riaa.com/news/newsletter/022805.asp (touting RIAA’s suits against illegal file sharers).} Instead of avoiding litigation, many predict the Sixth Circuit’s ruling will open the floodgates for litigation.\footnote{175. For a discussion of the Sixth Circuit’s anticipation that the Bridgeport holding will lead to more licensing in order to avoid litigation, see supra notes 156-58 and accompanying text; see also Young, \textit{supra} note 173, at 10 (warning increase in litigation will result).} Similarly, the attorney who argued the case for the plaintiffs contends that the broad rule will result in more, not less, litigation and that a case-by-case analysis is still preferable.\footnote{176. See \textit{Step Away From the Sampler}, KEYBOARD MAG., Jan. 2005, http://www.keyboardmag.com/story.asp?sectioncode=29&storycode=4979 [hereinafter \textit{Step Away}] (quoting plaintiff’s attorney disagrees with Sixth Circuit’s holding).}
The Sixth Circuit’s Rule Threatens to Upset the Traditional Copyright Balance

In addition to a torrent of litigation, the RIAA also argues that the traditional balance of copyright law will be upset. Indeed:

For more than a decade, the music industry has conformed its conduct to the existing rules—obtaining licenses for sampling when appropriate, and relying on de minimis and fair use principles if and where they apply.

It is possible that the elimination of the de minimis standard could be solely applied in making the prima facie case for infringement, to which a fair use defense could then be applied. Alternatively, the Bridgeport holding could potentially eliminate any substantial similarity analysis, which would have significant consequences if applied to the actual fair use defense. The third test of the fair use defense examines the amount and substantiality of the taken piece of the work in relation to the whole. If the sampling of a sound recording absent a license is per se infringing, it eliminates the “amount and substantiality” analysis which would preclude the defense almost entirely, drastically changing the nature of the copyright regime.

iii) Does the Sixth Circuit Pull the Plug on Sampling?

The Sixth Circuit’s decision could signal a disastrous result for rap and hip-hop music. Some commentators believe that this is finally time for either the Supreme Court to clarify judicial opinions on copyright law specifically applicable to sampling, or for Congress to develop some sort of legitimate statutory scheme to deal with digital sampling. With the Supreme Court’s recent denial of cert...

177. See Young, supra note 173, at 10 (asserting traditional balance of copyright law will be upset).
178. Id. (quoting RIAA amicus brief).
179. For a discussion of the prima facie case for copyright infringement, see supra notes 34-40 and accompanying text.
180. For a discussion of the amount and substantiality factor of fair use, see supra note 49 and accompanying text.
181. For a discussion of the fair use defense and its four factors, see supra notes 46-49 and accompanying text.
182. For a discussion of the fair use defense’s limited application in regards to digital sampling, see supra notes 46-49 and accompanying text.
183. See Young, supra note 173, at 10 (asserting “[t]he decision will kill off the art form of hip-hop”) (quoting Lawrence E. Feldman).
tiorari in *Newton*, one seemingly permissive rule regarding digital sampling is firmly entrenched. Should the Supreme Court similarly deny certiorari in *Bridgeport*, musicians will face both costly and complex licenses for samples, or potentially face equally costly litigation— which will, in effect, pull the plug on digital sampling. 

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Composer urged the Supreme Court to take the case for the sake of clarifying copyright law.  


186. See *Step Away*, supra note 176, ¶ 9 (advising musicians to acquire licenses for all samples) (quoting Jay Cooper, former President of National Academy of Recording Arts and Sciences). While Cooper suggests obtaining licenses for all samples, he also acknowledges the extreme costs and complexity involved with clearing samples. See id. (acknowledging complexity of clearing samples).